

New Developments

Contract and Fiscal Law

Recent Developments in the Availability of Appropriated Funds for Disposable Cups, Plates, and Cutlery

In December 2014, the Government Accountability Office (GAO) opined that agencies could not use appropriated funds to buy disposable cups, plates, and cutlery for use by its employees.¹ In August 2015, the GAO revisited that opinion but declined to reverse its decision.²

The original decision arose from a labor dispute between employees of the National Weather Service (NWS) and the Department of Commerce (DoC).³ In September 2009, Commerce and the National Weather Service Employees Union (NWSEO) signed a Memorandum of Understanding (MOU) whereby the DoC agreed to provide each NWS work station or cubicle with, among other things, disinfectant spray, tissues, paper towels, disposable cups, plates, and plastic utensils. For the next three and a half years, the NWS used appropriated funds to provide these items to its employees. However, in March 2013, the DoC's Office of General Counsel declared that disposable cups, plates, and cutlery were personal items and its subordinate agencies could no longer purchase them with appropriated funds.⁴

The NWSEO objected to the DoC's decision and sued for arbitration. The arbitrator ruled in the NWSEO's favor, finding that disposable items like cutlery and plates contributed to a healthy workplace which benefited the agency.⁵ The Department of Commerce appealed this decision to the Federal Labor Relations Authority (FLRA), requesting a stay of proceedings and an opinion from the GAO.⁶

The GAO's long-standing rule is that appropriated funds are not available to purchase personal items for government employees.⁷ The exception to this rule, in the absence of specific statutory authority, is when the purchase of a personal

expense directly advances a government agency's statutory mission⁸ and any ancillary benefit to the employee is outweighed by the benefit to the agency.⁹ What advances an agency's mission or where and how a benefit accrues is not always clear. What conveniences an employee while simultaneously contributing to an agency's mission may be difficult to measure or quantify. Therefore, the GAO resolves these issues on a case-specific basis.¹⁰

There have been instances in the past where the GAO permitted agencies to use appropriated funds to make similar purchases.¹¹ However, in those cases, the GAO found that the agencies sufficiently demonstrated that those purchases advanced the agencies' statutory mission or were supported by an existing regulatory scheme.¹² In this case, the DoC did not provide the GAO with any authority justifying the purchase of disposable cups, plates, and cutlery because the agency concluded none existed and there was no argument to be made despite the MOU.

In this case, the GAO noted that the arbitrator's decision did not rely on any empirical evidence to support its finding that disposable cups, plates, and cutlery created a healthier workplace thereby benefitting the agency.¹³ Consequently, the GAO concluded there was no legal authority for the agency to purchase these items with appropriated funds and provide them to its employees free of charge, regardless of what the NWS agreed to in the MOU.¹⁴

¹ Dep't of Com., Disposable Cups, Plates, and Cutlery, B-326021, 2014 WL 7331168 (Comp. Gen. Dec. 23, 2014).

² *Id.*

³ The National Weather Service is a subordinate agency of the National Oceanic and Atmospheric Administration, which is a branch of the Department of Commerce. *National Oceanic and Atmospheric Administration (NOAA)*, COMMERCE.GOV, <https://www.commerce.gov/national-oceanic-and-atmospheric-administration> (last visited Jan. 10, 2016).

⁴ Dep't of Com., *supra* note 1.

⁵ *Id.*

⁶ *Id.* at 3.

⁷ *Id.*

⁸ U.S. Fish and Wildlife Serv., *Steller's and Spectacled Eiders Conservation Plan*, B-318386, 2009 WL 2580314 (Comp. Gen. Aug. 12, 2009).

⁹ Dep't of the Navy, *Lunch for Volunteer Focus Group*, B-318499, 2009 WL 5184704 (Comp. Gen. Nov. 19, 2009).

¹⁰ Dep't of Com., *supra* note 1, at 4.

¹¹ See *Matter of: Expenditures by the Department of Veterans Affairs Medical Center, Oklahoma City, Oklahoma (II)*, B-247563, 1996 WL 713064 (Comp. Gen. Dec. 11, 1996); *Matter of: Purchase of Paper Napkins with Imprest Funds*, B-204214, 1982 WL 28632 (Jan. 8, 1982).

¹² Dep't of Com., *supra* note 1, at 5.

¹³ *Id.*

¹⁴ *Id.* at 6.

This would ordinarily have concluded the matter, but evidently, the NWSEO felt strongly enough about free sparks that it petitioned the GAO for reconsideration.¹⁵

In its petition, the NWSEO argued that the Federal Service Management Relations Statute¹⁶ prohibited the GAO from considering the DoC's request for an advanced appropriations decision, despite the specific authorization found in 31 U.S.C. § 3529.¹⁷

In denying the NWSEO's request for reconsideration, the GAO cited a relatively recent decision by the U.S. Court of Appeals for the District of Columbia Circuit that is exactly on point. In *U.S. Department of the Navy v. Federal Labor Relations Authority*,¹⁸ the court vacated an FLRA decision requiring the Navy to bargain with its employees over the free provision of bottled water. The court held that "[f]ederal collective bargaining is not exempt from the rule that funds from the Treasury may not be expended except pursuant to congressional appropriations."¹⁹ In other words, a collective bargaining proposal is void *ab initio* if it requires an agency to expend appropriated funds for an unauthorized purpose. In concluding that the purchase of bottled water was not for an authorized purpose, the court cited a "line of Comptroller General decisions . . . dating back to at least 1923" that required tap water to either be unavailable or unpotable for an agency to purchase bottled water for its employees with appropriated funds.²⁰

There are two important takeaways for the practitioner. First, the GAO has reinforced the principle that agencies cannot circumvent, nor be required to circumvent, 31 U.S.C. § 1301(a)²¹ (often called the Purpose Statute) in the absence of some other Congressional authorization. Second, in ruling that appropriated funds were not available to purchase disposable cups, plates, and cutlery, the GAO did not say that an agency may *never* purchase these items with appropriated funds. An agency could presumably reason that the primary benefit of tax payer-funded disposable cutlery accrued to the agency while advancing its statutory mission.

When analyzing a proposed expenditure as to purpose, the practitioner would do well to remember that the GAO does not substitute its own discretion or judgment for that of the agency counsel. Rather, the GAO questions "whether the expenditure falls within the agency's legitimate range of discretion."²² Therefore, the practicing judge advocate or

attorney-advisor must be able to articulate, with empirical evidence if necessary, that a proposed expense that is personal in nature "directly advances the agency's statutory mission and the benefit accruing to the agency clearly outweighs the ancillary benefit to the employee."²³ The attorney's ability to clearly articulate the rationale behind a proposed expenditure will protect a command from the consequences of any questionable expense of appropriated funds.

—MAJ Dale McFeatters

¹⁵ *Id.* at 1.

¹⁶ 5 U.S.C. § 7101 (2015).

¹⁷ 31 U.S.C. § 3529 (2015) (allowing a disbursing or certifying official or the head of an agency to request an advanced decision from the Comptroller General on questions regarding the payment of appropriated funds).

¹⁸ *U.S. Dep't of the Navy v. Fed. Labor Rels. Auth.*, 665 F.3d 1339 (D.C. Cir. 2012).

¹⁹ *Id.* at 1347.

²⁰ *Id.* at 1350.

²¹ "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a) (2015).

²² *Matter of: Implementation of Army Safety Program*, B-223608, 1988 WL 228374 (Comp. Gen. Dec. 12, 1988).

²³ *Dep't of Com.*, *supra* note 1, at 1.