



Decision

Matter of: U.S. Department of the Interior—Operation of the Old Post Office Observation Tower during the Fiscal Year 2019 Lapse in Appropriations

File: B-330775.1

Date: October 1, 2020

DIGEST

The National Park Service (Park Service), U.S. Department of the Interior, incurred obligations related to the reopening and operation of the Old Post Office Building observation tower during the fiscal year 2019 lapse in appropriations.

The Park Service did not violate the Antideficiency Act when it incurred obligations for the salaries of the employees who operated the observation tower during the lapse in appropriations because the Park Service obligated available budget authority. In addition, the Park Service permissibly relied on the exception to the Antideficiency Act for emergencies to protect property when it incurred obligations for the salaries of two Park Service officials who signed interagency agreements related to the observation tower with the U.S. General Services Administration during the lapse in appropriations.

DECISION

This responds to a request regarding whether the National Park Service (Park Service), a bureau within the U.S. Department of the Interior (Interior), violated appropriations laws when it reopened and operated the Old Post Office Building observation tower during a lapse in appropriations that occurred between December 22, 2018, and January 25, 2019.¹ In response to the same request, on

¹ Letter from Senator Thomas R. Carper, Ranking Member of the Permanent Subcommittee on Investigations, Senate Committee on Homeland Security and Governmental Affairs, Representative Elijah E. Cummings, then-Chairman, House Committee on Oversight and Reform, and Senator Gary C. Peters, Ranking (continued)

September 5, 2019, we issued a legal decision assessing the U.S. General Services Administration's (GSA) compliance with the Antideficiency Act regarding the reopening of the observation tower during the lapse in appropriations. B-330775, Sept. 5, 2019 (concluding that GSA's obligations with regard to the observation tower did not violate the Antideficiency Act because GSA obligated available budget authority for its activities).

As explained below, we conclude that the Park Service did not violate the Antideficiency Act when it obligated available budget authority for the salaries of the employees who operated the observation tower during the lapse in appropriations. We also conclude that the Park Service permissibly relied on the exception to the Antideficiency Act for emergencies to protect property when it incurred obligations for the salaries of two Park Service officials who signed interagency agreements related to the observation tower with GSA during the lapse in appropriations.

In accordance with our regular practice, we contacted Interior to seek factual information and its legal views on this matter. 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, GAO, to then-Acting Solicitor, Interior (May 2, 2019); E-mail from Assistant General Counsel, GAO, to Associate Solicitor, Interior, *Subject: B-330775.1: Old Post Office Decision—Performance of Non-Excepted Activities* (July 16, 2020). Interior responded with its explanation of the pertinent facts, legal analysis, and multiple exhibits. Letter from then-Associate Solicitor, Interior, to Assistant General Counsel, GAO (Sept. 12, 2019) (Response Letter); see also Telephone Conversation with Associate Solicitor, Interior (July 20, 2020) (July 20 Conversation); Telephone Conversation with Assistant Solicitor, Interior (July 22, 2020) (July 22 Conversation); Telephone Conversation with Assistant Solicitor, Interior (August 4, 2020) (August 4 Conversation).

BACKGROUND

By law, GSA is required to enter into an agreement with Interior providing for the Park Service to operate the GSA-owned observation tower in the Old Post Office Building. Pub. L. No. 98-1, § 4, 97 Stat. 3, 4 (Feb. 15, 1983); see Pub. L. No. 110-359, § 2, 122 Stat. 4005, 4005 (Oct. 8, 2008). The statute authorizes GSA to transfer amounts from the Federal Buildings Fund to the Park Service to cover the

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Member, Senate Committee on Homeland Security and Governmental Affairs, to Comptroller General (May 23, 2019); Letter from Representative Raúl M. Grijalva, Chairman, House Committee on Natural Resources, Representative Betty McCollum, Chair of the Subcommittee on Interior, Environment and Related Agencies, House Committee on Appropriations, and Representative Mike Quigley, Chairman of the Subcommittee on Financial Services and General Government, House Committee on Appropriations, to Comptroller General (Feb. 11, 2019).

Park Service's costs of operating the tower. Pub. L. No. 98-1, § 4; see 40 U.S.C. § 592 (Federal Buildings Fund). Under the statutorily required agreement, the services the Park Service typically provides for the observation tower include education and interpretation services for visitors, public information services for Park Service activities in the observation tower, and services related to staff and visitor safety. Response Letter, at 1–2; Memorandum of Agreement between GSA and the Park Service (Dec. 28, 2018) (December MOA), at 1–3.

According to the Park Service, GSA and the Park Service agreed on the terms of the fiscal year 2019 agreement in October 2018. Response Letter, at 8. However, as of December 22, 2018, the agencies had not executed a written interagency agreement that would provide for GSA to reimburse the Park Service for operating the observation tower. *Id.*, at 4. On December 22, 2018, the Park Service experienced a lapse in appropriations and closed the observation tower.² *Id.* On December 28, 2018, the agencies executed a written agreement documenting their previously agreed-upon responsibilities and a written agreement providing for GSA to reimburse the Park Service for its services. *Id.*, at 3–4; Interagency Agreement between GSA and the Park Service (Dec. 28, 2018) (funding document through December 31, 2018), Box 11; December MOA; see also Interagency Agreement between GSA and the Park Service (Jan. 4, 2019) (funding document through March 31, 2019), Box 27. The Park Service reopened the observation tower on December 29, 2018. Response Letter, at 4.

During the lapse in appropriations, the Park Service obligated its Operation of the National Park System (ONPS) appropriation for the salaries of the two Park Service officials who executed the interagency agreements with GSA and its Construction appropriation for the salaries of the employees who operated the observation tower after the tower reopened on December 29, 2018. *Id.*, at 6. Pursuant to the interagency agreements, GSA later reimbursed the Park Service for the costs the Park Service incurred to operate the tower during the lapse in appropriations. *Id.*, at 6, 7. The Park Service has since credited these reimbursements to its Construction appropriation. *Id.*, at 6.

DISCUSSION

In general, the Antideficiency Act prohibits agencies from obligating or expending in excess or in advance of an available appropriation, or from accepting voluntary services for the United States. 31 U.S.C. §§ 1341, 1342. Thus, if a program lacks

² The lapse in appropriations began when the continuing resolution providing funding for Park Service activities expired at midnight on December 21, 2018, and ended when Congress enacted another continuing resolution for Park Service activities on January 25, 2019. See Pub. L. No. 115-298, 132 Stat. 4382 (Dec. 7, 2018) (continuing resolution through December 21, 2018); Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, § 101, 133 Stat. 10 (Jan. 25, 2019) (continuing resolution through February 15, 2019).

sufficient budget authority to continue operating, the Act generally requires that the agency commence an orderly shutdown of the affected function. See B-330720, Feb. 6, 2019, at 4, 5. Nevertheless, if an appropriation or continuing resolution expires prior to the enactment of a new appropriation, a program may be able to continue operating if the agency has remaining budget authority for the program. B-330775, Sept. 5, 2019, at 7.

Here, GSA and the Park Service executed an interagency agreement during the lapse in appropriations that provided for GSA to reimburse the Park Service for the cost of operating the observation tower. Response Letter, at 6. After the agencies signed the agreement, the Park Service reopened the tower and obligated its Construction appropriation for the salaries of the employees who operated the tower during the lapse.³ *Id.* The Construction appropriation is a no-year appropriation and is available without fiscal year limitation. Pub. L. No. 115-141, div. G, title I, 132 Stat. 348, 641 (Mar. 23, 2018). Because the Construction appropriation remains available for obligation for an indefinite period of time, the Park Service could incur obligations for the salaries of the employees who operated the tower without violating the Antideficiency Act so long as the Park Service had available carryover balances in that appropriation account at the time it incurred the obligations. See B-330775, Sept. 5, 2019, at 7.

We note that absent an interagency agreement with GSA, the Park Service would have no independent authority to operate, nor would its Construction appropriation be available for the purpose of operating, the GSA-owned observation tower. 31 U.S.C. § 1301(a). *Cf.* 63 Comp. Gen. 422 (1984) (concluding that the Department of Defense's Operation and Maintenance appropriation is not available for certain civic and humanitarian assistance activities where such activities are ordinarily administered by another agency). However, Public Law 98-1 requires that GSA enter into an interagency agreement with the Park Service to operate the tower and authorizes GSA to reimburse the Park Service for those services using amounts in the Federal Buildings Fund. Pub. L. No. 98-1, § 4, 97 Stat. at 4. Pursuant to the agencies' interagency agreements under Public Law 98-1, GSA, as the requesting agency, typically obligates and transfers amounts from the Federal Buildings Fund to the Park Service to reimburse the Park Service for the expenses of operating the observation tower. Response Letter, at 3.

The interagency agreements under Public Law 98-1 constitute an obligation of GSA's appropriations and it is the statutory restrictions, limitations, and exemptions

³ The executed agreements contained deficiencies such as a lack of signatures from certain officials and incorrect or ambiguous dates in the scopes of agreement or periods of performance. We emphasize, as we did in our September 5, 2019, decision examining GSA's actions, that agencies should enter into interagency agreements only with documentation that clearly shows the terms of the agreement and indicates mutual assent. B-330775, Sept. 5, 2019, at 10 n.10.

on the Federal Buildings Fund that apply to such obligations. See B-234427, Aug. 10, 1989; 21 Comp. Gen. 254 (1941); 18 Comp. Gen. 489 (1938). We previously concluded that GSA properly obligated amounts in the Federal Buildings Fund for this purpose. B-330775, Sept. 5, 2019, at 9. By virtue of the specific statute requiring this agreement and authorizing this funding mechanism, we do not object to the Park Service temporarily charging, and crediting with reimbursements from GSA, its Construction appropriation here. Cf. Response Letter, at 6 (noting that the Park Service includes “record[ing] transactions related to reimbursable activities and agreements” in its budget request for its Construction appropriation account); December MOA, at 5 (providing that GSA will transfer funding to the Park Service).

For the salaries of the two Park Service officials who executed the interagency agreements with GSA during the lapse in appropriations, the Park Service obligated the ONPS appropriation. Unlike the Construction appropriation, the ONPS appropriation is a one-year appropriation, which expired with the commencement of the lapse, and so, the Park Service did not have available budget authority at the time it incurred these obligations. See, e.g., Pub. L. No. 115-141, 132 Stat. at 640. As such, the Park Service could permissibly incur obligations only if an exception to the Antideficiency Act permitted it to do so. See, e.g., B-330775, Sept. 5, 2019, at 7.

Here, the Park Service did not argue that executing the interagency agreements constituted an excepted function. Rather, the Park Service asserted that the two officials who signed the interagency agreements with GSA were recalled to perform other functions properly designated as excepted under the Antideficiency Act’s exception for “emergencies involving . . . the protection of property” and that the officials had “intermittent availability for non-excepted requirements.” 31 U.S.C. § 1342; see Response Letter, at 6–7; August 4 Conversation.

Under the Antideficiency Act’s exception for emergencies to protect property, an agency must demonstrate: (1) the property involved is government-owned property or property for which the government has a responsibility, and (2) the specific functions performed do not include those functions that, if suspended, would not “imminently threaten” the protection of property. 31 U.S.C. § 1342; B-331093, Oct. 22, 2019. Because the Antideficiency 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, at 7.

Regarding the first requirement, the two Park Service officials performed functions related to property in the National Capital Region that is within the Park Service’s jurisdiction.⁴ August 4 Conversation. Because such property is government-owned

⁴ The Park Service’s National Capital Region includes parks, memorials, and buildings throughout the Washington, D.C. area, including the Belmont-Paul Women’s Equality National Monument, Ford’s Theatre National Historic Site, Martin

and the Park Service has a responsibility for the property, we conclude that these areas constitute property within the meaning of the Antideficiency Act. See 54 U.S.C. §§ 100101, 100501; B-331093, Oct. 22, 2019, at 6; see *also* August 4 Conversation.

On the second requirement—whether the suspension of the functions would imminently threaten the protection of property—Interior explained that the two Park Service officials who signed the interagency agreements held leadership positions within the Park Service’s National Capital Region and were charged with addressing and coordinating an immediate response to any threats to property under the Park Service’s jurisdiction within that region. August 4 Conversation. To enable prompt action in response to any threats, the officials’ responsibilities included liaising with other entities, such as the D.C. government or the United States Park Police, and, if necessary, determining whether and when to recall additional Park Service employees to perform functions properly excepted under the Antideficiency Act. August 4 Conversation.

Given the Park Service’s mission and statutory responsibilities related to the subject government property and the nature of these officials’ leadership duties, we conclude that the Park Service could permissibly obligate amounts for the salaries of these two Park Service officials under the Antideficiency Act’s exception for emergencies to protect property. Specifically, because the officials’ responsibilities included coordinating an immediate response to protect government property in the event of an emergency, we conclude that the Park Service could incur obligations for the salaries of these officials under such exception to ensure that they would be available to perform the excepted functions as needed.⁵

The remaining issue is whether the officials were permitted to perform other, non-excepted functions, such as executing the interagency agreements with GSA, while they remained at work but were not actively performing the excepted functions.

We addressed a similar situation when the Farm Service Agency (FSA), within the U.S. Department of Agriculture (USDA), recalled certain employees to perform excepted functions during the fiscal year 2019 lapse in appropriations. B-331092,

Luther King, Jr. Memorial, and Washington Monument. August 4 Conversation; Park Service, *Region 1: National Capital Area*, available at <https://www.nps.gov/orgs/1465/visit-the-parks.htm> (last visited Sept. 29, 2020).

⁵ In this decision, we address only whether the Park Service could obligate amounts for the salaries of the leadership officials who signed the interagency agreements with GSA on December 28, 2018, and January 4, 2019. In a separate decision, we addressed the Park Service’s use of its appropriations for the purposes of maintaining national park sites that remained accessible to visitors during the fiscal year 2019 lapse in appropriations. B-330776, Sept. 5, 2019 (concluding that the Park Service violated the purpose statute and the Antideficiency Act).

June 29, 2020. According to USDA, the employees had to remain at work to be ready to perform the excepted functions even though this resulted in periods of time when the employees were not actively performing, and were not expected to perform, the excepted functions. *Id.*, at 8. In that regard, USDA provided that the employees performed non-excepted work during the “intervals between excepted activities [that] were too short to enable the employee to be furloughed.” *Id.* Because the employees’ readiness was critical to performance of the excepted functions, the agency properly incurred obligations for the employees’ salaries for the entire period of time the employees had to maintain readiness. *Id.* In those limited circumstances, we did not object to the employees’ performance of the non-excepted functions. *Id.*

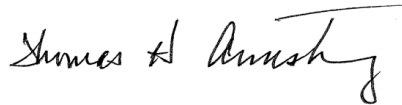
Central to that conclusion were three fact-specific conditions regarding the nature of each excepted function. First, we concluded that the permissibility of the excepted activity was a necessary prerequisite to the permissibility of the non-excepted activity. *Id.* Second, we concluded that the nature of the excepted activity must require that the employee remain at work to be immediately available to perform the excepted activity. *Id.* Third, we highlighted that the excepted work must take priority. *Id.* That is, that the employee may perform the non-excepted work only during intervals of time that the employee is not performing, and is not expected to perform, the excepted work and that the performance of a non-excepted activity must not interfere with the proper execution of, or readiness to perform, the excepted activity. *Id.*

Here, the Park Service permissibly incurred obligations for the salaries of the two officials who signed the interagency agreements with GSA because the officials were recalled to perform activities that fell under the Antideficiency Act’s exception for emergencies to protect property. Further, consistent with the second condition outlined above, Interior indicated that each official’s readiness to perform the excepted function was critical to the performance of the excepted function. August 4 Conversation. Additionally, in keeping with the third condition, Interior provided that the officials performed the non-excepted work only during intervals of time when each official was not performing, and was not expected to perform, the excepted work and that the officials’ performance of the non-excepted activity did not in any way interfere with the proper execution of, or each official’s readiness to perform, the excepted activity. *Id.* Under these limited circumstances, we do not object to the Park Service’s decision to allow these two Park Service officials to perform the non-excepted functions at issue here.⁶

⁶ During the lapse in appropriations, an official in the Park Service Office of the Comptroller appropriately highlighted the limited nature of an employee’s authority to perform non-excepted functions and also emphasized that “[e]mployees should document any use of this *very narrow* allowance.” E-mail from Park Service Official, Office of the Comptroller, to Park Service Officials, *Subject: very narrow allowance for non-excepted de minimis work* (Dec. 28, 2018) (emphasis with bold and underline in original).

CONCLUSION

The Park Service did not violate the Antideficiency Act when it incurred obligations for the salaries of the employees who operated the observation tower during the lapse in appropriations because the Park Service obligated available budget authority. In addition, the Park Service permissibly relied on the exception to the Antideficiency Act for emergencies to protect property when it incurred obligations for the salaries of two Park Service officials who signed interagency agreements related to the observation tower with GSA during the lapse in appropriations.

A handwritten signature in black ink, appearing to read "Thomas H. Armstrong". The signature is fluid and cursive, with a long horizontal line extending from the end.

Thomas H. Armstrong
General Counsel