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Matter of: National Weather Service – Georgia 9-1-1 Charge

File: B-301126

Date: October 22, 2003

The federal government is constitutionally immune from paying the Georgia 9-1-1 charge because it is a vendee tax, the legal burden of which falls directly on the federal government as a user of telephone services. In addition, Georgia statutes bar the assessment of this charge against federal entities. The National Weather Service should not pay assessments of this fee by its telephone service provider.

Matter of: Department of the Air Force – Purchase of Decals for Installation on Public Utility Water Tower

File: B-301367

Date: October 23, 2003

The Air Force Reserve Operation and Maintenance appropriation is available for affixing decals of the major units assigned to Grissom Air Reserve Base onto a nearby utility company water tower to inform the public of the military's activities in the area.

Affixing decals of units assigned to Grissom Air Reserve Base to a utility company water tower would not violate the rule against using appropriated funds for improvements to nonfederal property because the decals would not enhance the water tower's value.

Matter of: Reconsideration: District of Columbia's 9-1-1 Emergency Telephone System Surcharge and Effect of New Amendments

File: B-302230

Date: December 30, 2003

The District of Columbia's 9-1-1 emergency telephone system surcharge, as originally enacted in 2000, constituted a "vendee tax" on all users of telephone services within the District, and had no legal effect against the federal government because the District lacked explicit statutory authority from Congress to tax the federal government. Under *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and other cases, in the absence of an express statutory consent by the federal government, the Supremacy Clause of the United States Constitution precludes "subordinate governments," including the District, from taxing the federal government or its instrumentalities. The Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (Dec. 24, 1973), which empowers the District of Columbia, also evinces a congressional desire to preclude the District from taxing or otherwise interfering with the federal government.

However, the District's 2003 amendments to the 9-1-1 surcharge converted it to a "vendor tax" on the providers of telephone services. Federal agencies may pay bills that itemize an appropriate portion of the amended surcharge because this tax is, for the telephone companies, a cost of doing business in the District of Columbia.

Matter of: Small Business Administration Imposition of Oversight Review Fees on Preferred Lender Program Lenders

File: B-300248

Date: January 15, 2004

The Small Business Administration (SBA) directed private lenders subject to its regulation under the preferred lender program to pay service fees to an SBA contractor in order to reimburse the contractor for the value of services the contractor performed on SBA's behalf. This arrangement was

unlawful because it amounted to the constructive imposition of additional fees that were prohibited by SBA's organic legislation, and because SBA's constructive retention and use of the receipts from that fee were required by the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b), to be deposited into the general fund of the Treasury because SBA had no statutory authority to use those fees or deposit them into another account.

Matter of: U.S. Army Corps of Engineers, North Atlantic Division – Food for a Cultural Awareness Program

File: B-301184

Date: January 15, 2004

The U.S. Army Corps of Engineers' appropriation is not available to pay for the costs of food offered at the Corps' North Atlantic Division's February 2003 Black History Month program. The record here indicates that a meal was offered at the program, not a sampling of food. While the program flier referred to a "food sampling," all other evidence in the record, including the time of the program, the food items served, and the amounts available, indicate that a meal, not a sampling, was offered.

Matter of: Rescission by the Department of Commerce of Unobligated Emergency Steel Loan Guarantee Program Appropriation

File: B-302335

Date: January 15, 2004

The Emergency Steel Loan Guarantee Act of 1999 provided for the cost of guaranteeing loans to qualified steel companies through the Emergency Steel Loan Guarantee Program, stating that "there is appropriated $140,000,000 to remain available until expended." In fiscal year 2004, Congress mandated a rescission of $100 million from unobligated balances "available to the Department of Commerce" from prior year appropriations, and Commerce sought to partially satisfy this rescission through rescinding

some unobligated Program funds appropriated in 1999. Faced with the question of whether the Program's $140 million appropriation was available to the Loan Guarantee Board established in the 1999 Act or to Commerce, the Comptroller General used the canon of statutory construction that words should be considered in the context of the entire statute. Applied here, that resulted in a holding that the funds appropriated in the 1999 Act were available to the Board and not to Commerce, which thus had to find other unobligated balances to satisfy the $100 million rescission.

Matter of: Fish and Wildlife Service – Reimbursement for Individual Financial Planning for Retirement

File: B-301721

Date: January 16, 2004

We have no objection to the Fish and Wildlife Service's (Service) proposal to use appropriated funds to reimburse its employees for the costs of individual financial planning as part of the agency's retirement education program. Employee retirement education and retirement counseling are legitimate functions of administering an agency's personnel benefits system, and therefore legitimate agency expenses. As the Service implements the proposed program, it should develop internal controls to ensure that the service for which reimbursement is sought meets the agency's definition of "advice and consultation services on investments, retirement issues and benefit programs from a financial planner."

Matter of: Assignment of Losses Incurred by the Library of Congress FEDLINK Revolving Fund

File: B-301714

Date: January 30, 2004

The Library of Congress has incurred losses as a result of advance payments made for the acquisition of subscriptions by the Federal Library and Information Network (FEDLINK) revolving fund to a contractor who subsequently defaulted and declared bankruptcy. The Library should use the administrative fees that it has collected from all of FEDLINK's customers to cover this loss, rather than assign the loss to the specific agencies whose orders were placed with the contractor.

Matter of: Office of National Drug Control Policy Advice to State Prosecutors

File: B-301022

Date: March 10, 2004

The Office of National Drug Control Policy (ONDCP) did not violate anti-lobbying and propaganda prohibitions by distributing a letter to state level prosecutors urging action pertaining to state and local drug laws. The applicable anti-lobbying provisions prohibit ONDCP from distributing literature pertaining to legislation pending before Congress. The letter in question dealt with state and local law, not federal law before Congress. Therefore, ONDCP did not violate the anti-lobbying law. In addition, by urging state officials to strengthen drug controls, ONDCP was carrying out its statutory mandate to oppose legalization of controlled substances, and was not carrying out forbidden lobbying activities.

Matter of: Medicare Prescription Drug, Improvement, and Modernization Act of 2003 – Use of Appropriated Funds for Advertisements

File: B-302504

Date: March 10, 2004

The Department of Health and Human Services (HHS) did not violate the publicity and propaganda prohibition when it used appropriated funds to produce and distribute a flyer and print and television advertisements concerning the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA).

HHS has explicit authority to inform Medicare beneficiaries about changes to Medicare resulting from MMA and thus its justification for the materials is afforded considerable deference. While the materials have notable omissions and other weaknesses, they are not so purely partisan as to be unlawful.

Matter of: U.S. Agency for International Development – Availability of Funds Under 31 U.S.C. § 3721

File: B-300829

Date: April 4, 2004

GAO does not have jurisdiction to question another agency's settlement of a claim under the Military Personnel and Civil Employees' Claims Act, 31 U.S.C. § 3721, so long as the settlement was made in accordance with "the statutory criteria and applicable regulations." In its decision to pay for flood-caused damage to an employee's vehicle while the vehicle was parked on an overseas embassy lot, the U.S. Agency for International Development relied on section 3721 and specific provisions of the State Department's Foreign Affairs Manual. Accordingly, GAO has no basis to object to the settlement.

Matter of: Government Printing Office – Recruitment and Relocation Payments and Retention Allowances

File: B-301837

Date: April 28, 2004

In view of the broad authority under the Kiess Act, 44 U.S.C. § 305, to set the pay of Government Printing Office (GPO) employees, GPO may use appropriated funds to pay recruitment and relocation bonuses and retention allowances. Because of the close relationship between GPO and the Joint Committee on Printing (JCP), we suggest that GPO consult with JCP on its decision to make such payments.

Matter of: Transfer from Library of Congress to Architect of the Capitol

File: B-302760

Date: May 17, 2004

A transfer of funds from the Library of Congress to the Architect of the Capitol for renovations, under the Library's transfer authority, 2 U.S.C. § 141(c), did not extend the obligational availability of the Library's fiscal year 2003 appropriations, which were only available for the *bona fide* needs of that fiscal year. The Library had a *bona fide* need to renovate the loading dock in September 2003 when it entered into an interagency agreement with the Architect. In signing that interagency agreement with the Architect, the Library incurred an obligation for $500,000. Accordingly, that amount is available to liquidate the obligation in future fiscal years to cover costs incurred by the Architect in accordance with the terms of the interagency agreement.

Matter of: Department of Health and Human Services, Centers for Medicare and Medicaid Services – Video News Releases

File: B-302710

Date: May 19, 2004

The Centers for Medicare and Medicaid Services' (CMS) use of appropriated funds to pay for the production and distribution of story packages that were not attributed to CMS violated the restriction on using appropriated funds for publicity or propaganda purposes in the Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, div. J, title VI, § 626, 117 Stat. 11, 470 (Feb. 20, 2003).

CMS, in using appropriations in violation of the publicity or propaganda prohibition, incurred obligations in excess of appropriations available for that purpose. *See* B-300325, Dec. 13, 2002. Accordingly, CMS violated the Antideficiency Act, 31 U.S.C. § 1341, and must report the violation to Congress and the President in accordance with 31 U.S.C. § 1351 and Office of Management and Budget Circular No. A-11.

Matter of: District of Columbia – Claim for Additional Severance Pay

File: B-302996

Date: May 21, 2004

GAO does not have jurisdiction to consider a District of Columbia employee's claim for additional severance pay following the termination of his employment. From 1921 through 1996, GAO did consider, among other things, federal employee claims for additional severance pay under its authority to settle and adjust federal employee claims. *See*, *e.g.*, 31 U.S.C. § 3702 (1994); B-260092, Feb. 15, 1995. However, in 1996, Congress amended the law to transfer that general claims settlement authority elsewhere in the government. Pub. L. No. 104-53, § 211, 109 Stat. 514, 535

(Nov. 19, 1995). Consequently, GAO no longer has authority to consider and decide a claim for additional severance pay.

Matter of: Interagency Agreement with the Department of Energy for Online Research and Education Information Service

File: B-301561

Date: June 14, 2004

Submission from the Air Force Office of Scientific Research (AFOSR) and subsequent informal contacts with AFOSR and the Department of Energy (DOE) did not provide the information needed to definitively address whether AFOSR could use fiscal year 1999 funds to pay a voucher for amounts owed under an agreement with DOE to implement a governmentwide online research, education, and information service. The GAO letter responding to AFOSR discusses the various funding options depending on different scenarios that would require using fiscal year 1998 or 1999 funds, or both. Under account closing laws, fiscal year 1998 funds are now closed, so, to the extent payments should have been charged to fiscal year 1998, AFOSR would need to use current funds to pay the voucher. Fiscal year 1999 funds are expired but will not be closed until September 30, 2004, so under 31 U.S.C. § 1553(a) the appropriation account is still available to pay that part of the vouchered amount attributable to fiscal year 1999 funds.

Matter of: Use of Appropriated Funds to Purchase Kitchen Appliances

File: B-302993

Date: June 25, 2004

The U.S. Pacific Command (USPACOM) may use appropriated funds to purchase refrigerators, microwaves, and commercial coffee makers for central kitchen areas in its new headquarters building. Appropriations are available to pay for items ordinarily considered to be personal in nature,

such as kitchen appliances, when the primary benefit of their use accrues to the agency, notwithstanding a collateral benefit to the individual. USPACOM has demonstrated that equipping the workplace in this manner is reasonably related to the efficient performance of agency activities and provides other benefits to the agency, including assurance of a safe workplace. Earlier GAO decisions reflecting similar proposed uses of appropriations, such as B-276601, June 26, 1997, B-210433, Apr. 15, 1983, and 47 Comp. Gen. 657 (1968), are modified accordingly.

In applying this decision, agencies should develop an agency policy to ensure uniformity in the use of appropriations to acquire this equipment and determine the usefulness of appliances such as these in light of operational benefits, such as employee health and productivity, and the responsibility to provide a safe work environment.

Matter of: Department of Energy – Disposition of Interest Earned on State Tax Refund Obtained by Contractor

File: B-302366

Date: July 12, 2004

The federal government is legally entitled to a refund of state taxes plus interest that the state of Washington gave to Fluor Hanford, Inc. (FHI) for taxes that FHI paid under a contract with the Department of Energy. Because the department previously reimbursed FHI for those taxes, the department is entitled to retain and to credit to its appropriations the principal portion of the state tax refund. However, the department may not retain or credit to its appropriations interest amounts paid by the state along with the refunded taxes. The interest amounts must be credited to the general fund of the Treasury as miscellaneous receipts, pursuant to 31 U.S.C. § 3302(b).

Matter of: General Services Administration and Real Estate Brokers' Commissions

File: B-302811

Date: July 12, 2004

The General Services Administration's (GSA) proposed National Brokers Contract is a "no-cost" contract which adopts a common practice of the real estate industry and allows real estate brokers to accept commission payments from landlords whose property the government leases. The National Brokers Contract specifies that the brokers agree to provide services at no cost to GSA and will have no expectation of payment from GSA—even if landlords fail to pay commissions the landlords owe to the brokers. Although the landlords will pay the brokers' commissions for services rendered to both GSA and the broker, this does not constitute a constructive augmentation of GSA's appropriations because the services that GSA will acquire under the National Brokers Contract are services that brokers commonly offer in commercial leasing transactions and are typically expected to be covered by landlords' commissions to brokers.

Matter of: Kid's Fishing Day

File: B-302745

Date: July 19, 2004

The Forest Service may not use appropriated funds to purchase refreshments for the public as part of a Kid's Fishing Day program. Kid's Fishing Day is not a cultural awareness program because it does not serve to advance federal Equal Employment Opportunity objectives.

Matter of: Reclamation Fund and Western Area Power Administration

File: B-303180

Date: July 26, 2004

While the relationship between the Bureau of Reclamation (BOR) and the Western Area Power Administration (WAPA) is not a creditor-debtor relationship, WAPA is required to set rates to recover from its power customers amounts appropriated over the years from BOR's Reclamation Fund to finance construction, operation, and maintenance of federal power facilities, and to deposit power revenues into the Reclamation Fund. The statutory power marketing scheme was designed to ensure that power customers reimburse the federal government for the benefit they receive from the federal government. The statutory scheme requires WAPA to enforce reimbursement by WAPA's customers and to repay to the Reclamation Fund the amount it collects.

Matter of: Scope of Professional Credentials Statute

File: B-302548

Date: August 20, 2004

Pursuant to 5 U.S.C. § 5757(a), federal agencies are authorized to use appropriated funds to pay an employee's expenses to obtain professional credentials. However, an agency may pay only the expenses required to obtain the license or official certification needed to practice a particular profession, including licensing fees and examinations to obtain credentials. Accordingly, section 5757(a) does not authorize the agency to pay for an employee's membership in a professional association unless membership is a prerequisite to obtaining the professional license or certification. Under 5 U.S.C. § 5946 payment for voluntary memberships in organizations of already-credentialed professionals is prohibited, and section 5757(a) does not provide any authority to pay such fees.

Matter of: Department of Health and Human Services – Chief Actuary's Communications with Congress

File: B-302911

Date: September 7, 2004

Pursuant to section 618 of the Consolidated Appropriations Act of 2004, the Department of Health and Human Services' appropriation was not available to pay the salary of a Department official who prohibited a subordinate from communicating with Congress. The legislative history of the act indicates that federal employees must remain free to communicate with Congress in order to provide Congress with programmatic information from frontline employees. In this case, that stricture was violated. Consequently, under section 618 the appropriated funds are unavailable to pay the official's salary.

Section 618 is not unconstitutional as a violation of the separation of powers. While certain applications of section 618 could raise constitutional concerns, such as a request for privileged, classified, or deliberative information or legislative recommendations from federal employees, the prohibition was applicable to this case, given the narrow scope of information requested and Congress's need for such information in carrying out its legislative duties, as well as the fact that no court has held section 618 unconstitutional.

Matter of: Forest Service – Sierra Nevada Brochure and Video Materials

File: B-302992

Date: September 10, 2004

The Forest Service's use of appropriated funds to produce and distribute a brochure and video materials on the land management and resource plan for the Sierra Nevada National Forest did not violate the publicity or propaganda prohibition of the Consolidated Appropriations Act of 2004. Under its information dissemination authority, the Forest Service may

distribute these materials to explain and defend its forest management policies to the general public.

The Forest Service's use of appropriated funds to pay a private public relations firm to assist with the production and dissemination of the brochure and video materials also did not violate the prohibition of using appropriated funds to pay for a publicity expert under 5 U.S.C. § 3107. The Forest Service contracted with the firm to assist with a legitimate information dissemination activity and did not hire the firm as a "publicity expert" as envisioned by section 3107.

Matter of: Special Counsel and Permanent Indefinite Appropriation

File: B-302582

Date: September 30, 2004

The Department of Justice properly used the permanent indefinite appropriation to fund the expenses of a Special Counsel who was not appointed from outside the government. Although the authority to appoint counsels under 28 U.S.C. §§ 591 *et seq.* expired in 1999, the permanent indefinite appropriation remains available to pay the expenses of an independent counsel appointed under other law. The Justice Department appointed the Special Counsel in this case under 28 U.S.C. §§ 509, 510, and 515, which constitute "other law" for purposes of the permanent indefinite appropriation. Although the term "independent counsel" is not defined in the permanent indefinite appropriation, the Special Counsel in this case filled the same investigative role as independent counsels under the expired law; furthermore, the Special Counsel in this case had sufficient indicia of independence from the Department of Justice that, taken with the nature of his investigative role, conferred the functional status of an independent counsel, despite the fact that he was not appointed from outside government. Because the Special Counsel was in fact an independent counsel and was appointed under "other law", the Department of Justice properly used the permanent indefinite appropriation to fund his activities.

The Department of Justice may waive 28 C.F.R. Part 600, because it does not act as a substantive limitation on the Attorney General's authority to

delegate departmental functions to an appointed Special Counsel. The regulations themselves state that they do not create any rights enforceable at law or equity. In addition, the effective date of Part 600 when issued was not delayed thirty days because it was not a substantive rule. Because it is not a substantive rule but an internal administrative procedure, Part 600 may properly be waived by the Department of Justice.

Matter of: State Department – Rest and Recuperation Travel

File: B-302728

Date: October 1, 2004

A State Department certifying officer located in the United States Embassy, Kiev, Ukraine, may certify payment of a Foreign Service employee's travel expenses to attend the funeral of a close family member, based on the department's authority to grant "rest and recuperation" travel under the Foreign Service Act of 1980, Pub. L. No. 96-465, codified in 22 U.S.C. ch. 52.

Matter of: Department of Veterans Affairs – Appropriations for CARES Cost Comparison Studies

File: B-302973

Date: October 6, 2004

The prohibition in 38 U.S.C. § 8110(a)(5) on using appropriations for "medical care, medical and prosthetic research, and medical administration and miscellaneous operating expenses" for the Veterans Health Administration (VHA) to conduct studies comparing the cost of the provision of commercial services and products by the Department of Veterans Affairs (VA) with that by private contractors applies to cost comparison studies conducted as part of VA's Capital Asset Realignment for Enhanced Services (CARES) process. It also prohibits the use of VHA employees to conduct such studies. The section 8110(a)(5) prohibition applies unless Congress includes an affirmative statement that it is

appropriating VHA funds for that specific purpose. This conclusion is supported both by applying the plain meaning rule to section 8110(a)(5) and reviewing the provision's legislative history. If VA has used restricted VHA appropriations in fiscal year 2004 to conduct such studies in the absence of an express appropriation, then VA has violated section 8110(a)(5). It would also constitute a violation of the purpose statute, 31 U.S.C. § 1301(a). If VA, after adjusting its accounts, were to have insufficient budget authority to cover all obligations incurred, then VA would have to report an Antideficiency Act violation.

Matter of: Forest Service – Request for Relief of Liability of Juanita Jimenez

File: B-303177

Date: October 20, 2004

We deny relief for a Forest Service certifying officer who certified duplicate payments in the amount of $5,631.85 to a vendor for emergency fire equipment during a fire emergency in Gifford Pinchot National Forest. We find that the certifying officer failed to act with the requisite amount of care and due diligence when she certified payments based upon carbon copies of original invoices that she had previously certified for payment.

Matter of: Federal Communications Commission Order 800 MHz Band Communications

File: B-303413

Date: November 8, 2004

The Federal Communications Commission's (FCC) *Report and Order* on improving public safety communications in the 800 MHz band, which would provide Nextel with spectrum in exchange for Nextel relinquishing other spectrum and paying costs associated with 800 MHz band reconfiguration, does not violate 31 U.S.C. § 1341(a)(1)(B), a provision of the Antideficiency Act, because the *Report and Order* does not involve FCC obligations or expenditures.

FCC *Report and Order* on improving public safety communications in the 800 MHz band would provide Nextel with spectrum through a license modification in exchange for Nextel relinquishing other spectrum and paying costs associated with 800 MHz band reconfiguration. The license modification results in no money owed the government. The miscellaneous receipts statute, 31 U.S.C. § 3302(b), requires that money received for the United States be deposited in the Treasury and an agency cannot avoid the statute by changing the form of its transaction to avoid receiving money that would otherwise be owed to it unless so authorized by law. Because GAO defers to the FCC's interpretation of its authority under the Communications Act of 1934 to provide Nextel with spectrum through a license modification, GAO believes that the FCC *Report and Order* does not violate the miscellaneous receipts statute.

GAO defers to the FCC's interpretation of its authority under the Communications Act of 1934 consistent with the standard guiding the consideration of the FCC's regulatory actions established in *Chevron* and other court cases.

Matter of: Navy Disbursing Officer – Physical Loss

File: B-303671

Date: December 3, 2004

GAO does not review military disbursing officer physical loss relief requests on a case-by-case basis. GAO, *Policy and Procedures Manual for Guidance of Federal Agencies*, title 7, § 8.10 (May 1993). Where the Secretary of Defense, or the official to whom the Secretary has delegated relief authority, makes certain determinations required by 31 U.S.C. § 3527(b), relief is automatic; if the Secretary is unable to make these determinations, relief is not available. GAO will not review requests for relief of liability from military disbursing officers where the determinations and the subsequent decision to grant or deny relief appear to be properly considered.

Matter of: Architect of the Capitol – Payment of Fringe Benefits to Temporary Employees

File: B-303961

Date: December 6, 2004

Participation by the Architect of the Capitol (AOC) in a multiemployer defined benefit plan would constitute a violation of the Antideficiency Act because of the possibility of indeterminate withdrawal liability under the Employee Retirement Income Security Act. Language instructing AOC to take all steps which may be required to pay fringe benefits to its temporary employees "notwithstanding any other provision of law" does not suffice to waive the Antideficiency Act. Nothing in the statute or its legislative history suggests that Congress intended a waiver of the Antideficiency Act, and AOC can give effect to both this language and the Antideficiency Act.

Matter of: National Parks Service Contract – Payments to Subcontractors

File: B-303906

Date: December 7, 2004

GAO no longer has claims settlement authority under 31 U.S.C. § 3702. Authority to settle claims now lies with the executive branch agency out of whose activity the claims arose. Consequently, the Department of the Interior, not GAO, must decide whether to pay the claims of subcontractors under an equitable theory of *quantum meruit*. In that regard, Interior may find our past claims settlement decisions helpful.

Matter of: Office of Federal Housing Enterprise Oversight – Disposition of Collections from Third Party Litigants

File: B-302825

Date: December 22, 2004

The Office of Federal Housing Enterprise Oversight (OFHEO) may not deposit into the Federal Housing Enterprises Oversight Fund amounts that it collects from third parties to its administrative proceedings in payment of document discovery costs. Under the miscellaneous receipts statute, 31 U.S.C. § 3302(b), OFHEO must deposit such collections into the general fund of the Treasury.

Matter of: Bureau of Customs and Border Protection – Automated Commercial Environment Contract

File: B-302358

Date: December 27, 2004

Customs' Automated Commercial Environment (ACE) contract was an indefinite delivery, indefinite quantity (IDIQ) contract and therefore was not subject to the multiyear contracting requirements of 41 U.S.C. § 254c, including the termination provisions in that section.

Upon award of the ACE contract, Customs should have obligated the contract minimum of $25 million in accordance with 31 U.S.C. § 1501(a), the recording statute, to ensure the integrity of Customs' obligational accounting records.