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Decisions and Opinions

(January 1 to December 31, 2007)

Matter of: Patent and Trademark Office—High-Speed Internet Access in Employees' Homes

File: B-308044

Date: January 10, 2007

The United States Patent and Trademark Office (PTO) may reimburse employees for high-speed internet service at employee's homes incident to the agency's telework program. We recommend that PTO periodically review reimbursements to ensure that it has adequate safeguards against private misuse and is reimbursing employees for home internet service used for official purposes.

Matter of: United States Capitol Police—Current Rate for Operations Under the 2007 Continuing Resolution

File: B-308773

Date: January 11, 2007

When calculating the current rate for operations under the 2007 Continuing Resolution for its General Expenses appropriation, the United States Capitol Police should include \$4,513,671 reprogrammed within its General Expenses appropriation in fiscal year 2006. It should not include \$5,486,329 transferred into its General Expenses appropriation from its Salaries appropriation in fiscal year 2006, nor should it include any unobligated no-year and multiyear balances held in the General Expenses appropriation at the end of fiscal year 2006.

Matter of: Pension Benefit Guaranty Corporation—Reimbursement for
Financial Analysis Services

File: B-307849

Date: March 1, 2007

The Pension Benefit Guaranty Corporation (PBGC) may not retain a reimbursement for financial analysis services associated with a request for waiver from claims arising under title IV of the Employee Retirement Income Security Act. Absent statutory authority to the contrary, amounts received by government corporations are subject to the miscellaneous receipts statute, 31 U.S.C. § 3302(b), and must be deposited into the general fund of the Treasury.

Matter of: United States Central Command—Cairo Housing

File: B-308150

Date: March 9, 2007

The Office of Military Cooperation, Cairo, may use its appropriation to fund leases of residential property occupied by personnel of other agencies at the U.S. Embassy in Cairo as part of a housing pool. Such payments are a proper use of an agency's appropriation when they represent the costs attributable to an agency's use of housing in the pool.

Matter of: Architect of the Capitol—Reimbursement of Office of
Compliance Investigating and Monitoring Costs

File: B-308774

Date: March 15, 2007

Under the Congressional Accountability Act (CAA), the Office of Compliance (Compliance) is responsible for investigating and litigating compliance with the Occupational Safety and Health Act (OSHA) with regard to legislative branch entities, including the Architect of the Capitol (AOC), and it receives an appropriation to carry out these activities. In view of Compliance's statutory responsibility to investigate, prosecute, and monitor alleged violations of the CAA, and absent any specific statutory authority to the contrary, Compliance lacks authority to accept reimbursement of its costs from AOC as part of an agreement to settle a Compliance complaint alleging violations of the OSHA provision of the CAA. Any acceptance of such reimbursement by Compliance would improperly augment appropriations made to it by Congress. Conversely, AOC's appropriation is not available to cover costs properly incurred by Compliance in discharging its statutory responsibilities.

Matter of: Mr. Jeffrey Elmore—Request for Relief of Financial Liability

File: B-307693

Date: April 12, 2007

1. This decision responds to a request from the Director of the Defense Logistics Agency asking GAO to relieve a certifying officer of liability arising out of four improper government purchase card payments. GAO declines to grant relief because the certifying officer knew or should have known that the payments were improper.
2. The decision also addresses two threshold issues, concluding that (1) GAO has authority to entertain relief request from certifying officers of defense agencies but not certifying officers of the armed forces, and (2) a certifying officer has a duty to examine and question

charges made by purchase card holders appearing on a purchase card billing statement before certifying payment to the purchase card bank.

Matter of: Department of Agriculture—Cooperative Agreement for Use of Aircraft

File: B-308010

Date: April 20, 2007

The Animal and Plant Health Inspection Service (APHIS), a division in the U.S. Department of Agriculture, did not violate the *bona fide* needs rule when it used fiscal year 2000 funds to facilitate purchase of an aircraft as part of a cooperative agreement. APHIS had the authority to enter into a cooperative agreement with Wyoming Woolgrowers Association (WWGA), but made the payments prior to a written cooperative agreement. We do not endorse APHIS's actions in expending federal funds prior to executing a cooperative agreement and remind APHIS of its duty to protect government funds from potential loss.

Matter of: Department of Energy—Title XVII Loan Guarantee Program

File: B-308715

Date: April 20, 2007

Section 1702(b)(2) of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 1117–18 (Aug. 8, 2005), confers upon the Department of Energy independent authority to make loan guarantees, notwithstanding the requirements imposed by the Federal Credit Reform Act of 1990 (FCRA), Pub. L. No. 101-508, title XIII, subtitle B, § 13201, 104 Stat. 1388, 1388-610 (Nov. 5, 1990), codified at 2 U.S.C. § 661c.

The Department of Energy violated 42 U.S.C. § 7278 by expending appropriated funds to implement a new loan guarantee program authorized by title XVII of the Energy Policy Act. Section 7278 prohibits the

Department from using funds made available to it under any Energy and Water Development Appropriations Act to “implement or finance” any loan guarantee program unless specific provision is made for the program in an appropriations act. At the time, there was no such provision for title XVII and the Department used funds appropriated to it for other purposes by two Energy and Water Development Appropriations Acts. These activities also violated the purpose statute, 31 U.S.C. § 1301(a), and the Antideficiency Act, 31 U.S.C. § 1341(a).

Matter of: National Archives and Records Administration—Damage to Revolving Fund Records Caused by Building Failure

File: B-308822

Date: May 2, 2007

The Federal Property and Administrative Services Act of 1949, as amended, governs the interagency occupancy agreement between the General Services Administration (GSA) and the National Archives and Records Administration (NARA) for the Washington National Records Center building. Consistent with the Act and our past decisions involving GSA and the Federal Buildings Fund, we find that the interdepartmental waiver rule applies and GSA is not required to reimburse NARA for property damage. 57 Comp. Gen. 130 (1977). Operating reserves in NARA’s records center revolving fund are available to cover the costs of repairing water damage to records that NARA stores for its federal agency customers caused by a building failure.

Matter of: Interagency Agreements—Obligation of Funds under an Indefinite Delivery, Indefinite Quantity Contract

File: B-308969

Date: May 31, 2007

The Department of the Interior, National Business Center, awarded a 1-year indefinite delivery, indefinite quantity contract (IDIQ) on behalf of the Department of Defense (DOD), having a period of performance from July 1, 2003, to June 30, 2004. The contract required the government to purchase a minimum of \$1 million in services from the contractor. The entire minimum amount of the IDIQ contract should have been obligated against fiscal year 2003 funds; however, Interior and DOD only charged \$45,000 to the proper fiscal year appropriation. Accordingly, Interior and DOD should adjust their accounts to correct the improper obligation.

Matter of: Recess Appointment of Sam Fox

File: B-309301

Date: June 8, 2007

An ambassador whose nomination was withdrawn, but later received a recess appointment, cannot receive a salary under 5 U.S.C. § 5503. However, the voluntary services prohibition of the Antideficiency Act does not prohibit the State Department from accepting his uncompensated services. The voluntary services prohibition was enacted to prevent subsequent claims against the government and coercive deficiencies, but the recess appointee could not raise a subsequent claim against the government because he accepted the position with full knowledge that he could not receive a salary under section 5503. Furthermore, serious constitutional issues would arise if Congress attempted by statute to restrict the President's constitutional recess appointment power.

Matter of: Presidential Signing Statements Accompanying the Fiscal Year
2006 Appropriations Act

File: B-308603

Date: June 18, 2007

The President issued signing statements for 11 appropriations acts in fiscal year 2006, identifying constitutional concerns or objections with some provisions appearing in the acts. In total, the President singled out 160 provisions of law, which GAO categorized on the basis of the President's stated concern or objection. GAO examined 19 of these provisions to determine whether the agencies responsible for their execution carried out the provisions as written. Of these 19 provisions, 10 were executed as written, 6 were not, and 3 were not triggered and so there was no agency action to examine. Of the 6 provisions that were not executed as written, the President's objection to 3 provisions was based on *Immigration and Naturalization Service v. Chadha*; his objection to 2 provisions was based on the theory of the unitary executive; and his objection to 1 provision was based on the President's law enforcement authority.

GAO also reported that federal courts cite or refer to presidential signing statements infrequently and only in rare instances have relied on them as authoritative interpretations of the law.

Matter of: Expired Funds and Interagency Agreements between
GovWorks and the Department of Defense

File: B-308944

Date: July 17, 2007

GovWorks, a Department of the Interior franchise fund, entered into four contracts on behalf of the Department of Defense (DOD). With one exception, the Military Interdepartmental Purchase Requests (MIPRs) used to finance these contracts did not identify the specific items or services that DOD wanted GovWorks to acquire on its behalf. Lacking the necessary specificity as to the items or services ordered, these MIPRs did

not properly obligate DOD's appropriation. Accordingly, in fiscal year 2005, when GovWorks used these funds for three of the four contracts, GovWorks improperly used prior year funds.

One MIPR, for laser printers, described the goods DOD sought with enough specificity to create a valid interagency agreement and to properly obligate DOD's appropriation. Although the laser printers ordered are a readily available commercial item, GovWorks did not use the funds to execute a contract on DOD's behalf until 17 months after the date of the MIPR, and 11 months after the funds expired. Because GovWorks did not use the funds within a reasonable time of their receipt, the contract did not fulfill a *bona fide* need arising during the funds' period of availability.

DOD and GovWorks share responsibility for ensuring the proper use of DOD funds transferred to and "parked" at GovWorks. DOD must adjust its appropriations accounts to record obligations for these four contracts against fiscal year 2005 appropriations. If DOD has insufficient unobligated balances in these appropriations, DOD must report violations of the Antideficiency Act.

To prevent future occurrences of the problems associated with the four contracts, GovWorks should examine its accounts to identify interagency agreements that lack the requisite specificity under the recording statute. For those agreements that do not meet the requirements, GovWorks should return the funds advanced by the ordering agency. GovWorks also should develop internal controls to ensure that it does not accept nonspecific, indefinite orders nor use expired funds to enter into contracts on behalf of the ordering agency.

Matter of: Interagency Agreements—Use of an Interagency Agreement between the Counterintelligence Field Activity, Department of Defense, and GovWorks to Obtain Office Space

File: B-309181

Date: August 17, 2007

Without a delegation from the General Services Administration or independent statutory authority to enter into a lease, neither GovWorks

(a Department of the Interior franchise fund) nor the Counterintelligence Field Activity (CIFA) of the Department of Defense (DOD) had authority to obtain office space through a third-party lease. Unless ratified by an appropriate government official, the agreement for office space is unenforceable against the government. GovWorks and CIFA cannot circumvent federal statutory and regulatory requirements on leasing by bundling the lease agreement in a contract for services. Without ratification, all payments made under this third-party lease are improper payments, and DOD and GovWorks should take appropriate action to resolve them.

There is no evidence to suggest that CIFA violated the Antideficiency Act. Although CIFA and GovWorks entered into an agreement to obtain office space through a third-party lease without requisite authority, CIFA does have an appropriation that is otherwise available for the purpose of leasing office space—the Operation and Maintenance, Defense-wide appropriation. CIFA recorded these costs as obligations of this appropriation and transferred funds to GovWorks to pay for them. There is no indication, however, that CIFA recorded or transferred amounts in excess of or in advance of the appropriation. The conclusion that neither CIFA nor GovWorks violated the Antideficiency Act does not diminish or excuse CIFA's and GovWorks's disregard of federal statutes and policy, involving the government in an unauthorized transaction and millions of dollars of improper payments.

Matter of: National Park Service—Special Park Use Fees

File: B-307319

Date: August 23, 2007

The National Park Service (NPS) may set special park use fees based on market value when it is acting under business-type conditions, but it may not double charge for costs by setting a two-part fee in which one part is based on market value and the other based on costs. Both the Independent Offices Appropriations Act (IOAA) of 1952, codified at 31 U.S.C. § 9701, and section 3a of title 16 of the United States Code authorize NPS to charge a user fee. When providing commercial goods, service, or resources, NPS may charge a fee based on market value under the IOAA and, under section

3a, calculate its actual costs, deduct that amount from the fee collected, and credit that amount to the current NPS appropriation. Any fees collected in excess of costs must be deposited into the miscellaneous receipts of the Treasury. Alternatively, NPS may choose to set special park use fees to recover only its actual costs and retain those under section 3a.

Matter of: Bureau of Alcohol, Tobacco, Firearms, and Explosives—Words of Futurity in Fiscal Year 2006 Appropriations Act

File: B-309704

Date: August 28, 2007

A proviso appearing in the Bureau of Alcohol, Tobacco, Firearms, and Explosives' fiscal year 2006 appropriation directing that "no funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose" data from the Firearms Trace System to unauthorized parties is permanent law. Provisions in appropriations acts are presumed effective only for the covered fiscal year, unless Congress makes clear that they are permanent. Here, the provision contains words of futurity that indicate Congress intended it to be permanent.

Matter of: Department of Homeland Security's Use of Shared Services within the Preparedness Directorate

File: B-308762

Date: September 17, 2007

The conference report accompanying the Department of Homeland Security (DHS) appropriations act for fiscal year 2007 directed GAO to review DHS's use of shared services within the Preparedness Directorate and its compliance with appropriations law and the proper use of the Economy Act. GAO found that the Preparedness Directorate pooled its appropriations to fund what it refers to as shared services. Pooling funds across appropriations is a form of transfer, and, unless otherwise

authorized by law, transfers of funds between agency appropriation accounts are prohibited by law. The Preparedness Directorate had authority, pursuant either to the Economy Act or to the “account adjustment” statute, to pool appropriations to fund shared services. The directorate, however, did not enter into valid Economy Act agreements. In addition, it appears that the directorate did not properly record allocated charges against each of the benefiting appropriations, as required by the account adjustment statute. DHS should adjust the expired fiscal year 2006 directorate appropriations so that each benefiting appropriation is charged for the value received. If any of the appropriations that funded the directorate do not have available unobligated balances to cover the adjustments, the directorate should report an Antideficiency Act violation.

Matter of: National Labor Relations Board—Funding of Subscription Contracts

File: B-309530

Date: September 17, 2007

The National Labor Relations Board (NLRB) did not violate the *bona fide* needs rule when, in September 2006, it obligated fiscal year (FY) 2006 funds for five Web site database subscription renewals that it needed to have in place on October 1, 2006, the first day of FY 2007. Even though delivery of the renewed subscriptions would occur entirely in FY 2007, to ensure continued receipt of the subscriptions, NLRB reasonably determined that the renewal orders needed to be placed in FY 2006, before the expiration of the existing subscriptions on September 30, 2006. However, NLRB violated the *bona fide* needs rule when it obligated FY 2006 funds to renew two Web site database subscriptions that were not due to expire until October 31, 2006. These subscription renewals were a *bona fide* need of FY 2007, and NLRB should have purchased these subscriptions using its FY 2007 appropriation.

Matter of: National Transportation Safety Board—Insurance for
Employees Traveling on Official Business

File: B-309715

Date: September 25, 2007

The National Transportation Safety Board (NTSB) improperly used its appropriated funds to purchase accident insurance for its employees on official travel. NTSB does not have an appropriation specifically available for such a purpose, and the expenditures cannot be justified as a necessary expense. Because NTSB has no appropriation available to purchase accident insurance, the payments NTSB made constitute violations of the Antideficiency Act. NTSB must report the violations to the President and Congress, with a copy of the report to the Comptroller General.

Matter of: Department of Agriculture—Conservation Security Program

File: B-307720

Date: September 27, 2007

The Department of Agriculture was not authorized to make annual payments to Conservation Security Program participants that exceeded the annual payment limits imposed by 16 U.S.C. § 3838c(b)(2). Any payment that exceeded the annual payment limit is improper and should be promptly resolved.

Matter of: Customs and Border Protection—Availability of
Appropriations for Credit Monitoring Services

File: B-309604

Date: October 10, 2007

Customs and Border Protection's (CBP) Salaries and Expenses appropriation is not available to pay for credit monitoring services for its employees in the New Orleans area who, as a result of Hurricane Katrina, are, or may become, victims of identity theft. The costs of the services are personal expenses. Without express statutory authority, appropriations are not available to pay personal expenses unless the expenditure primarily benefits the government and the benefit to the employee is incidental. CBP employees individually, not the government, would be the primary beneficiaries of the proposed credit monitoring. Neither government action nor inaction compromised the employees' identities. Government credit cards were not compromised or threatened. The credit monitoring services are part of the employees' overall management of their personal finances.

Matter of: Department of Energy—Report of Antideficiency Act Violation

File: B-308715

Date: November 13, 2007

The Antideficiency Act and OMB Circular No. A-11 require agencies to report violations of the Act to Congress and the President and transmit copies of those reports to the Comptroller General at the same time. 31 U.S.C. §§ 1351, 1517(b); OMB Cir. No. A-11, *Preparation, Submission, and Execution of the Budget*, § 145.8 (July 2, 2007). In an April 2007 opinion, GAO concluded that the Department of Energy (DOE) violated the Act when it incurred obligations of more than \$503,000 for its title XVII loan guarantee program before Congress enacted appropriations for that program. B-308715, Apr. 20, 2007. While DOE has informally indicated that it intends to report these violations to Congress, more than 6 months have passed and DOE has not yet done so. For these reasons, GAO is advising

Congress of DOE's violation of the Act and its failure to report the violation to Congress.

Matter of: No-Cost Contracts for Event Planning Services

File: B-308968

Date: November 27, 2007

Federal agencies may enter into no-cost contracts like that proposed by National Conference Services, Inc. (NCSI) to procure conference planning services. The NCSI contract proposal is a valid, binding no-cost contract that an agency may agree to without violating the Antideficiency Act's voluntary services prohibition. 31 U.S.C. § 1342. Services performed pursuant to a formal contract, in which the agency has no financial obligation and the contractor has no expectation of payment from the government, but which contain reciprocal rights and duties, are not "voluntary" within the meaning of the statutory prohibition.

Matter of: United States Capitol Police—Cost of Living Payments

File: B-310004

Date: December 3, 2007

The United States Capitol Police (USCP) was authorized to make a lump sum payment on April 12, 2007, for a cost of living adjustment effective the first pay period of 2007. USCP regulations specifically authorize such payments following approval by the House Committee on House Administration and the Senate Committee on Rules and Administration. USCP received approval from these committees prior to making the payment. The delay in implementing the adjustment was due to the fact that the Senate Committee withheld its approval pending enactment of funding for the remainder of fiscal year 2007. The Senate Committee,

however, recognized that the adjustment was forthcoming and would be effective as of the first pay period of 2007.

Matter of: Presidential Signing Statements—Agency Implementation of
Ten Provisions of Law

File: B-309928

Date: December 20, 2007

The House Judiciary Committee and Senate Appropriations Committee asked GAO to examine how agencies executed ten provisions of law to which the President took exception in signing statements. Because one provision applied to two agencies, GAO examined agency action in eleven instances. GAO found that, in six of the eleven instances, the responsible agencies reported either that they had taken actions to implement the provisions as written or that they had experienced no interference in carrying out their responsibilities as required by law. In two instances, the provisions were not triggered. In the remaining three instances, GAO found that the Department of Energy and the Federal Emergency Management Agency had not yet implemented the provisions for which they were responsible, although in all three instances each agency indicated that it was planning to implement the provision.
