DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-213666 **DATE:** July 26, 1984

MATTER OF: Department of Justice--Purchase of air purifier

DIGEST: Appropriated funds may be used to purchase an air purifier for an individual employee's office only if he qualifies as handicapped under Rehabilitation Act of 1973, as amended, 25 U.S.C. § 701 et seq., because of his hypersensitivity to tobacco smoke. If not found to be handicapped, fact that he may be found eligible to retire on partial or total disability grounds does not provide the necessary statutory authority to what would otherwise be a personal convenience purchase.

The Assistant Attorney General for Administration has asked whether the Department of Justice may purchase an air purifier for an employee who may qualify for disability retirement benefits due to a hypersensitivity to tobacco smoke. The Assistant Attorney General notes that in our decision at 61 Comp. Gen. 634 (1982), we held that the purchase of an air purifier for the office of an employee who suffered from allergies was the employee's personal responsibility and that the expenditure of public funds for such an item was not appropriate. He also notes that subsequent to our decision, the Ninth Circuit Court of Appeals held that an employee who was unable to perform her duties in the smoke-filled room to which she was assigned would qualify for disability retirement payments unless the Government could accommodate her environmental limitation by offering her suitable employment in a smoke-free environment. Parodi v. Merit Systems Protection Board, 702 F.2d 743 (1982). The Assistant Attorney General suggests that the Parodi decision establishes authority to procure air purifiers for employees who would otherwise be entitled to disability benefits.

The Parodi case involved a Federal employee who developed pulmonary complications after being transferred to an office in which a large number of employees smoked. Her doctor recommended that she refrain from working in the smoke-filled environment, and she filed for disability retirement benefits. After reviewing the medical evidence, the Office of Personnel Management (OPM) concluded that Parodi was not totally disabled "within the meaning and intent of the Civil Service Retirement Regulations." Parodi appealed to the Merit Systems Protection

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Board (MSPB), which recognized the probable risk to her future health, but nonetheless concluded that she was not totally disabled.

The Ninth Circuit panel ruled that the OPM and the MSPB had erred in failing to find Parodi "totally disabled." The Court noted that under the then-governing legislation, a person was totally disabled if unable to perform "useful and efficient services in the grade or class of position last occupied by the employee or Member because of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part within five years before becoming so disabled." As noted by the court, 5 U.S.C. § 8331(6), quoted here, has been repealed. The OPM and the MSPB argued that Parodi was not disabled since she did not suffer from any permanent or serious impairment and would be able to work in a less smoke-filled environment. The court rejected both of these contentions, noting that section 8331(6) does not require that an individual "have a serious or permanent physical problem to qualify for disability benefits," or that he "prove an inability to perform useful service under all circumstances." 702 F.2d at 749-750. The Court concluded that Parodi suffered from an environmental limitation, which made it impossible for her to perform the job she last occupied. The Court went on, however, to say:

> "* * * Under the facts presented here, Parodi would not be disabled if the government offered her suitable employment--employment at the same grade or position in a location appropriate for Parodi's physical condition--because if such employment were offered, Parodi would be able to perform useful and efficient service. * * *" 702 F.2d at 751.

The Court also suggested that the Government "could simply remove the environmental barriers" thus, enabling Parodi to remain at her normal work station.

The civil service disability retirement provisions were amended in 1980 to incorporate the requirement that employees be reassigned if qualified. Pub. L. No. 96-499, § 403(a), 94 Stat. 2605, December 5, 1980 (5 U.S.C. § 8337(a) (1982)).

> "An employee who completes 5 years of civilian service and has become disabled shall be retired on the employee's own application or on application by the employee's agency. Any employee shall be considered to be disabled only if the employee if found by the Office of Personnel

> Management to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service.* * *"

The Justice Department's submission does not indicate whether reassignment of the particular employee in question is possible. As noted above, 5 U.S.C. § 8377(a) requires that OPM determine that the employee not be qualified for reassignment to a vacant position of the same grade or level before the employee will be eligible for disability retirement. It is therefore not clear on the basis of the information provided that disability retirement would be the consequence of not providing an air purifier in this case.

In another recent case, Vickers v. Veterans Administration, 549 F. Supp. 851 (W.D. Wash., 1982), the Court held that a person unusually sensitive to tobacco smoke qualified as a "handicapped person" within the meaning of the Act. There the Court stated:

> "The Court finds that plaintiff is a handicapped person within the meaning of the term 'handicapped person' as defined in 29 U.S.C. § 706(7)(B). * * * It appears from the evidence in this cause that plaintiff is unusually sensitive to tobacco smoke and that this hypersensitivity does in fact limit at least one of his major life activities, that is, his capacity to work in an environment which is not completely smoke free." 549 F. Supp. at 86-87.

Our decision at 63 Comp. Gen. 115 (1983) also recognized that in appropriate circumstances, special equipment may be made available under the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701 et seq., if the employee is found to be handicapped, as defined by the statute and its implementing regulations, and if the purchase in question will enable the qualified handicapped employee to perform his or her official duties.

In the past, our decisions have established the general rule that appropriated funds may not be spent to pay for personal convenience items such as air purifiers in the absence of specific statutory authority. 61 Comp. Gen. 634 (1981). The

expenditure of appropriated funds to remove an environmental barrier so as to avoid the necessity of a disability retirement, as suggested by the Parodi court, would be a cost efficient solution to a difficult problem. However, as pointed out above, it is not clear from the facts presented that purchase of an air purifier would avoid a disability retirement here.

Accordingly, in our view, it would be more appropriate for the Department of Justice to justify purchase of an air purifier for an employee who is allergic to tobacco smoke by relying on the statutory authority provided by the Rehabilitation Act.

for Milton J. Socolar
Comptroller General
of the United States