

Decision

Matter of: Smithsonian Institution—Application of the Antideficiency Act to Employee Travel during a Lapse in Appropriations

File: B-333281

Date: October 19, 2021

DIGEST

The Antideficiency Act bars agencies from incurring obligations in advance of appropriations, and prohibits the acceptance of voluntary services, except in certain circumstances. 31 U.S.C. §§ 1341(a), 1342. The Act includes an emergency exception that allows agencies to accept voluntary services in emergencies that imminently threaten the safety of human life or the protection of government property.

During a 2019 lapse in appropriations, the Smithsonian Institution (Smithsonian) incurred an obligation for an employee's salary when the employee travelled to a conference on animal care and nutrition. Smithsonian improperly relied on the Antideficiency Act's emergency exception when it did not record the obligation at the time of the travel. Smithsonian did not clearly link the employee's participation in the conference to an emergency posing imminent harm to its animal collections.

DECISION

This responds to a request for our decision regarding whether the Smithsonian Institution (Smithsonian) violated the Antideficiency Act when a federal employee traveled to a conference about animal care and nutrition during a lapse in appropriations.¹

As discussed below, we conclude that Smithsonian improperly relied on the Antideficiency Act's emergency exception when it incurred an obligation for an

¹ Letter from Inspector General, Smithsonian, to Comptroller General (May 3, 2021) (Request Letter).

employee's salary and did not record the obligation against funds available at that time. Smithsonian has not shown that there was an emergency necessitating the obligation and has not explained how the employee's participation in the conference avoided imminent harm to human life or property. Smithsonian had sufficient budget authority available when it incurred the obligation but did not record its obligation against the available funds. Therefore, we conclude Smithsonian should adjust its accounts to obligate funds that were available at the time Smithsonian incurred the obligation. If Smithsonian has insufficient budget authority to make the adjustment, it must report an Antideficiency Act violation. 31 U.S.C. § 1351.

In accordance with our regular practice, we contacted Smithsonian to seek factual information and its legal views on this matter.² Smithsonian provided a response.³

BACKGROUND

Smithsonian generally receives a lump-sum appropriation for salaries and expenses, available for two fiscal years.⁴ On September 28, 2018, the President signed a continuing resolution appropriating amounts for Smithsonian's operations through December 7, 2018.⁵ After an extension enacted on December 7, 2018, the continuing resolution expired at midnight on December 21, 2018.⁶

From December 22, 2018 until January 2, 2019, Smithsonian continued operating by obligating available balances from its Salaries and Expenses appropriation enacted in March of 2018.⁷ These funds were available for obligations incurred during fiscal years (FY) 2018 and 2019.⁸ On January 2, 2019, Smithsonian shut down the majority of its operations, even though a small amount from its FY 2018 and 2019

² 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; Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, Smithsonian (June 1, 2021).

³ Letter from Associate General Counsel, Smithsonian, to Assistant General Counsel for Appropriations Law, GAO (June 24, 2021) (Response Letter).

⁴ See, e.g., Department of the Interior, Environment, and Related Agencies Appropriations Act, 2018, Pub. L. No. 115-141, div. G, title III, 132 Stat. 635, 682 (Mar. 23, 2018).

⁵ Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. C, §§ 101(6), 105, 132 Stat. 3123, 3124 (Sept. 28, 2018).

⁶ Pub. L. No. 115-298, 132 Stat. 4382, 4382 (Dec. 7, 2018).

⁷ Response Letter, at 2.

⁸ Pub. L. No. 115-141, div. G, title III, 132 Stat. at 682.

Salaries and Expenses appropriation remained available.⁹ Smithsonian “furloughed non-excepted federal employees and through the remainder of the partial government shutdown did not incur obligations with federal funds unless it determined that an exception to the Antideficiency Act applied.”¹⁰

From January 15, 2019, through January 20, 2019, a senior nutritionist at the Smithsonian National Zoological Park (Zoo) attended a conference in the United Kingdom on animal care and nutrition.¹¹ On January 19, 2019, Smithsonian incurred an obligation for the employee’s salary of \$2,736.17, but did not record the obligation against available budget authority because Smithsonian determined the Antideficiency Act’s emergency exception applied.¹² On January 25, 2019, Congress and the President enacted a continuing resolution appropriating amounts for Smithsonian.¹³ On January 30, 2019, Smithsonian recorded the obligation for the employee’s salary against funds appropriated by the continuing resolution.¹⁴

Smithsonian also incurred an obligation for \$1,987.23 for the employee’s travel expenses, charged to non-appropriated trust funds.¹⁵ Smithsonian’s trust funds include amounts received from private sources, including its endowments, and revenues from Smithsonian Enterprises’ operations.¹⁶ Smithsonian had sufficient

⁹ Response Letter, at 1–2. Smithsonian stated that the remaining amount was “not enough budget authority to continue full operations without a reprogramming of funds.” *Id.* at 2.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 1, 3; Request Letter, at 2.

¹² Response Letter, at 1, 3. An agency incurs an obligation for an employee’s salary when the salary is earned—that is, when the services are performed—generally on a pay period basis. B-287619, July 5, 2001. Here, the employee attended the conference during a pay period which ended January 19, 2019. Response Letter, at 1. January 19 and 20 were weekend days for which the employee was not paid. *Id.*

¹³ Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, § 101, 133 Stat. 10, 10 (Jan. 25, 2019).

¹⁴ Response Letter, at 1; see Pub. L. No. 115-245, div. C, § 138, *as added by* Pub. L. No. 116-5, § 101, 133 Stat. at 10 (providing that obligations previously incurred “in anticipation of the appropriations made . . . by this Act for the purposes of maintaining the essential level of activity to protect life and property . . . are hereby ratified and approved if otherwise in accord with the provisions of this Act”).

¹⁵ Response Letter, at 1.

¹⁶ Smithsonian, *The Smithsonian Institution Fact Sheet* (Apr. 7, 2020), available at <https://www.si.edu/newsdesk/factsheets/smithsonian-institution-fact-sheet>.

trust amounts to cover the travel expenses and recorded the obligation against those amounts.¹⁷ As such, the remainder of this decision concerns only the obligation for the employee's salary.

DISCUSSION

At issue here is whether Smithsonian violated the Antideficiency Act when it incurred an obligation for the employee's salary during a lapse in appropriations.

The Antideficiency Act prohibits agencies from obligating or expending in excess or in advance of an available appropriation unless otherwise authorized by law. 31 U.S.C. § 1341. The Act further prohibits agencies from accepting voluntary services for the United States, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342. During a lapse in appropriations, the Antideficiency Act generally bars an agency from incurring obligations and the agency must commence an orderly shutdown of affected functions unless it has available budget authority or where an exception to the Antideficiency Act allows the agency to continue operating. B-331132, Dec. 19, 2019.

Here, Smithsonian had sufficient budget authority available for the employee's salary in its FY 2018 and 2019 Salaries and Expenses account.¹⁸ However, when it incurred the obligation on January 19, 2019, Smithsonian did not record the obligation against the available funds.¹⁹ Instead, on January 30, 2019, Smithsonian recorded the obligation for the employee's salary against funds Congress appropriated on January 25, 2019.²⁰ Because Smithsonian incurred an obligation for the employee's salary in advance of the appropriation it charged, we must determine whether an exception to the Antideficiency Act applied.

One key exception is provided explicitly in the text of the Antideficiency Act itself. The Act permits agencies to accept voluntary services "for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 1990, Congress amended this section to add: "As used in this section, the term 'emergencies involving the safety of human life or the protection of property' *does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.*" Budget Enforcement Act of 1990, Pub. L. No. 101-508, title XIII, § 13213(b),

¹⁷ Response Letter, at 2.

¹⁸ *Id.*

¹⁹ *Id.* at 3.

²⁰ *Id.* at 1, 3

104 Stat. 1388-573, 1388-621 (Nov. 5, 1990), *codified at* 31 U.S.C. § 1342 (emphasis added).

Activities that protect property, where suspension of the activity would imminently threaten property, fall within Congress's explicit authorization in the Antideficiency Act, and obligations for those activities may continue during a lapse in appropriations. See, e.g., B-331092, June 29, 2020 (taking time-sensitive actions to protect security interests was authorized under the Antideficiency Act's exception for emergencies involving the protection of property); 3 Comp. Gen. 979 (1924) (local firefighters fighting a fire on federal property, where the fire would have almost certainly destroyed most of the property had they not responded, was authorized under the Antideficiency Act's emergency exception). However, agencies must take only those limited actions necessary to avoid imminent threat to property to minimize obligations incurred. B-331092, June 29, 2020.

The first question is whether the Zoo's animal collections constitute property within the meaning of the Antideficiency Act. We conclude that they do. Under the Act, "the property must be either government-owned property or property for which the government has a responsibility." B-331093, Oct. 22 2019, at 6; 9 Comp. Dec. 182, 185 (1902). Here, the Zoo's animal collections are property of the United States, and Smithsonian is charged with their care. See 20 U.S.C. § 81.

The next question is whether the obligation for the employee's salary was necessary to avoid imminent harm to the Zoo's animal collections. The Antideficiency Act provides that an emergency involving the protection of property does not include functions that, if suspended, would not imminently threaten the protection of property. 31 U.S.C. § 1342. Because the Act is central to Congress's constitutional power of the purse, we interpret exceptions narrowly and in a manner to protect congressional prerogative, applying a case-by-case analysis. B-331093, Oct. 22, 2019.

Agencies must establish a clear link between the relevant activity and the imminent harm the activity would prevent. For example, we concluded that the Farm Service Agency (FSA) could file time-sensitive continuances to protect security interests, which would otherwise have been "immediately damaged." B-331092, June 29, 2020, at 6. On the other hand, the emergency exception does not authorize activities undertaken to overcome mere inconvenience or to avoid a potential future emergency. See 10 Comp. Gen. 248 (1930) (denying a claim for expenses incurred while voluntarily towing an aircraft where the aircraft had landed intact and the pilot was in no immediate danger). In addition, employees recalled to perform excepted functions may intermittently perform limited non-excepted functions where the excepted activity requires the employee to remain at work, so long as the excepted activity takes priority. B-330775.1, Oct. 1, 2020 (Department of the Interior employees could perform limited non-excepted functions while remaining ready to perform excepted duties); see *also* B-331092, June 29, 2020 (FSA employees could perform non-excepted work during intervals of time where the employees had to

remain at work ready to perform, but were not actively performing, nor were they expected to perform, the excepted functions).

Here, Smithsonian has not clearly linked the employee's participation in the conference to an emergency posing imminent harm to the Zoo's animal collections. In its response to us, Smithsonian explained that the employee presented a paper and "shared his experience in developing novel milk formulas for infant animals."²¹ According to Smithsonian, the employee also gained "unique, valuable, and up-to-date information about animal nutrition . . . a matter directly related to his responsibilities and his ability to provide care for, and protect the life and safety of, the animals at the Zoo."²² This description, without more, is insufficient to establish the existence of an emergency, or to connect the employee's participation in the conference with imminent harm to the Zoo's animal collections.

Smithsonian argues that if zookeepers who feed and care for living collections are "excepted employees" under the emergency' exception, then a senior Zoo nutritionist participating in a conference related to animal nutrition is also engaging in an excepted activity.²³ We disagree with Smithsonian's conclusion. The Antideficiency Act does not categorize employees as "excepted" or "non-excepted," and an employee's job description is generally insufficient to determine whether the emergency exception applies to a particular activity. Rather, we must analyze the activity itself to determine whether it may continue during a lapse in appropriation. Here, Smithsonian has not identified a relevant emergency or demonstrated how the employee's participation in the conference avoided imminent harm to human life or property. Nor has Smithsonian demonstrated that the employee's participation in the conference was incidental to other excepted functions. Therefore, based on the information before us, we conclude that Smithsonian improperly relied on the emergency exception in accepting the employee's voluntary services and incurring an obligation for his salary without recording the obligation against available funds.

CONCLUSION

The Antideficiency Act provides that agencies may accept voluntary services—and incur resultant obligations—only in emergencies involving the safety of human life or protection of property. Smithsonian's reliance on the emergency exception was improper because Smithsonian has not demonstrated that the employee's participation in a conference on animal care and nutrition was necessary to avoid imminent harm to human life or property. Therefore, Smithsonian should de-obligate the FY 2019 and 2020 funds it obligated on January 30, 2019, as it recorded the obligation against this appropriation due to its improper reliance on the emergency exception. Smithsonian should adjust its accounts to record the obligation against

²¹ Response Letter, at 3.

²² *Id.*

²³ *Id.* at 3–4.

balances that remained available at the time it incurred the obligation. If Smithsonian has insufficient budget authority available to make the adjustment, it must report an Antideficiency Act violation. 31 U.S.C. § 1351.

A handwritten signature in cursive script that reads "Edda Emmanuelli Perez".

Edda Emmanuelli Perez
General Counsel