Federal Financial Management NEWS
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Human capital is the missing link, GAO says

The General Accounting Office (GAO) has recently released its biennial "high-risk" list, a report of all federal programs and functions that are most vulnerable to waste, fraud, and mismanagement. Since 1999, GAO has removed 5 items from the list and added one new one. *See table for details.*

Senator Joe Lieberman (D-Ct) expressed his satisfaction with the results. "I think it's a substantial achievement to be able to say that five areas have been removed from the list this year," he said. "These problems are generally long-standing and deep-rooted, and therefore, require significant agency commitment, planning, and effort to resolve."

In the report, GAO noted that agencies are taking the mismanagement problems seriously, and have made progress, overall, to correct them. GAO has made only one addition this year – strategic human capital management. Human capital management, GAO says, is the critical missing link to reforming and modernizing the government's management practices.

Many agencies are experiencing serious human capital challenges, including

- skills imbalances;

High Risk Designations Removed

High-Risk Area	Year Added	Year Removed
Pension Benefit Guaranty Corporation	1990	1995
State Department Management of Overseas Real Property	1990	1995
Federal Transit Administration Grant Management	1990	1995
Bank Insurance Fund	1991	1995
Resolution Trust Corporation	1990	1995
Customs Service Financial Management	1991	1999
The Year 2000 Computing Challenge	1997	2001
The 2000 Census	1997	2001
Superfund Program	1990	2001
Farm Loan Programs	1990	2001
National Weather Service Modernization	1995	2001

- succession planning problems;
- outdated performance management systems; and
- understaffing.

The challenges undermine agencies' abilities to accomplish their missions, GAO concluded. In addition, the human capital management issues contribute to problems across the the entire federal government.

GAO has taken steps to improve human capital management, and is currently working with agencies, the Office of Management and Budget (OMB), the Office of Personnel Management (OPM), and members of Congress to plan outreach throughout the government.

OMB okays promotions

The Office of Management and Budget (OMB) has excepted promotions and within-grade increases from the hiring controls recently established by President Bush. The exceptions were noted in a guidance bulletin published by OMB.

Federal departments and agencies without appointed heads in place are prohibited from making hiring decisions, according to restrictions established by the Bush administration in a January 20, 2001, memorandum. Once appointed agency heads have been approved by Congress, the controls no longer apply and hiring authority may be delegated by the appointed individual.

The Office of Personnel Management (OPM) issued a notice on January 22, 2001, affirming that the controls applied to all hiring decisions, including appointment, promotion, and reassignment at all grade levels. Mitchell Daniels, the new director of OMB, however, published the January 30 bulletin superceding OPM's notice. OMB's guidance states that the hiring controls apply to all federal employment decisions, except

- internal career ladder promotions and within grade increases;
- appointments approved by Andrew Card;
- placement of individuals with restoration rights, such as restoration after absence with injury compensation and restoration after military duty;
- placement of an agency's surplus and displaced employees who are eligible under the Career Transition Assistance Program; and
- conversion to the competitive service of individuals completing employment programs with conversion authority, such as Veterans Readjustment Act appointments, Thirty-Percent Disabled Veterans, and Presidential Management Interns.

OMB, in conjunction with the Bush administration, expects all agency heads to develop long-term plans describing how their agencies will reduce federal management positions within the next 4 years. Further guidance on the plans will be published by OMB within the next few months.

OMB expects that the controls implemented by the Bush administration will ensure that the President's appointees have the opportunity to make personnel decisions consistent with government reform goals.

Events Calendar

30th Annual JFMIP Conference:
New Horizons for Financial Management

When: March 13, 2001

Where: Hilton Washington and Towers, Washington, DC

Contact: *http://grad.usda.gov/Conferences/JFMIPRegForm.cfm*

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Budget Status

The Fiscal Year 2002 Budget will be released this month. Look for details next month.

FMS to discontinue print edition of TFM

The Financial Management Service (FMS) has recently announced that it will phase out print versions of the Treasury Financial Manual (TFM) within the next two years. Along with the TFM, FMS will also be discontinuing print copies of the FAST Book and the Standard General Ledger (SGL).

FMS' decision to phase out print distribution of these documents will bring the organization closer to complying with the Paperwork Reduction Act of 1995 (P.L. 104-3) and the Government Paperwork Elimination Act (P.L. 105-27). In addition, the plan will save FMS substantial printing costs.

FAST Book customers have already been notified that the final printed copies will be sent out during the first quarter of calendar year 2001. FMS will also stop print publication of the SGL no later than the second quarter of 2001.

Over the next year, TFM transmittal letters will include a notice of FMS' intentions to discontinue print updates. FMS expects all TFM chapters to be available via internet only by the end of 2001. The TFM is currently available online at *www.fms.treas.gov/tfm/index.html*.

Decisions

FAA may use funds to tear down structures it does not own

RULE: *FAA may use its appropriations to demolish air traffic control towers that are not owned by the government under the necessary expense doctrine.*

B-286457

Federal appropriations may only be used for statutorily approved purposes. What constitutes an "approved purpose" is not always clear when applying the necessary expense doctrine, however, as is demonstrated by the following case.

The Department of Transportation's fiscal year 2001 Appropriations Act authorized the Federal Aviation Administration (FAA) to use federal funds to construct new air traffic control towers (ATCTs) at 50 airports throughout the country. The FAA has already begun construction of an ATCT at LaGuardia Airport in Flushing, New York.

The FAA originally planned to partially demolish the existing ATCT so that it would not obstruct the view of the new one. The New York and New Jersey Port Authority, which owns the existing tower, objected to the plan. It complained that a partially demolished tower would be an "eye sore." It informed the FAA that it would not agree to pay any of the costs of removing the existing ATCT, but, nonetheless, requested that the agency demolish the entire structure.

The FAA was uncertain whether it had statutory authority to use its appropriations to completely tear down the tower. It requested an advance decision from the General Accounting Office (GAO) on whether the use of federal money for such an expense was proper. To support the ATCT's complete destruction, the agency explained that the electrical wiring hub of the existing tower is located underground at the structure's base. As a result, it would be difficult to access and modify the wiring for the new tower if the old one remained standing.

GAO found that the agency could use its funds for the proposed purpose. It noted that appropriated funds may only be used for authorized purposes. However, under the necessary expense doctrine, even if a particular expense is not specifically provided for in an appropriations act, the expenditure is permissible if "it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of the function, and if it is not otherwise prohibited by law." Determining whether a particular expense is "necessary" is a matter of agency discretion, and GAO will only overturn that decision if it determines that the connection between the expense and a specifically authorized purpose is not reasonably related.

Here, the DOT FY 2001 Appropriations Act did not specifically authorize the FAA to use federal funds to demolish existing ATCTs. Rather, it provided that appropriations were available for the "necessary expenses of acquisition, establishment, and improvement of air navigation and experimental facilities and equipment." GAO emphasized, however, that the conferees to the Act identified $145 million for "replacement of air traffic control towers and other terminal facilities." More importantly, the conferees specifically agreed that LaGuardia Airport would receive $23 million of these funds. In light of the conferees' statements, use of federal money to tear down an ATCT should be considered an expected expense, and therefore, a reasonably necessary one.

Although GAO noted that as a general rule, agencies may not use appropriated funds to make permanent improvements to property not owned by the government, *See 65 Comp. Gen. 722 (1986)*, it found that the prohibition was not applicable in this case. The prohibition enforces the notion that to permit such improvements would constitute a gratuity to the property owner which government officials are not permitted to make in absence of specific statutory authority. The prohibition constitutes public policy and not a statutory requirement, however; and GAO recognized it had made in the past based on the facts and circumstances of particular cases. In the present case, GAO found that it need not determine whether an exception applied. It found that the FY 2001 Act provided statutory authority to make the improvements.

Matter of: Demolition of the Existing LaGuardia Air Traffic Control Tower, January 29, 2001.

DOE gets the "cold" shoulder from GAO

RULE: *Transfers of funds between accounts are prohibited unless specifically permitted by statute.*

B-286661

As a general rule, agencies cannot transfer funds between accounts unless specifically authorized by statute. What constitutes "statutory authorization" is not always clear as is demonstrated by the following case.

The Energy Policy Act of 1992 (P.L. 102-486) established the United States Enrichment Corporation (USEC). The USEC's chief activities included leasing and operating the Department of Energy's (DOE) uranium enrichment facilities at Pikerton and Paducah.

The 1992 Act established a revolving fund in the Department of the Treasury – United States Enrichment Corporation Fund (Fund). The Fund was available to the USEC "without need for further appropriation and without fiscal year limitation, for carrying out its purposes, functions, and powers."

In 1996, Congress enacted the USEC Privatization Act (P.L. 104-134) which authorized the establishment of a private, non-profit corporation and the transfer of ownership of the assets and obligations of the government-owned USEC to that private corporation. The Act also required that USEC, "concurrent with privatization, transfer the private corporation such funds in accounts of the USEC held by the Treasury or on deposit with any bank or other financial institution as approved by the Secretary of the Treasury." Finally, the Act provided that expenses of privatization would be paid from the USEC's revenue accounts in the Treasury, including the USEC Fund.

Two years after the enactment of the Privatization Act, Congress passed legislation, the McConnell Act (P.L. 105-204), which reserved a portion of the USEC Fund for disposition of depleted uranium at the DOE enrichment plants. That Act "fenced off" a portion of the USEC Fund to finance the construction and operation of facilities to treat and recycle uranium at the Portsmouth and Paducah plants.

On July 28, 1998, proceeds from the transfer of the government's interest ($1.885 billion) in the USEC were deposited in a special account in the Treasury, in accordance with P.L. 105-204. In addition, specified assets of the USEC were transferred to the private corporation while the remaining balances in the USEC Fund were kept on the books of the Treasury.

As a result of the Privatization and McConnell Acts, the USEC Fund was available only for 2 purposes: (1) environmental clean-up under the McConnell Act; and (2) expenses of privatization.

On September 30, 1998, DOE transferred $725 million from the USEC Fund to miscellaneous receipts in the Treasury. It was unclear why the transfer was made.

Two years later, USEC announced that it intended to privatize the Portsmouth gaseous diffusion plant. However, before privatization was complete, DOE intended to keep the plant in "cold standby" status. On October 6, 2000, DOE requested the Department of the Treasury to move the $725 that was transferred on September 30, 1998, back to the USEC Fund to pay the costs of privatizing the plant and keep it in standby status. In addition, DOE informed the Treasury that it intended to use the balance to build an advanced centrifuge technology demonstration plant for gas centrifuge uranium enrichment.

Senator Peter Domenici (R-NM), Chairman of the Senate Subcommittee on Energy and Water Development, learned of the transfer and expressed concern over its legality. He requested an opinion from the General Accounting Office (GAO).

GAO ruled that the $725 million was properly credited back to DOE and remains available for obligation. However, it found that the returned money could not be used to keep the Portsmouth Plant in "cold standby" or develop a demonstration plant since these expenses were not authorized by the USEC Privatization Act (P.L. 104-134).

According to GAO, transfers between accounts are generally prohibited without statutory authority. Here, DOE cited section 3103(b) of P.L. 104-134 as authority for the original transfer from the USEC Fund. The provision provided that, "proceeds from the sale of the United States' interest in the Corporation shall be deposited in the general fund of the Treasury." The $725 million, however, was not proceeds from the "sale of the United States' interest in the [USEC]." Rather, the transferred money resulted from USEC's business operations that were not transferred at the time of its sale to the private corporation.

GAO noted that the timing and circumstances of the transfer were more consistent with a year-end Capital Transfer authorized by the 1992 Privatization Act. That Act, however, was repealed in 1996, and therefore, could not provide statutory authority for the transfer.

Since DOE's original transfer of money from the USEC Fund lacked authorization, the return of that money to the account was not only permissible, it was required.

Although the returned funds were available for the expense of privatization, GAO did not find that DOE's planned expenditures qualified for transfer under the 1996 Privatization Act. GAO noted that the Privatization Act refers to those expenses necessary to bring about the privatization of the USEC. However, DOE's planned expenditures represent the costs of the consequences of privatization. To permit DOE to spend USEC Fund money for these purposes would exceed the authorization established by the Privatization Act and violate section 1301(a) of Title 31 of the U.S. Code which provides that appropriations must be applied only to "the objects for which the appropriation were made."

In support of its finding, GAO noted that the definitions of "privatization" contained in the Act as well as the statute's legislative history suggest that the transfer of funds should represent a transaction and not a continuing activity. Here, DOE should have sought to develop the demonstration plant and place the Portsmouth plant in standby status back in 1998 when the plants were initially privatized. For money to be used for DOE's proposed purposes, the agency should request Congress to rescind or transfer the balance of the USEC Fund not reserved under the McConnell Act.

Subject: USEC Portsmouth Gaseous Diffusion Plant "Cold Standby" Plan, January 19, 2001.

D.C. Courts can augment their appropriations

RULE: *Agencies may use gifts or donations to augment their appropriations only if they have specific statutory authority.*

B-286182

As a general rule, agencies may not use gifts or donations to augment their appropriations unless they have statutory authority. Such authority should be explicit, as is demonstrated by the following case.

As part of a settlement agreement between the District of Columbia's Office of the People's Counsel and Verizon Communications, the District of Columbia's Public Service Commission (Commission) approved a price cap plan in late 1999. The plan was an alternative form of regulation that used market-based incentives with prices caps. In addition, the plan required Verizon to provide $1.53 million worth of services and equipment to the District of Columbia Courts (Courts). The services and equipment were to be administered by a trust fund created by the District of Columbia.

The Courts expressed concern over the legality of accepting such services and equipment. It requested an advance opinion from the General Accounting Office (GAO) on whether acceptance of such items constituted an illegal augmentation of its appropriation.

GAO found that the Courts could accept and use the services and equipment. It noted that generally an agency may not augment its appropriation from outside sources without specific statutory authority. The "miscellaneous receipts" statute requires that any "outside" money received must be deposited into the general fund of the Department of the Treasury absent statutory authority to the contrary. *See 31 U.S.C. § 3302(b)*. Similar statutes also apply specifically to the District of Columbia. Section 446 of the District of Columbia Home Rule Act provides that "no amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been approved by an Act of

Congress." Similarly, section 450 of the same Act requires all money received by the Courts to be deposited with the Department of the Treasury or the Crime Victims Fund.

Here, the Courts had explicit statutory authority to use the services and equipment. Congress had authorized the District of Columbia to accept and use gifts or donations in annual appropriations acts for fiscal years 1992 through 2000. This authority was specifically extended to Courts in the District's FY 2001 Appropriations Act. The applicable provision provides that the Courts may accept and use a gift or donation if they are used to carry out authorized functions or duties.

As a concluding note, GAO emphasized that even if the Courts had not been authorized by its appropriations to accept gifts, it would have been authorized to use the goods and services. It recognized that in previous cases it has defined gifts as "gratuitous conveyances or transfers of ownership in property without any consideration." *See 25 Comp. Gen. 637 (1946).* In the present case, the telecommunications equipment and services provided by Verizon represented the costs, i.e., consideration, of its settlement agreement with the District of Columbia. Accordingly, agencies are not prohibited from accepting and using non-gratuitous conveyances.

Matter of: Contribution of Telecommunications Services to the D.C. Courts, January 11, 2001.

Tom's Corner

Q: May our supply office sell unwanted or unusable equipment to a local company and use the proceeds to buy new and usable equipment?

A: Definitely not. A law provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury." This is commonly called the miscellaneous receipts statute, and is quoted in *Principles of Federal Appropriations Law* page 6-105.

Note another law on page 6-107 near the top. 40 U.S.C. 485(a) requires that proceeds from the sale of surplus public property also go to the Treasury.

This may seem unfair, but a basic theory is that property belongs to the government not to the agency, even if that agency originally bought the property out of its own funds. Therefore any money received from selling the property goes back to the government.

Correction

In the second-to-last sentence of last month's column, there is a misprint. *See the* Federal Financial Management News*, January 15, 2001, page 6.* The sentence should read, "I've heard rumors that such fees are ***now*** allowed, but have not actually seen any specific references." Please send any examples you have via email to *Publications@managementconcepts.com.*

Not all grants must be awarded competitively

RULE: *If the terms of an appropriations act are unclear, Congress' intent must govern how the funds may be distributed.*

B-285794

An agency's appropriations act represents one of the first sources to review in determining how its funds may be distributed. Unfortunately, the language of appropriations bills are not always clear. As a result, Congress' intentions must occasionally be deciphered to determine the permissible and prohibited uses for those funds, as is demonstrated by the following case.

The Department of Housing and Urban Development (HUD) received an appropriation of $4.675 million in fiscal year 1998 for its Community Development Block Grant program. Of that amount, $25 million from the Rural Housing and Economic Development (RHED) grants was earmarked for rural and tribal areas to test comprehensive approaches to developing a job base through economic development, developing affordable low- and moderate-income rental and homeownership housing, and increasing the investment of both private and nonprofit capital.

HUD issued 3 RHED grants to 2 Indian tribes on a noncompetitive basis.

The agency's Inspector General (IG) reviewed the awards and found that they were improper since they should have been awarded competitively. It reasoned that the RHED earmark appears under the Community Development Block program. The fiscal year 1998 Departments of Veterans Affairs and Housing and Urban Development Appropriations Act which funded the program required grants made under it to be awarded on a competitive basis.

The IG requested an opinion from the General Accounting Office (GAO) on whether the awards were proper.

GAO found that they were. It noted that although the RHED earmark appeared under the Community Development Block program title in the appropriations act, it was not governed by that program's requirements.

In general, a section of a statute should be read to apply to all provisions under that heading unless Congress has intended otherwise. Here, the language of the section containing the Community Development Block program provided that all assistance awarded "under this heading" must be issued on a competitive basis. The section, however, is silent on whether the competitive requirements of the program explicitly applied to the RHED earmark.

GAO interpreted that silence as evidence that Congress did not intend to impose competitive requirement on the RHED grants. It noted that for the most part, when Congress used the phrase "under this heading" in the section, it was referring to the Community Development Block program lump sum appropriation. As evidence of its conclusion, it noted that the competition requirement appeared in a separate paragraph from the earmark. In addition, it reviewed the purpose of the RHED grants and determined that competition was not consistent with Congress' wishes in issuing the grants.

The RHED grants were intended to assist rural and tribal areas in improving economic development and housing opportunities. Requiring the awards to be made competitively would not further Congress' wishes in providing the assistance.

Matter of: Department of Housing and Urban Development — Competitive Selection of Recipients for Rural Housing and Economic Development Grants, December 5, 2000. 🗁

Employee Corner

Q: Must agencies pay interest on payments owed to a deceased employee's estate as a result of excess retirement deductions?

A: No. *See Edward N. Maurer, Estate of Ely Maurer, Russell A. Maurer v. Office of Personnel Management, U.S. Court of Appeals for the Federal Cicruit, Case no. 00-3100, January 17, 2001.*

In the case, the estate of Ely Maurer, a federal employee for 59 years, sued the Office of Personnel Management for interest on voluntary contributions to the Civil Service Retirement System (CSRS) due Maurer's estate after his death. Maurer had reached the maximum annuity level under the CSRS after 42 years of service. He, however, continued to work as an active employee for an additional 17 years before his death.

According to federal law, after an employee reaches the maximum annuity level, mandatory retirement deductions continue to be withheld from the employee's pay, but because the employee's annuity does not increase, the deductions are considered "excess" and are subject to refund under section 8342(a) of Title 5 of the U.S. Code.

Following Maurer's death, OPM proposed to pay a refund of the excess deductions to his estate. It calculated the refund to be equal to the excess deductions, plus interest at 3 percent a year compounded annually to the date of his death. OPM did not propose to pay any interest for the period between Maurer's death and the actual payment of the refund. Maurer's estate disagreed with the agency's calculation and appealed to the Merit Systems Protection Board (MSPB). The Board denied the appeal. Maurer's estate appealed to the Federal Court of Appeals.

The Court agreed with MSPB's ruling. It noted that section 8342(a)(1) makes clear that post-death interest is not payable on excess contributions. The statute provides that interest is paid to the "date of payment, separation, or transfer." Although separation is not defined to include death, the term in employment and retirement contexts is commonly understood to include this event. As a result, that definition should be applied here.

Maurer's estate argued that the term "separation" should not be defined to include death since such a definition of the term would be inappropriate in sections 8343(a)(2) and 8343(d). For example, section 8343(d) refers to an employee who returns to work after separation, which of course excludes employees who separated because of death.

The Court was not persuaded. It emphasized that the fact that the term as defined to include death does not apply to all circumstances does not mean that the definition is wrong in the instant context. Given the purpose of the section, to define separation to include death was a reasonable and controlling interpretation of the provision since no evidence exists that Congress intended otherwise.

Overpayment debt can increase over tax years

RULE: *The return of erroneous overpayments across tax years can increase the gross amount an employee owes.*

Claims Case No. 00081602

An employee is liable for erroneous payments of which he/she was aware. If an employee chooses to repay that debt over multiple tax years, the total amount owed may increase, and the employee will be liable for the enlarged amount, as is demonstrated by the following case.

An employee of the Naval Amphibase Child Development Center resigned her position on January 29, 1999. Due to an administrative error, she continued to receive salary payments until March 13, 1999. The overpayments totaled $2,000.

When the employee received her first erroneous salary payment in the net amount of $755.77, she contacted her former supervisor and informed him that she would write a personal check for the overage amount. She was advised to keep the check until the situation was resolved. Upon receiving additional checks in the mail, the employee made repeated attempts to resolve the problem.

Finally, in July 1999, the Defense Finance and Accounting Service (DFAS) notified her that she had been overpaid $2,000. She did not refute that she had been overpaid, but she calculated that overpayments only totaled $1,511.42. She based her calculations on the net amount of 2 salary payments.

Only July 7, 1999, the employee completed a Voluntary Repayment Agreement to repay her perceived debt of $1,514.54 in $40 per month payments. In April 2000, DFAS contacted her and informed her that she owed an additional $304.88. It explained that its initial calculation of the overpayments ($2,000) was incorrect. However, since the repayment schedule extended into a new taxable year, the debt amount had changed to $1,816.42 since it was unable to recover the entire amount of federal income tax withheld that stretched over 2 tax years.

The employee requested a waiver of $304.88 – the difference between her initial debt and the added amount due to the new taxable year. DFAS denied the request. The employee appealed to the Department of Defense Office of Hearings and Appeals.

The Board denied the appeal. It emphasized that the overpayments were the result of administrative error and there was no indication of fraud, misrepresentation or lack of good faith by the employee. As a result, no basis for a waiver existed.

While the Board recognized that she was ready to pay the debt when she initially discovered it, the erroneous payments continued. Therefore, she remained obligated to pay the gross amount of the overpayments minus the amount of deductions DFAS was able to recover on her behalf.

November 22, 2000.