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The Honorable James Walsh
Chairman
The Honorable Alan Mollohan
Ranking Minority Member
Subcommittee on Appropriations
VA, HUD, and Independent Agencies
Committee on Appropriations
House of Representatives

Subject: HUD Gun Buyback Initiative

This responds to your inquiry of March 30, 2000, concerning the Department of Housing and Urban Development's (HUD) Gun Buyback Violence Reduction Initiative. You asked whether HUD may use funds appropriated for the Public Housing Drug Elimination Grants Program (PHDEG) for gun buyback programs. You also asked whether HUD has used PHDEG funds for that purpose.¹

By letter dated April 6, 2000, we asked HUD for an explanation of its authority to administer a gun buyback program under the PHDEG program and for information regarding the amount of funds obligated and expended for gun buybacks. HUD responded by letter on May 8, 2000, and met with us on May 15, 2000, to discuss these issues.

Our decision in this matter rests upon a narrow legal issue. It is not a reflection of the desirability of the efforts to reduce the number of guns in and around public housing or the efficacy of gun buyback programs in reducing gun-related violence

¹ You also asked whether the HUD Inspector General (IG) may administer a gun buyback program under the authority of Operation Safe Home and whether the HUD IG has obligated funds for this program. We will respond to this inquiry under separate cover.

and violent crime. However, for the reasons explained below, if HUD is to support these activities, HUD needs additional authority.

BACKGROUND

The Public Housing Drug Elimination Act of 1988 (the Act), enacted as Title V of the Anti-Drug Abuse Act of 1988, established the PHDEG program. Pub. L. No. 100-690, Title V, §§ 5121-5129, 102 Stat. 4181, 4301 (Nov. 18, 1988) (codified at 42 U.S.C. §§ 11901-11908.) In 1990, Congress reauthorized the Act as a permanent program (the 1988 Act was a pilot program) and made other changes. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, Title V, § 581(a), 104 Stat. 4079, 4245 (1990). As reauthorized, the Act consisted of congressional findings, a grant of authority to the Secretary to make grants, specified activities eligible for grant funding under the Act, grant application and approval requirements, definitions and authorization of appropriations.

The congressional findings emphasized the federal government's commitment to provide public housing that is decent, safe, and free from illegal drugs, and related the negative effects of drug-related crime on public housing tenants and the deterioration of the physical environment that requires substantial government expenditures. Section 5122, 102 Stat. at 4301. The congressional findings also recognized that local law enforcement often lack the resources to deal with the drug problem in public housing. Section 5123 of the Act authorized the Secretary of HUD, "in accordance with the provisions of this [Act]," to "make grants to public housing agencies . . . for use in eliminating drug-related crime in public housing projects." Section 5123, 102 Stat. at 4301. Section 5124 identifies the specific activities for which the Secretary could award the grants. As relevant here, section 5124, as reauthorized, provides that "[g]rants under this [Act] may be used in public housing or other federally assisted low-income housing projects for" activities including the "reimbursement of local law enforcement agencies for additional security and protective services" (subsection (a)(2)) and "programs designed to reduce use of drugs in and around public or other federally assisted low-income housing projects, including drug-abuse prevention, intervention, referral, and treatment programs." Subsection (a)(6), Section 581(a), 104 Stat. at 4246.²

In 1998, Congress recognized the impact of violent crime on public housing in the Act's findings and amended some but not all grant eligible activities. Public and Assisted Housing Drug Elimination Program Amendments of 1998, Pub. L. No. 105-276, § 586, 112 Stat. 2461, 2646 (1998), amending sections 5122 and 5123 of the Act. In addition, the Secretary's authority to make grants was amended to recognize the changes in the findings. Section 586(c), 112 Stat. at 2647, amending section 5123 of

² Congress amended subsection (a)(6) to include "drug abuse, prevention, intervention, referral and treatment programs" in the 1990 reauthorization. Section 581(a), 104 Stat. at 4246.

the Act. However, Congress only amended some of the grant eligible activities to, for example, include the employment of individuals to investigate violent, not just drug-related, crime. Section 586, 112 Stat. at 2646.³ Congress also amended the Act by adding a provision that authorized a set-aside of amounts appropriated to provide technical assistance directly or indirectly by grants, contracts, or cooperative agreements. Section 586, 112 Stat. at 2650.

Generally, Congress has provided a lump-sum appropriation to remain available until expended for the PHDEG program. See, e.g., Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, 112 Stat. 2461, 2472-2473 (1998); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, Pub. L. No. 105-65, 111 Stat. 1344, 1353-1354 (1997); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1994, Pub. L. No. 103-124, 107 Stat. 1275, 1286 (1993); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-164, 103 Stat. 1069, 1108 (1989). Beginning in fiscal year 1990, with the exception of fiscal year 1994, Congress has set aside funds from amounts appropriated for the PHDEG program for the provision of technical assistance and training for or on behalf of public housing agencies. Id.

HUD has established its gun buyback program as part of the PHDEG program. Notice of Fund Availability (NOFA), 64 Fed.Reg. 60080, November 3, 1999, amended and republished at 65 Fed. Reg. 5400, Thursday, February 3, 2000. In the PHDEG program, Public Housing Authorities (PHAs) receive PHDEG grants for the eligible activities specified in section 5124 (codified at 42 U.S.C. § 11903).⁴ In November 1999, HUD announced that PHAs could use PHDEG grants for gun buyback programs. 65 Fed. Reg. at 5400. Of the \$10 million set aside for technical assistance in the PHDEG appropriation, HUD made \$4.5 million available to match up to \$10.5 million of PHDEG grant funds used to implement gun buyback programs. Id. PHAs were advised that in order to receive matching funds, they must program or reprogram a portion of the PHDEG grant funds for gun buyback activities. Id. What this means is that if PHAs make grant funds otherwise provided to them by HUD

³ The 1998 amendments added to section 5124 as an eligible activity “sports programs and sports activities that serve primarily youths from public or other federally assisted low-income housing projects and are operated in conjunction with, or in furtherance of, an organized program or plan designed to reduce or eliminate drugs and drug-related problems in and around such projects.” Section 586(d), 112 Stat. at 2647.

⁴ For ease of reference when referring to the Public Housing Drug Elimination Grant Act of 1988, as amended, we will refer to the sections in title 42 of the United States Code.

available for gun buybacks, HUD will provide additional matching funds for gun buybacks from the set-aside appropriation.⁵

To be eligible for funding, the gun buyback programs must meet certain requirements. 65 Fed. Reg. at 5401. The gun buybacks are to be conducted by a local law enforcement agency. Law enforcement conducting the buybacks should accept firearms as defined by federal, state, or local law. HUD concluded that “perpetrators of gun violence are frequently non-resident predators of public housing;” thus, the buybacks do not have to be conducted on the public housing premises. 65 Fed. Reg. at 5402. However, the buybacks “must be planned to reduce drug-related, violent and criminal activity in or around the premises of public housing.” Id. The guns must be subjected to tracing, testing and identification procedures to determine if they are needed for criminal investigations or prosecutions, or if stolen, to be returned to a lawful owner. When not needed for these or other limited purposes, the guns must be destroyed. Id.

PHAs must submit applications for funding including a description of the gun buyback program, the procedures to be followed as required by the NOFA, letters of intent from law enforcement to conduct the gun buyback in accordance with that description, and a letter of intent from the chief executive officer of the local government indicating the jurisdiction’s cooperation and support. 65 Fed. Reg. at 5402. HUD reviews the applications and approves them until a total of \$10.5 million of PHDEG funding has been designated eligible for the buybacks. 65 Fed. Reg. at 5400, 5402. Upon approval of a PHA’s reprogramming request and executed agreement with the law enforcement agency to conduct the buyback, HUD awards the additional matching funding from the set aside. Id.

ANALYSIS

To determine whether HUD is authorized to administer and fund its gun buyback programs, we must address two questions. First, we address whether HUD is authorized to use the lump sum appropriated for the PHDEG programs for this purpose. The second question is whether HUD is authorized to use the PHDEG set-aside funds to match PHDEG grant funds reprogrammed for gun buybacks.

Appropriated funds may be used only for authorized purposes. 31 U.S.C. § 1301(a). Neither the PHDEG appropriations nor the PHDEG set-aside for technical assistance specifically identify a gun buyback program as an object of that appropriation.

⁵ In its May 8 letter, HUD informed us that \$4.5 million of the set-aside funds had been designated for gun buybacks, \$2,675,799 in fiscal year 1999 funds and \$1,824,201 in fiscal year 1998 funds. As of May 8, 2000, \$791,026 had been awarded in matching funds. On May 15, we were informally advised that PHAs had committed approximately \$2.5 million in PHDEG funds to finance gun buybacks. Due to time constraints, we have not audited these amounts.

Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, 112 Stat. 2461, 2472-2473 (1998); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, Pub. L. No. 105-65, 111 Stat. 1344, 1353-1354 (1997). This is not dispositive, however. Where expenditures are not specifically authorized in an appropriation act, an agency may show that the expenditure is reasonably necessary to carry out an authorized function. 71 Comp. Gen. 527, 528 (1992). While this necessary expense doctrine reflects a respect for an agency's exercise of discretion to determine how best to accomplish the objects of its appropriation, it is not unlimited. Accordingly, we look to see "whether the expenditure falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range." B-223608, Dec. 19, 1988.

HUD justifies its authority to fund gun buyback programs on several grounds. First, HUD contends that the PHDEG statute should be read as both a drug elimination and an anti-violent crime statute. For this proposition, HUD relies upon the 1998 amendments to the PHDEG program statute. HUD argues that these amendments explicitly reconfirmed the statute's focus on the problem of violent crime as well as drug use in public housing. HUD points to the 1998 amendments that inserted "violent" between "drug-related" and "crime" in the Act's congressional findings. 42 U.S.C. § 11901(2) and (4). In addition, Congress added three new findings which included support for safety and security measures to combat drug-related and violent crime; cooperation between public housing authorities, residents and local law enforcement agencies in developing anti-crime programs, and improvement of anti-crime strategies through expansion of community-oriented policing initiatives. 42 U.S.C. § 11901(6)-(8). Along with the broadened focus of the Act's findings, HUD contends that the amendment of section 11902 to include violent crime broadens the authority of the Secretary of HUD to make grants to eliminate drug-related and violent crime.⁶

⁶ HUD also relies upon a March 22, 2000 statement by Senator Lautenberg, an author of the Public Housing Drug Elimination Act, in which he states that "the Act supports efforts to eliminate drug-related and violent crime and that a gun buyback program to combat violent crime falls within the purview of the Act." The problem with a post-enactment statement is that it is impossible to demonstrate that the substance of the statement reflects the intent of the pre-enactment Congress. General Accounting Office, 1 Principles of Federal Appropriations Law (PFAL), 2-69 (2nd ed. 1991). This rule applies regardless of the identity of the speaker and regardless of the form of the statement. Id. The courts, notably the Supreme Court, have consistently expressed unwillingness to give weight to post-enactment statements. See, e.g., Bread Political Action Committee v. Federal Election Commission, 455 U.S. 577, 582 n.3 (1982) and other cases cited in 1 PFAL at 2-70.

With respect to the authority to use PHDEG funds for gun buybacks, HUD urges us to interpret the authority to make grants for eligible activities in section 11903 (a)(2) (reimbursement to local law enforcement for additional security and protective services) and (a)(6) (programs designed to reduce drug use) in light of the congressional findings and authority to make grants for drug-related and violent crime in public housing.⁷ In this light, HUD believes its gun buyback program is a reasonable exercise of its discretion. Since law enforcement agencies conduct the gun buybacks, HUD believes they may be reimbursed as security and protective services under subsection (a)(2). HUD does not believe that the language of subsection (a)(6) requires a showing of a nexus between gun buybacks and reduction of drug use.

With respect to the use of the set-aside funds for gun buybacks, HUD argues that the set-aside funds are not limited to technical assistance, but can be used for grants within the same range of eligible activities authorized by section 11903. In support of this position, HUD points to the language of the set-aside providing that “\$10,000,000 shall be for grants, technical assistance, contracts and other assistance, training, and program assessment and execution for or on behalf of public housing agencies, . . . (including the cost of necessary travel for participants in such training).” Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, 112 Stat. 2461, 2472-2473 (1998) (emphasis added). We address each of HUD’s arguments in turn.

Section 11903 Grants

While the broad purposes of the statute inform our interpretation of eligible activities, Congress has limited HUD’s discretion in the types of activities it can fund in this program. In our opinion, sections 11901 and 11902 do not constitute independent sources of authority for activities eligible for PHDEG grants. The key to HUD’s argument is that we should interpret the statute’s increased emphasis on violent crime reduction in public housing as authorizing the award of grants for the gun buyback programs. The difficulty is that this argument rests mainly upon the Act’s congressional findings. General statutory sections setting forth legislative policy and purpose neither constitute an operative section of the statute nor prevail over more specific provisions. Bissette v. Colonial Mortgage Corp., 477 F.2d 1245, 1246 (D.C. Cir. 1973); Council of Hawaii Hotels v. Aagsalud, 594 F. Supp. 449, 453 (D. HI. 1984); see 1A Sutherland Statutes and Statutory Construction § 20.12 (5th ed. 1993).

We also do not view section 11902 as amended as an independent source of authority for gun buyback programs. In this regard, a federal agency does not have inherent authority to make grants or provide financial assistance. Rather, it can do so only to the extent authorized by law and available appropriations. 2 PFAL at 10-20 (2nd ed. 1992). Section 11902 certainly provides the Secretary with the requisite authority to

⁷ Section 5124 in the 1988 Act.

award grants, authority he would not otherwise have. The difficulty, however, is that this section provides that he may only award those grants “in accordance with the provisions of this [Act].”

Section 11903(a) lists eight activities for which grants “under this [Act] may be used.” HUD relies upon subsection (a)(6) and (a)(2) as authority to award grants for gun buybacks. Subsection (a)(6) provides that grants under the Act may be used in public housing or other federally assisted low-income housing projects for:

“programs designed to reduce use of drugs in and around public or other federally assisted low-income housing projects, including drug-abuse prevention, intervention, referral and treatment programs.”

Subsection (a)(6) requires that grant eligible activities justified under that subsection must be “designed to” reduce drug use. HUD argues that this does not require it to demonstrate with empirical evidence a link between buying back guns and the reduction of drug use. HUD asserts instead that it is enough if in its design the program or activity is reasonably expected to reduce drug-related crime and violent crime in and around public housing. We think this misreads the language of the statute. Section 11903(a)(6) specifically addresses drug-use, not drug-related crime and violent crime.⁸ At a minimum, given the structure of the Act and the language of subsection (a)(6), there must be a reasonable showing that the program has the means of accomplishing the statutory purpose, namely, to reduce drug use. While HUD relies upon evidence of a relationship between guns and violence and guns and drug dealing, this does not support a relationship between reduction of guns and reduction of drug-use. In fact, none of the studies cited by HUD find any direct correlation between the impact of reducing violence or weapons used for violent crime to a reduction in drug use.

The language of subsection (a)(6) also evidences Congress’ understanding of the types of activities it was authorizing as eligible for grant funding under the Act. Eligible activities under subsection (a)(6) include “drug-abuse prevention, intervention, referral and treatment programs.” While the language of subsection (a)(6) does not limit the activities that may be funded to those specified, we view the inclusion of examples of eligible activities as definitional in nature and as clarification of its scope. The examples included, namely, “prevention, intervention, referral and treatment,” indicate that the programs that Congress considered eligible for grant funding under subsection (a)(6) are those designed to help prevent

⁸ For purposes of this Act, “drug-related crime” is defined as “the illegal manufacture, sale, distribution, use or possession with intent to manufacture, sell, distribute, or use a controlled substance.” 42 U.S.C. § 11905(2) (section 5126(2) of 1988 Act, 102 Stat. at 4302).

individuals from trying drugs or help them quit using drugs.⁹ While the legislative history of subsection (a)(6) is limited, it supports the interpretation that programs to treat drug use in public housing were key to this provision. The conference report addressing the 1990 amendments to the Act discussed the limited availability of drug treatment programs for public housing residents. H.R. Rep. No.101-943, at 455-456 (1990). Consistent with our interpretation of the purposes of the Act, the conference report also noted that drug treatment programs could help reduce drug-related crime and encouraged the use of grants under subsection (a)(6) for construction and maintenance of drug treatment facilities or hiring of treatment professionals. H.R. Conf. Rep. No. 101-943, at 456. It is also telling that in the 1998 amendments to the Act, Congress amended sections 11901, 11902, and 11903 to introduce the elements of violent crime for certain purposes, but did not expand either subsection (a)(6) or (a)(2) to address violent crime as an eligible activity.¹⁰

HUD also relies on its authority under subsection (a)(2) for the gun buyback program. HUD maintains that when read in light of the expanded congressional findings, gun buyback programs are authorized as a grant made for “reimbursement of local law enforcement agencies for additional security and protective services.” Security and protective services are commonly understood as including patrols by law enforcement officers, security guards, and police substations in public housing. These are, in fact, the types of services that HUD refers to in its budget justifications. Budget Justifications 1999, p. 357. The gun buyback funds do not reimburse law enforcement agencies for security and protective services; they are used to pay individuals for the guns they turn in under the program. Thus, we are not persuaded that, under the language of subsection (a)(2), HUD is authorized to make grants for gun buybacks.

The legislative history is not inconsistent with our interpretation. The conference report for the 1990 amendments to PHDEG addressed proposed regulations giving the Secretary of HUD discretion to consider factors, other than those specifically enumerated in the law, in awarding PHDEG grants. The conference report emphasized that with respect to the PHDEG grants “all funding decisions must be

⁹ HUD’s budget justifications for fiscal year 1999 appropriations are consistent with this understanding. HUD’s budget justifications include descriptions of education, intervention and community center programs to encourage youth to avoid drugs and to keep them engaged in constructive activities instead of drug use. Congressional Justifications for 1999 Estimates, HUD, reprinted in Hearings Before the Subcomm. on VA, HUD and Independent Agencies of the House Comm. On Appropriations, 105th Cong. 2nd Sess. Part 6, p. 356 (1998) (hereinafter Budget Justifications 1999).

¹⁰ While HUD may argue that Congress did not amend subsections (a)(2) and (a)(6) because it did not need to in light of the broad purposes of the Act, as amended, there is no affirmative evidence that Congress believed such purposes were authorized. Moreover, the structure of the Act, limiting grant funding to eligible activities listed in section 11903, undermines such an argument.

based exclusively on the stated criteria included in the law.” H.R. Rep. No. 101-943, at 455-456 (1990). In the final analysis, grant funded activities and projects must rest on the specific requirements contained in section 11903. For the reasons stated above, we do not believe a gun buyback program is an eligible activity under that section.

Set-Aside for Technical Assistance

The remaining issue is whether HUD is authorized to use the PHDEG set-aside funds to match PHDEG grant funds reprogrammed for gun buybacks. Since we have already decided that PHDEG funds are not available for gun buybacks, the answer to this question is necessarily “no.” Apart from that reasoning, the language and intent of the set-aside appropriation does not support HUD’s interpretation. The relevant language of the appropriation states that the set aside is to be available for:

“grants, technical assistance, contracts and other assistance, training, and program assessment and execution for or on behalf of public housing agencies, resident organizations, . . . (including the cost of necessary travel for participants in such training).”

Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, 112 Stat. 2461, 2472-2473 (1998). HUD contends that these funds are not limited to activities in the nature of technical assistance or training being provided to the public housing authorities, but may be used to award grants for eligible activities under the PHDEG authority found in section 11903. HUD concludes that the reference in the appropriations act to “grants” and “other assistance” provides it with the authority to use set-aside funds for the PHDEG grants authorized by section 11903.

We believe that HUD’s reliance upon this language is misplaced. The appropriations language must be read in concert with the program authority. Section 11908(c) authorizes HUD to make funds available “to the extent provided in appropriations Acts to provide training, technical assistance, contract expertise, program oversight, program assessment, execution, and other assistance for or on behalf of public housing agencies.” Section 11908(c) further provides that “[a]ssistance and other activities carried out using amounts made available under this subsection may be provided directly or indirectly by grants, contracts, or cooperative agreements.” As we read this authority, the purpose of the set aside is to provide technical assistance to the public housing authorities. The reference to “grants, contracts and other assistance” simply authorizes the manner in which this technical assistance can be provided. In other words, HUD can provide technical assistance directly to the public housing authorities or it can provide technical assistance indirectly by grant, contract, or cooperative agreement.

The listing of the types of technical assistance helps define the activities that Congress considered to be technical assistance. For example, training or program assessment do not directly carry out the purposes of the program, but can provide support for the program’s design, execution, and effectiveness. Providing funds for

gun buybacks does not fit within the provision of support for a program; it is the program itself. The examples of technical assistance HUD listed in its budget justifications for prior years are consistent with this understanding of the definition of technical assistance. For example, HUD awarded grants to provide technical assistance and training to assist in establishing resident patrols, and for the design of methodologies and conferences on environmental designs to improve safety. Budget Justifications 1999, p. 356.

The legislative history of the set-aside language supports our understanding of what Congress intended. The language found in the 1999 appropriations set-aside was first inserted in HUD's fiscal year 1995 appropriation. Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1995, Pub. L. No. 103-327, 108 Stat. 2298, 2309 (1994). In proposing this language, the House Appropriations Committee explained that the proviso earmarked "\$10,000,000 for grants, contracts, and other support for technical assistance and training for public housing agencies and resident organizations." H.R. Rep. No. 103-555, at 30-31 (1994). Congress clearly connected the use of grants, contracts, and other assistance to providing technical services.

Accordingly, for the reasons discussed, the technical assistance set-aside funds are not available for grants under section 11903 for gun buybacks.

CONCLUSION

HUD has not identified, nor did we find, any other HUD appropriation that would be available to pay for the gun buyback program. Since HUD does not have any funds available for the gun buyback program, HUD should make a report to the President and the Congress in accordance with 31 U.S.C. § 1351.

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