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Date: June 21, 1990 To: Director, Financial Management Systems Audit and Oversight Group, AFMD - Jeffrey C. Steinhoff From: Associate General Counsel, OGC/AFMD -Gary L. Kepplinger

Subject: Reporting a Potential Anti-deficiency Act Violation by the Executive Office of the President (B-239854)

As you explained in our May 10th meeting, your staff is currently preparing a report to the Congress on the results of its audit of presidential and vice-presidential unvouchered expenditures undertaken pursuant to 3 U.S.C. Secs. 105(d), 106(b)(1988), enacted in the Act of Nov. 2, 1978, Pub. L. No. 95-570, 92 Stat. 2445 (referred to as a Pub. L. No. 95-570 audit). Pub. L. No. 95-570 authorizes annual appropriations to the President and Vice President to cover, for example, necessary expenses for the care, maintenance, repair and refurnishing of the Executive Residence at the White House. Our Pub. L. No. 95-570 audits focus on whether presidential and vice-presidential expenditures were made for the purposes authorized in the statute. During your recent audit of unvouchered expenditures incurred in fiscal year 1988, your staff came across a transaction that raised several legal issues, including (1) whether there was a violation of the "miscellaneous receipts" statute; (2) whether the Antideficiency Act applies to the White House; and (3) whether GAO is required to report an Anti-deficiency Act violation to the Congress with respect to funds expended under the authority of Pub. L. No. 95-570.

BACKGROUND

Several years ago, Edward Boehm, an artist, donated a pair of porcelain swans he had designed to the Executive Residence at the White House. Mr. Boehm later borrowed the swans to display in Russia. He took out insurance in case the swans were damaged in Russia, which they were. (We do not know whether the loan agreement between Mr. Boehm and the White House required Mr. Boehm to insure the swans.) Since the swans had been "one of a kind," Mr. Boehm gave the insurance proceeds of $50,000 to the White House to replace the swans. The White House used the insurance proceeds to purchase vases designed by another artist, Stuart Feld. The White House had considered replacing the swans with another of Mr. Boehm's works, but were apparently concerned with the appearance of impropriety. (Mr. Boehm could have replaced the swans with one of his works which sell for less than the $50,000 he collected from the insurance company and kept the remaining cash.)

TRANSFER OF INSURANCE PROCEEDS TO MISCELLANEOUS RECEIPTS

The first issue raised by this transaction, and one on which GAO has a longstanding position, is whether the $50,000 received by the White House should have been deposited in the Treasury as miscellaneous receipts rather than being used to replace the damaged swans. /1/ The general rule is that amounts received by the government from private parties or their insurers for damage to government property cannot be credited to the appropriation available to repair or replace the property, but must be deposited in the general fund of the Treasury as miscellaneous receipts. 35 Comp.Gen. 393 (1956); 26 Comp.Gen. 618 (1947). In 64 Comp.Gen. 431 (1985), we explained that this rule is based on 31 U.S.C. 6 3302(b)(1982) (formerly 31 U.S.C. Sec. (484) which requires that unless there is statutory authority for some other disposition, "official[s] . . . of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as Practicable." By its terms, 31 U.S.C. Sec. 3302(b) applies to "officials. . . of the Government" and we see no reason to exclude white House receipts from the requirements of this statute.

Nonetheless, there are several exceptions to this rule, none of which apply to the present situation. One exception is that an agency or government office may retain receipts which qualify as "refunds to appropriations" as defined in Treasury Department-GAO Joint Regulation No. 1, Sec. 2b, September 22, 1950, reprinted in GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 7, Appendix B. Refunds to appropriations, as defined in Sec. 2b, "represent amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed, including returns of authorized advances." In 64 Comp.Gen. 431 (1985), a private party negligently collided with a government vehicle and caused damage in the amount of $1,500. The agency repaired the vehicle, and subsequently recovered the $1,500 from-the private party (or its insurer) under common law tort principles. We there held that the monies received did not represent "refunds to appropriations. While the recoveries were "related" to a prior expenditure, they were not "adjustments" of a Prior disbursement as contemplated by the regulation. We therefore held that the monies must be paid into the general fund of the Treasury. Id. at 434. The facts in our case are similar to those in 64 Comp.Gen. 431 and would warrant the same conclusion. /2/

A second exception recognized in our decisions is where the private party responsible for the damaged property either replaces the property in kind or makes payment directly to the party making the repairs. 14 Comp. Dec. 310 (1907). In 67 Comp.Gen. 510 (1988), we addressed the issue whether an agency must transfer an amount equal to the value of the replaced property to the miscellaneous receipts fund of the Treasury when the private party replaces the damaged property. We there held that the agency is not required to make such a transfer in order to comply with 31 U.S.C. Sec. 3302(b) since, by its terms, that section applies only to monies received for the use of the government. /3/ The miscellaneous receipts statute was read literally to apply only when money, as opposed to goods or services, has been provided to the government. As we stated in 67 Comp.Gen. 510, "this is true despite the fact that, had the tortfeasor paid the government rather than the person making the repairs, the money would have to be deposited as miscellaneous receipts." Id. at 511. (We note in the draft to the revised Appropriations Manual that this is one of the extremely few instances in which our decisions have sanctioned doing indirectly something that cannot be done directly.)

Therefore, had Mr. Boehm simply replaced the damaged swans with another one of his works, there would have been no necessary transfer of money to the Treasury.

In line with our decisions it is clear, however, that the White House should have deposited the $50,000 it received from Mr. Boehm as miscellaneous receipts in the Treasury rather than using it to replace the swans. /4/

APPLICABILITY OF ANTI-DEFICIENCY ACT TO WHITE HOUSE

According to AFMD auditors, a transfer of $50,000 to the Treasury to correct the violation of the miscellaneous receipts statute will likely result in a violation of the Anti-deficiency Act. 31 U.S.C. Sec. 1341(a)(1)(A)(1982) (obligating monies in excess of available appropriation). There is only about $7,000 of unobligated funds in the White House's 1988 account at this point in time. There is an issue as to whether the Anti-deficiency Act applies to funds authorized under Pub. L. No. 95-570. The issue is raised, despite the fact that 31 U.S.C. Sec. 1341 applies by its terms to any "officer or employee of the United States Government," because Pub. L. No. 95-570 provides that the President and Vice-President may expend funds appropriated under this law as they determine and "notwithstanding the provisions of any other law." 3 U.S.C. Sec.(s) 105(d), 106(b).

We think the Anti-deficiency Act applies to the expenditure of funds authorized under Pub. L. No. 95-570. Our position is based on the fact that Pub. L. No. 95-570 provides that funds shall be appropriated only on a fiscal year basis. 3 U.S.C. Sec.(s) 105(d), 106(b). And, to date, funds have been appropriated under the authority of sections 105(d) and 106(b) only on an annual basis, thus being available for obligation only during the applicable fiscal year. See, e.g., Pub. L. No. 100-202, 101 Stat. 1329, 1398-99 (1987) (1988 White House appropriation). Therefore, to hold otherwise would render meaningless the restrictions on time and amount imposed on the annual appropriations to the President and Vice-President made pursuant to this authorization. Furthermore, we think that the language "notwithstanding the provisions of any other law" exempts the President's expenditures from federal laws controlling the expenditure of federal funds, such as federal procurement laws, but not laws such as the Anti-deficiency Act which affect the time limitation on the availability of federal funds. We see no reason, therefore, to exclude executive office expenditures from the limitations contained in 31 U.S.C. Sec. 1341.

GAO'S REPORTING REQUIREMENTS UNDER PUB. L. NO. 95-570

The last issue presented concerns the parameters of our reporting responsibilities under Pub. L. No. 95-570. More specifically, the issue is whether Pub. L. No. 95-570 requires us to report the Anti-deficiency Act violation to the Congress. On this point, questions have been raised concerning the need to report to the Congress a seemingly "inadvertent" and small dollar violation by White House officials. At the same time, we must be concerned with meeting our statutory reporting responsibilities. Pub. L. No. 95-570 does not clearly address this matter. We think the better position, in this particular instance, would be to report the potential violation to the President but not include it in our report to the Congress.

As noted above, Pub. L. No. 95-570 authorizes the appropriation of necessary funds for:

"(1) the care, maintenance, repair, alteration, refurnishing, improvement, air-conditioning, heating,and lighting (including electric power and fixture) of the Executive Residence at the White House; . . .

(3) the official entertainment expenses of the President; . . . and

(5) the subsistence expenses of persons in the government service while traveling on official business in connection with the travel of the President."

3 U.S.C. Sec. 105(d). Pub. L. No. 95-570 further provides that:

"Such sums shall be accounted for solely on the certificate of the President, except that, with respect to such expenses, the Comptroller General may inspect all necessary books, documents, papers, and records relating to any such expenditures solely for the purpose of verifying that all such expenditures related to expenses in paragraph (1), (3), or (5). The Comptroller General shall certify to Congress the fact of such verification, and shall report any such expenses not expended for such purpose."

3 U.S.C. Sec. 105(d) (emphasis added). By its plain language, Pub. L. No. 95-570 requires GAO to verify only that presidential expenditures relate to the expense categories identified in the statute. All of the presidential expenditures which we examined during our audit were, in fact, for such authorized purposes. This would include the $50,000 expenditure for the vase, the authorized purpose being the refurnishing of the Executive Residence. Pub. L. No. 95-570 does not, by its own terms, require us to report an Anti-deficiency Act violation.

The legislative history of Pub. L. No. 95-570 supports this view of the law. In this regard, the legislative history of 3 U.S.C. Sec. 105(d) explains the limited responsibilities of the Comptroller General under this legislation:

"However, the bill as reported allows the Congress limited oversight to insure that the expenditures in the certificate accounts under paragraphs (1), (3), and (5) of subsection (d) are properly related to the purposes specified in such paragraphs. For these certificate accounts the Comptroller General is allowed to inspect all necessary books, documents, papers, and records relating to any such expenditure solely for the purpose of verifying that all such expenditures related to expenses specified in paragraphs (1), (3), or (5). Information furnished to the Comptroller General for inspections shall not be revealed to any other person. If the Comptroller General verifies that the document in question relates to an expenditure in any of these three categories, he would report this verification to Congress. If the Comptroller General determines that the document does not properly relate to an expenditure in any of these categories, the Comptroller General would report the expenditure to Congress.

"This provision does not authorize a full GAO audit or accounting. It merely allows the Comptroller General to verify that the expenditures were properly within three authorized categories and allows a reporting to Congress of any unauthorized expenditures. It is the view of this committee that the limited verification procedure provided in subsection (d) will enable the Congress to perform its oversight role while at the same time protect the confidential nature of the funds and avoid an overly broad intrusion into this area of Executive discretion. Under this procedure the Congress will receive a report from the Comptroller General certifying the fact of his verification and listing only those specific sums which were not expended for the purposes certified."

S. Rep. No. 95-868, 95th Cong., 2d Sess. 8-9 (1978). The pertinent House Committee report contains similar language. H.R. Rep. No. 95-979, 95th Cong., 2d Sess. 708 (1978). There is no other discussion in the legislative history

relevant to our reporting responsibilities under the law.

Under our reading of the statute, a reading supported by its legislative history, the Comptroller General's report to the Congress under Pub. L. No. 95-570 need contain only (1) the Comptroller General's verification that the expenditures designated for the pertinent expense categories properly fall within those categories; and (2) a listing of any expenditures examined which did not fall within such categories. Although we are not prohibited from reporting an Anti-Deficiency Act violation to the Congress under Pub. L. 95-570, this law does not require us to report such a violation.

Nonetheless, since we are necessarily concerned about the Anti-deficiency Act violation, we think GAO should report it to the President (perhaps in a separate letter to the President). Under 31 U.S.C. Sec. 1351 (1982), the President would then be required to report the violation to the Congress. Given the nature of the violation, we think this approach is best.

cc: Mr. Pewanick, AFMD Ms. Mullen, AFMD

1. Under 3 U.S.C. Sec. 110 (1988), the National Park Service 1s authorized to accept, with the approval of the President, donations of furniture and furnishings for use in the Executive Residence at the White House. There is no specific statutory authority, however, to accept cash donations.

2. Our decision in 64 Comp.Gen. 431 implicitly recognizes the reason for the rule, namely, that an agency's operating appropriation is typically available for necessary repairs, as is the White House, see Pub. L. No. 100-200, 101 Stat. 1329, 1399 (1987). Thus, to allow an agency to credit the amount to its own appropriation would be an impermissible augmentation of its appropriations. See 14 Comp. Dec. 87 (1907).

3. A 1943 case suggested a different result: the agency might have to transfer the value of the repairs to miscellaneous receipts, if the agency had a special appropriation for repair or replacement of the property in question. 22 Comp.Gen. 1133, 1137 (1943). We expressly rejected this approach in 67 Comp.Gen. 510, 512 (1988).

4. There are two other exceptions, neither of which apply to our case. There is a statutory exception where the agency or office is authorized by law to retain any monies paid for damage or repair. 59 Comp.Gen. 515 (1980). See also 24 Comp.Gen. 847 (1945). The other exception is where the same appropriation is chargeable with the purchase and transportation of property, and the property is damaged in transit. The value of damage to the government's property is offset against the transportation charges and no monies are necessarily transferred to miscellaneous receipts. 46 Comp.Gen. 31 (1966); 21 Comp.Gen. 632 (1915).