Appropriations Law Review

I. KEY CONCEPTS AND TERMINOLOGY

A. Concept of "Appropriation."

GAO Definition —"Authority given to federal agencies to incur obligations and to make payments from the Treasury for specified purposes." GAO, *Principles of Federal Appropriations Law,* vol. 1, 3rd ed., GAO-04-261SP (Washington, D.C.: January 2004), at 2–5.

- *American Federation of Government Employees (AFGE) v. Federal Labor Relations Authority (FLRA)*, 388 F.3d 405 (3rd Cir. 2004).

  AFGE, representing Army depot employees, had proposed an amendment to the employees' collective bargaining agreement that would have required the Army to pay reimbursements of personal expenses incurred by the depot employees as a result of cancelled annual leave from a defense working capital fund. When the Army objected that it had no authority to use the working capital fund for personal expenses, AFGE appealed to FLRA. FLRA agreed with the Army and ruled that the provision was "nonnegotiable." Citing FLRA decisions, Comptroller General decisions, and federal court cases, FLRA concluded that the working capital fund, a revolving fund, is treated as a continuing appropriation and, as such, the fund was not available for reimbursement of personal expenses.

  The court agreed with FLRA that the defense working capital fund consists of appropriated funds and is thus not available to pay the personal expenses of Army employees. The court, however, rejected what it called "FLRA's blanket generalization that revolving funds are always appropriations." *AFGE,* 388 F.3d at 411. Instead, the court applied a standard used by the Federal Circuit and the Court of Federal Claims when addressing the threshold issue of Tucker Act jurisdiction, a "clear expression" standard; that is, funds should be regarded as "appropriated" absent a "clear expression by Congress that the agency was to be separated from the general federal revenues." *Id.* at 410. The court observed in this regard:

  > "While that 'clear expression' standard arises in the context of Tucker Act jurisprudence, we think it accurately reflects the broader principle that one should not lightly presume that Congress meant to surrender its control over public expenditures by authorizing an entity to be entirely self-sufficient and outside the appropriations process. . . . For this reason, the courts have sensibly treated agency money as appropriated even when the agency is fully financed by outside revenues, so long as Congress

has not clearly stated that it wishes to relinquish the control normally afforded through the appropriations process.

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"[W]e think the correct rule is that the characterization of a government fund as appropriated or not depends entirely on Congress' expression, whatever the actual source of the money and whether or not the fund operates on a revolving rather than annualized basis."

Id. at 410–411. In applying this standard to the particular funding arrangement at issue, the court determined that the defense working capital fund was not a nonappropriated fund instrumentality and upheld the FLRA decision. "What matters is how Congress wishes to treat government revenues, not the source of the revenues." *Id.* at 413.

B. Concept of "Obligation."

- B-302358, Dec. 27, 2004—*Bureau of Customs and Border Protection—Automated Commercial Environment Contract.*

  Customs's 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's obligational accounting records.

II. STATUTORY CONSTRUCTION.

A. Plain Meaning Rule.

- B-300222, Mar. 28, 2003—*Use of Fiscal Year 2003 Funds for Boeing 737 Aircraft Lease Payments.*

  Statutory provision precludes the use of appropriated funds to lease aircraft "under any contract entered into under any procurement procedures other than pursuant to" the Competition in Contracting Act of 1984 (CICA). The statute does not preclude the Department of Defense from using fiscal year 2003 funds to incur or liquidate obligations for lease payments for aircraft where the Department of Defense awarded the lease under the provisions of CICA authorizing the use of noncompetitive procedures.

B. Constitutional Concerns.

- B-302911, Sept. 7, 2004—*Department of Health and Human Services—Chief Actuary's Communications with Congress.*

  Pursuant to section 618 of the Consolidated Appropriations Act of 2004, the Department of Health and Human Services's 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. 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. No court has held section 618 unconstitutional, however. Given the narrow scope of the information requested in this case and Congress's need for such information in carrying out its legislative duties, the application of section 618 in this case does not raise constitutional concerns.

C. Interpreting "Notwithstanding" Clauses.

- B-303961, Dec. 6, 2004—*Architect of the Capitol—Payment of Fringe Benefits to Temporary Employees.*

  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. Appropriations 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 that language and the Antideficiency Act.

  The Antideficiency Act is one of the fundamental statutes by which Congress exercises its constitutional control of the public purse. The Act represents Congress's strongest means to enforce the constitutional command that "no Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." U.S. Const. art. I, 9, cl. 7. GAO is unwilling to read general language, such as the "notwithstanding" clause in the appropriations act, as a waiver of the Antideficiency Act without some legislative history to indicate that Congress intended to give the agency authority to obligate in advance or in excess of an appropriation.

- B-303268, Jan. 5, 2005—*State Department—Assistance for Lebanon.*

  The requirements of section 1224 of the Foreign Relations Authorization Act, 2003, did not apply to amounts appropriated in the Foreign Operations, Export Financing, and Related Appropriations Act, 2003, for assistance to Lebanon. Section 1224 required that, "notwithstanding any other provision of law," $10 million of the lump sum appropriation be withheld until certain certification requirements were met. Section 534(a) of the appropriations act, enacted subsequent to section 1224, required that the lump sum appropriated for the assistance of Lebanon be available "notwithstanding any other provision of law." Because Congress passed section 534(a) more than four months after section 1224, section 534(a) superseded the requirements of section 1224.

III. AVAILABILITY OF APPROPRIATED FUNDS AS TO PURPOSE.

A. Restrictions on Information Dissemination.

1. Publicity or Propaganda Prohibition.

- B-302504, Mar. 10, 2004—*Flyer and advertisements regarding the Medicare Prescription Drug, Improvement, and Modernization Act*.

  The Department of Health and Human Services (HHS) did not violate the publicity or 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. While the materials have notable omissions and other weaknesses, they are not so purely partisan as to violate the prohibition.

- B-302992, Sept. 10, 2004—*Forest Service—Sierra Nevada Forest Plan Amendment brochure and video materials*.

  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.

2. Video News Releases (VNRs)—Beware of Prepackaged News Stories.

- B-302710, May 19, 2004—*Department of Health and Human Services, Centers for Medicare and Medicaid Services—Video News Releases*.

  The Centers for Medicare and Medicaid Services's (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.

- B-303495, Jan. 4, 2005—*Office of National Drug Control Policy—Video News Release.*

  Some prepackaged news stories that the Office of National Drug Control Policy (ONDCP) produced and distributed as part of some video news releases it issued under the Drug-Free Media Campaign Act of 1998 violated the publicity or propaganda prohibitions contained in its 2002, 2003, and 2004 appropriations acts. ONDCP's prepackaged news stories constituted covert propaganda because ONDCP did not identify itself to the viewing audience as the producer and distributor of those stories.

- B-303495.2, Feb. 15, 2005—*Reconsideration of B-303495—Office of National Drug Control Policy Prepackaged News Stories*.

  GAO was asked to reconsider and withdraw the opinion in B-303495, Jan. 5, 2005, and the analysis upon which it was based. After considering the issues raised in the request, GAO declined to withdraw the opinion.

- B-304272, Feb. 17, 2005—*Circular Letter—Prepackaged News Stories*.

  GAO circular letter to heads of agencies provides guidance regarding the use of prepackaged news stories. To avoid violation of the publicity or propaganda prohibition, an agency must ensure that the prepackaged news story clearly discloses to the target audience that it was created and distributed by the producing agency. Because agencies have no appropriation available to produce and distribute materials in violation of the publicity or propaganda prohibition, the improper use of appropriated funds to produce or distribute prepackaged news stories constitutes a reportable violation of the Antideficiency Act, 31 U.S.C. § 1341.

B. <u>Use of Appropriations to Hire a Publicity Agent.</u>

- B-302992, Sept. 10, 2004—*Forest Service—Sierra Nevada Forest Plan Amendment brochure and video materials.*

  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 did not violate the prohibition on using appropriated funds to pay for a publicity expert, 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.

III. AVAILABILITY OF FUNDS AS TO AMOUNT.

A. Amendment to the Antideficiency Act

- The Antideficiency Act provides that whenever an officer or employee of the United States government or the government of the District of Columbia violates the Antideficiency Act, the head of the agency or the Mayor of the District of Columbia is required to report immediately to the President and Congress all relevant facts and a statement of actions taken. 31 U.S.C. §§ 1351, 1517(b).

  Recent amendments to the Antideficiency Act require heads of agencies and the Mayor of the District of Columbia to transmit to the Comptroller General a copy of each such report on the same date it is transmitted to the President and Congress. 31 U.S.C. §§ 1351, 1517(b), *as amended by* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. G, title II, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004).

  The Senate Appropriations Committee Report explained that the purpose of this provision is to authorize GAO to establish "a central repository of Antideficiency Act reports [and] track all Antideficiency Act reports, including responses to Comptroller General legal decisions and opinions and findings in audit reports and financial statement reviews." S. Rep. No. 108-307, at 43 (2004).

B. Antideficiency Act and Purpose violations.

- B-302710, May 19, 2004—*Department of Health and Human Services Centers for Medicare and Medicaid Services—Video News Releases*; B-303495, Jan. 4, 2005—*Office of National Drug Control Policy—Video News Release*.

  CMS's and ONDCP's uses of appropriated finds to create prepackaged news stories violated the publicity or propaganda prohibition. CMS and ONDCP also violated the Antideficiency Act because they had no appropriations available for that purpose. *See* B-300325, Dec. 13, 2002. Accordingly, each agency was required to report their respective violations to Congress and the President in accordance with 31 U.S.C. § 1351 and Office of Management and Budget Circular No. A-11.

- B-302973, Oct. 6, 2004—*Veterans Administration—Appropriations for CARES Cost Comparison Studies*.

  Veterans Health Administration (VHA) is prohibited by 38 U.S.C. § 8110(a)(5) from using its "medical care, medical and prosthetic research, and medical administration and miscellaneous operating expenses" appropriation 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, including cost comparison studies conducted as part of VA's Capital Asset Realignment for Enhanced Services (CARES) process. If VHA used restricted VHA appropriations in fiscal year 2004 to conduct such studies, then VHA has violated section 8110(a)(5) and the purpose statute, 31 U.S.C. § 1301(a). If VHA, 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.

C. Augmentation of Appropriations.

- B-300248, Jan 15, 2004—*SBA Imposition of Oversight Review Fees on PLP Lenders.*

  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 legislation, and because SBA's constructive retention and use of the receipts from that fee augmented SBA's appropriation. The Miscellaneous Receipts Act, 31 U.S.C. § 3302(b), required SBA to deposit the amount of the fees into the general fund of the Treasury because SBA had no statutory authority to use those fees or deposit them into another account.

- B-302811, July 12, 2004—*General Services Administration and Real Estate Brokers' Commissions*.

  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 GSA, this does not constitute a constructive augmentation of GSA's appropriations because the proposed brokers contract is a "no-cost" contract. B-291947, Aug. 7, 2003. GSA will have no financial liability to the brokers under the contract and the brokers will have no expectation of payment from GSA.