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Office of the General Counsel

B-240365.2

March 14, 1996

Mr. Stephen M. Bodolay  
Legal Counsel  
Federal Law Enforcement Training Center  
Building 94  
Glynco, GA 31524

Dear Mr. Bodolay:

This responds to your request regarding the Federal Law Enforcement Training Center's (Center) authority to use its appropriation to pay clergy for invocations at graduation ceremonies associated with the completion of training. When we first corresponded with you concerning this issue, we agreed with your observation that the Establishment Clause of the First Amendment to the Constitution might prohibit the use of your appropriation for this purpose. B-240365, Apr. 10, 1991. We further noted that the Supreme Court had just granted certiorari in the case of Lee v. Weisman, No. 90-1014, March 18, 1991, and that the Supreme Court's decisions in that case might provide some useful guidance on the constitutional issues presented by your request. The Supreme Court issued its Weisman opinion at the end of June 1992 (505 U.S. 577), and you have renewed your request for our opinion on the propriety of the payment in light of Weisman.

Unless an expenditure is expressly authorized by law, we resolve questions concerning the use of an appropriation for a particular purpose by application of a "necessary expense" analysis. To justify an expenditure as a "necessary expense," we must determine whether: (1) the expenditure bears a logical relationship to the appropriation to be charged; (2) the expenditure is prohibited by law; and (3) the expenditure is not otherwise provided for, *i.e.*, within the scope of another appropriation or statutory funding scheme. See 63 Comp. Gen. 422, 427-28 (1984); B-230304, Mar. 18, 1988. Here, there is no dispute with respect to the first and third criteria. The sole issue is whether the Establishment Clause that provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." proscribes the use of your appropriation to pay clergy for invocations at Center-sponsored graduation ceremonies.

While the Weisman decision would preclude the use of appropriated funds to pay clergy for invocations at public high school graduation ceremonies, it does not preclude the use of appropriated funds to pay clergy for invocation at all types of graduation ceremonies, including those of the Center. We base this opinion on our understanding that Center graduates are adults, voluntarily present at the graduation ceremonies, and not required to actively participate in the nonsectarian prayer.

As we noted in our earlier letter to you, in Marsh v. Chambers, 403 U.S. 83 (1983), the Supreme Court approved the use of public funds for invocations by chaplains at the opening of sessions of a state legislature. In Weisman, a closely divided court concluded for a variety of reasons that the Establishment Clause prohibited a public school's inclusion of a nonsectarian prayer in a school graduation ceremony. The Supreme Court in Weisman was particularly sensitive to the subtle coercive pressure that state sponsored nonsectarian prayer had on students in elementary and secondary schools. Although the Court recognized that "in our culture standing or remaining silent can signify adherence to a view or simple respect . . .", id. at 593, in the public school promotional or graduation setting, "the dissenter of high school age" could reasonably view respectful silence during the invocation and benediction as participation in or approval of it. Id. The State may not force elementary and secondary public school children to choose between silently participating in such group prayer exercises or protesting them. Id.

The Court made clear that they were not addressing whether "that choice is acceptable if the affected citizens are mature adults." Id. Further, the Court distinguished Marsh on the basis of inherent differences between a public school graduation and a session of the state legislature:

"The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in Marsh." Weisman, 505 U.S. at 597.

We think it is significant that unlike the students in Weisman, the Center's graduates are mature adults. Because the Court's decision is narrowly drawn, and highly dependent on the age level of the ceremony's participants, we think that the issue presented by the Center's expenditure of funds for an invocation at its graduation ceremony is factually and legally distinguishable from the situation addressed in Weisman. Presumably the Center's ceremony is more in the nature of the Marsh prayer exercise where the influence and force of the prayer exercise on attending

adults is far less than the subtle coercive pressures brought to bear on the school age children in Weisman.

In our earlier letter, we stated that until Weisman was issued, the Center could continue to accept the gratuitous services of clergy under the Center's gift acceptance authority. This, of course, remains as true today as before. With respect to the use of your appropriation, as a general rule, to conclude that a proposed expenditure fails the "necessary expense" test as being prohibited by law, we would require some affirmative expression in law prohibiting the expenditure. Because the Supreme Court has declined to broadly construe the Establishment Clause to prohibit the invocation of the deity at all state-sponsored ceremonies, absent clearer guidance from the Court, we would not object to the Center's expenditure of funds for this purpose should the Center conclude that such expenditures are necessary for their traditional graduation ceremony.

Sincerely yours,

Gary L. Kepplinger  
Associate General Counsel

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**DIGEST**

Since the Supreme Court has not directly addressed the applicability of the Establishment Clause of the First Amendment to the United States Constitution to this type of expenditure, we would not object to the Federal Law Enforcement Training Center's use of appropriated funds to pay clergy for invocations at the Center's traditional graduation ceremonies.