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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Federal Election Commission—Dual Offices and Voluntary Services Prohibition

**File:** B-321744

**Date:** June 23, 2011

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### DIGEST

The voluntary services prohibition, 31 U.S.C. § 1342, does not prevent the incumbent Chief Information Officer (CIO) from simultaneously serving as Staff Director and being compensated only for the CIO position. The dual compensation statute, 5 U.S.C. § 5533, inferentially recognizes the legality of dual office-holding but prohibits compensation for both positions. *See* B-309301, June 8, 2007. The employee is not waiving the salary for the Staff Director position nor is he volunteering in that position. Rather, his uncompensated service is compelled by the dual compensation statute. 5 U.S.C. § 5533(a).

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### DECISION

The Federal Election Commission (Commission) has requested an advance decision under 31 U.S.C. § 3529 on whether the prohibition on voluntary services in 31 U.S.C. § 1342 prevents the Commission from appointing the Chief Information Officer (CIO) to serve simultaneously as CIO and in the statutory position of Staff Director. The Commission has further asked whether it can use appropriated funds to compensate an individual serving as both CIO and Staff Director at the higher CIO salary. Letter from Chair and Vice Chair, Commission, to Comptroller General, GAO (Mar. 18, 2011) (Request Letter). We conclude that the voluntary services prohibition, 31 U.S.C. § 1342, does not prevent the incumbent CIO from simultaneously serving as Staff Director and being compensated only for the CIO position.

Our practice when issuing decisions and opinions is to obtain the views of the relevant agencies in order to establish a factual record and the agencies' legal positions on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, [GAO-06-1064SP](#) (Washington, D.C.: Sept. 2006), available at [www.gao.gov/legal/resources.html](http://www.gao.gov/legal/resources.html). The record in this case consists of

the Request Letter, which includes the legal views of the Commission. We also interviewed an official from the Commission via teleconference on May 12, 2011.

## BACKGROUND

The Staff Director position is established by statute. The Federal Election Campaign Act of 1971, as amended, provides, in pertinent part:

“The Commission shall have a staff director and a general counsel who shall be appointed by the Commission. The staff director shall be paid at a rate not to exceed the rate of basic pay in effect for level IV of the Executive Schedule (5 U.S.C. 5315).”

2 U.S.C. § 437c(f)(1).

The Staff Director reports directly to the Commission and is the highest-ranking employee of the Commission other than the presidentially-appointed Commissioners. Request Letter, at 1–2. The incumbent serves as the chief administrative and management officer of the Commission and supervises the operation of all divisions, except the Office of General Counsel, the Office of Inspector General, and the Office of the Chief Financial Officer. *Id.* at 2. The current compensation for the Staff Director position is \$155,500 per year, which is the annual rate of compensation for Executive Level IV. *Id.*

Unlike the Staff Director position, the CIO position is not established by statute. The CIO is responsible for the Commission’s information technology strategy and architecture, and manages all aspects of the work of the Commission’s Information Technology Division. The CIO is compensated under the Senior Level system. In 2011, agencies that do not have a certified appraisal system, such as the Commission, may pay Senior Level employees a minimum of \$119,554 per year and a maximum of \$165,300 per year. *See* 5 U.S.C. § 5376; *see also* Request Letter, at 2. The current incumbent CIO is paid in excess of the maximum allowable compensation for the Staff Director position. Request Letter, at 2.

The position of Staff Director is currently vacant, and the CIO incumbent has been performing the duties of Acting Staff Director while also continuing to perform the duties of CIO without additional compensation.

## DISCUSSION

The issue before us is whether the voluntary services prohibition, 31 U.S.C. § 1342, prevents the Commission from appointing the CIO to serve simultaneously as CIO and in the statutory position of Staff Director, and compensating him at the higher CIO salary.

As a threshold matter, we note the general rule that an individual can concurrently hold two federal positions. The statutory dual compensation prohibition provides

that “an individual is not entitled to receive basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week.” 5 U.S.C. § 5533(a). The Attorney General has held, and we have concurred, that the prohibition, nevertheless, inferentially recognizes dual office-holding. 2 Op. Off. Legal Counsel 368 (1977), *discussed in* B-309301, June 8, 2007, at 6. However, the dual office-holder may be compensated only for one position. The question here is whether the CIO may simultaneously serve as Staff Director and be compensated, not at the Staff Director salary, but at the higher CIO salary.

Congress enacted the voluntary services prohibition because agencies would coerce their employees to “volunteer” their services in order to stay within their annual appropriation. However, these employees would later come to Congress and seek additional appropriations to pay their salaries for the “volunteered” time, and Congress would often feel a moral obligation to pass an appropriation. B-309301, at 4. The voluntary services prohibition acts to prevent these “coercive deficiencies.”<sup>1</sup>

We have found that where a statute bars compensation, the risk of coercive deficiencies is mitigated. In a 2007 opinion, we determined that Mr. Sam Fox, a recess appointee who served without compensation, did not violate the voluntary services prohibition. Mr. Fox was appointed during a Senate recess to serve as Ambassador of Belgium, a position that was vacant prior to the Senate recess. While the minimum salary of an ambassador to a nation is set by statute, a recess appointee was not entitled to payment for services in those circumstances. *See* 5 U.S.C. § 5503(a). When an individual is appointed during a recess of the Senate to fill a vacancy in an existing office, payment is prohibited until the appointee has been confirmed by the Senate, if the vacancy existed while the Senate was in session and the position was by law required to be filled by and with the advice and consent of the Senate. *Id.*; *see also* B-309301, at 2. We concluded that Mr. Fox was not volunteering his services as Ambassador to Belgium; rather, his compensation was barred by statute. In light of this statutory prohibition, Mr. Fox could not file a claim against the government for compensation. Accordingly, this was not a situation where a coercive deficiency might occur. B-309301, at 5.

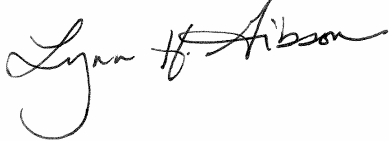
Similarly, the facts here do not give rise to circumstances in which a coercive deficiency might occur. The CIO could not file a claim against the government for compensation as Staff Director, because there is a statutory prohibition on his receipt of such compensation. 5 U.S.C. § 5533(a). Additionally, the CIO is not waiving the Staff Director salary or volunteering his services for that position. Rather, his uncompensated service is compelled by a provision of law.

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<sup>1</sup> For a general discussion on the voluntary services prohibition, see GAO, *Principles of Federal Appropriations Law*, Vol. II, 3<sup>rd</sup> ed., ch. 6, § C.3, [GAO-06-382SP](#) (Washington, D.C.: Feb. 2006), at 6-93 to 6-116.

## CONCLUSION

The voluntary services prohibition does not prevent the incumbent CIO from simultaneously serving as Staff Director and being compensated at the higher CIO salary.<sup>2</sup> The dual compensation statute, 5 U.S.C. § 5533, while inferentially recognizing the legality of dual office-holding, prohibits compensation for both positions. Furthermore, the employee is not waiving the Staff Director salary or volunteering in that position. Rather, his uncompensated service is compelled by the dual compensation statute. 5 U.S.C. § 5533(a).

A handwritten signature in black ink that reads "Lynn H. Gibson". The signature is written in a cursive style with a large initial "L" and a stylized "H".

Lynn H. Gibson  
General Counsel

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<sup>2</sup> This decision is limited to the issue of whether the voluntary services prohibition of the Antideficiency Act prevents the incumbent CIO from serving also as Staff Director at the higher salary. We express no opinion on the Commission's decision to use a permissible dual service arrangement to fill the Staff Director position on a permanent basis.