



B-330935

Federal Appropriations Law Practitioners

May 20, 2019

Subject: *U.S. Government Accountability Office—Unavailability of Appropriated Funds to Subsidize Employees’ Long-Distance Home-to-Work Travel*

Enclosed are three U.S. Government Accountability Office (GAO) appropriations law decisions addressing the availability of appropriated funds to subsidize federal employees’ long-distance home-to-work travel costs. GAO has concluded that, without specific statutory authority providing otherwise, appropriations are not available for this personal expense.

It is Congress’s prerogative to determine the availability of appropriations for employees’ long-distance home-to-work travel. Unless or until Congress enacts legislation establishing, as a matter of public policy, that agencies may use the public’s money for this personal expense of a federal employee, appropriations are not available for this purpose.

GAO issued the enclosed decisions to certain GAO officials pursuant to the Comptroller General’s authority under 31 U.S.C. § 3529. Having become aware of possible confusion and uncertainty regarding the proper use of appropriations for this purpose, we deemed it important to make our decisions more widely available. In addition to the material below, I will be discussing these decisions at the GAO Appropriations Law Forum on June 6, 2019.

GAO’s Role in Serving Congress’s Constitutional Power of the Purse

The Constitution specifically vests Congress with the power of the purse and the power to make all laws “necessary and proper” to implement Congress’s constitutional authorities. U.S. Const., art. I, § 8, cl. 18 (Necessary and Proper clause); *id.* § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”). The Constitution further provides that the President “shall take Care that the Laws be faithfully executed.” U.S. Const., art. II, § 3. These provisions provide the framework through which Congress enacts laws to establish, authorize action by, and provide funding for federal agencies. See also U.S. Const., art. I, § 7, cl. 2, 3 (bicameral and presentment clauses). Consequently, an agency has authority to act only to the extent authorized by Congress. See, e.g., *Louisiana Public Service Commission v. Federal*

Communications Commission, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”); *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (a federal agency is “a creature of statute” and “has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress”).

In that regard, Congress conferred certain authorities upon the Comptroller General when it established GAO in 1921. Budget and Accounting Act, 1921, Pub. L. No. 67-13, ch. 18, title III, 42 Stat. 20, 23 (June 10, 1921). As relevant here, Congress vested in the Comptroller General the authority to settle the accounts of the United States and to issue decisions and opinions concerning the use and obligation of appropriated funds. See 31 U.S.C. § 712(1) (investigating the use of public money); *id.* § 717(b) (evaluating programs and activities of the United States government); *id.* § 3526 (settlement of accounts); *id.* § 3527 (general authority to relieve accountable officials and agents from liability); *id.* § 3528 (responsibilities and relief from liability of certifying officials); *id.* § 3529 (requests for decisions of the Comptroller General). Pursuant to these statutory duties, GAO’s General Counsel has issued thousands of decisions and opinions regarding the use of appropriated funds.¹ Questions regarding the legal availability of appropriations for particular purposes, including purposes that might constitute unauthorized personal expenses, have constituted a primary component of almost 100 years of Comptroller General decisions and opinions.² B-327146, Aug. 6, 2015, at 4. GAO’s statutory responsibilities in this field are widely respected throughout the federal government, with the legislative, executive, and judicial branches consistently relying on GAO’s appropriations law decisions and opinions.

Congress often requests legal opinions from GAO and, in some cases, responds to such opinions through legislation or report language. For example, in 2015 GAO concluded that the Environmental Protection Agency (EPA) violated two statutory restrictions and the Antideficiency Act. B-326944, Dec. 14, 2015. The explanatory statement accompanying the Consolidated Appropriations Act, 2016, referenced GAO’s decision and directed EPA to coordinate with OMB to ensure that GAO’s conclusions were “disseminated to communications offices throughout the government.” 161 Cong. Rec. H10221 (Dec. 17, 2015). See *also* H. Rep. No. 115-238, at 61–62 (July 21, 2017) (noting that GAO “concluded that EPA

¹ The Comptroller General has delegated to the General Counsel authority to sign correspondence generated by the Office of General Counsel. The General Counsel may delegate signature authority to a lower level.

² In addition to GAO’s statutory authority to issue appropriations law decisions and opinions, GAO serves as the repository for agencies’ Antideficiency Act reports. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004). See *also* 31 U.S.C. §§ 1351, 1517.

violated prohibitions against publicity or propaganda and grassroots lobbying contained in appropriations Acts” and that the “Committee reminds EPA that funding may not be used in a manner contrary” to the pertinent legal provisions).

As another example, in 2014 GAO concluded that the Department of Defense (DOD) violated a statutory notification requirement and the Antideficiency Act. B-326013, Aug. 21, 2014. The House of Representatives subsequently voted 249—163 to condemn and disapprove of DOD’s actions. H. Res. 644, 113th Cong. (2014); 160 Cong. Rec. H7335 (daily ed. Sept. 9, 2014). During a debate on the resolution, Members of Congress emphasized GAO’s status as a nonpartisan agency and cited GAO’s opinion concluding that the Department of Defense had violated such statutes. See 160 Cong. Rec. H7326, H7327, H7331, H7334 (daily ed. Sept. 9, 2014) (statements of Reps. McKeon, Rigell, Lamborn, DeSantis, Thornberry, Wilson, and Thompson).

Congress has also responded to our opinions as part of the regular appropriations process. In 2011, GAO concluded that the Office of Science and Technology Policy (OSTP) violated the Antideficiency Act when it violated a statutory prohibition by using its appropriations for bilateral engagements with China. B-321982, Oct. 11, 2011. Congress subsequently reduced OSTP’s appropriations by over 30 percent, which required OSTP to strictly limit its personnel, travel, wireless and communications requirements, supplies and materials, equipment, and other contractual services in FY 2012. Executive Office of the President, *Fiscal Year 2013 Congressional Budget Submission*, pt. III, OSTP-7 to OSTP-8, available at <https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-eop-budget1.pdf> (last accessed May 17, 2019). Compare Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, div. B., title III, 125 Stat. 552, 622 (Nov. 18, 2011) (appropriating \$4.5 million to OSTP for FY 2012), with Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, div. B, title III, § 1316, 125 Stat. 38, 120 (Apr. 15, 2011) (appropriating \$6.66 million to OSTP for FY 2011).

Further, agencies themselves routinely request appropriations law decisions pursuant to the Comptroller General’s authority under 31 U.S.C. § 3529. See, e.g., B-327146, Aug. 6, 2015, at 4. See also B-329316, Nov. 29, 2017; B-328615, May 9, 2017; B-326941, Dec. 10, 2015; B-318588, Sept. 29, 2009; B-300826, Mar. 3, 2005; B-302548, Aug. 20, 2004; B-288266, Jan. 27, 2003; B-255672, Apr. 6, 1994. When the Comptroller General issues a decision at the request of an agency head or agency official pursuant to 31 U.S.C. § 3529, that decision is binding on the Comptroller General when settling the account containing the payment, and the balance certified by the Comptroller General is conclusive on the executive branch. 31 U.S.C. § 3526(b). In 2017, the Air Force Reserve Command requested a decision under 31 U.S.C. § 3529 regarding whether an agency may use appropriated funds to purchase disposable plates and utensils for personnel who work in a facility where the agency provides potable water via bottled water.

B-329316, Nov. 29, 2017. We concluded that, absent specific statutory authority, appropriated funds were not available for that personal expense. *Id.*

Agencies' inspectors general also refer questions to GAO regarding the use and obligation of appropriated funds. See B-329368, Dec. 13, 2017; B-324214, Jan. 27, 2014; B-318229, Dec. 22, 2009; B-316372, Oct. 21, 2008; B-308969, May 31, 2007; B-245541, May 21, 1992. For example, as part of his review of communications from DOT officials, the Department of Transportation (DOT) Inspector General identified a potential appropriations law issue related to DOT's use of social media. Letter from Inspector General, Department of Transportation, to Representative Peter A. DeFazio, Then-Ranking Member, Committee on Transportation and Infrastructure, Representative Nita M. Lowey, Then-Ranking Member, Committee on Appropriations, and Representative David E. Price, Then-Ranking Member, Subcommittee on Transportation, Housing and Urban Development, and Related Agencies, Committee on Appropriations, at 7 (Aug. 30, 2017). After consulting informally with GAO on the matter, the Inspector General requested that GAO issue an appropriations law decision regarding DOT's actions. *Id.*, at 2, 5, 7, 8. See B-329368, Dec. 13, 2017.

In addition to GAO's critical role in issuing opinions to Congress and decisions to agencies and inspectors general, courts regularly cite to and rely on GAO's *Principles of Federal Appropriations Law* treatise (Red Book) and published GAO appropriations law decisions and opinions. See *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 190–191, 193–194, 197, 199, 199 n.10 (2012); *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 643 (2005); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); *Republic National Bank of Miami v. United States*, 506 U.S. 80, 90, 92 (1992); *Tin Cup, LLC v. United States Army Corps of Engineers*, 904 F.3d 1068, 1073 (9th Cir. 2018); *County of Westchester v. United States Department of Housing and Urban Development*, 778 F.3d 412, 417 n.8 (2nd Cir. 2015); *Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1348–1350 (D.C. Cir. 2012); *Star-Glo Associates, LP v. United States*, 414 F.3d 1349, 1354 (Fed. Cir. 2005); *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1084–1086 (Fed. Cir. 2003).

GAO's appropriations law decisions and opinions serve to support Congress's constitutional prerogative to prescribe how, when, and for what purposes federal agencies may obligate and expend public funds, thereby promoting accountability and integrity in government and protecting the public fisc. GAO ensures this same accountability and careful stewardship of appropriated funds in its own operations.

Like all federal agencies, GAO is a creature of law and can carry out its functions only to the extent authorized by law. See, e.g., *Louisiana Public Service Commission*, 476 U.S. at 374; *Michigan*, 268 F.3d at 1081. As such, GAO operates within the confines of its authorizing legislation, congressionally established funding levels, and any other governmentwide or agency-specific laws Congress enacts that apply to GAO. Where a question arises as to GAO's use of its own appropriations and an authorized official requests a decision, the Comptroller General, under the

law, will issue a decision to that requesting official just as the Comptroller General will issue a decision to an authorized official at another federal agency. 31 U.S.C. § 3529. See, e.g., B-301152, May 28, 2003. Cf. B-320868, Sept. 29, 2010 (GAO's use of its appropriations to pay a stormwater fee); B-320795, Sept. 29, 2010 (GAO's use of its appropriations to pay a stormwater fee assessment); B-319556, Sept. 29, 2010 (GAO's use of its appropriations to pay a D.C. Water Impervious Surface Area Fee).

Transit Subsidies Decisions

Between September 2016 and August 2017, GAO responded to three requests related to GAO's authority to use appropriated funds to subsidize an employee's long-distance home-to-work travel. Pursuant to GAO's statutory responsibility under 31 U.S.C. § 3529, we issued three separate decisions in response to each distinct set of facts. GAO, *Transit Benefits and Long-Distance Travel* (Aug. 28, 2017) (August 2017 Decision); GAO, *Transit Benefits for Employees Residing at Long-Distance Locations* (July 25, 2017) (July 2017 Decision); GAO, *Appropriations for Transit Benefits for Field Office Employees* (Sept. 19, 2016) (September 2016 Decision).

In the first decision, issued in September 2016, we addressed whether GAO's appropriations were legally available to provide a transit subsidy to an employee who used bus or rail to travel long-distance from his or her residence to his or her official duty station at a GAO field office. September 2016 Decision, at 1. In the second decision, issued in July 2017, we addressed whether GAO's appropriations were legally available to provide a transit subsidy to an employee who used bus or rail to travel long-distance from his or her residence to his or her official duty station at GAO headquarters. July 2017 Decision, at 1. In the third decision, issued in August 2017, we addressed how to administer the GAO Transit Benefits Program in a manner that ensures that GAO's appropriations are used to provide transit subsidies only to the extent authorized by law.³ August 2017 Decision, at 1. Even though GAO issued each decision in response to a unique set of facts, the underlying conclusion in all three decisions is the same: an agency may not use appropriated funds to subsidize an employee's long-distance home-to-work travel. Rather, appropriated funds are available to provide a transit subsidy only for commuting expenses an employee incurs within the local travel area defined by the agency.

³ At the time, GAO's Office of the Controller had identified certain instances of improper payments of transit subsidies to GAO employees. August 2017 Decision, at 3. Because appropriated funds are not available to subsidize an employee's long-distance home-to-work travel costs, we directed GAO to cease any improper payments as soon as possible. *Id.*

In February 2019, the GAO Employees Organization, IFPTE Local 1921 (Union) “indicated that it was unable to locate a single federal transit benefits program that conditions receipt of benefits on falling within a mileage limitation.” *In re GAO Employees Organization, IFPTE Local 1921*, GAO Personnel Appeals Board, Docket No. LMR 2018-03, at 9 (Mar. 7, 2019) (citing Union’s Feb. 21, 2019 Filing, at 1–2). We have no firsthand knowledge of other agencies’ practices in this regard. We note, however, that the agency implementing documents the Union identified, standing alone, do not conclusively show the full manner in which the relevant agencies implement their transit subsidies programs.⁴

Our general practice is to publicly release decisions concerning GAO’s own appropriations where there is evidence that the question is of general interest and appears likely to recur. *Cf.* GAO, *Principles of Federal Appropriations Law*, 4th ed., 2016 rev., ch. 1, § B.2.a, GAO-16-463SP (Washington, D.C.: Mar. 2016), available at www.gao.gov/legal/appropriations-law-decisions/red-book; GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP. For these reasons, we are publicly releasing our decisions on this matter.

5 U.S.C. § 7905: Transit Subsidies

As discussed above, the issue in the transit subsidies decisions was whether GAO may use its appropriations to provide transit subsidies for employees’ long-distance home-to-work travel, that is, costs an employee incurs outside of the local travel area when the employee is traveling between his or her residence and his or her official duty station. We concluded that GAO’s appropriations are not available for this purpose.

A fundamental principle of appropriations law is that appropriated funds are available only for the purpose or purposes for which Congress has provided. 31 U.S.C. § 1301(a); *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (“The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”). In general, absent affirmative statutory authority from Congress, appropriated funds are not available for the personal expenses of an employee. B-322337, Aug. 3, 2012. Stewardship of public money, and accountability to Congress for the proper use of public money appropriated to agencies, demands an exceptionally high bar to overcome this overarching principle. B-326021, Dec. 23, 2014, at 3; *Navy*, 665 F.3d at 1350 (providing that an expense that “would serve no purpose other than accommodating employees’ personal tastes . . . generally cannot justify the expenditure of appropriated funds”). In accordance with this exacting standard, the settled rule is that an employee must bear the cost of commuting to and from his or

⁴ For example, the GAO Order pertaining to transit subsidies makes no explicit reference to the length of an employee’s commute. GAO Order 2820.1.

her residence and his or her official duty station. B-318229, Dec. 22, 2009; B-305864, Jan. 5, 2006; B-261729, Apr. 1, 1996; B-202370, Apr. 2, 1984; B-202044, Aug. 6, 1981; B-189061, Mar. 15, 1978. An employee chooses where to live and, in doing so, accepts the distance between the employee's home and official duty station. B-318229, Dec. 22, 2009, at 4.

Congress, of course, may enact a statute authorizing an agency to use public funds for what would otherwise be a personal expense. B-326021, Dec. 23, 2014, at 3. To overcome the prohibition against using appropriated funds for the personal expenses of an employee, a statute must include language explicitly permitting an agency to use public funds for that purpose. As relevant here, Congress enacted legislation authorizing agencies to provide transit subsidies for employee commutes. Federal Employees Clean Air Incentives Act, Pub. L. No. 103-172, 107 Stat. 1995, 1995 (Dec. 2, 1993), *codified at* 5 U.S.C. § 7905. See Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, title III, § 3049, 119 Stat. 1144, 1711–12 (Aug. 10, 2005) (requiring that agencies in the National Capital Region implement a transit benefits program as described in section 2 of Executive Order No. 13150); Exec. Order No. 13150, *Federal Workforce Transportation*, 65 Fed. Reg. 24613 (Apr. 21, 2000). Specifically, section 7905(b)(1) provides that “[t]he head of each agency may establish a program to encourage employees of such agency to use means other than single-occupancy motor vehicles to commute to or from work.”⁵ 5 U.S.C. § 7905(b)(1). In addition, section 7905(b)(2) provides a nonexhaustive list of options that an agency may offer to its employees as part of its program, including transit passes.

Consistent with the demanding bar for overcoming the personal expense prohibition, we have concluded in prior cases that section 7905 does not give agencies

⁵ We addressed an agency's implementation of its transit subsidy program when the United States Army Center for Health Promotion and Preventative Medicine (USACHPPM) asked whether it was authorized to deny a reimbursement request for what it described as an employee's relatively short commute in an uncongested area. B-316381, July 18, 2008. The Army had established a policy implementing 5 U.S.C. § 7905, which provided that “no installation outside the national capital region may restrict the benefit to eligible service members and employees for qualified means of transportation, including restricting the amount of fare a program participant may receive based on commuting distance.” *Id.*, at 4 (footnote omitted). Because the employee's reimbursement request satisfied the Army's policy and did not conflict with the law, we concluded that the Army could certify the payment for transit benefits. *Id.*, at 4–5. In dicta, we noted that “[n]either [section 7905] nor the policy restricts the availability of benefits on the basis of commuting distances or traffic conditions.” *Id.*, at 4. Because we were not addressing the issue of long-distance home-to-work travel in that decision, our conclusions, while pertinent to an agency's implementation of its transit subsidies program, do not impact our interpretation of section 7905 here.

unbridled authority to subsidize any and all costs an employee may incur during his or her home-to-work travel. See B-318325, Aug. 12, 2009 (an agency may provide a cash reimbursement under section 7905 to employees who commute by bicycle, but should implement internal controls to eliminate opportunities for fraud, waste, and abuse); B-291208, Apr. 9, 2003 (section 7905 does not provide an agency with authority to pay parking fees for employees with disabilities). *But see* B-320116, Sept. 15, 2010 (concluding that an agency may not rely on section 7905 to use appropriated funds to install and operate battery recharging stations for privately owned hybrid or electric vehicles, and noting that “[i]t is for Congress to set the statutory direction for . . . federal agencies as they address these or similar issues in the future”); Pub. L. No. 114-94, div. A, title I, subtitle D, § 1413(c), 129 Stat. 1312, 1418 (Dec. 4, 2015), *classified at* 42 U.S.C. § 6364 (providing specific statutory authority for agencies to install and operate battery recharging stations on a reimbursable basis). Rather, an agency’s authority to provide transit subsidies for its employees under section 7905 is limited to the text of the statute. See *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009).

Because section 7905 authorizes agencies to establish programs that encourage “commuting” by means other than single-occupancy vehicles, the meaning of the term “commute” is paramount to determining the scope of the authority granted. Section 7905 does not define “commute,” but the common meaning of this term is “to travel back and forth regularly (as between a suburb and a city).”

Merriam-Webster Dictionary Online, *Definition of commute*, available at www.merriam-webster.com/dictionary/commute (last accessed May 17, 2019). In turn, a “suburb” is “an outlying part of a city or town” or “a smaller community adjacent to or within commuting distance of a city.” Merriam-Webster, *Definition of suburb*, available at www.merriam-webster.com/dictionary/suburb (last accessed May 17, 2019). Thus, geographic limits inhere in the term commute. As such, an employee’s commute includes regular, local home-to-work travel, but does not include all home-to-work travel regardless of where the employee resides.

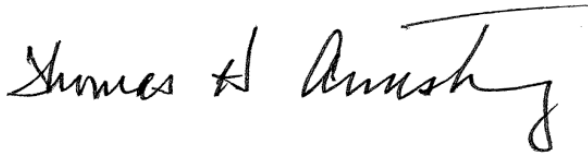
Congress enacted a separate statute, 5 U.S.C. § 5702, to address employees’ nonlocal, long-distance travel. 5 U.S.C. § 5702 (authorizing allowances for expenses an employee incurs “when traveling on official business away from the employee’s designated post of duty”). It is title 5, chapter 57 of the United States Code that affirmatively authorizes agencies, pursuant to regulations the General Services Administration (GSA) Administrator prescribes under 5 U.S.C. § 5707, to use appropriated funds to reimburse employees for certain expenses an employee incurs when traveling for official business. See, e.g., *id.* § 5702 (authorizing allowances “[u]nder regulations prescribed pursuant to 5 U.S.C. § 5707”); *id.* § 5707 (charging the GSA Administrator with prescribing travel regulations). The regulations the Administrator prescribes pursuant to section 5707, also known as the Federal Travel Regulation (FTR), address transportation, per diem, lodging, and miscellaneous expenses. See 5 U.S.C. § 5702; Federal Travel Regulation, 41 C.F.R. pt. 301-10 (transportation); *id.* pt. 301-11 (lodging and per diem); *id.* pt. 301-12 (miscellaneous expenses). In accordance with the FTR, in general an

agency may reimburse an employee for such expenses only if the employee is performing official travel, that is, travel pursuant to an official travel authorization. 5 U.S.C. §§ 5702, 5707; 41 C.F.R. § 300-3.1 (defining official travel as “[t]ravel under an official travel authorization from an employee’s official station . . . to a temporary duty location”); *id.* § 301-2.1 (providing that an employee generally must have written or electronic authorization prior to incurring any travel expense). It is the official travel authorization, issued in accordance with the implementing regulations for section 5702, that provides authority to use appropriated funds to reimburse the costs an employee incurs while traveling outside of the local travel area defined by the agency. As such, absent other affirmative authority, section 5702 provides the only authority to use appropriations for an employee’s long-distance travel costs.

It is our duty to construe statutes harmoniously. See *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936); 2B Sutherland, *Statutes & Statutory Construction*, § 53:1 at 375 (7th ed. 2012) (“Harmony and consistency are positive values in a legal system because they promote impartiality and minimize arbitrariness. Construing statutes by reference to other statutes advances those values. And courts do indeed have a duty to construe statutes harmoniously where reasonable.”) (footnotes omitted). In reading sections 5702 and 7905 harmoniously, we note that only section 5702 provides affirmative authority to reimburse costs an employee incurs outside of an agency’s local travel area. Section 7905 provides no such affirmative authority and is limited by the express language of the statute. Because section 5702 provides the only affirmative authority to use appropriated funds to reimburse costs an employee incurs while traveling outside of the local travel area, it is the bounds of the agency’s local travel area that define the scope of section 7905.

Though each agency’s definition of the local travel area may differ, the general rules that govern reimbursement within or outside of the local travel area remain the same. An agency may use appropriated funds to reimburse an employee for costs the employee incurs for travel outside the local travel area when the employee is traveling pursuant to an official travel authorization. An agency may not use appropriated funds to provide transit subsidies for home-to-work travel costs an employee incurs beyond the local travel area. An agency may use appropriated funds, however, to provide transit subsidies for home-to-work travel costs an employee incurs once he or she enters the local travel area, because those costs are within the scope of section 7905.

Enclosed you will find GAO's transit subsidies decisions of September 2016, July 2017, and August 2017. In these decisions, we describe the facts and circumstances of each decision in greater detail. If you have any questions, please contact Shirley Jones, Managing Associate General Counsel, at (202) 512-8156, or Omari Norman, Assistant General Counsel for Appropriations Law, at (202) 512-8272.

A handwritten signature in black ink that reads "Thomas H. Armstrong". The signature is written in a cursive style with a long horizontal line above the "y" in "Armstrong".

Thomas H. Armstrong
General Counsel

Enclosures



Memorandum

Date: September 19, 2016

To: Director, Labor Management Relations Office – Rhonda A. Mayfield
Thomas H. Armstrong

From: Deputy General Counsel – Thomas H. Armstrong

Subject: Appropriations for Transit Benefits for Field Office Employees

You have asked whether GAO's appropriations are legally available to provide transit benefits to employees who use bus or rail long-distance to travel from their residences to their assigned duty stations at GAO field offices at least once each pay period.¹ For example, an employee whose assigned duty station is the Boston field office may choose to live in New York City and travel via rail from his or her residence in New York City to the Boston field office and back home again the next day, a distance of roughly over 200 miles each way. Use of appropriations for the purpose of subsidizing the employee's cost of rail travel in situations like this is not legally permissible. This is a personal expense, and GAO does not have the legal authority to use its appropriation for this personal expense.

Unless statutorily authorized, agency appropriations are not legally available for the personal expenses of the government's employees.² See B-326021, at 3 (Dec. 23, 2014). The cost of transportation between residences and official duty locations is such a personal expense and, as a general rule, employees must bear that cost. 60 Comp. Gen. 633, 635 (1981). The Federal Employees Clean Air Incentives Act provides GAO with specific statutory authority to use its appropriation to subsidize some employee home-to-work transportation, but not all. It authorizes the use of appropriations to provide transit benefits to encourage employees to use "means other than single-occupancy motor vehicles to commute to or from work."³ 5 U.S.C. § 7905(b)(1).

The word "commute" covers those expenses associated with the *local* travel of an employee to and from home and work; it does not encompass *all* travel from home to work no matter where the employee's home is and the distance involved.⁴ Indeed, there is another statute that

¹ GAO's Enhanced Telework Pilot permits eligible field office employees to telework up to 66 hours per pay period, requiring them to report to their official duty stations for at least 14 hours during the pay period over at least 2 work days. See Internal Evaluation of GAO's Telework Program, at 3 (June 10, 2015), available at http://intranet.gao.gov/teleworking_at_gao/telework_portal/links/telework_resources.

² The Supreme Court has stated that "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

³ Transit benefits for headquarters employees are provided under a separate statute known as the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, § 3049 (2005), and are not addressed in this memorandum.

⁴ Although the law does not permit GAO to provide transit benefits to employees for long-distance travel to their duty stations, such employees are eligible to receive transit benefits for their local commute between their official duty station and a hotel or residence where they are staying if they use mass transit.

governs long-distance travel, and it authorizes the use of appropriations only when an employee is traveling pursuant to an official travel authorization. See 5 U.S.C. § 5702.

In this regard, while Department of Transportation (DOT) transit benefit guidance permits the use of rail (subway, commuter and light) and bus (transit authority and commuter), it expressly provides that employees traveling to work in “any vehicle not designated as mass transportation” are not eligible for the transit subsidy. U.S. Department of Transportation, Office of the Secretary, Transit Benefit Program Policy and Guidance, §§ 3.0 (para. 17), 6.1 (April 2012). For example, Amtrak, a form of intercity passenger rail, would not be approved. See *id.*; 49 U.S.C. §§ 24101(b), 24102(4), 24102(3). For similar reasons, DOT does not approve intercity bus lines.

Stewardship of public money, and accountability to Congress for the proper use of public money appropriated to agencies, is necessarily an exceptionally high standard. See B-326021, at 3. It is legally impermissible to use public funds to cover a personal expense that “would serve no purpose other than accommodating employees’ personal tastes.” *Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1350 (D.C. Cir. 2012). An employee chooses where to live and, in doing so, accepts the distance between home and office place. B-318229, at 4 (Dec. 22, 2009).

Please call me if you have any questions.



Memorandum

Date: July 25, 2017

To: Director, Labor Management Relations Office – Rhonda A. Mayfield

From: Deputy General Counsel, Office of the General Counsel – Thomas H. Armstrong

Subject: Transit Benefits for Employees Residing at Long-Distance Locations

You have asked whether GAO's appropriations are legally available to provide transit benefits to employees who use bus or rail long-distance to travel from their residences to their assigned duty station at GAO headquarters.¹ For example, an employee whose assigned duty station is GAO headquarters may choose to live in New York and travel via rail to GAO on a Thursday morning and return home on a Friday afternoon. Use of appropriations for the purpose of subsidizing the employee's cost of rail travel in situations like this is not legally permissible. GAO does not have the legal authority to use its appropriation for this personal expense.

Unless statutorily authorized, agency appropriations are not legally available for the personal expenses of the government's employees.² B-326021, Dec. 23, 2014, at 3. The cost of transportation between residences and official duty locations is such a personal expense and, as a general rule, employees must bear that cost. 60 Comp. Gen. 633, 635 (1981). The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), however, requires agencies in the National Capital Region³ to use appropriations to subsidize some employee home-to-work transportation, but not all.⁴ Pub. L. No. 109-59, title III, § 3049, 119 Stat. 1144, 1711–12 (Aug. 10, 2005). GAO must provide transit benefits in amounts equal

¹ In September 2016, we concluded that GAO cannot use its appropriation to provide transit benefits to field office employees who travel long-distance from residences to a field office via bus or rail. Memorandum from Deputy General Counsel, GAO, to Director, Labor Management Relations Office, GAO, *Subject: Appropriations for Transit Benefits for Field Office Employees* (Sept. 19, 2016). Transit benefits for field office employees are authorized under the Federal Employees Clean Air Incentives Act. 5 U.S.C. § 7905(b)(1).

² The Supreme Court has stated that "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

³ The National Capital Region "includes the District of Columbia and every county or other geographic area covered by section 2 of Executive Order No. 13150." Pub. L. No. 109-59, § 3049(a)(3)(C). Section 2 of Executive Order No. 13150 defines the National Capital Region as "the District of Columbia; Montgomery, Prince George's, and Frederick Counties in Maryland; Arlington, Fairfax, Loudon, and Prince William Counties in Virginia; and all cities now or hereafter existing in Maryland or Virginia within the geographic area bounded by the outer boundaries of the combined area of said counties." Exec. Order No. 13150, *Federal Workforce Transportation*, 65 Fed. Reg. 24613 (Apr. 21, 2000).

⁴ SAFETEA-LU requires agencies in the National Capital Region to implement a transit benefits program as described in section 2 of Executive Order No. 13150. Section 2 of Executive Order No. 13150 directs agencies to provide transit passes "as defined in section 132(f)(5) of title 26, United States Code, in amounts approximately equal to employee commuting costs, not to exceed the maximum level allowed by law (26 U.S.C. 132(f)(2))." Section 132(f)(5) of title 26, United States Code, in turn, defines "transit pass" as "any pass, token, farecard, voucher, or similar item entitling a person to transportation (or transportation at a reduced price) if such transportation is—(i) on mass transit facilities (whether or not publicly owned)" or in a "highway vehicle—the seating capacity of which is at least 6 adults (not including the driver)." 26 U.S.C. §§ 132(f)(5)(A), 132(f)(5)(B)(i).

to employee commuting costs, up to a certain limit. SAFETEA-LU refers to Executive Order No. 13150, which directs agencies to “encourage mass transportation and vanpool use” to “reduce [f]ederal employees’ contributions to traffic congestion and air pollution and to expand their commuting alternatives.” 65 Fed. Reg. at 24613.

The word “commute” covers those expenses associated with the *local* travel of an employee to and from home and work; it does not encompass *all* travel from home to work no matter where the employee’s home is and the distance involved.⁵ Indeed, another statute governs long-distance travel and it authorizes the use of appropriations only when an employee is traveling pursuant to an official travel authorization. 5 U.S.C. § 5702. Without other affirmative authority to use appropriations for long-distance travel, GAO’s transit benefit program is necessarily limited.⁶

Stewardship of public money, and accountability to Congress for the proper use of public money appropriated to agencies, is necessarily an exceptionally high standard. B-326021, at 3. It is legally impermissible to use public funds to cover a personal expense that “would serve no purpose other than accommodating employees’ personal tastes.” *Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1350 (D.C. Cir. 2012). An employee chooses where to live and, in doing so, accepts the distance between home and office place. B-318229, Dec. 22, 2009, at 4.

Please call me if you have any questions.

cc: Controller, Financial Management and Business Operations – William L. Anderson

⁵ Although the law does not permit GAO to provide transit benefits to employees for long-distance travel to their official duty stations, such employees are eligible to receive transit benefits for their local commute between their official duty station and a location where they are staying in the local area.

⁶ See footnote 2 above.



Memorandum

Date: August 28, 2017
To: Controller – William L. Anderson
From: Deputy General Counsel – Thomas H. Armstrong
Subject: Transit Benefits and Long-Distance Travel

You asked for our views on how to administer the GAO Transit Benefit Program to ensure that GAO’s appropriations are used only to provide transit benefits to employees for eligible commuting costs to and from their residences and their GAO official duty station. At issue is the use of GAO’s appropriations to subsidize long-distance travel between an employee’s residence and the employee’s official duty station. As explained in my memos of September 2016 and July 2017, GAO has no legal authority to use appropriations for long-distance travel other than for travel costs incurred as authorized by an official travel authorization placing an employee in a temporary duty (TDY) status.¹ GAO has no authority to cover other long-distance travel costs. Consequently, with no authority otherwise, GAO legally may subsidize only those commuting costs employees have incurred within the local travel area of the employees’ official duty station.² In this regard, you also asked for our assistance in setting out the parameters for allowable local travel vs. prohibited long-distance travel in GAO’s Transit Benefit Program order, GAO Order 2820.1.

This issue was first brought to my attention in 2016 when OGC was asked whether GAO, pursuant to the GAO Transit Benefit Program, could reimburse a field office employee for an Amtrak ticket on the Acela Express to be used for travel to and from their residence in New York City to the Boston Field Office (the employee’s official duty station), a distance of over 200 miles each way. In September 2016, I advised the Director of Labor Management Relations (LMR) that GAO’s appropriations were not available to subsidize the cost of such home-to-work travel:

¹ The employee’s request for reimbursement must be supported by a properly filed travel voucher. Once GAO has accepted the travel voucher, GAO may then obligate and expend its appropriation for such long-distance travel costs.

² GAO operates a transit benefits program at headquarters and in the field offices. Transit benefits for headquarters employees are covered by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). Pub. L. No. 109-59, title III, § 3049, 119 Stat. 1144, 1711–12 (Aug. 10, 2005). SAFETEA-LU requires agencies in the National Capital Region to implement a transit benefits program as described in section 2 of Executive Order No. 13150. Section 2 of Executive Order No. 13150, in turn, directs agencies to provide transit passes “as defined in section 132(f)(5) of title 26, United States Code, in amounts approximately equal to employee commuting costs, not to exceed the maximum level allowed by law (26 U.S.C. 132(f)(2)).” Transit benefits for field office employees are authorized under the Federal Employees Clean Air Incentives Act. 5 U.S.C. § 7905(b)(1). This act also incorporates the definition of “transit pass” in 26 U.S.C. § 132(f)(5). *Id.* § 7905(a)(4).

“The word ‘commute’ covers those expenses associated with the *local* travel of an employee to and from home and work; it does not encompass *all* travel from home to work no matter where the employee’s home is and the distance involved. Indeed, there is another statute that governs long-distance travel, and it authorizes the use of appropriations only when an employee is traveling pursuant to an official travel authorization. See 5 U.S.C. § 5702.”

Memorandum from Deputy General Counsel, Office of the General Counsel, to Director, Labor Management Relations Office, *Appropriations for Transit Benefits for Field Office Employees* Sept. 19, 2016.

Earlier this year, LMR advised OGC that it had become aware that GAO is providing transit benefits to some employees whose official duty station is GAO Headquarters for long-distance travel between their residences and their official duty station. I reiterated that such long-distance travel is a personal expense of the employee. Memorandum from Deputy General Counsel, Office of the General Counsel, to Director, Labor Management Relations Office, *Transit Benefits for Employees Residing at Long-Distance Locations*, July 25, 2017. GAO’s appropriations are only available for long-distance travel when an employee is on official travel (TDY) pursuant to a travel authorization. 5 U.S.C. § 5702.

As explained in my earlier memos, the cost of an employee’s travel is, under the law, a personal expense. To understand the constraints imposed by law on the use of GAO’s appropriations for employee commuting costs, it is important to understand the interplay of the relevant statutes: (1) SAFETEA-LU (or the Federal Employees Clean Air Incentives Act when discussing GAO field offices), and (2) 5 U.S.C. § 5702 (long-distance travel). While the first permits the use of appropriations for “employee commuting costs,” the second, which addresses long-distance travel, permits the use of appropriations only for official TDY travel. The Supreme Court has explained that public funds (appropriations) are available for employees’ personal expenses (in this case, travel costs) only when authorized by Congress. *United States v. MacCollom*, 426 U.S. 317, 321 (1976). In interpreting and applying the statutes at play here, GAO necessarily follows the statutory interpretation canons of the Supreme Court providing that one must read statutes harmoniously. See, e.g., *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). Given that GAO’s appropriations are available for long-distance travel only for official TDY travel, it necessarily follows as a *matter of law* that GAO’s appropriations are only available for transit benefits for personal commutes that take place within the local travel area of their official duty station. Travel outside of that area is covered by 5 U.S.C. § 5702, and must be official TDY travel.³

GAO specifically defines⁴ the local travel area for GAO Headquarters and Field Offices in GAO Order 0300.3 (May 12, 2006):

³ Of course, GAO’s use of the word “commute” in GAO Order 2820.1 (Transit Benefit Program) must be understood within the constraints of GAO’s legal authorities. Any attempt to read the Order more expansively to cover long-distance commuting costs would be beyond the limits of GAO’s authority.

⁴ GSA delegated its authority to define local travel areas to federal agencies. 5 U.S.C. § 5707 (authorizing the Administrator of GSA to prescribe travel regulations); 75 Fed. Reg. 24434 (May 5, 2010) (“Federal employees should adhere to their agency’s policies for reimbursement

- For GAO headquarters, the Order identifies the city of Washington, D.C., as well as specified counties in Virginia and Maryland. The Order provides a map of the local travel area.
- For each field office, the Order identifies the local travel area as a 50 mile radius of the field office, with the exception of Seattle (40 mile radius of field office, except between Seattle and the Olympic Peninsula, which is considered TDY, and 50 mile radius for Richland, Washington).

Travel outside of such local travel areas is payable by GAO only for an employee's costs incurred on official TDY travel pursuant to a travel authorization. GAO Order 0300.1 (Aug. 19, 2009).

While GAO legally may not subsidize employee commuting costs incurred beyond the local travel areas identified in Order No. 0300.3, GAO may subsidize costs incurred within the local travel area, including the cost of the travel after the long-distance commuter has crossed into the local travel area. For instance, a headquarters employee who lives in Richmond, Virginia, might travel by car to the Leeland Road VRE station in Stafford County; GAO may offer transit benefits for the rail fare to headquarters. Similarly, a headquarters employee who lives in Washington County, Maryland, might travel to headquarters via Maryland Transit Administration Commuter Bus Service from Hagerstown. GAO may not offer transit benefits for the entire cost of the trip because Hagerstown is outside of the local travel area for GAO headquarters. The employee, however, could certify that 60 miles of the 75 mile total one-way trip or 80% takes place within the local travel area for headquarters. The employee may then seek reimbursement for 80% of the one-way fare.

For purposes of ascertaining an employee's eligibility for transit benefits, GAO may accept the employee's certification of local commuting distances.⁵ The employee, when requesting transit benefits, should file documentation to support the certification. Employee certifications should be subjected to periodic GAO internal audit.

You explained that your office has identified some instances of improper payment of transit benefits for long-distance travel. GAO must cease such improper payments as soon as possible. OGC is prepared to assist your office and others regarding any impact and implementation of GAO's cessation of these unauthorized payments. As GAO's telework program has developed and grown, and employees have moved away from their official duty station, it is important to help GAO employees understand the legal limitations on the use of GAO's appropriation for transit benefits.

of expenses incurred for transportation within the vicinity of their official stations when expenses do not pertain to TDY or relocation.").

⁵ GAO currently accepts an employee's certification of travel distances for his or her official local travel, like using the MARC train to commute to Baltimore for a recruiting event. For example, in requesting reimbursement for official local travel, the employee agrees that, "I certify that this voucher is true and correct to the best of my knowledge and belief, and that payment or credit has not been received by me." GAO also accepts an employee's certification of time and attendance charges in WebTA. An employee validating their WebTA agrees that, "I certify that the number of hours worked and leave represented on my time and attendance is accurate. I understand that falsification may lead to disciplinary action and/or criminal sanctions under 18 U.S.C. 1001."

Please call me if you have any questions.

cc: Susan Poling
Paul Johnson
Hazel Williams-Johnson
Rhonda Mayfield
Craig Kimball
Joan Hollenbach
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