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Comptroller General  
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United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Department of Housing and Urban Development, Office of Inspector General—Reasonable Accommodation

**File:** B-318229

**Date:** December 22, 2009

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### DIGEST

Department of Housing and Urban Development, Office of Inspector General appropriations are not available to pay for local lodging as a reasonable accommodation under the Rehabilitation Act of 1973 for an employee who suffers from chronic back pain when sitting for long periods. Although, in some instances, agencies may use their appropriations to pay for reasonable accommodations under the Rehabilitation Act even though the agency's appropriation otherwise may not be used for that purpose, we do not find that to be the case here. There is a statutory limitation on local lodging. Also, this local travel is more akin to a commute, which is not covered by the Rehabilitation Act. The agency should consider other available accommodations.

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### DECISION

The Office of Inspector General (OIG), Department of Housing and Urban Development (HUD), has requested a decision under 31 U.S.C. § 3529 on whether it may use appropriated funds to pay for local lodging as a reasonable accommodation under the Rehabilitation Act of 1973 for an employee who suffers from chronic back pain when sitting for long periods, including while driving extensive distances. Letter from Acting Director, Budget and Administration, OIG, to General Counsel, GAO, received May 21, 2009 (Request Letter). As explained below, we conclude that OIG appropriations are not available for the local lodging in question.

Our practice when issuing decisions is to obtain the views of the relevant office to establish a factual record and the office's legal position 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). In this regard, we requested the legal views of the Counsel to the Inspector General. Letter from Assistant General Counsel for Appropriations Law, GAO, to Counsel to the Inspector General, HUD, June 1, 2009. OIG responded via e-mail messages and telephone conversations.

## BACKGROUND

On February 9, 2009, an OIG field office employee submitted a request for a reasonable accommodation under the Rehabilitation Act of 1973<sup>1</sup> that she be allowed to telework 4 or 5 days a week. The employee suffers from chronic lower back pain, a condition that makes it very difficult for the employee to sit for long periods of time, including driving to work. OIG granted the employee an accommodation permitting work from home 3 days a week and allowing the employee to accrue credit hours to further reduce driving. Telephone Conversation between Deputy Counsel to the Inspector General, HUD, and Senior Attorney, GAO, Aug. 11, 2009.

OIG staff are frequently required to travel as a function of their employment. E-mail from Deputy Counsel to the Inspector General, HUD, to Senior Attorney, GAO, *Subject: Add'l Information*, June 16, 2009. Subsequently, the employee requested an additional accommodation. Because OIG staff generally may have to travel several days a week to local work sites, the employee asked OIG for reimbursement for lodging near the work sites to minimize the time driving back and forth from the employee's home to the audit site. *Id.* The employee's official duty station is Baltimore and the audit sites under consideration here to which the employee may travel are in Washington, D.C. and Annapolis, Maryland. The employee lives about 35 miles north of Baltimore. E-mail from Deputy Counsel to the Inspector General, HUD, to Senior Attorney, GAO, *Subject: Request for Reasonable Accommodation*, Dec. 11, 2009. Both of these audit sites are within the local travel area of the employee's office. E-mail from Deputy Counsel to the Inspector General, HUD, to Senior Attorney, GAO, *Subject: Add'l Information*, June 23, 2009. The employee stated that such drives will cause additional pain and stress because of the length of time on the highway when the traffic is usually heavy and the employee must sit for an extended time without a break. E-mail from Ombudsman Coordinator, HUD, to Deputy Counsel to the Inspector General, HUD, June 5, 2009.

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<sup>1</sup> OIG has published procedures for reviewing and approving employee requests for reasonable accommodations under the Rehabilitation Act. OIG Manual, *Reasonable Accommodations*, No. 1732, Feb. 2009. With modifications set forth in its manual, OIG also follows the processes and procedures set out in HUD Handbook 7855.1, *Procedures for Providing Reasonable Accommodation for Individuals with Disabilities*. OIG Manual, § 1-2.

In support of the request, the employee submitted a letter from an orthopedic physician who has been the employee's doctor for a number of years:

“[The employee's] problem is that getting up in the morning and driving, going to work and getting back and forth is much more difficult for [the employee] than the ordinary person.”

Letter from Orthopedic Physician, Jan. 16, 2009.

On March 20, 2009, HUD's Employee Assistance Program Director consulted with an Occupational Medical Consultant, a physician with a master's degree in public health. The consultant reported that the employee has suffered from chronic lower back pain for many years and that the condition will likely get worse with time. He noted that some medications that the employee was prescribed cause drowsiness and could potentially make “long driving trips” hazardous. Letter from HUD Occupational Medical Consultant, to EAP, Reasonable Accommodation, HUD, Apr. 15, 2009 (Consultant Letter). He also stated that “extensive driving or sitting without break could make [the] back pain worse and render [the employee] totally unfit to work for a significant period of time.” *Id.* He stated his opinion that “[the employee] is unable to sit for long periods or drive extensive distances” and that the employee “also needs to rest fairly frequently during the workday.” *Id.*

OIG has asked whether it may use its appropriations to pay for local lodging as a reasonable accommodation under the Rehabilitation Act when there is no statutory authority to pay for local lodging otherwise.

## DISCUSSION

Agencies are authorized to use their appropriations to reimburse employees for lodging when the employee is “traveling on official business away from the employee's designated post of duty.” 5 U.S.C. § 5702(a)(1). That is not the case before us. Here, the employee asks for reimbursement for lodging at her designated post of duty.

The statute that authorizes agencies to pay for lodging for an employee allows such payments only when the employee is “traveling on official business away from the employee's designated post of duty.” 5 U.S.C. § 5702(a)(1). The Federal Travel Regulation that implements section 5702 provides that an employee's lodging expenses may be paid when incurred in the performance of “official travel away from [the employee's] official station,” that is, the location of the employee's permanent work assignment, and when the employee is in travel status for more than 12 hours. 41 C.F.R. §§ 301-11.1(a), 300-3.1. There is no authority for lodging for travel that is not considered to be away from an employee's official station. OIG has indicated that the travel to the audit sites here would not be away from the

employee's official duty station. In this case, the local travel area is a 50-mile radius from Baltimore, the employee's official duty station. Both Washington, D.C. and Annapolis are within the 50-mile radius. Washington D.C. is about 40 miles from Baltimore, and Annapolis is about 30 miles from Baltimore. The employee lives approximately 35 miles from the official duty station, and therefore it is possible that the employee could travel to a site that is within the 50 miles of the official duty station, and thus is not outside of the designated post of duty, but is more than 50 miles away from home. Nevertheless, an employee chooses where to live and, in doing so, accepts the distance between home and office place.

In considering reasonable accommodations,<sup>2</sup> we have found that the U.S. Commission on Civil Rights could not use its appropriated funds to pay for an employee's commercial parking under the Transit Pass Transportation Fringe Benefit Program or under the Rehabilitation Act when there was no indication that the employee was limited or disadvantaged in performing Commission work. B-291208, Apr. 9, 2003. We also found the Army Corps of Engineers could not reimburse an employee the cost of structural alterations to his new residence at his new permanent duty station, because this cost was unrelated to the performance of official travel; instead, it enabled the individual to have mobility in his private residence. B-266286, Oct. 11, 1996.

In some instances, we have recognized that agencies may use their appropriations to pay for reasonable accommodations under the Rehabilitation Act, even though the agency's appropriation otherwise may not be used for that purpose. For example, in 68 Comp. Gen. 242 (1989), we found that an agency could pay excess baggage handling fees because an employee in a wheelchair could not carry his baggage

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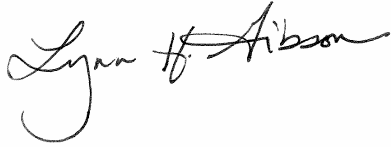
<sup>2</sup> Although the Rehabilitation Act, not the Americans with Disabilities Act (ADA), applies to the federal government, ADA standards have been adopted for application by federal agencies. 29 U.S.C. §§ 791(g), 794(d); 29 C.F.R. §§ 1614.203(b), 1630.1(a). *See also* B-291208, Apr. 9, 2003; B-243300, Sept. 17, 1991. The ADA standards for what constitute a reasonable accommodation, for application under section 501 of the Rehabilitation Act (29 U.S.C. § 791), are set forth in the Equal Employment Opportunity Commission's regulations. 29 C.F.R. § 1614.203(b). Congress amended the ADA in 2008 in reaction to two Supreme Courts decisions. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b); 122 Stat. 3553 (Sept. 25, 2008). One of the stated purposes of the amendment is to "carry out the ADA's objectives . . . by restating a broad scope of protection to be available under the ADA." *Id. at* § 2(b)(1). The amendment clarified the term "disability" by, among other things, expanding the definition of the term "major life activities" and authorizing the Equal Employment Opportunity Commission to refine the meaning of the phrase "substantial limitation" of a major life activity as it relates to persons with disabilities. *Id. at* § 4(a).

himself. The employing agency denied reimbursement under the travel regulations. We held that an agency could expend appropriated funds to reasonably accommodate the physical limitations of the employee since the accommodation was directly related to the disability. We noted that the employee with a disability should not be reimbursed costs necessarily incurred by all employees. Baggage fees and tips are reimbursed as part of *per diem*. To the extent the employee incurred costs that exceeded what a nondisabled employee may pay, we would not object to the agency reimbursing the costs. A reasonable accommodation must be appropriate to the circumstances. We have also accepted as a reasonable accommodation paying the expense of a reader to accompany a blind employee on a business trip. When an agency determines that an employee with a disability, who is unable to travel without a reader, should perform official travel, then the travel expenses of the reader are “necessary travel expenses” incident to the employee’s travel and may be paid out of the agency’s appropriations. 59 Comp. Gen. 461 (1980).

An employer, however, is not required to provide for accommodations that fall outside the scope of employment, like commuting. *Laresca v. American Telephone and Telegraph*, 161 F. Supp. 2d. 323 (D.N.J. 2001). In this case the employee’s drive is akin to a commute, traveling from the employee’s home to the work site. Reasonable accommodations are directed at enabling an employee to perform the essential functions of the job itself, 29 C.F.R. § 1630.2(o)(1)(ii), and federal courts have held that activities like commuting to and from the workplace fall outside the scope of a job. Consequently, an employer is not obligated to provide a reasonable accommodation for such activities. *Livingston v. Fred Meyer Stores, Inc.*, 567 F. Supp. 2d 1265 (D. Ore., 2008); *Bull v. Coyner*, No. 98 C 7583 (N.D. Ill. Feb. 23, 2000). We recognize that the employee would be reimbursed for travel expenses from the Baltimore office to the audit site. We also note that alternative transportation may be available from the Baltimore office to the audit site, for example, by commuter rail, bus, or accompanying a fellow employee, that would not require the employee to drive.

Clearly, having to drive only one way in a day, resting overnight, then driving back on another day is easier for all employees. However, while an agency may reimburse an employee for local travel expenses, the agency may not reimburse an employee for an overnight stay. We believe there are other accommodations conducive to this employee’s disability, the employee’s workload, and the interests of OIG that would not require OIG to circumvent statutory lodging limitations. For example, OIG could consider extending the employee’s telework arrangement and make assignments that the employee could perform from home while teleworking or assignments that otherwise reduce driving time. Under the Rehabilitation Act, the employing agency does not need to provide the accommodation that the employee requests or prefers; the agency has the discretion to choose among effective accommodations. *See*

*Trepka v. Board of Education of the Cleveland City School District*, 28 Fed. Appx. 455 (C.A.6 Ohio. Jan. 24, 2002); *Hankins v. The Gap*, 84 F.3d 797, 800-01 (6<sup>th</sup> Cir. 1996). Accordingly, we conclude that OIG appropriations are not available to pay for local lodging as a reasonable accommodation under the Rehabilitation Act.

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

Lynn H. Gibson  
Acting General Counsel