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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Denali Commission—Anti-Lobbying Restrictions

File: B-317821

Date: June 30, 2009

DIGEST

Anti-lobbying provisions prohibit Commissioners and their personal staff as well as agency officials from using appropriated funds to engage in grassroots lobbying by encouraging interest groups to contact Members of Congress and their staff regarding Denali's reauthorization. The Byrd Amendment prohibits Commissioners and their personal staff, in their role as grantees, from using grant funds to lobby Members of Congress and their staff in connection with the making of a grant. Commissioners and their personal staff may be reimbursed for travel expenses incurred while conducting the official business of the agency.

DECISION

The Inspector General of the Denali Commission has requested an advance decision on the availability of the Denali Commission's appropriations to contact Members of Congress and congressional staff about the agency's reauthorization, including the use of appropriations for related travel costs. Letter from Mike Marsh, Inspector General, Denali Commission, to Susan Poling, Managing Associate General Counsel, GAO, Feb. 6, 2009 (Denali Request Letter). In this regard, the Inspector General has asked specifically whether Denali Commissioners and their personal staff, who are not federal employees, may contact Members of Congress and congressional staff for this purpose, and whether the agency may provide travel funding for Commissioners and their personal staff for this purpose.

As explained below, we conclude that when performing their duties as Commissioners, Commissioners (and their staff acting in support of or on behalf of Commissioners) may contact Members of Congress and congressional staff regarding the Denali Commission's reauthorization and other agency business. Anti-lobbying provisions, however, prohibit Commissioners, when being compensated or reimbursed, including *per diem*, in performance of their duties as Commissioners, and their personal staff from engaging in grassroots lobbying. The so-called Byrd

Amendment, 31 U.S.C. § 1352, prohibits Commissioners and their staff from using grant or contract funds to influence Members of Congress and congressional staff in connection with the award of a federal grant or contract. The agency's appropriations are available to reimburse Commissioners and their personal staff for travel expenses incurred while conducting the official business of the agency.

Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record 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. Consistent with our practice, we sought additional information regarding agency activities. Telephone Conversation between Mike Marsh, Inspector General, Denali Commission; Corrine Eilo, Director of Administration, Denali Commission; Thomas H. Armstrong, Assistant General Counsel, GAO; and Crystal Wesco, Staff Attorney, GAO (Feb. 23, 2009) (February 2009 Teleconference). In a subsequent meeting, the Inspector General provided additional clarifying information. Meeting between Mike Marsh, Inspector General, Denali Commission; Tom Armstrong, Assistant General Counsel, GAO, and Crystal Wesco, Staff Attorney, GAO (Mar. 19, 2009) (March 2009 Meeting).

BACKGROUND

Congress established the Denali Commission as a federal agency in the Denali Commission Act of 1998. Pub. L. No. 105-277, § 301, 112 Stat. 2681-1, 2681-637, 42 U.S.C. § 3121 note (Oct. 21, 1998). This federal agency operates exclusively in, and for the benefit of, the State of Alaska for the purposes of: (1) delivering the services of the federal government in the most cost-effective manner practicable by reducing administrative and overhead costs; (2) providing job training and other economic development services in rural communities; and (3) promoting rural development, providing power generation and transmission facilities, modern communication systems, water and sewer systems and other infrastructure needs. *Id.* § 302. One way in which the agency carries out its purpose is to make grants to the State of Alaska and various interest groups to implement specific projects. Congress has traditionally funded the agency through an annual "base" appropriation and several specialized appropriations for particular subject areas (*e.g.,* clinics, solid waste, job training). Denali Request Letter. In fiscal year 2009, Congress appropriated $11,800,000, to remain available until expended, for "the expenses of the Denali Commission including the purchase, construction, and acquisition of plant and capital equipment as necessary and other expenses." Pub. L. No. 111-8, 123 Stat. 524, 628 (Mar. 11, 2009). Congress also appropriated several specialized appropriations for the Denali Commission in fiscal year 2009, including, for example, $434,000, to remain available until expended, to address deficiencies in solid waste disposal sites that threaten to contaminate rural drinking water supplies. Pub. L. No. 111-8, § 716.

The Denali Commission effectively consists of two groups: the Commissioners and the agency itself. There are seven Commissioners who form the Commission, as provided by the Denali Commission Act. Six Commissioners are, by statute, officials of the State of Alaska or Alaska organizations, including the Governor of Alaska (or

her nominee) who serves as the State Co-chair. The Denali Commission Act designates, in addition to the Governor of Alaska, the President of the University of Alaska, the President of the Alaska Municipal League, the President of the Alaska Federation of Natives, the Executive President of the Alaska State AFL-CIO, and the President of the Associated General Contractors of Alaska as the remaining nonfederal Commissioners. Pub. L. No. 105-277, § 303(b). Many of the Commissioners are officials of organizations who receive federal grants from the agency or whose members receive federal grants. The seventh member is a federal official who serves as the Federal Co-chair and is appointed by the Secretary of Commerce to a four-year term. *Id.* § 303(b)(2)(B).

The Commissioners' statutory role is to propose a work plan for providing federal financial assistance in Alaska.[1] The Commissioners present the proposed work plan to the Federal Co-chair who approves or disapproves it.[2] *Id.* § 304(b). The Department of Justice has determined that the Commissioners are "special government employees."[3] They receive reimbursement for travel, including *per diem* when engaged in agency business.[4] February 2009 Teleconference.

The Denali Commission Act authorizes the Federal Co-chair to appoint agency staff. *Id.* § 306(c). The employees along with the Federal Co-chair comprise the federal agency.[5] Some Commissioners have personal staff who assist them in carrying out

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[1] The agency solicits project proposals from local governments and other entities and organizations in Alaska for rural and infrastructure development and job training in the area covered under the work plan. Pub. L. No. 105-277, § 304.

[2] The Federal Co-chair is also vested with the authority to break any tie in the Commissioners' votes. Pub. L. No. 105-277, § 304(b)(2)(C).

[3] E-mail from Brad Smith, Attorney-Advisor, Office of Legal Counsel, Department of Justice, to George Cannelos, Federal Co-Chair, Denali Commission, *Subject: Applicability of 18 U.S.C. § 208 to Members of the Denali Commission,* Dec. 7, 2006. A special government employee is as an officer or employee who is retained, designated, appointed, or employed by the government to perform temporary duties either on a full-time or intermittent basis or a part-time United States commissioner, with or without compensation, for not more than 130 days during any period of 365 consecutive days. 18 U.S.C. § 202(a).

[4] The Denali Commission Act provides that Commissioners are to be paid travel expenses, including *per diem,* "while away from their homes or regular places of business in the performance of services for the Commission." Pub. L. No. 105-277, § 306(b).

[5] For the purposes of this decision, we use "Commissioners" to refer to the six nonfederal Commissioners, and we use "agency" to refer to the Federal Co-chair and

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their duties as Commissioners. February 2009 Teleconference. The Commissioners' personal staff were not hired by the Federal Co-chair and are not agency employees or officials. Instead, the Commissioners' personal staff are employees of the state government entity or interest group represented by the individual Commissioner.[6] They receive no compensation from the agency; however, sometimes they use agency office space and are reimbursed for travel expenses to carry out agency or Commissioners' business. February 2009 Teleconference. A Commissioner's personal staff member generally assists the Commissioner, sometimes setting forth the Commissioner's position or otherwise acting for the Commissioner in meetings. February 2009 Teleconference.

The Denali Commission's authorization expired at the end of fiscal year 2008.[7] A reauthorization bill was introduced in the 110th Congress[8] but was not enacted. Even though the Denali Commission has not yet been reauthorized, it received an appropriation for fiscal year 2009. Pub. L. No. 111-8, 123 Stat. 628 (Mar. 11, 2009). It is well settled that an appropriation without an authorization can act as its own authorization. 71 Comp. Gen. 378 (1992).

ANALYSIS

Because the six nonfederal Commissioners and their personal staff are not agency employees, the Inspector General asked for an advance decision to address the following questions: (1) May Commissioners contact Members of the Alaska congressional delegation, as well as other Members of Congress, regarding the agency's possible reauthorization? (2) May the Commissioners' personal staff discuss reauthorization with Members of Congress and congressional staff? (3) If Commissioners' personal staff, using agency appropriations, travel to Washington, D.C. for the purposes of contacting Members of Congress regarding Denali's reauthorization, may they conduct nonagency business as well? February 2009 Teleconference. We address the first two questions in our discussion, below, of anti-lobbying restrictions. Because many of the Commissioners represent agency

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staff hired by the Federal Co-chair. While the Federal Co-chair is also a Commissioner, we have grouped him with the agency because he is a federal employee. Pub. L. No. 105-277, § 303(b)(2)(B).

[6] For the purposes of this opinion, state government entity refers to the Office of the Governor of Alaska and the University of Alaska. Both the Governor of Alaska and the President of the University of Alaska (or their delegees) serve as Commissioners. Pub. L. No. 105-277, § 303(b).

[7] The Commission was authorized through September 30, 2008. Pub. L. No. 108-7, § 504, 117 Stat. 11, 158 (Feb. 20, 2003).

[8] S. 1368, 110th Cong. (2007).

grantees, our discussion of the application of anti-lobbying restrictions includes a discussion of restrictions imposed on federal grantees. We address the Inspector General's third question in our discussion of travel reimbursements.

Anti-Lobbying Restrictions

The Denali Commission's appropriations are subject to three anti-lobbying restrictions: 18 U.S.C. § 1913; section 501 of the Energy and Water Development and Related Agencies Appropriations Act, 2009, Pub. L. No. 111-8, div. C, title V, § 501, 123 Stat. 524, 630 (Mar. 11, 2009); and, section 717 of the Financial Services and General Government Appropriations Act, 2009, Pub. L. No. 111-8, div. D, title VII, § 717, 123 Stat. at 685.

The prohibition in section 1913 provides that appropriated funds may not be used—

> "directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress . . . to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation . . ."

18 U.S.C. § 1913. Section 1913, however, does not prohibit agency officers or employees from communicating directly with Congress. It states that the prohibition—

> "shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy, or appropriations which they deem necessary for the efficient conduct of the public business . . ."

Id.

Section 501 applies to the agency's fiscal year 2009 appropriations and prohibits their use—

> "in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. 1913."

Pub. L. No. 111-8, § 501.

Section 717 applies to all appropriations enacted in fiscal year 2009 for any executive agency:

> "No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, . . . for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself."

Pub. L. No. 111-8, § 717. Both sections 501 and 717 were enacted in annual appropriations acts and apply only to the appropriations enacted in fiscal year 2009.[9]

All three provisions apply to the agency's use of appropriations. Clearly, they apply to activities of the agency's employees, that is, the Federal Co-chair and his staff. While the six nonfederal Commissioners and their staff are not agency employees, the provisions apply to them as well when a Commissioner is using appropriated funds (for example, is paid *per diem* and travel expenses) in performance of Commissioner duties, or when a Commissioner's personal staff is acting on behalf of or in support of a Commissioner acting in that capacity. As noted above, the agency uses its appropriations to pay Commissioners a *per diem* when the Commissioner is carrying out Commission duties. However, because the three provisions apply to the use of appropriated funds, they do not apply to a Commissioner's activities when the Commissioner is not receiving a *per diem* or when there are no appropriations being used otherwise.

We view section 1913 as well as agency-specific and governmentwide provisions like sections 501 and 717 to prohibit communications designed to encourage members of the public to pressure Members of Congress to support administration or agency legislative or appropriations proposals (also referred to as "grassroots" lobbying).[10]

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[9] Both provisions are, however, regularly enacted as part of the annual appropriations bills. *See, e.g.*, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, §§ 501, 720, 121 Stat. 1844, 1971, 2024 (Dec. 26, 2007).

[10] B-285298, May 22, 2000 (section 1913 and governmentwide provision); B-239856, Apr. 29, 1991 (section 1913 and agency-specific provision). The Department of Justice, which is responsible for enforcement of section 1913, has similarly held that section 1913 prohibits grassroots lobbying. 13 Op. Off. Legal Counsel 300 (1989). Referring to the legislative history of section 1913, Justice has concluded that it prohibits the use of "substantial" grassroots lobbying campaigns; Justice defines a "substantial" campaign to be one that involves the expenditure of $50,000 or more. *Id.*

We have said that anti-lobbying restrictions do not apply to agency officials' direct contact with or appeals to Members of Congress. B-285298, May 22, 2000. Agencies have a legitimate need to communicate with Congress regarding agency funding, policies and activities. *E.g.* B-304715, Apr. 27, 2005. In fact, all three provisions expressly recognize this. In assessing a potential anti-lobbying violation by the Social Security Administration, we made clear that we will avoid construing anti-lobbying provisions in such a way that would unnecessarily or excessively constrain agency officials' communications with Congress. B-304715, Apr. 27, 2005. Therefore, the anti-lobbying provisions would not prohibit the Federal Co-chair and other officials from engaging in discussions with Members of Congress and congressional staff regarding Denali's reauthorization or other agency business. Similarly, contact by Commissioners and Commissioners' staff with Members of Congress and congressional staff with regard to Denali's reauthorization would also be permissible.

All three provisions prohibit grassroots lobbying, that is, encouraging the public, including Alaska interest groups and grantees, to contact Members of Congress regarding reauthorization or other agency-related legislation, policies or appropriations. For example, in a May 2000 decision, we found that an e-mail from staff of the China Trade Relations Working Group (established by the Secretary of Commerce) violated anti-lobbying laws because it appealed to interested organizations and their members to contact a Member of the House of Representatives in support of permanent normal trade relations with China. B-285298, May 22, 2000. However, agency officials and Commissioners, as well as Commissioners' personal staff, may meet with interested groups or otherwise share information with them. In B-239856, Apr. 29, 1991, a representative from the National Endowment for the Arts (NEA), presenting a lecture to members of an arts lobbying group, mentioned, in response to a question from the audience, that members might contact their legislators regarding NEA's reauthorization. We concluded that because the NEA representative was not appealing to the audience to lobby Congress, only answering a question, the representative did not violate the anti-lobbying restrictions. In B-304715, Apr. 27, 2005, analyzing a Social Security Administration publication that detailed the funding problems of the Social Security System, we held that the prohibition requires evidence of a clear or explicit appeal to the public to contact Members of Congress, and that statements that are merely "likely" to influence the public to contact Members of Congress do not violate the prohibition.

As mentioned above, the Commissioners are not only members of the Denali Commission, many of them are also officials of agency grantees or organizations whose members are agency grantees. For example, the State of Alaska receives about 40 percent of available grant funding. E-mail from Mike Marsh, Inspector General, Denali Commission, to Crystal Wesco, Staff Attorney, GAO, *Subject: Denali Request for CG Decision,* Feb. 28, 2009. When Commissioners are not acting as members of the Commission but as officials of their grantee organization, they should be aware of the restrictions imposed by the so-called Byrd Amendment. Codified at 31 U.S.C. § 1352, the Byrd Amendment prohibits the use of appropriated funds awarded to a grantee, or federal contractor, "to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress,

an officer or employee of Congress, or an employee of a Member of Congress in connection with" the award of a federal grant or contract. 31 U.S.C. § 1352(a). For example, in *United States v. National Training and Information Center,* 532 F. Supp. 2d 946 (N.D. Ill. 2007), the court held that the National Training and Information Center (NTIC), a Justice Department grantee, could not use grant funds to pay the salaries of NTIC officials who organized a conference of NTIC sub-recipients for the purpose of lobbying Congress for 2001 grant funding. *National Training and Information Center,* 532 F. Supp. 2d at 959.

Travel Reimbursements

The Denali Commission Act provides for the reimbursement of travel expenses of Commissioners, including *per diem,* incurred in the performance of services for the Commission. Pub. L. No. 105-277, § 306(b). The Act, however, does not address reimbursement of Commissioners' personal staff, who may accompany a Commissioner or travel on behalf of a Commissioner. Agencies are permitted to reimburse travel or transportation expenses of individuals who serve the agency without pay. 5 U.S.C. § 5703. We have not objected to an agency's use of appropriations to reimburse the travel expenses of an individual not employed by the federal government so long as the agency determines, on a case-by-case basis, that that individual's travel costs are a necessary expense of the agency, helping the agency achieve the object of its appropriation. B-259620, Feb. 29, 1996 (agency may pay the travel costs of the spouse of an overseas employee to attend cross-cultural training considered important to the success of the employee's assignment); 60 Comp. Gen. 235, 240 (1981) (the cost of a candidate for employment to travel to Washington, D.C., for a preemployment interview was a necessary expense payable from the agency's appropriation); 37 Comp. Gen. 349 (1957) (agency may pay travel costs of college faculty members for the purpose of consulting with agency officials on recruiting).

The necessary expense determination should be made by the head of the agency, in this case the Federal Co-chair, [11] or an official to whom the agency head has delegated that determination. Consistent with our case law, the Federal Co-chair, in consultation with the Commissioner, must determine that the travel of a Commissioner's personal staff is in the interest of the agency, benefiting the agency by assisting the agency or the Commissioner in performance of the agency's or the Commissioner's duties.

The Inspector General has asked if the agency can use its appropriation to reimburse the travel expenses of a Commissioner's personal staff, traveling with or on behalf of the Commissioner, who, while traveling, conducts nonagency business as well as

[11] Under the Denali Commission Act, the Federal Co-chair establishes the official business of the agency; the Federal Co-chair approves and adopts the work plan proposed by the Commission as well as appoints employees of the agency. Pub. L. No. 105-277, §§ 304(b), 306(c).

Commission business. The question arises because the Commission's statutory structure is such that a Commissioner's interests are often intertwined with the agency's interests, but, at times, could be different, and it might be difficult to discern when a Commissioner's personal staff is traveling on behalf of the Commissioner's service to the Commission and when the travel is on behalf of the organization the Commissioner represents. Heads of agencies (and their delegees), to whom Congress has entrusted the proper use of public money, are often called upon to make difficult decisions in the use of that money. It is incumbent upon the Federal Co-chair or his delegee to ensure that the use of the agency's appropriation serves the purposes for which Congress appropriated the funds to the agency: "For the expenses of the Denali Commission . . ." Pub. L. No. 111-8, 123 Stat. at 628. We do not see any basis for objecting to the agency reimbursing travel expenses where the primary purpose of the travel was in performance, or support, of the Commissioner's services under the Act, notwithstanding that the traveler may have conducted nonagency business incident thereto. *Cf.* B-136762, Aug. 18, 1958.

Since Commissioners' personal staff are not federal employees, their travel is authorized using invitational travel orders. A copy of the agency's travel request form that was provided to us shows that the agency asks that the traveler describe the services to be performed during the travel. *Denali Commission Travel Request/Report*, part II (Direct Service Provided to the Government). Under the Federal Travel Regulation, before the agency makes reimbursement, Denali's nonfederal travelers, like federal travelers, should submit a travel voucher upon completion of travel to confirm the travel took place as authorized. 41 C.F.R. § 301-52 (GSA's Federal Travel Regulation).

CONCLUSION

Denali Commissioners, when performing their duties as Commissioners, may contact members of the Alaska delegation, as well as other Members of Congress, regarding the agency's possible reauthorization or other agency business. Anti-lobbying restrictions do not prohibit such direct contact with Members of Congress. Commissioners' personal staff, who represent, or act for, their Commissioner, also may discuss reauthorization with Members of Congress and their staff. However, anti-lobbying provisions prohibit Commissioners and their personal staff from using appropriated funds to engage in grassroots lobbying by encouraging interest groups and grantees to contact Members of Congress and congressional staff regarding Denali's reauthorization. The Byrd amendment prohibits Commissioners and their personal staff from using grant funds to contact Members of Congress and congressional staff in connection with a grant award.

With regard to travel reimbursements, the Denali Commission Act provides for the reimbursement of travel expenses, including *per diem*, of Commissioners incurred in performance of their service as Commissioners. The Federal Co-chair may use appropriated funds to reimburse travel expenses of the Commissioners' personal staff so long as the Federal Co-chair, or his delegee, determines that the cost is a

necessary expense of the agency and that the primary purpose of the travel was in performance, or support of, the Commissioner's duties to the Denali Commission.

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