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General Accounting Office
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Office of the General Counsel

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Lorraine Lewis, Esq.
General Counsel
Office of Personnel Management

Dear Ms. Lewis:

This responds to your letter requesting our opinion on whether an agency employee on official duty, who is also a member of the National Guard or the armed forces Reserves, may conduct, and use agency office equipment to support, Guard or Reserve business. As explained below, we believe that agencies may permit their employees to use a limited amount of official time and agency resources to support the Guard or Reserves.

Background

On January 29, 1997, you advised the General Counsel of the Department of Veterans Affairs (VA) that federal employees may not use official time and government equipment for National Guard or Reserve duty purposes. You based this opinion primarily on two provisions of the Standards of Ethical Conduct for Employees of the Executive Branch promulgated by the Office of Government Ethics. The first requires employees to use official time in an honest effort to perform official duties unless laws or regulations authorize using the time for other purposes. 5 C.F.R. § 2635.705. The second states that an employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes. 5 C.F.R. § 2635.704. It defines authorized purposes as those for which Government property is available to members of the public or those purposes authorized in accordance with law or regulation. *Id.* You noted that there is no provision that includes Reserve or National Guard duties within an employee's official civilian responsibilities.

You also advised the VA General Counsel of the provisions of 5 U.S.C. § 6323, which authorizes military leave for federal employees who perform active military service as members of a Reserve or Guard component. You noted that our office has held that an agency may not grant administrative leave in conjunction with military leave so as to extend the period for which military leave is to be used. 49 Comp. Gen. 233 (1969). You also noted that we have held that it is incompatible for a person to be on active duty in the military and also be employed in a civilian

position with the government. B-222967, June 2, 1987; and 47 Comp. Gen. 505 (1968). You indicated that the cited decisions further support your conclusion.

Subsequently, you received an inquiry from Senator Patty Murray expressing concern that your opinion may establish unfair and inequitable treatment of reservists employed by the federal government as compared to those employed in the private sector. She furnished an example provided by a constituent who is a Naval Reserve officer and a private employer. The constituent stated that his unit conducted a "Recall Drill" in which one of the unit's officers is required to verbally contact each of the other members of the unit and report back by voice or FAX to the Reserve Center. The officer who was requested to make the calls works for the federal government and has been told that it would be unethical and illegal for him to use the government telephones, FAX machines and his time while at work to make these contacts. Senator Murray's constituent states that as a private employer he would feel obligated to allow an employee to use company time and equipment to perform this function, and he believes the government should do likewise.

You then requested an opinion from the Office of Government Ethics (OGE), which promulgates the ethics regulations cited in your letter to the VA. OGE advised you that 5 C.F.R. § 2635.704, concerning use of government property, was worded with the intent to make it clear that "authorized purposes" may be purposes that do not strictly relate to the performance of official duties. OGE also advised you that 5 C.F.R. § 2635.705, concerning use of employees' time, was worded with the intent to ensure that it would not be construed to limit any authority an agency may have to permit its employees to use official time for appropriate purposes.¹ OGE did not make a determination on the specific issue you raised, but advised you that a finding that an employee's use of government property or official time is not authorized would be necessary before these regulations could be invoked against an employee to restrict such use.

You also requested advice from the Department of Defense (DOD) General Counsel whether DOD has authority or an internal policy permitting federal civilian employees who are Guard members or reservists to use official time and government equipment for Guard or Reserve purposes. The DOD General Counsel advised you that this is an issue concerning the appropriate use of government resources, governed principally by fiscal law, and it is DOD's position that since the National Guard and Reserve forces are parts of DOD, its support of those activities does not violate 31 U.S.C. § 1301 (often called the Purpose Statute).

¹Examples OGE provided were the use of government property under certain circumstances in support of a professional association, pursuant to 5 C.F.R. § 251.202(a)(1), and use of official time on behalf of labor organizations pursuant to 5 U.S.C. § 7131.

The DOD General Counsel also indicated that the attitude of the Federal government toward service in the National Guard and the Reserves is captured by the Uniformed Services Employment and Reemployment Act of 1994,² which states that "[It] is the sense of Congress that the Federal government should be the model employer in carrying out the provisions" of the act.³

The DOD General Counsel also noted that 5 C.F.R. § 251.202, promulgated by the Office of Personnel Management (OPM), permits an agency to provide support services to organizations when the agency determines that such action would benefit the agency's programs or be warranted as a service to employees who are members of the organization. The General Counsel noted that this provision is intended to permit agencies to provide official support for their employees who, in their personal capacities, engage in professional associations or community groups that benefit the agency or employee. She stated that while the Guard and Reserves are not usually considered professional associations or community groups, they also provide benefits to the agency, employee, and community that may warrant official support. The DOD General Counsel further indicated that since the Guard and Reserve are officially promoted by the federal government and contribute to the national defense, it would be difficult for a federal agency to authorize support for a private organization, yet withhold similar support for its employees who are members of the Guard or Reserve.

Discussion

First, we address the three decisions of our office cited in your letter to VA. In 49 Comp. Gen. 233 (1969), we held that an agency may not grant administrative leave to an employee who is a Reservist serving in an active duty status to, in effect, extend the period for which the employee continues to receive his civilian pay beyond the period covered by military leave provided for this purpose by

²The Uniformed Services Employment and Reemployment Act of 1994, 38 U.S.C. Chapter 43, provides employment and reemployment protection for employees who serve in the uniformed services, and prohibits discrimination against them because of such service. It applies to private, state, and federal employers. It does not include any specific provision authorizing a federal civilian employee who is also a member of the National Guard or Reserve to use federal agency property or official time for Guard or Reserve work.

³38 U.S.C. § 4301(b). See also, the July 6, 1998, "Memorandum for Members of the Cabinet" jointly issued by the Secretaries of Defense and Labor requesting that federal agencies become model employers to government employees serving in the National Guard and Reserves.

5 U.S.C. § 6323. In the situation you present, the civilian employee would not be in a military duty status at the time he or she makes use of the agency equipment and official time; the employee would merely be performing some incidental function related to his or her Guard or Reserve organization while remaining in a civilian status. Since the employee would not be in an active military duty status for which military leave is available, 49 Comp. Gen. 233 would not prevent an agency from permitting use of its resources in the circumstances you describe.

The other two decisions, B-222967, June 2, 1987, and 47 Comp. Gen. 505 (1968), apply the general rules that an individual on active military service may not be employed in a civilian capacity with the government, and the rendition of services to the government in a civilian capacity by a member of the armed services on active duty is incompatible with the member's actual or potential military duties. These decisions hold that payment for civilian services in such circumstances is not authorized in the absence of specific statutory authority therefor. In the situation you describe, the employees would not be in an active military status receiving military pay at the time they perform the limited incidental service for their Reserve or Guard component. Therefore, these two decisions also would not bar an agency from permitting an employee to perform the described services.

Generally, in analyzing questions concerning the extent to which an agency may permit use of its resources for purposes not specifically authorized by law, we begin with the Purpose Statute, 31 U.S.C. § 1301(a), which provides that "[A]ppropriations shall be applied only to the objects for which the appropriations were made, except as otherwise provided by law." In applying this statute, we have taken the position that while federal funds, facilities and employees' time are available only for purposes authorized by law, it is not necessary that each and every authorized government employee activity or agency activity be specifically designated by statute. Accordingly, we have viewed certain civic, charitable, and similar community support activities involving limited use of agency resources and employee time as falling within an agency's permissible range of discretion. 71 Comp. Gen. 469, 471 (1992); 67 Comp. Gen. 254, 256 (1988).

For example, an agency may allow limited use of its equipment, supplies, and employees' official time to participate in an Adopt-A-School program in which the agency and its employees provide assistance to a Washington, D.C., elementary school. 71 Comp. Gen. 469 (1992). We stated that an agency's community and employee relations activities are generally committed to the sound discretion of the head of the agency in managing and controlling the agency's employees and resources, with the caveat that the exercise of such discretion must of course be consistent with relevant statutory authority and with our decisions on the use of appropriated funds.

In other cases we have held that when governmental interests are served, an agency may permit certain kinds of expenditures although no specific appropriations were provided for them. For example, an agency may use its appropriation to fund limited amounts of promotional materials for Saving Bonds campaigns in the agency although the agency has no specific statutory authority to do so. B-225006, June 1, 1987. We noted that it is the policy of the government, expressed in statute and executive order, to promote the sale of savings bonds which furthers the government interest of financing the public debt. We have approved similar campaigns undoubtedly requiring some work time of federal employees and the use of government supplies and equipment.⁴

The National Guard and Reserves form a significant part of our national defense forces as well as provide assistance to state and local communities during disasters and emergencies, and in other ways. Many federal employees are members of the Guard and Reserves. As noted above, Congress has encouraged and supported employees' participation by providing military leave to cover limited periods when they are on active military duty away from their civilian jobs, and by prohibiting discrimination against them and providing job protection for them when they are called to longer periods of active duty, and by stating that the federal government should be a model employer in regard to these projections.

Although not all federal agencies' missions are as closely connected to the missions of the Guard and Reserves as is DOD's, all agencies would appear to have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves. Thus, some use of employee time and agency equipment to carry out limited, incidental Guard or Reserve functions falls within the parameters of activities that an agency may permit.

It may be advisable for OPM, after consultation with DOD and other interested agencies such as the General Services Administration (GSA),⁵ to provide some general guidelines as to the amount of time and types of agency equipment that may

⁴See also, 67 Comp. Gen. 254, 256 (1988), permitting agency support for the Combined Federal Campaign; B-155667, Jan. 21, 1965, permitting Post Office support for the Eleanor Roosevelt Memorial Foundation; B-154456, Aug. 11, 1964, permitting Navy support for the John F. Kennedy Library fund drive; 32 Comp. Gen. 361 (1953), concerning support for employees registering and voting; and 30 Comp. Gen. 521 (1951), concerning employees making Red Cross blood donations.

⁵As you are aware, GSA has major responsibilities for government property-management and telecommunications.

be used for this purpose, and under what circumstances this is permitted.⁶ For example, it appears appropriate to provide that the use of the agency resources for this purpose may not interfere with the agency's mission and the employee's responsibilities to the agency. It also may be appropriate to limit the use of agency resources for this purpose to situations where the employee is called upon to perform some incidental Guard or Reserve function which the employee cannot reasonably schedule for nonworking hours or for which he or she cannot make reasonable arrangements to carry out elsewhere.

Sincerely yours,

Robert P. Murphy
General Counsel

⁶See for example, OPM's "Guidance on Scheduling Work and Granting Time Off to Permit Federal Employees to Participate in Volunteer Activities," issued to support the efforts of agencies to encourage employee participation in volunteer activities, as expressed in the President's April 22, 1998, memorandum to federal agencies.