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Testimony

Before the Subcommittee on Civil Service,
Committee on Government Reform and
Oversight
House of Representatives

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FEDERAL DOWNSIZING

Delayed Buyout Policy at DOE Is Unauthorized

Statement of
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Federal Downsizing: Delayed Buyout Policy at DOE Is Authorized

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the legality of the Department of Energy's (DOE) delayed buyout policy. On June 6, 1996, our Office of General Counsel issued a legal opinion to you, Mr. Chairman, and to the Ranking Minority Member, on this subject. A copy of our opinion is attached to my prepared statement (See appendix.). We concluded that DOE's policy is inconsistent with the Federal Workforce Restructuring Act of 1994.

The Federal Workforce Restructuring Act authorized civilian agencies to offer voluntary separation incentive payments, or "buyouts," to employees who separated from government service by retirement or resignation. The act generally limited eligibility for buyouts to employees who separated prior to April 1, 1995. However, the act contained an exception to this general rule. The exception authorized the payment of a buyout to an employee who delayed his or her separation to a date not later than March 31, 1997, if the agency head determined that it was necessary to delay such employee's separation in order to ensure performance of the agency's mission.

In a memorandum dated July 10, 1995, the General Counsel of DOE concluded that the Federal Workforce Restructuring Act did not preclude DOE from offering buyouts to employees who had not applied for them prior to April 1, 1995. The General Counsel took the position that the act does not specifically require that employees file applications for buyouts, nor does it impose a deadline on an agency's authority to offer buyouts. He further stated that a determination by the Secretary of Energy to "conditionally approve" delayed buyouts for all DOE employees in broad categories of positions who applied before April 1, 1995, could later be amended to cover employees who had not filed buyout applications before that date.

For the reasons detailed in our June 6 opinion, we disagree with the General Counsel's position. We believe that the plain language of the act, as well as the fundamental logic and underlying context of the statute, clearly require that determinations to invoke the exception and permit delayed separations must be made in conjunction with approval of the buyouts themselves. We believe that the authority of agencies to approve buyouts terminated on March 31, 1995.

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The legislative history of the Act supports this view. Although the specifics varied, all versions of the buyout legislation that were considered by Congress—from the original administration proposal to the final language enacted into law—had several basic features that remained unchanged. All versions imposed deadlines on the period during which buyouts could be offered and approved. All versions likewise provided for delays in separation beyond the deadline, but only for employees who had been approved for buyouts and for whom the requisite delayed separation determination had been made by the agency head prior to the deadline.

Therefore, we conclude that the Federal Workforce Restructuring Act precludes offering buyouts to employees after March 31, 1995, or making buyout payments to employees after that date unless the head of the agency had determined by March 31 that a specific employee could delay his or her departure in order to ensure the performance of the agency's mission. The DOE Secretary's determination to conditionally approve delayed buyout applications for employees in broad categories of positions does not meet this test. This determination was limited by its terms to those employees who actually applied for buyouts by the March 31 deadline.

Finally, our interpretation of the Federal Workforce Restructuring Act is entirely consistent with guidance provided by the Office of Personnel Management to federal agencies in February 1995. The contrary position taken by the DOE General Counsel has the basic effect of extending the authority to grant buyouts beyond the limit intended by the act.

Mr. Chairman, this concludes my prepared statement. My colleague and I would be pleased to answer any questions.



**Comptroller General
of the United States**
Washington, D.C. 20548

B-272150

June 6, 1996

The Honorable John L. Mica
Chairman, Subcommittee on Civil Service
Committee on Government Reform and Oversight
House of Representatives

Dear Mr. Chairman:

This responds to the joint request by you and Representative Moran for our analysis of an opinion by the General Counsel of the Department of Energy (DOE) which concluded that the Department may offer voluntary separation incentive payments, or "buyouts," under the Federal Workforce Restructuring Act to employees who had not been approved for such payments prior to April 1, 1995. For the reasons stated hereafter, we disagree with the General Counsel's opinion. In our view, the Act does not authorize buyout payments to any employee who separates from service after March 31, 1995, unless on or before that date the agency head (1) approved a buyout for that employee and (2) determined that a delayed separation for the employee (until not later than March 31, 1997) was necessary to ensure the performance of the agency's mission.

BACKGROUND

Section 3 of the Federal Workforce Restructuring Act of 1994, Pub. L. No. 103-226, 108 Stat. 112 (March 30, 1994), 5 U.S.C. § 5597 note, authorized a buyout program for federal employees who separated from government service by retirement or resignation. Section 3 generally limited eligibility for buyouts to employees who separated prior to April 1, 1995. However, it included an exception allowing the payment of buyouts to employees who separated on or after April 1, 1995, but not later than March 31, 1997, if the agency head determined that delaying their separation was necessary to ensure performance of the agency's mission.

The relevant provisions are set forth in section 3(b) of the Act, 108 Stat. 113, as follows:

"(b) AUTHORITY.—

"(1) IN GENERAL.—In order to avoid or minimize the need for involuntary separations due to a reduction in force, reorganization, transfer of function, or other similar action, and subject to paragraph (2), the head of an agency may pay, or authorize the payment of, voluntary separation incentive payments to agency employees—

"(A) in any component of the agency;

"(B) in any occupation;

"(C) in any geographic location; or

"(D) on the basis of any combination of factors under subparagraphs (A) through (C).

"(2) CONDITION.—

"(A) IN GENERAL.—In order to receive an incentive payment, an employee must separate from service with the agency (whether by retirement or resignation) before April 1, 1995.

"(B) EXCEPTION.—An employee who does not separate from service before the date specified in subparagraph (A) shall be ineligible for an incentive payment under this section unless—

"(i) the agency head determines that, in order to ensure the performance of the agency's mission, it is necessary to delay such employee's separation; and

"(ii) the employee separates after completing any additional period of service required (but not later than March 31, 1997)."

On March 7, 1995, the Secretary of Energy issued the Department's buyout policy under the Act. The buyout policy included a determination by the Secretary, dated March 6, 1995, that separations for employees occupying broad categories of positions needed to be delayed in order to ensure performance of DOE's mission. The categories included all DOE managerial and supervisory positions, all positions at grade GS-14 and above, and positions at grade GS-13 and below that met specified criteria. Under the DOE's policy, all employees in these categories could apply for delayed separation buyouts during the period from March 1 through

March 27, 1995. The policy further provided that all such applications would be "conditionally approved" prior to April 1, 1995, subject to the availability of funds to pay for the buyouts, the level of buyouts approved by the Office of Management and Budget (OMB), and other considerations.

Subsequently, in a memorandum dated July 10, 1995, DOE's General Counsel responded to an internal request for a legal opinion on whether DOE's buyout policy could be amended to authorize buyouts for employees in the "targeted positions" identified by the Secretary's March 6 determination who had not filed applications or been approved for buyouts prior to April 1, 1995. According to the memorandum, approval for additional buyouts was sought to the extent that buyout allocations by OMB were "not completely used due to employee decisions not to take delayed buyout separations."

In his July 10 memorandum, the General Counsel concluded that the Act did not preclude DOE from offering additional buyouts to employees who did not file applications prior to April 1, 1995. He reasoned that the Secretary's March 6 determination satisfied the exception in section 3(b)(2)(B) of the Act permitting buyouts for employees who did not separate prior to April 1, 1995, even with respect to DOE employees who had not applied for buyouts before that date. In this regard, the General Counsel observed that the portions of the Secretary's original policy requiring that all applications be received before April 1 "were not necessary to meet the Act's substantive requirements for delaying the separation date beyond March 31, 1995." Rather, he stated:

"The Act does not require that employees file applications. The Act does not require that employees formally 'agree' to separate prior to March 31, 1995. The Act does not specifically state that a separation has to be authorized by any particular date."

The General Counsel noted that the issue had been discussed with an Assistant General Counsel of the Office of Personnel Management (OPM), "who indicated that OPM would take a very constraining view of the law." Specifically, the OPM Assistant General Counsel expressed the view that in order to receive a buyout for a separation occurring on or after April 1, 1995, an individual employee must have been approved for a buyout and been subject to a delayed separation determination made before that date. The DOE General Counsel responded that OPM had not issued regulations interpreting section 3(b) of the Act,¹ and that:

"The absence of procedural mandates from the Act or regulations, and the broad purpose of the Act 'to avoid or minimize the need for

¹Section 3(e) of the Act authorizes the Director of OPM to prescribe regulations necessary for the administration of subsections (a) through (d).

involuntary separations due to a reduction in force, reorganization, transfer of function, or other similar action,' remain persuasive to us that the Secretary was given broad discretion to fashion agency procedures that will achieve the stated congressional objective."

ANALYSIS

While OPM had not prescribed regulations interpreting section 3(b), OPM's Associate Director for Employment Service issued a memorandum dated February 14, 1995, to personnel directors in civilian agencies setting forth guidance agencies should follow when they delay the separation of employees who accept buyouts under the Act. The guidance was provided in the form of a series of questions and answers, one of which specifically addressed the issue here as follows:

"Q. What actions have to be taken by the agency in order to delay the separation of an employee receiving a buyout past March 31, 1995?

"A. The buyout has to be offered by the agency and accepted by the employee prior to April 1, 1995.

"The agency has to commit to pay the buyout to the employee prior to April 1, 1995, either as part of a general offer letter in which it agrees to pay buyouts to all who apply, or on an individual basis after the employee applies.
[and]

"The agency has to determine, prior to April 1, 1995, that a delay in the separation of designated employees receiving buyouts (either individually or collectively) is necessary to ensure performance of the agency's mission."

In our view, the interpretation set forth by the OPM Assistant General Counsel and the above-quoted OPM guidance is correct. This interpretation follows from the plain terms of section 3(b) of the Act, as well as from the fundamental logic and context of the statute.

Subparagraph 3(b)(2)(A) states the general rule that in order to receive a buyout, an employee must separate before April 1, 1995. Subparagraph (B) states, as an exception to the general rule, that "[a]n employee who does not separate from service before the date specified in subparagraph (A) shall be ineligible for an incentive payment . . . unless . . . the agency head determines that in order to ensure the performance of an agency's mission it is necessary to delay such employee's separation . . ." (Emphasis supplied) This language clearly contemplates that determinations to invoke the exception and permit delayed

separations be made in conjunction with the approval of the buyouts themselves. Therefore, such determinations must be made prior to April 1, 1995. Moreover, use of the term "such employee" in subparagraph (B) clearly requires that exceptions be made with reference to those employees being designated and approved for buyouts.

The DOE Secretary's determination of March 6 that it was necessary to conditionally approve the delayed separation of employees in broad categories of positions cannot now be invoked on behalf of employees who did not apply or receive even conditional approval for buyouts prior to April 1, 1995. The March 6 determination only listed the categories of employees who would be eligible for a deferred separation buyout should they apply for one. However, as the determination itself stated, employees who wanted a deferred buyout still needed to apply for one by the March 31 deadline. This is entirely consistent with OPM's guidance of February 14 that buyouts had to be offered by the agency and accepted by the employee prior to April 1, 1995.

Accordingly, employees who were not approved for buyouts prior to April 1, 1995, cannot thereafter satisfy the eligibility requirements in section 3(b)(2) for payments based on delayed separation. More fundamentally, we disagree with the DOE General Counsel's premise that authority to approve buyouts under the Act continued after March 31, 1995. The legislative history of the Act confirms that the authority to approve buyouts was intended to terminate on March 31, 1995, and that buyouts based on delayed separations were limited to specific employees approved for such delayed separations on or before that date on the basis of a determination of need under section 3(b)(2)(B).

The original version of the buyout legislation was drafted by the Administration and introduced (by request) as H.R. 3218, 103d Cong., on October 5, 1993. The Administration bill provided a limited 90-day period during which buyouts could be authorized. The 90-day period could vary by agency, but could not extend beyond September 30, 1994. The bill also required employees receiving buyouts to separate by the close of the applicable 90-day period unless the agency head determined that delayed separation was necessary to ensure performance of the agency's mission.

Specifically, section 3(b) of the bill provided as follows with respect to the basic authority for the proposed buyout program:

"(b) ESTABLISHMENT OF PROGRAM.—

"(1) IN GENERAL.—In order to assist in the restructuring of the Federal workforce while minimizing involuntary separations, the head of an agency may pay, or authorize the payment of, a voluntary separation incentive to employees in any component of the agency, employees in any occupation or geographic location, or any

combination thereof, who agree, during a continuous 90-day period designated by the agency head for the agency or a component thereof, beginning no earlier than the date of enactment of this Act and ending no later than September 30, 1994, to separate from service with the agency, whether by retirement or resignation.

"(2) REQUIREMENTS RELATING TO SEPARATION DATE.—In order to receive a voluntary separation incentive, an employee shall separate from service no later than the last day of the 90-day period designated by the agency head under paragraph (1), unless the agency head determines that, in order to ensure the performance of the agency's mission, the employee must agree to continue in service until a later date, but not later than 2 years after such last day of the 90-day period."

During hearings on the H.R. 3218, OPM witnesses described these features of the bill and the rationale for them. The OPM Deputy Director stated:

"The 90-day window during which employees would be able to elect to leave and receive their incentive would be designated by each agency head and may occur at any time between the date of the enactment of this legislation and September 30, 1994 . . .

"Agencies would have the authority to delay separations of particular employees for whom separation incentives have been authorized for up to two years after the end of the 90-day window, where necessary, to ensure that performance of the agency's mission is not impaired."

Joint Hearings before the Subcommittee on Compensation and Employee Benefits and the Subcommittee on Civil Service of the Committee on Post Office and Civil Service, House of Representatives, 103d Cong. 1st Sess., October 1993. Serial No. 103-25, at 6.

The OPM Associate Director for Career Entry later elaborated as follows:

"[I]f they signed up during the 30-day [sic] window, they could leave at periods during that following two years as long as they sign up. We have to get them signed up during that window.

"If they made that commitment, they could leave later on during a two-year window if they were in a critical occupation where we had to keep them on board to get the job done and collect taxes or process claims or what have you.

* * * * *

"[T]hey could at that time retire if they signed up during the 90-day window.

"That is critical for us, to have people commit so they are not waiting and hoping for a more expensive buyout."

Id. at 23.

On November 19, 1993, the House Committee on Post Office and Civil Service reported out a new bill—H.R. 3345, 103d Cong. Section 3 of this bill was similar in substance to section 3 of H.R. 3218. It retained the agency-specific 90-day buyout authorization "window" while extending the termination date for any such window to December 31, 1994. The Committee report reiterated the intent that buyouts could only be offered during the applicable 90-day window, but noted that some witnesses at the hearing had expressed concern "that the 90-day period for offering separation incentives would provide insufficient time for employees to adequately and comfortably consider the offers." H.R. Rep. No. 103-386, 103d Cong., 1st Sess. at 5 (1993).

On February 10, 1994, H.R. 3345 passed the House in the form of an amendment in the nature of a substitute to the bill reported by the Committee. The amendment omitted the 90-day limit on offering buyouts but retained the condition that buyout recipients separate by the end of 1994 unless the agency head determined that a delay was necessary. *See* section 2(b)(2) of H.R. 3345, printed at 140 Cong. Rec. H452 (daily ed., Feb. 10, 1994).

While the House floor amendment eliminated the more restrictive 90-day period, the overall time limit on buyout offers was retained. Thus, Representative Clay, floor manager of the bill, stated that "the authority to offer voluntary separation incentives, pursuant to this legislation, expires at the end of this calendar year." *Id.* at H446. Except for further extensions of the deadlines made in conference, the House-passed language was identical to the language enacted as section 3(b)(2) of the Act.

The Senate version of the buyout legislation also imposed time limits on buyout authority, using the 90-day agency-specific window originally proposed by the Administration and followed in the early version of the House bill. *See* 140 Cong. Rec. S1526-27 (daily ed., Feb. 11, 1994). In this regard, the report on S. 1535 by the Senate Committee on Governmental Affairs observed:

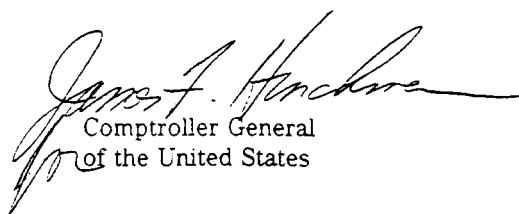
"Subsection (b) of section 3 provides the basic parameters governing the voluntary separation incentive program. Paragraph (1) authorizes . . . voluntary separation incentives to employees in any component of the agency, in any occupation, in any geographic location, or in any combination thereof. In exchange, the employees

must agree to resign or retire during the continuous 90-day period designated by the agency head for the agency or component. That period may not begin before the date of enactment of the Act or end later than September 30, 1994. Paragraph (2) provides that, in order to ensure the performance of the agency's mission, the agency head may make exceptions to the requirement of separation by the last day of the 90-day period, and grant voluntary separation incentives to employees who agree to continue in service but not longer than two years after the last day of the 90-day period." S. Rep. No. 103-223, 103d Cong., 2d Sess. at 5-6 (1994).

In sum, while their specific provisions varied, all versions of the buyout legislation—from the original Administration bill, through the various House and Senate versions, to the version enacted as Public Law 103-226—had several basic features that remained unchanged. All versions imposed deadlines on the period during which buyouts could be offered and approved, the deadline eventually enacted being March 31, 1995. All versions likewise provided for delays in separation beyond the deadline, but only for employees who had been approved for buyouts and for whom the requisite delayed separation determination had been made by the agency head prior to the deadline.

For the foregoing reasons, we conclude that the Federal Workforce Restructuring Act precludes offering buyouts to employees after March 31, 1995, or making buyout payments to employees after that date unless the head of the agency had determined by March 31 that the specific employee could delay his or her departure in order to ensure the performance of the agency's mission.

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Comptroller General
of the United States

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