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United States Government Accountability Office
Washington, DC 20548

B-305945

September 30, 2005

The Honorable Jerry Lewis
Chairman
Committee on Appropriations
United States House of Representatives

Subject: *Architect of the Capitol—Maximum Rate of Pay for Senior Employees*

Dear Mr. Chairman:

This responds to your request of July 29, 2005, for our legal opinion as to whether the Architect of the Capitol (AOC) has the authority to raise the maximum rate of pay for its employees to Level II of the Executive Schedule.[1] Specifically, you ask whether AOC's authority under 2 U.S.C. § 1849 to fix the rate of basic pay of certain employees at a rate not to exceed the highest total rate of pay for the Senior Executive Service (SES) authorizes AOC to compensate at rates above Level III of the Executive Schedule[2] without a certified performance appraisal system, as is required for executive branch agencies by 5 U.S.C. § 5382.

To respond to your request, we asked AOC for factual information and for its legal views on this question.[3] In response, AOC stated that it has not submitted its performance management system to the Office of Personnel Management (OPM) for certification and that it had increased the rate of pay for several of its employees above Level III of the Executive Schedule. Letter from Peter Kushner, General Counsel, AOC, to Michael R. Volpe, Assistant General Counsel, GAO, Aug. 29, 2005 (Kushner Letter). AOC asserted that the certification requirement applies only to the executive branch, and that its own authority is without condition or limitation. *Id.*

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[1]In 2005, level II of the Executive Schedule is $162,100. Exec. Order No. 13368, *Adjustments of Certain Rates of Pay*, 70 Fed. Reg. 1147, 1152 (Dec. 30, 2004).

[2]In 2005, level III of the Executive Schedule is $149,200. Exec. Order No. 13368, *Adjustments of Certain Rates of Pay*, 70 Fed. Reg. 1147, 1152 (Dec. 30, 2004).

[3]Letter from Michael R. Volpe, Assistant General Counsel, GAO, to Peter Kushner, General Counsel, AOC, Aug. 10, 2005.

As we explain below, we disagree with AOC's conclusion. We conclude that AOC may only pay up to level III of the Executive Schedule unless it has a certified performance appraisal system that makes meaningful distinctions in performance. Congress created two separate maximum rates of pay for the SES, but intended that only agencies with certified performance appraisal systems could pay up to the higher maximum.

Background

Since 1991, AOC has had the authority to compensate certain employees at a rate that was linked to the maximum rate of the SES.[4] Pub. L. No. 102-90, § 104 (Aug. 14, 1991). Currently, this authority states: "The Architect of the Capitol may fix the rate of basic pay for not more than 12 positions at a rate not to exceed the highest total rate of pay for the Senior Executive Service under subchapter VIII of chapter 53 of title 5 for the locality involved." 2 U.S.C. § 1849(a).

When this authority was originally enacted, title 5 required the President to establish five or more rates of basic pay for the SES. Pub. L. No. 95-454, § 407(a) (Oct. 13, 1978) (codified as amended at 5 U.S.C. § 5382(a)). The lowest of these rates was not to be less than the minimum rate applicable to senior-level scientific or professional positions (120 percent of the minimum rate of basic pay for GS-15 of the General Schedule), and the maximum rate was not to be greater than level IV of the Executive Schedule. Pub. L. No. 101-509, § 529 (Nov. 5, 1990) (codified as amended at 5 U.S.C. § 5382(b)). The President established six rates of basic pay (ES-1 through ES-6), which were adjusted each year by executive order. *See, e.g.,* Exec. Order No. 13282, *Adjustments of Certain Rates of Pay*, 68 Fed. Reg. 1133, 1138 (Dec. 31, 2002).

In 2003, Congress eliminated the rates of SES pay and established a range of rates of pay for the SES, with the minimum rate not less than the minimum rate for senior-level scientific or professional positions and the maximum rate not more than level III of the Executive Schedule. Pub. L. No. 108-136, § 1125(a)(2) (Nov. 24, 2003), 5 U.S.C. § 5382. The rate of pay of an individual senior executive is now to be based on individual performance or contribution to the agency's performance, or both. *Id.*

However, Congress also added a provision that stated: "Notwithstanding the provisions of subsection (a) [establishing the minimum and maximum rates], the applicable maximum shall be level II of the Executive Schedule for any agency that is certified under section 5307 as having a performance appraisal system which, as designed and applied, makes meaningful distinctions based on relative performance." *Id.* Section 5307, which sets the annual aggregate compensation limit for executive branch employees, was amended in 2002 and sets the higher limit of the Vice President's salary, rather than level I of the Executive Schedule, for employees of agencies who have been certified by OPM, with the concurrence of the Office of Management and Budget (OMB), as having "a performance appraisal system which (as designed and applied) makes meaningful distinctions based on relative

[4]The Senior Executive Service is comprised of individuals who hold the top managerial, supervisory and policy positions in the executive branch. 5 U.S.C. §§ 3131-2.

performance." 5 U.S.C. § 5307(d). OPM's regulations implementing the performance appraisal certification provision are contained in 5 C.F.R. pt. 430, subpt. D (2005).

After Congress revised the provisions setting the rates of pay for the SES, AOC raised the rate of basic pay for several of its employees above level III of the Executive Schedule. In 2004, two employees were paid at rates above level III.[5] Kushner Letter, at 5. The rate of pay of one was set at $152,000, while the other was set at $150,000. *Id.* In 2005, the rate of pay of three employees is set above level III;[6] their rates of pay are $158,000, $153,000, and $150,000. *Id.*

AOC has a performance management system, with performance agreement plans, performance standards, and a pass-fail system. Human Resources Manual, Chapter 430: Performance Review Plan for Exempt Personnel, AOC, July 1, 2003. However, AOC has not submitted this system for OPM approval, nor has it self-certified that the system makes meaningful distinctions in relative performance consistent with OPM's regulations. Kushner Letter, at 5.

Analysis

For purposes of the SES pay setting statute, 5 U.S.C. § 5382, AOC is not within the definition of "agency." 5 U.S.C. §§ 3132(a)(1), 5381. In addition, there are no terms of condition or limitation in 2 U.S.C. § 1849; instead, it simply provides that AOC may pay up to the highest total rate of pay for the SES. Therefore, AOC asserts that the certification requirement that applies to executive branch agencies does not apply to AOC. Kushner Letter, at 2-3. AOC also noted that amendment by implication is disfavored, especially when constitutional issues might arise. *Id.* at 4. AOC asserted that a separation of powers issue might arise if OPM, an executive branch agency, were to certify the performance appraisal system of AOC, a legislative branch agency. *Id.*

Amendments by implication are not favored. 1A Sutherland, *Statutes and Statutory Construction* § 22:13 (6th ed. 2000). However, this is not a case of amendment by implication because section 1849 explicitly references another statute (5 U.S.C. § 5382), which was later amended. If AOC is correct in asserting that Congress did not intend to amend its pay authority when it revised the maximum rate of pay for the SES, then AOC could only pay its employees up to the former maximum, level IV of the Executive Schedule.

In 2003, Congress clearly intended to increase the maximum rate of pay for the SES to level III of the Executive Schedule. *See* H.R. Rep. No. 108-106 (May 16, 2003), at 366. Level III is now the "highest rate" of pay for the SES. 5 U.S.C. § 5382(a). Under normal circumstances, the maximum rate of basic pay for SES members in the

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[5]In 2004, level III of the Executive Schedule was $145,600. Exec. Order No. 13332, *Further Adjustment of Certain Rates of Pay*, 69 Fed. Reg. 10891, 10896 (March 3, 2004).

[6]In 2005, level III of the Executive Schedule is $149,200. Exec. Order No. 13368, *Adjustments of Certain Rates of Pay*, 70 Fed. Reg. 1147, 1152 (Dec. 30, 2004).

executive branch is Level III. The statute does have an exception to this rule, but it is only for agencies who have a certified appraisal system. 5 U.S.C. § 5382(b). Thus, 2 U.S.C. § 1849 authorizes AOC to pay up to 12 positions at a maximum of level III under normal circumstances.

Congressional amendments to the statutes setting pay for the Defense Intelligence Senior Executive Service and the Senior Foreign Service confirm this interpretation. Prior to 2004, the Secretary of Defense had the authority to fix the rate of pay for members of the Defense Intelligence Senior Executive Service up to an amount not to exceed "the maximum rate provided in section 5382 of title 5." Pub. L. No. 104-201, § 1632(a)(3) (Sept. 23, 1996) (codified as amended at 10 U.S.C. § 1602(b)(2)). In 2004, Congress amended this provision and subjected members of the Defense Intelligence Senior Executive Service to the same maximum rates of pay as other Department of Defense employees, but provided that the Secretary of Defense must certify that the performance appraisal system for Defense Intelligence senior executives makes meaningful distinctions based on relative performance. Pub. L. No. 108-375, § 1103 (Oct. 28, 2004), 10 U.S.C. § 1602. This provision was entitled "Pay and Performance Appraisal Parity for Civilian Intelligence Personnel," which implies that without the amendment, the Defense Intelligence Senior Executive Service would not have been authorized to set its pay comparable to other Defense Department senior executives. *Id.*

Similarly, Congress amended the compensation provisions for the Senior Foreign Service. Prior to 2004, the President was authorized to set basic salary rates for the Senior Foreign Service up to an amount not to "exceed the maximum rate . . . of basic pay payable for the Senior Executive Service under section 5382 of Title 5." Pub. L. No. 96-465, § 402 (Oct. 17, 1980) (codified as amended at 22 U.S.C. § 3962). In 2004, Congress amended this provision to raise the maximum rate of pay for the Senior Foreign Service to level II of the Executive Schedule upon a determination by the Secretary of State that the performance appraisal system for the Senior Foreign Service makes meaningful distinctions based on relative performance. Pub. L. No. 108-447, § 412 (Dec. 8, 2004), 22 U.S.C. § 3962(a).

If Congress had adopted an interpretation similar to AOC's reading of 2 U.S.C. § 1849, there would have been no need for Congress to amend the Defense Intelligence Senior Executive Service and Senior Foreign Service pay provisions. Under AOC's interpretation, once Congress amended 5 U.S.C. § 5382 in 2003, the Defense Intelligence Senior Executive Service and Senior Foreign Service could have immediately raised their maximum rate of pay to level II of the Executive Schedule, because their maximum rate of pay was also linked to the maximum for the SES. However, Congress' amendment of these provisions indicates that the maximum rate of pay for the SES is level III and agencies whose maximum rate of pay is linked to the SES may only compensate up to that level.

Furthermore, these amendments demonstrate Congress' intention that senior executives government-wide may be compensated at rates above level III of the Executive Schedule only if they are covered by a performance appraisal system that makes meaningful distinctions in performance. To allow AOC to raise its maximum rate of pay to level II without a performance appraisal system that makes such meaningful distinctions would clearly frustrate that intent.

Congress could grant authority to AOC to raise its maximum rate of pay in less specific terms. For example, Congress granted the Comptroller General authority to establish a GAO Senior Executive Service and to provide for rates of pay "not more than the maximum rate or less than the minimum rate for the Senior Executive Service under section 5382 of title 5." 31 U.S.C. § 733(a). Additionally, the Comptroller General is authorized to apply any part of title 5 that applies to the executive branch SES to the GAO Senior Executive Service. 31 U.S.C. § 733(b). This authority was granted as part of the General Accounting Office Personnel Act of 1980. Pub. L. No. 96-191, § 5(a)(2). The purpose of the Act was to ensure that GAO's personnel management system "would be self-contained and not subject to regulation or oversight by the Office of Personnel Management." H.R. Rep. No. 96-494, at 2 (1979). Pursuant to this authority, the Comptroller General certified that the GAO Senior Executive Service performance appraisal system, as designed and applied, makes meaningful distinctions based on relative performance,[7] and subsequently raised the maximum rate payable under the GAO Senior Executive Service to level II of the Executive Schedule. AOC, however, lacks this general authority.

In order for AOC to pay up to a maximum of level II of the Executive Schedule for its 12 authorized positions, it should submit its performance appraisal system to OPM for certification. AOC argues that "significant questions with regard to separation of powers would arise if the AOC, a legislative branch agency, must submit its performance appraisal system to OPM/OMB for review and certification in order to qualify for the higher SES pay rate." Kushner Letter, at 4. However, the courts have clearly rejected such an inflexible view of the separation of powers. Indeed, the Supreme Court has on more than occasion noted that "the Framers did not require -- and indeed rejected -- the notion that the three Branches must be entirely separate and distinct." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). The Framers recognized that "our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence." *Id.* at 381. In the Federalist Papers, James Madison stated that separation of powers "d[oes] not mean that these [three] departments ought to have no partial agency in, or no controul over the acts of each other," but rather "that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." The Federalist No. 47 (James Madison). The Supreme Court has upheld statutory provisions that involve the commingling of the functions of the three branches "but that pose no danger of either aggrandizement or encroachment." *Mistretta*, at 382. The Court has only found a violation of the separation of powers in situations where one branch intrudes upon "the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996).

While AOC is a legislative branch agency, the Architect is appointed by the President by and with the advice and consent of the Senate. 2 U.S.C. § 1801. AOC is charged with such duties as care and superintendence of the Capitol, but does not exercise any legislative powers. 2 U.S.C. §§ 1811-22. It is unlikely that OPM review of the appraisal system of an organization whose head is appointed by the President and which does not perform any legislative duties would impair the functioning of the

[7]Certification of David M. Walker, Comptroller General, GAO, Jan. 18, 2005.

legislative branch or intrude upon one of its central prerogatives. *See Mistretta*, at 388; *Loving*, at 757. Even if OPM refused to certify its performance appraisal system, AOC could still compensate its employees; it would simply be limited to level III of the Executive Schedule. Such a minor commingling of the executive branch and a legislative branch support agency does not impair the functioning of the legislative branch so as to lead to a violation of the separation of powers.[8]

Furthermore, the Supreme Court has allowed Congress to "delegate to others powers which the legislature may rightfully exercise itself." *Wayman v. Southard*, 23 U.S. 1, 43 (1825). If Congress can delegate some of its own legislative powers to the executive branch, then it can also delegate some of the powers of its support agencies to the executive branch, a far less significant delegation of power. Nonetheless, if AOC still has concerns about OPM certification of its performance appraisal system, it should approach Congress for authorization to self-certify its system, as Congress granted to the Comptroller General, the Defense Intelligence Senior Executive Service, and the Senior Foreign Service.

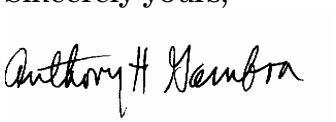
Since AOC has not received certification of its performance appraisal system, but nonetheless raised the maximum rate of pay to level II of the Executive Schedule, it must either collect any amounts paid to employees over level III or it may waive these overpayments as authorized by 5 U.S.C. § 5584. Section 5584 allows the Architect to waive any erroneous payments of pay if collection would be "against equity and good conscience and not in the best interests of the United States." 5 U.S.C. §§ 5584(a),(g). GAO has long interpreted this provision to authorize waiver if the overpayment was made through administrative error and there was no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee. *See, e.g.*, 68 Comp. Gen. 326 (1989). Prior to the transfer of the waiver authority from GAO to the executive branch, we had previously granted waivers in cases involving a misinterpretation of law by an agency where there was no indication of any fault on the part of the employee. *See, e.g.*, B-230880.2, Oct. 27, 1989.

[8]OPM also approves voluntary early retirement authority for the Library of Congress, another legislative branch support agency. 5 U.S.C. §§ 8331, 8336(d), 8414(b). Congress delegated this authority to OPM without either branch raising separation of powers issues.

Conclusion

AOC's authority to fix the pay of certain positions up to the highest total rate of pay for the SES authorizes it to compensate such positions up to a maximum of level III of the Executive Schedule. Congress intended that only agencies with performance appraisal systems certified as making meaningful distinctions in performance may pay up to level II of the Executive Schedule. If AOC wishes to continue to pay up to level II, it must submit its performance appraisal system to OPM for certification or request Congress provide it with the authority to self-certify.

Sincerely yours,



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