

Appropriations Law Forum 2010

Personal Expenses

GAO responds to hundreds of requests for informal appropriations assistance each year, covering a broad array of subjects. We identify below some types of spending that we addressed most often during the past year, and provide GAO decisions and opinions that discuss these types of spending.

Recruitment

- B-247563.2, May 12, 1993. The Veterans Administration (VA) was authorized to purchase and distribute matchbooks and jar openers at a state fair because those items had been imprinted with a telephone number that could be called to obtain information about employment with VA.
- B-260260, Dec. 28, 1995. The Department of Energy could not use appropriated funds to distribute for recruitment purposes baseball caps imprinted with the words “DOE – Valuing Diversity” because of the intrinsic value of the items and because there was only a tenuous relationship between the caps and the stated goal—furthering a diverse workforce.
- B-247563.3, Apr. 5, 1996. The Veterans Administration’s (VA) purchase of pens, scissors, and shoe laces for potential employees was improper, because the items contained only a VA slogan or logo. As such, they were only “favorable reminders of VA” which did nothing to facilitate VA’s acquisition of information necessary to its recruiting effort.

Honoraria

- B-20517, Sept. 25, 1941. The payment or gift of an honorarium to an invited guest speaker is allowable so long as it passes the necessary expense test, does not contravene any limitations in the appropriation, and the speaker is not a federal employee.

Funerals, Memorial, and Other Commemorative Services

- B-275365, Dec. 17, 1996. CIA official who attended a funeral without seeking official approval had no authority to use a government vehicle for that purpose.

Dedication of Buildings and Groundbreaking Ceremonies

- B-158831, June 8, 1966; B-11884, Aug. 26, 1940. Agencies may use funds appropriated for building construction to purchase floral centerpieces for building dedication ceremonies and print programs and invitations for cornerstone ceremonies.
- B-195896, Oct. 22, 1979. Photographs as mementos for participants at a dedication ceremony considered impermissible personal gifts.
- B-250450, May 3, 1993. Expenses connected with grand opening of new cafeteria inside an existing federal building not allowable as a part of a traditional ceremony. Nevertheless, if the event otherwise qualifies as an official reception, available reception and representation appropriations might be available to cover those expenses.

Changes in Command and Swearing-In Ceremonies

- 56 Comp. Gen. 81, 82 (1976). Appropriated funds are available to print invitations for a change of command ceremony for a Coast Guard vessel. “Just as building dedication ceremonies are considered to be a proper way of commemorating the completion of public buildings, so a ceremony may be a proper way of observing a change in command in the armed forces.”
- 69 Comp. Gen. 242 (1990). Agencies may use official reception and representation funds to pay for such ceremonies.



GAO

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Comptroller General
of the United States

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

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.

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. 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 1973¹ 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.

¹ 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,² 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

² 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 (6th 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, appearing to read "Lynn H. Gibson". The signature is fluid and cursive, with the first name "Lynn" and last name "Gibson" clearly distinguishable.

Lynn H. Gibson
Acting General Counsel



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United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: National Indian Gaming Commission—Reimbursing Bicyclists as Part of the Agency’s Transportation Fringe Benefit Program

File: B-318325

Date: August 12, 2009

DIGEST

Under the federal government’s transportation fringe benefit program, as established by 5 U.S.C. § 7905 and Executive Order No. 13150, the National Indian Gaming Commission (NIGC) provides monthly transit subsidies to employees who certify that they use mass transit to commute to and from work. NIGC may use its authority under 5 U.S.C. § 7905 to extend the program to provide a \$20 cash reimbursement to those employees who commute to and from work by bicycle. If NIGC chooses to do so, NIGC should consider the provisions of the Internal Revenue Code, 26 U.S.C. § 132(f)(5), and guidance provided by the Internal Revenue Service and the Office of Management and Budget.

DECISION

A certifying officer for the National Indian Gaming Commission (NIGC) requested an advance decision on whether NIGC may use appropriated funds to reimburse employees who bicycle to and from work under its transportation fringe benefit program. Letter from Director of Administration, NIGC, to Acting Comptroller General, GAO, June 8, 2009 (Request Letter).¹ As we explain below, agencies have authority to design their transit benefit programs consistent with 5 U.S.C. § 7905. In

¹ Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and the agency’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. In this case we did not solicit further information from the agency because the request included the opinion of the NIGC’s Office of General Counsel and fully articulated the agency’s views.

our view, NIGC may expand its program to provide a \$20 per month cash reimbursement to those employees who use their bicycles to commute to and from work. In designing and executing its program, NIGC should be mindful of the criteria in the Internal Revenue Code and the Office of Management and Budget (OMB) guidance.

BACKGROUND

Congress established NIGC as a federal regulatory agency in the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2704. NIGC participates in the federal government's transportation fringe benefit program under 5 U.S.C. § 7905 and Executive Order No. 13150, *Federal Workforce Transportation*, Apr. 21, 2000, by providing monthly transit passes to employees who certify that they use mass transit to commute to and from work. Request Letter. Several NIGC employees who commute by bicycle and do not participate in the transit pass program have asked whether they can obtain commuting subsidies. They point out that Congress, in 2008, amended the Internal Revenue Code to permit employers to provide up to \$20 per month to those employees who commute to work by bicycle to cover the costs of a new bicycle, bicycle improvements and repairs, and storage.² 26 U.S.C. §§ 132(f)(1)(D), (f)(5)(F).

Because the provisions in 26 U.S.C. § 132(f) do not specify whether the bicycle reimbursement is available to federal employees, the certifying officer asked if NIGC can extend its transit program to include a \$20 cash reimbursement for employees who regularly commute to work by bicycle. The certifying officer also asked for advice on how such a program could be implemented.

DISCUSSION

In 1993, Congress enacted the Federal Employees Clean Air Incentives Act, Pub. L. No. 103-172, 107 Stat. 1995 (Dec. 2, 1993), codified at 5 U.S.C. § 7905, which authorizes each agency head to establish a program to encourage employees to use means other than single occupancy motor vehicles to commute to and from work. The purposes of this authority are "to improve air quality and to reduce traffic congestion." Pub. L. No. 103-172, § 1(b), 5 U.S.C. § 7905 note. Programs established under this authority may include such options as: transit passes or cash reimbursements for transit passes; furnishing space, facilities, or services to bicyclists; and nonmonetary incentives. 5 U.S.C. § 7905(b)(2). At issue here is whether NIGC, under the transportation fringe benefit program that it established

² Pub. L. No. 110-343, div. B, title II, § 211, 122 Stat. 3765, 3840–41 (Oct. 3, 2008). Under the Internal Revenue Code, an employer can deduct these costs as business expenses and the employees do not report the payments as income for tax purposes. See Internal Revenue Service (IRS) Publication 15-B, *Employer's Tax Guide to Fringe Benefits: For Use in 2009* (Dec. 16, 2008), at 2–3, 18–20, available at www.irs.gov/pub/irs-pdf/p15b.pdf (last visited July 30, 2009) (IRS Publication 15-B).

pursuant to section 7905, may use its appropriations to reimburse employees up to \$20 per month for costs incurred in commuting by bicycle.

NIGC's Office of General Counsel advised the certifying officer that a qualified bicycle commuting reimbursement program furthers the purpose of section 7905 and could be included as part of NIGC's transit program because an agency head is not limited by the examples given in section 7905. Request Letter, *quoting* Office of Personnel Management, Office of the General Counsel, *Compensation and Leave Decision*, OPM File No. S001842 (Aug. 11, 1998) ("Although [5 U.S.C. § 7905] gives several examples of the types of programs agencies may establish, it does not limit an agency head's discretion to approve any program reasonably related to the stated goal"). We agree with OPM's and the NIGC's Office of General Counsel's assessments.

As mentioned above, the purposes of the section 7905 program are to improve air quality and reduce traffic congestion by encouraging federal employees to commute by means "other than single-occupancy motor vehicles." 5 U.S.C. § 7905(b). The statute left it to the head of the agency to determine how to implement the program and what types of commuting activities would be covered by that particular agency. It provides, "A program established under this section may involve such options as" transit passes, space, facilities and services to bicyclists, and nonmonetary incentives. *Id.* While section 7905(b)(2) gives some options that the program "may involve," they are not exclusive. Bicycles could easily be found to serve the purpose of the statute: to improve air quality and reduce traffic congestion by encouraging employees "to use means other than single-occupancy motor vehicles to commute to or from work." *Id.* § 7905(b)(1). For example, the Federal Transit Administration considers bicycles important in helping to meet goals for cleaner air and less congested roadways because they "provide low-cost mobility and place fewer demands on local roads and highways to carry everyday trips." Federal Transit Administration, *Bicycles & Transit: A Partnership that Works* (1999), at 1.³

The legislative history of section 7905 supports the notion that, not only does the agency have discretion to determine the parameters of the program, but the legislators also contemplated that bicycle subsidies may be part of a program under section 7905. The conference report states:

"The program options that may be established under this legislation (7905(b)(2)) are not intended to be an inclusive list of programs that agencies may establish. Public Law 101-509 [predecessor legislation] limited the programs in which Federal agencies could participate to programs established by State or local governments. [Section 7905] expands the scope of the previous authorization to include, *but not be limited to*, privately operated vanpools. *The Committee believes that*

³ Available at www.fta.dot.gov/publications/publications_5838.html (last visited July 30, 2009).

this expansion conforms the programs available to Federal agencies with those available in the private sector.

“[Section 7905] also expands the scope of current law by permitting agencies to furnish space, facilities, or services to bicyclists as part of [a] transit program. For example, agencies are permitted to use the money allocated for the subsidy to provide bicycle racks, lockers, or other facilities for the use of bicyclists. *Agencies may also choose to provide a subsidy to those employees who commute by bicycle for use toward the cost of agency-provided locker rooms or showers.*”

H. R. Rep. No. 103-356(I), at 3 (1993) (emphasis added).

We have no objection, therefore, if NIGC decides to use its appropriations under the authority granted to it by section 7905 to extend its transportation fringe benefit program to include a \$20 per month reimbursement to NIGC employees who commute to and from work by bicycle.

The 2008 amendment to the Internal Revenue Code, 26 U.S.C. § 132(f), that led to the certifying officer’s question deals with the tax consequences of certain fringe benefit programs. The authority of a federal agency to use appropriated funds for what would otherwise be a personal expense is found, as discussed above, in section 7905, not section 132(f). However, the amendment provides useful guidance to NIGC and other agencies that choose to extend their transportation fringe benefit programs to cover bicycles.⁴ For example, under the IRS rules, employees are eligible for a \$20 reimbursement in a “qualified bicycle commuting month” as defined by any month in which the employees meet certain criteria, including, for example, that they regularly use the bicycle for a substantial portion of the travel between their residence and their place of employment and do not receive a transit pass.⁵ 26 U.S.C. § 132(f)(5)(F); IRS Publication 15-B, at 20.

NIGC should also be mindful of the guidance provided by OMB on preserving the benefits of the transit program while eliminating the opportunity for waste, fraud, and abuse. OMB Memorandum No. M-07-15, *Federal Transit Benefits Program* (May 14,

⁴ In the legislative history of section 7905, the House Committee on Post Office and Civil Service referred to private sector programs as a model for the federal program. H. R. Rep. No. 103-356(I), at 3 (“The Committee believes that this expansion conforms the programs available to Federal agencies with those available in the private sector.”).

⁵ A bill pending before the House Committee on Ways and Means would amend section 132(f) to allow employees to receive both transit passes and bicycle commuting reimbursements, not to exceed an aggregate amount of \$100 per month. H.R. 863, 111th Cong. (2009).

2007).⁶ The memorandum lists a set of internal controls that agencies should implement and may also apply to the inclusion of a bicycle expense reimbursement program. *Id.* at 2. These include requirements for application information, independent verification of eligibility, and implementation. *Id.*

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Daniel I. Gordon
Acting General Counsel

⁶ Available at www.whitehouse.gov/omb/memoranda_2007/ (last visited July 30, 2009). The memorandum was written in response to a GAO report that found numerous instances of fraud and abuse of transit benefits by federal employees. *See* GAO, *Federal Transit Benefits Program: Ineffective Controls Result in Fraud and Abuse by Federal Workers*, GAO-07-724T (Washington, D.C.: Apr. 24, 2007).



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Washington, DC 20548

Decision

Matter of: U.S. Fish and Wildlife Service—Steller's and Spectacled Eiders
Conservation Plan

File: B-318386

Date: August 12, 2009

DIGEST

Because considerable conservation efforts over several years have not halted the decline of two threatened eider species, GAO will not object to the U.S. Fish and Wildlife Service's (FWS) proposed use of appropriated funds to purchase and distribute caps and other items to residents of Alaska North Slope communities in furtherance of the agency's eider conservation plan. FWS will print images of the threatened eiders on these items and, for some items, include eider conservation messages. The items, which FWS will distribute as part of agency outreach events, will help residents identify the threatened species and serve as reminders of the agency's conservation message.

DECISION

The U.S. Fish and Wildlife Service (FWS) Alaska Regional Director requests an advance decision under 31 U.S.C. § 3529(a) regarding the use of appropriated funds to purchase and distribute items such as T-shirts, baseball caps, stocking caps, and coffee mugs to North Slope communities in furtherance of the agency's eider conservation plan. Letter from Alaska Regional Director, FWS, to Acting Comptroller General, GAO, June 16, 2009 (Request Letter). As explained below, because traditional methods of public outreach and education have failed to halt the decline of threatened eiders, FWS may use appropriated funds to purchase and distribute the items as part of an education plan strategically designed to reach North Slope residents.¹

¹ Our practice when issuing decisions is to obtain the facts and views from the relevant agency. 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. In addition to materials provided with the request

(continued...)

BACKGROUND

FWS is responsible for determining “policies and procedures that are necessary and desirable in carrying out ... laws relating to fish and wildlife.” 16 U.S.C. § 742f(a). The Endangered Species Act of 1973 (ESA), as amended, is one such law, providing for “a program for the conservation of [threatened] . . . species.” 16 U.S.C. § 1531(b).

Steller’s and spectacled eiders are “two threatened waterfowl species . . . [that] breed, raise broods, stage, and migrate” throughout the remote Alaska North Slope. Request Letter. Some species of eiders (*e.g.*, common and king eiders) are legal to hunt, but steller’s and spectacled eiders are not.² FWS, *Conservation Measures for Steller’s and Spectacled Eiders During the 2009 Alaska Migratory Bird Subsistence Harvest and 2009 Migratory Game Bird Hunt*, at 1, 7, Apr. 2, 2009 (Eider Conservation Strategy). However, the population of protected eiders continues to decline as a result of hunting. See Eider Conservation Strategy; FWS, *Biological opinion for 2009 Alaska Migratory Bird Subsistence Harvest*, Apr. 6, 2009 (Biological Opinions).

Critical to the protection of steller’s and spectacled eiders is hunter proficiency at distinguishing among eider species, particularly on-the-wing identification. Eider Conservation Strategy at 7. During the summer months, the protected eiders inhabit many of the same areas as the unprotected eiders and often fly in mixed-species flocks. Eider Conservation Strategy at 7--8; Biological Opinion at 15. The agency conceived a host of outreach actions aimed at educating North Slope residents about eider conservation in general, and developing eider identification skills in particular, including on-the-wing identification proficiency.³ Eider Conservation Strategy;

(...continued)

letter, FWS supplied supporting information by e-mail and telephone. E-mail from Assistant Regional Director, Migratory Birds and State Programs, Alaska Region, FWS, to Managing Associate General Counsel, GAO, *Subject: Threatened Eider Conservation in Alaska*, June 30, 2009 (Assistant Director E-mail); Telephone Conversation between Assistant Regional Director, Migratory Birds and State Programs, Alaska Region, FWS, and Assistant General Counsel for Appropriations Law and Staff Counsel, GAO, July 7, 2009 (Assistant Director Phone Conversation).

² In the past, Native Alaskans were allowed to hunt steller’s and spectacled eiders even though they are listed as threatened species. See 16 U.S.C. § 1539(e). FWS has suspended hunting by Native Alaskans because the species have declined to dangerously low levels. See *Migratory Bird Subsistence Harvest in Alaska; Harvest Regulations for Migratory Birds in Alaska During the 2009 Season*, 74 Fed. Reg. 23336 (May 19, 2009) (*to be codified at* 50 C.F.R. pt. 92).

³ For an example of eider identification materials, see FWS, *Steller’s Eiders Need Your Help – Do Not Shoot Them!*, available at <http://alaska.fws.gov/ambcc/ambcc/Eiders.pdf> (last visited Aug. 7, 2009).

Memorandum of Understanding Between the North Slope Borough, Ukpeagvik Inupiat Corporation, the Inupiat Community of the Arctic Slope, and the Native Village of Barrow and Department of the Interior, The U.S. Fish and Wildlife Service, Sept. 26, 2008. FWS has convened public meetings in North Slope villages, hosted public radio talk shows, submitted articles to local newspapers, distributed pamphlets and fliers, and displayed posters in affected villages. Request Letter; Assistant Director E-mail.

However, FWS explains that while the agency is undertaking an aggressive education strategy, efforts to date have made very little difference. Request Letter. In spring 2009, FWS implemented a multifaceted conservation strategy aimed at protecting threatened steller's and spectacled eiders. Eider Conservation Strategy. For example, because of 2008 mortality rates, FWS this year plans to continue its meetings with residents in four villages where protected eiders historically reside during summer months as well as with hunters at the annual Duck Camp where a large number of steller's eiders were killed last year. Eider Conservation Strategy at 10. FWS also plans a sustained law enforcement presence, including 24-hour coverage in Barrow. *Id.* at 11. In addition, FWS is considering educating hunters by distributing caps and other items at public outreach meetings where agency staff are speaking about eider conservation. Assistant Director E-mail. These items will contain images of the protected eiders and simple conservation messages. According to FWS, standard marketing methods such as posters, newspapers, and fliers do not work in the North Slope, and in rural Alaska there are no "freeways, billboards, etc. that flood mainstream America." Request Letter. FWS notes that most North Slope residents wear baseball caps for protection from cold, wind, and bright 24-hour summer daylight, and that T-shirts are typical apparel. Assistant Director E-mail. FWS hopes that the items will focus public awareness on the gravity of the eiders' situation. Assistant Director Phone Conversation. FWS expects that the villagers and hunters receiving these items will become "walking billboard[s] for [eider] conservation messages" as the recipients use the items on a daily basis in the broader community, and that these items will serve as constant reminders to hunters, who will see the items whether or not they attended an outreach meeting. *Id.*; Assistant Director E-mail.

DISCUSSION

At issue here is whether FWS may use appropriations to distribute items that would otherwise be considered personal gifts. As a general rule, appropriated funds may not be used for personal gifts without specific statutory authority. B-307892, Oct. 11, 2006. Because of the clear potential for abuse, we find exceptions to the general rule only rarely. We recognize that, occasionally, some gift items in some contexts may advance legitimate agency goals and policies as opposed to simply attracting attention to the agency and its programs. We will consider exceptions to the general rule only after careful consideration of particular factual circumstances in which an agency can demonstrate that the gift item will directly advance an agency's statutory mission and objectives. *See, e.g.* B-310981, Jan. 25, 2008 (National Telecommunications and Information Administration's purchase of gift cards as an

incentive to encourage participation in a survey of its digital converter box coupon program was a necessary expense of the agency's duty to establish and administer a program subsidizing the purchase of analog-to-digital converter boxes); 62 Comp. Gen. 566 (1983) (Army Chaplain's Office purchase of calendars publicizing scheduled services was a necessary expense of the Chaplain's duty to coordinate religious services for uniformed servicemen and their families); B-193769, Jan. 24, 1979 (National Park Service purchase of quarried volcanic rocks was a necessary expense of maintaining a national monument by deterring visitors from removing naturally occurring lava rock found along the park's roads and trails). If the gift item serves only to attract attention to the agency, the well-established rule is that the expenditure is not an authorized use of appropriated funds.

In this case, FWS has broad authority to establish policies and programs "necessary and desirable" to implement fish and wildlife laws and protect threatened species. With its multifaceted eider conservation program, FWS is attempting to protect two threatened species by educating hunters on accurate species identification and asking them to be more discriminate in the birds they take. As explained above, FWS has already tried numerous, more traditional approaches to educate North Slope communities, yet the population of threatened eiders remains in decline because of hunting. Continuing to identify ways to educate residents and hunters and achieve its goal of eider conservation, FWS proposes to distribute at outreach meetings caps and other items that will contain images of the protected eiders and conservation messages. Because of the nature of these items, FWS expects that they will remain in use and on view in North Slope villages throughout the hunting season. Clearly, these items are personal gifts to the recipients. From the government's perspective, however, these items will serve as reminders to residents and hunters of the protected status of the eiders and will aid in identifying the protected eiders and distinguishing them from unprotected species.

The distribution of items that include conservation messages and images of threatened eiders advances FWS's objective of educating the recipients of the items as well as others who view those items even though they may not have attended an outreach meeting, and FWS's ultimate objective of protecting threatened species. In our view, FWS, in response to the effects of hunting on the population of threatened eiders and having had limited success with more traditional means of educating hunters, has identified an approach strategically designed to reach and educate a

particular community of hunters in furtherance of its eider conservation plan. We do not object, therefore, to FWS's use of its appropriations for this purpose.

A handwritten signature in black ink, appearing to read 'D. Gordon', with a long horizontal flourish extending to the right.

Daniel I. Gordon
Acting General Counsel