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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-198103

February 19, 1981

[Determination As to Whether Hiring Freeze Violates U.S. Code]

The Honorable Alan K. Simpson
Chairman, Committee on Veterans' Affairs
United States Senate

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Dear Mr. Chairman:

This is in response to your concern as to whether the hiring freeze imposed by President Reagan on January 20, 1981, violates section 5010(a)(4) of title 38 of the United States Code. That section requires the Director of the Office of Management and Budget, in each fiscal year, to provide to the Veterans' Administration the full funded personnel ceiling for which the Congress has appropriated funds for the year in three specified accounts. The hiring freeze, on the other hand, with some exceptions, precludes all Executive branch agencies from hiring any employees after January 20, 1981.

As is our usual practice, we requested the views of the concerned agencies--in this instance, the Office of Management and Budget (OMB) and the Veterans' Administration (VA). We have not yet received the formal written comments of OMB. However, we have been told informally that it is OMB's position that: 1. The Director of OMB has already complied with the statute; 2. the temporary hiring freeze is not inconsistent with the full-time employee equivalent (FTE) certification because the VA could use all available staff years after the freeze is lifted; 3. the required certification does not limit the President's authority to impose a Government-wide hiring freeze; and 4. the certification requirement would be satisfied with a deferral report to the Congress delaying availability of some of the funds appropriated for medical care staffing, to be used later on to partially offset the need for a supplemental appropriation to cover the October 1, 1980, pay raise.

In its response to our inquiry the VA takes the position that 38 U.S.C. § 5010(a)(4) is an absolute mandate to OMB to allow VA to fill all positions for which Congress has appropriated funds, and that the President does not have legal authority to prevent VA from hiring to fill those positions.

We agree with the Veterans Administration. For the reasons indicated below, it is our opinion that the presidential hiring freeze is not applicable to the positions which the Congress has required to be released for fiscal year 1981. We also hold that the funds needed to fill these positions may not be deferred or otherwise withheld during fiscal year 1981.

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THE STATUTE

As is relevant to this decision, 38 U.S.C. § 5010(a)(4) provides:

> "(A) With respect to each law making appropriations for the Veterans' Administration, there shall be provided to the Veterans' Administration the funded personnel ceiling defined in subparagraph (D) of this paragraph and the funds appropriated therefore.
>
> "(B) In order to carry out the provisions of subparagraph (A) of this paragraph, the Director of the Office of Management and Budget shall with respect to each such law (i) provide to the Veterans' Administration for the fiscal year concerned such funded personnel ceiling and the funds necessary to achieve such ceiling ***.
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> * * * * *
>
> "(D) For the purposes of this paragraph, the term 'funded personnel ceiling' means, with respect to any fiscal year, the authorization by the Director of the Office of Management and Budget to employ (under the appropriation accounts for medical care, medical and prosthetic research, and medical administration and miscellaneous operating expenses) not less than the number of employees for the employment of which appropriations have been made for such fiscal year."

This provision was passed by the Congress in response to actions by the Administration blocking VA from hiring all the health-care employees for which Congress had appropriated funds. The statute was intended to insure that VA was staffed at the level specified by the Congress by preventing the Administration from withholding funded personnel positions from VA. Thus, in the explanatory statement accompanying the compromise bill which contained paragraph 5010(a)(4), the House and Senate Committees on Veterans' Affairs jointly stated:

> "The compromise agreement requires the Director of OMB to provide to the VA the personnel ceiling for VA health-care staffing for which appropriations are made ***.

> "The Committees believe that it is essential that when the Congress appropriates funds specifically designated for VA personnel levels, OMB not thwart the will of Congrss by requiring the VA to use the funds so appropriated for other purposes (as occurred in fiscal year 1979 when funds appropriated for additional personnel were diverted, at OMB's direction, to cover in part the VA's cost of the Federal government pay raise)." 125 Cong. Rec. H11648 (daily ed., December 6, 1979).

Also, in explaining the compromise bill to the House, Representative Hammerschmidt, Ranking Minority Member of the Subcommittee on Medical Facilities and Benefits, Committee on Veterans' Affairs, said:

> "Another provision is aimed at preventing the recurrence of a situation that generated widespread outrage earlier this year. The Office of Management and Budget directed the Veterans' Administration to use funds appropriated by the Congress to prevent the planned closing of hospital beds within the VA medical system for another purpose. The appropriated funds were used, instead, to absorb the Federal pay raise for VA employees and the bed closings went ahead as planned.
>
> "The Director of OMB is required by the bill before us to allocate funds to the VA for the health care staffing Congress intends. ***" 125 Cong. Rec. H11654 (daily ed., December 6, 1979).

See also the statements of Representative Satterfield, Chairman, Subcommittee on Medical Facilities and Benefits (125 Cong. Rec. H11645 (daily ed., December 6, 1979)), and Senator Cranston, Chairman of the Senate Veterans' Affairs Committee (125 Cong. Rec. S17990 (daily ed., December 6, 1979)).

By its terms, the statute requires the Director of OMB to make available to the VA the funds appropriated by the Congress for personnel and to authorize VA to employ at least the number of employees for which funds were appropriated in the three specified accounts. The means for determining the personnel ceiling intended by the Congress was specified in the compromise agreement explanatory statement referred to above:

> "The term 'for which appropriations have been made for ... [a particular] fiscal year' in subparagraph (D) of new paragraph (4) of section 5010(a), as used with respect to an appropriation Act, means the appropriations amount that is identified unequivocally in the legislative history of such Act (including the President's budget submissions for the appropriations account involved) as intended to support a specified employment level." 125 Cong. Rec. H11648 (daily ed., December 6, 1979).

In the Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1981, Pub. L. No. 96-526, 94 Stat 3045, 3059, the Congress appropriated approximately $6 billion, $132 million, and $51 million respectively for "Medical Care", "Medical and Prosthetic Research", and "Medical Administration and Miscellaneous Operating Expenses." The committee reports accompanying the Act, when read with the President's budget requests, indicate the following mandated health-care positions under the three accounts:

Medical Care	185,848
Medical and Prosthetic Research	4,418
Medical Administration and Miscellaneous Operating Expenses	832

Under 38 U.S.C. § 5010(a)(4) the Director of OMB is required to authorize VA to fill at least this number of positions, and must make available sufficient funds to pay their salaries.

Subparagraph (C) of paragraph 5010(a)(4) requires the Comptroller General to verify that the Director of OMB has complied with the statute. By letters of February 3, 1981, HRI-63 (B-198103), the Comptroller General reported to the Chairmen of the House and Senate Appropriations and Veterans Affairs committees that the Director had released at least the required number of positions to VA. However, the letters cautioned that any determination that the Director was in compliance with the law would turn on the application of the presidential hiring freeze to the VA.

THE HIRING FREEZE

On January 20, 1981, President Reagan issued to the Heads of Executive Departments and Agencies a Memorandum announcing "a strict freeze on the hiring of Federal civilian employees to be applied across the board in the

executive branch." See 46 Fed. Reg. 9907. The Memorandum indicated that the Director of OMB would issue detailed instructions concerning the freeze. The President delegated to the Director of OMB the authority to grant exemptions from the freeze in special circumstances. Thus the Director of OMB is administering the freeze and it is by his directions that Executive Branch agencies are not hiring.

On January 24, 1981, OMB issued Bulletin No. 81-6 providing "for an immediate and total freeze on the hiring of Federal civilian personnel as directed by the President***." The Bulletin directs all Executive Branch departments and establishments to stop all hiring immediately. The Bulletin provides for exemptions from the freeze including "situations where medical, hospital or health care is furnished directly***."

In response to our inquiry we have been informally notified by OMB that the Director of OMB granted a blanket exemption from the freeze to VA with respect to positions delivering direct health-care services (doctors, nurses, dentists, etc.). However the Director denied a blanket exemption for VA administrative and other positions funded under the three specified appropriation accounts. The Director indicated that he would consider requests for exemptions for these positions on a facility by facility basis.

Because all three accounts contain appropriations for personnel other than direct health-care personnel, the Director's decision not to exempt these positions too amounts to an impoundment of funds which were made immediately available for obligation by 38 U.S.C. § 5010 (a)(4). In this respect, we see no difference in the application of a Government-wide hiring freeze to the VA, or a freeze imposed only on the VA. Both types of actions would prevent the use of budget authority otherwise made immediately available for obligation and therefore constitute impoundments, even though no formal impoundment message has been transmitted to the Congress to date.

CONTENTIONS OF OMB STAFF */

OMB, however, contends that the Director has already complied with the requirements of paragraph 5010(a)(4) by releasing funds and the Congressionally-directed employment ceiling to VA. It apparently is OMB's position that paragraph 5010(a)(4) does not impose a continuing obligation on the Director to maintain the funded VA personnel ceiling throughout the entire fiscal year.

*/ As we have indicated, we have not received any formal written comments from OMB. For the remainder of this decision when we refer to OMB positions or contentions we are referring to the views of OMB staff informally communicated to us.

OMB's interpretation of paragraph 5010(a)(4) would completely defeat the intent of the Congress and we must reject it. As we have indicated, parapraph 5010(a)(4) was enacted specifically to prevent OMB from reducing VA staffing below the congressionally-funded level. It was the intent of the Congress that VA be free to fill all of the positions for which the Congress made annual appropriations. To interpret 5010(a)(4) as allowing the Director to withdraw the personnel ceiling after he had initially granted it would clearly thwart the will of the Congress.

OMB next argues that 5010(a)(4) merely requires the Director to release the positions; it is not a mandate to the VA to actually hire to the full employment ceiling. Therefore, the hiring freeze, which does not actually reduce the ceiling, does not violate the language of the statute.

Certainly, OMB is correct that by its terms 5010(a)(4) does not compel the VA to fill all the positions funded by the Congress. However, the paragraph does require that the Administration not deprive the Administrator of Veterans' Affairs of the authority to fill all the positions should he choose to do so. Clearly it was the intent of the Congress to remove by statute the power of the Administration to reduce VA employment ceilings below the congressionally authorized level. As we have indicated, 5010(a)(4) was enacted by the Congress specifically in response to Administration action which prevented the VA from filling congressionally funded health care positions in fiscal year 1979. In reporting the compromise language which became 5010(a)(4) the House and Senate Veterans' Affairs Committees made it clear that the statue would force OMB to release all congressionally funded positions to VA.

Interpreting 5010(a)(4) to allow OMB to control VA hiring by means of a hiring freeze would be as much contrary to the intent of the Congress as allowing OMB to actually withhold the positions from VA. The OMB Bulletin which implements the freeze purports to deprive the Administrator of Veterans' Affairs of the power to fill the congressionally funded positions, which is not permitted by paragraph 5010(a)(4).

OMB next contends that 5010(a)(4) does not deprive the President of his power to manage the Executive Branch of the Government.

The President's power to manage the Government derives from his constitutional designation as Chief Executive and his responsibility to see that the laws are faithfully executed. However, the President may not use his powers to prevent the law from being fulfilled. See Kendall v. United States, 12 Pet. (37 U.S.) 524, 613 (1838) National Treasury Employees Ass'n v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974); Haring v. Blumenthal, 471 F.Supp. 1172, 1179 (D.D.C. 1979). A presidential order may not supercede contradictory statutory provisions or policies. Marks v. Central Intelligence Agency, 590 F.2d 997, 1003 (D.C. Cir. 1978); Weber v. Kaiser Aluminum & Chemical Corp. 563 F.2d 216, 227 (5th Cir. 1977), rev'd on other grounds, United Steelworkers v. Weber 443 U.S. 193 (1979).

Clearly paragraph 5010(a)(4) directs the Executive not to withhold from the VA the authority to fill the congressionally-funded personnel ceiling. The President cannot use his executive powers to defeat this statute. Rather he has a constitutional obligation to see that it is fulfilled.

OMB contends that to the extent that 5010(a)(4) deprives the President of his executive powers it is contrary to the Constitution. This Office will not consider the constitutionality of congressional enactments in ruling on the legality of Federal agency actions. We consider every Federal law to be valid until such time as a Federal court of competent jurisdiction declares it to be unconstitutional.

OMB finally argues that 5010(a)(4) does not preclude the Administration from using the provisions of the Impoundment Control Act of 1974, 31 U.S.C. § 1400 et seq, to attempt to control Federal expenditures. OMB indicates that it intends to propose a deferral of budget authority for the VA positions not filled and to instruct VA to use this budget authority later in the fiscal year in lieu of a supplemental to cover the costs of the Federal pay increase. We do not think the President's impoundment authority is available, however, to defeat a clear congressional mandate that certain funds be made immediately available for obligation.

On April 16, 1980, the President proposed a deferral (D80-65) of funds available for the Federal-Aid Highways Program. Several district courts held that the fourth disclaimer in the Impoundment Control Act, 31 U.S.C. § 1400(4), precluded the President from impounding funds by reducing the obligational ceiling established by Congress and, thereby, reducing the allotments to the states. */ The courts held that the fourth disclaimer exempts from the application of the Impoundment Control Act any law "which requires the obligation of budget authority or the making of outlays thereunder." The statute involved in the Highway cases requires the Secretary of Transportation to allot funds to the states by formula, subject to an obligational ceiling. Reducing the obligational ceiling would have had the effect of reducing the states' allotments, and, therefore, the amount that could be obligated to and expended by the states. Though the fourth disclaimer speaks in terms of obligations and outlays and the Federal-Highway Act's mandatory requirement is in terms of the

*/ In the 1980 Supplemental Appropriations and Rescissions Act, the Congress rendered the question of the legality of deferral D80-65 moot. Accordingly, in cases pending before courts of appeals, the district courts' rulings were vacated. However, we believe the analysis contained in many of these cases is useful and provides guidance in the situation before us.

apportionments to the states, the courts still held that the President was precluded by the fourth disclaimer from impounding funds under the Impoundment Control Act.

The situation involved here is analogous to the Highways cases. Both section 5010(a) and the Federal Highway Act require a type of allotment but neither statute requires the recipient of the funds to spend them. In both situations, some further action must occur after the allotment and before funds are actually obligated and spent. In the case of section 5010(a), VA determines that positions need to be filled, finds qualified individuals, and hires them. In the case of the Federal-Aid Highways Program, a state determines it needs the funds, submits a program plan and obtains Department of Transportation approval. Furthermore, the reduction of available positions in contravention of section 5010(a) and the reduction of the obligational ceiling in contravention of the Federal-Aid Highways Act have the same effect--the amount of funds available for obligation and expenditure are reduced. Since the Impoundment Control Act was not available in the Highway cases, it should not be available to OMB to reduce the positions allocated to VA and, thereby, reduce the funds available to it.

Section 1001 of the Impoundment Control Act 31 U.S.C. § 1400, provides:

"Nothing contained in this Act, or in any amendments made by this Act, shall be construed as--

* * * * *

(4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder."

In light of the provisions of section 1001 it is our view that the Impoundment Control Act may not be used to deny to VA the funds and related positions mandated to be available by paragraph 5010(a)(4). In this connection, and in the context of paragraph 5010(a)(4), we see no distinction between a Congressional mandate to spend and a mandate to allot positions and make funds available to fill them.

We conclude that 38 U.S.C. § 5010 (a) (4) precludes the administration from using the President's hiring freeze, as implemented by OMB Bulletin No. 81-6, to reduce congressionally funded VA employment levels. We also hold that all the funds appropriated for the designated positions in the Medical Care, Medical and Prosthetic Research, and Medicial Administration and Miscellaneous Operating Expenses accounts for fiscal year 1981 must continue to be available to fill those positions.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States