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United States General Accounting Office
Washington, DC 20548

B-289496

December 21, 2001

Mr. Alan M. Hantman
Architect of the Capitol
Washington, D.C. 20515

Subject: Temporary Employees' Allotments

Dear Mr. Hantman:

This responds to your December 5, 2001, request for our opinion concerning your authority to transfer fringe benefit payments of temporary employees to union employee benefit trust funds on a pretax basis. For the reasons discussed below, you are authorized under current law to make direct payments on behalf of temporary employees to such trust funds, provided the employees have elected to make allotments and assignments of pay to the trust funds. However, such direct payments may be made on a pretax basis only where specifically authorized by statute or regulation.

The Office of the Architect of the Capitol (Office of the Architect) has followed the practice of hiring, on a temporary basis, employees who are members of unions. Private employers typically agree to make contributions on behalf of their unionized employees into various employee benefit trust funds established by the unions that provide medical, welfare, training and other assistance to union members. The Office of the Architect has in the past paid to its temporary employees, in addition to their normal wages, an amount for fringe benefits equivalent to that contributed by private employers to the trust funds. As pointed out in your letter, a decision by this Office (B-189553, October 13, 1977) held that the Office of the Architect did not have the authority to make contributions directly into employee benefit trust funds. However, recently enacted legislation (Legislative Branch Appropriations Act, Fiscal Year 2002, Pub. L. No. 107-68, § 133(b), 115 Stat. 560, 582 (2001)) gave the Office of the Architect authority to permit employees to make allotments and assignments from their pay. Accordingly, you are of the view that your agency may transmit directly to union employee benefit trust funds that portion of employees' pay that represents fringe benefits. Your letter further indicates that your office and several labor unions disagree over whether the recently enacted legislation authorizes your office to deduct fringe benefit payments from employees' pay and deposit such allotments

directly into union employee benefit trust funds before making deductions for Federal Insurance Contributions Act (FICA) and federal income taxes.

In our 1977 decision holding that the Office of the Architect was precluded from making contributions into employee benefit trust funds, we pointed out that under 31 U.S.C. § 492(a) (currently codified at 31 U.S.C. § 3322(a)), disbursing officials can only make payments of public moneys to persons who are legally entitled to such payments. As we recognized in that decision, Congress has enacted several exceptions to this general rule. One exception, currently found at 5 U.S.C. § 5525, authorizes heads of agencies to establish procedures under which employees may make allotments and assignments out of their pay for such purposes as the head of the agency considers appropriate. At the time of our 1977 decision, the Office of the Architect was not authorized to allow employees to make allotments or assignments out of their pay because the definition of "agency" for purposes of 5 U.S.C. § 5525 did not include the Office of the Architect. 5 U.S.C. § 5521. Congress recently amended 5 U.S.C. § 5525 to include the Office of the Architect within the definition of agency to permit allotments and assignments of pay by its employees. Legislative Branch Appropriations Act, Fiscal Year 2002, Pub. L. No. 107-68, § 133(b), 115 Stat. 560, 582 (2001). Accordingly, we agree that you are now authorized to allow employees, including temporary employees, to make allotments and assignments and, provided the employees make the appropriate allotments and assignments, your agency may transmit that portion of their pay representing fringe benefits directly to union employee benefit trust funds.

The regulations implementing 5 U.S.C. § 5525, including when an agency may make pretax allotments for fringe benefits, are established by the Office of Personnel Management (OPM) for executive agencies and the head of the agency concerned for agencies outside the executive branch. 5 U.S.C. § 5527(b). We understand from your letter that the Office of the Architect follows the OPM regulations.

OPM's implementing regulations (5 C.F.R. part 550, subpart C, "Allotments and Assignments from Federal Employees") specifically permit pay deductions for labor organization dues, dues to an association of management officials, charitable contributions, income tax withholding, savings, alimony and child support, and an employee's share of health benefits premiums. 5 C.F.R. § 550.311(a). In addition, an agency may permit allotments "for any legal purpose deemed appropriate by the head of the agency," but this authority "does not extend to allotments to the paying agency for the purpose of reducing taxable income, except where there is an authority specific to Federal employees (statute, Executive order, Presidential directive, or OPM regulations) permitting agencies to provide the pretax benefit in question." 5 C.F.R. § 550.311(b). Significantly, 5 C.F.R. § 550.313(a) directs that:

> "[A]n agency must deduct allotments from any net pay remaining after applying all deductions authorized by law, including any deductions for

> retirement and other benefits, Social Security and income tax withholdings, collection of a debt to the Government via levy or salary offset, and garnishment."

See also B-251181, B-251181.2, January 14, 1994 (federal employees are permitted to make assignments and allotments pursuant to 5 U.S.C. § 5525 from their "disposable pay" subject to collection of income and other required taxes). The regulations specify that an agency must deduct an allotment for an employee's share of Federal Employees Health Benefits premiums on a pretax basis. 5 C.F.R. § 550.313(b).

Pursuant to the Congressional Accountability Act of 1995, Pub. L. No. 104-1, § 220, 109 Stat. 3, 19 (1995), and 5 U.S.C. § 7102, the employees of the Office of the Architect have the right to join labor organizations and to engage in collective bargaining with the agency. The Office of the Architect has a duty to bargain in good faith, but may not enter into a bargaining agreement that is inconsistent with any federal law or government-wide rule or regulation. 5 U.S.C. § 7117. Although the OPM regulations do not address pretax allotments to union-established fringe benefit trust funds, they clearly would permit pretax allotments to pay an employee's share of Federal Employees Health Benefits premiums. 5 C.F.R. §§ 550.313(b), 550.311(a)(8). Assuming for the purposes of this opinion that your temporary union employees do not participate in the Federal Employees Health Benefits Program, this authority would not be available to your union employees. OPM regulations permit allotments on a pretax basis only where there is authority specific to federal employees.

As noted above, pursuant to 5 U.S.C. § 5527(b), the Architect of the Capitol, as the head of the agency concerned, may choose to establish the procedures for allotments and assignments of employees of the Office of the Architect. Any procedures the Office of the Architect devises, however, must be consistent with federal laws, including those that govern pretax benefits. Therefore, any agreement to make pretax allotments must cite clear authority permitting the pretax benefit in question. See Dept. of the Navy—Payment for Commercial Driver's License Fees, B-249061, May 17, 1993. In this regard, the Internal Revenue Code, 26 U.S.C. Subtitle A, ch. 1, subchapter B, parts I-III, addresses the tax implications of fringe benefits and whether benefits may be excluded from taxable income.[1]

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[1] See, e.g., 26 U.S.C. § 61 ("gross income" defined as including fringe benefits); 26 U.S.C. § 63 ("taxable income" defined); 26 U.S.C. § 125 ("cafeteria plan" benefits specifically excluded from gross income); and 26 U.S.C. § 132 ("certain fringe benefits" specifically excluded from gross income).

In conclusion, you are now authorized to make direct payments to trust funds. If you choose to devise your own procedures, you may make direct payments on a pretax basis only when specifically authorized by statute. With respect to your authority to make any particular fringe benefit allotment before deducting FICA and federal income taxes, you should consult with the Internal Revenue Service.

We trust this is responsive to your question.

Sincerely yours,

Anthony H. Gamboa
General Counsel