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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: U.S. Army Corps of Engineers, North Atlantic Division – Food for a Cultural Awareness Program

File: B-301184

Date: January 15, 2004

DIGEST

The U.S. Army Corps of Engineers' appropriation is not available to pay for the costs of food offered at the Corps' North Atlantic Division's February 2003 Black History Month program. The record here indicates that a meal was offered at the program, not a sampling of food. While the program flier referred to a "food sampling," all other evidence in the record, including the time of the program, the food items served and the amounts available, indicate that a meal, not a sampling, was offered.

DECISION

Pursuant to 31 U.S.C. § 3529(a), the Acting Deputy Director of Finance, U.S. Army Corps of Engineers (Corps), requests an advance decision regarding the purchase of food for a Black History Month program. For the reasons set forth below, we conclude that the Corps may not use its appropriation to pay for the food.

BACKGROUND

The Corps, North Atlantic Division, New York, celebrated Black History Month with a program on February 26, 2003. This program was scheduled from 11:30 a.m. to 1:30 p.m. and included what the program flier called a "down home" food sampling, poetry reading, a special Black History Contest, and music. The program flier indicates that the North Atlantic Division sponsored the program and identifies the Equal Employment Opportunity (EEO) Office as the contact for additional information about the program.

The EEO Director purchased \$399.12 of food and miscellaneous supplies for the program, including: smothered chicken, fried fish, pan-chopped barbeque (totaling \$100.30); cabbage, string beans, and collard greens (\$67.50); corn bread and rolls (\$38.00); peach cobbler and pecan pie (\$33.50); potato salad (\$20.00); and related materials, including plates, cups, linens, coffee, as well as approximately \$27.00 for prepared cookies and other desserts, etc. (totaling \$139.82 including taxes). The EEO Office requested that the Corps reimburse the Director the \$399.12.

A Corps' certifying officer denied the request for reimbursement on the basis that "appropriated funds cannot be used to purchase food for government employees at the permanent duty station." Letter from Cynthia R. Blevins, Acting Deputy Director, U.S. Army Corps of Engineers Finance Center, to U.S. General Accounting Office, April 23, 2003 ("Blevins Letter"). The Director, contending that the food items were bought as samples for the purpose of furthering cultural awareness, asked the certifying officer to reconsider the denial of reimbursement. The certifying officers who evaluated the reconsideration request did not agree that the food qualified as samples. They concluded that the food "represented a full meal and not a 'sampling' of ethnic foods." Id. The certifying officers noted, also, that while the activity was scheduled for lunchtime, "[t]here is no indication that employees were told to bring lunch or be prepared to pay for their own lunches." Id.

ANALYSIS

The general rule is that appropriated funds are not available for the purchase of food for government employees. B-288266, Jan. 27, 2003. The underlying premise of this rule is that it is improper to use taxpayer dollars to feed (or entertain¹) government employees because the costs of meals (and entertainment) are personal expenses that an employee is expected to bear. Id. Therefore, unless statutory authority exists to support payment, or the expenditure falls under one of the recognized, narrow exceptions to the general rule, appropriations are not available to provide food to employees at their permanent duty stations. 64 Comp. Gen. 802 (1985).

One of the exceptions to this general rule is that agencies may use appropriated funds to pay for samples of ethnic foods prepared and served as an integral part of a celebration intended to promote EEO objectives by increasing employee appreciation for the cultural heritage of ethnic groups. B-199387, March 23, 1982. We recognized this exception in 1981, distinguishing between food and entertainment in connection with legitimate, multi-faceted cultural awareness programs and food and entertainment for the personal benefit of agency employees.

¹ The term "entertainment" as used in the decisions of the Comptroller General is an "umbrella" term which includes: food and drink, either as formal meals or as snacks or refreshments; receptions, banquets and the like; music, live or recorded; live artistic performances; and recreational facilities.

When we first addressed this issue, in a 1979 case, we concluded that appropriated funds could not be used to pay for live entertainment at a National Hispanic Heritage Festival. 58 Comp. Gen. 202 (1979). We recognized that some agencies in the past had expended appropriated funds to provide entertainment characterized as training in connection with EEO programs, and that differentiating between entertainment authorized as part of an EEO program and employee entertainment that had no such connection to EEO purposes could be difficult. We held that in the absence of specific authority in statute or regulation, agencies could not use appropriated funds to procure entertainment in connection with EEO programs, even if the entertainment was characterized as training and presented in connection with EEO programs. Id.

Two years later, however, we overruled this decision in 60 Comp. Gen. 303 (1981). In the 1981 decision, we held that the Internal Revenue Service could use appropriated funds to pay for an artistic performance as part of a three-day National Black History Month celebration so long as the “performance [is] an authorized part of an agency’s EEO effort . . . determined by the agency to be intended to advance EEO objectives.” 60 Comp. Gen. at 306. Our change in position in 1981 turned on the fact that the Office of Affirmative Employment Programs, Office of Personnel Management (OPM), developed and issued guidelines for Hispanic Heritage Week programs that set out criteria that we believed could be applied generically by agencies to distinguish any EEO special emphasis program, not just Hispanic Heritage programs, from employee entertainment. The OPM guidelines stated that it was important that (1) the cultural events be related to the observance of the celebration, and (2) intent is shown to develop cultural awareness, and the purchased items are not just for entertainment purposes. Id. We said that criteria along these lines could be applied to any cultural, special emphasis programs, and that we would consider an artistic performance authorized if it is part of a formal, multi-faceted program determined by the agency to be intended to advance EEO objectives.

The 1979 and 1981 decisions concerned entertainment. We addressed food in a 1982 decision. In the 1982 decision, we extended the logic of 60 Comp. Gen. 303, the 1981 decision, to the use of appropriated funds by the Oakland Army Base to pay for ethnic food samples as part of a three-day multi-ethnic heritage festival. B-199387, Mar. 23, 1982. We reiterated the point we made in 60 Comp. Gen. 303, that criteria along the lines of those found in the OPM guidelines provide a general rationale justifying expenses incurred in carrying out ethnic celebrations. Thus, we advised that small samples of food prepared and served as part of a formal cultural awareness program with many other components could be an authorized part of an agency’s EEO programs. Id.

On December 31, 1993, OPM abolished its Federal Personnel Manual, which contained the EEO guidelines we had referenced in our 1981 and 1982 decisions.² See B-271511, March 4, 1997. Because our decisions, as a matter of fact, had not applied these guidelines, instead encouraging agencies to apply criteria along the lines of those adopted by OPM, the elimination of OPM's guidelines was not significant for our purpose. For example, notwithstanding the elimination of the OPM guidelines, in a 1999 decision regarding the use of appropriated funds to pay for a musical performance at a cultural awareness program at the International Trade Commission, we advised the Commission to apply the same criteria in determining whether to pay for the performance. B-278805, July 21, 1999. The absence of EEO guidelines is irrelevant; it is the criteria used to make the determination that are important, and the EEO guidelines had been a convenient reference.

As a review of our case law in this area shows, when we address the availability of appropriations for food, or other entertainment, at cultural awareness programs, there are two fundamental questions that we consider: (1) Is the food part of a formal program intended by the agency to advance EEO objectives and to make the audience aware of the cultural or ethnic history being celebrated? (2) Does the food provided constitute a meal, or is it a sample of the food of the culture offered as part of the larger program to serve an educational function? We answer these questions, necessarily, in the context of any given event, and there are various facts surrounding the event that we consider in assessing the nature of the event and the food offered.

The first question, typically, is not a difficult one. The first part of that question, whether the food is part of a formal program, is a factual question. In the case before us, the Division's program flier, describing the food as part of an event including, also, a poetry reading, music and a Black History Contest, establishes that the food was a part of a larger, formal cultural awareness program. In answering the second part of that question, whether the program will advance EEO objectives and make the audience aware of the cultural or ethnic history being celebrated, we defer to the determination of an authorized agency official. See 60 Comp. Gen. 303 (1981); B-278805, July 21, 1999; B-199387, Mar. 23, 1982.

In this regard, this case poses some concern for us. First, in our research, we learned that the Corps has no published guidance for cultural awareness programs that identifies, in particular, Corps officials authorized to make the necessary determination and the criteria those officials should use in making the determination. Importantly, however, the Director of the Corps' EEO Office advised us informally that the Directors of the Corps' Division EEO Offices, including the Director of the North Atlantic Division's EEO Office, have the discretion to make the

² OPM intended to allow agencies greater flexibilities in managing their human resources.

determination. Having been advised of that policy, we will accept a determination of the Corps' North Atlantic Division EEO Director.

Another concern for us in this regard, however, is that in this case we have little affirmative evidence that the North Atlantic Division's EEO Director, indeed, made the determination. Although our case law does not require advance written justification for a cultural awareness program,³ the only evidence we have in this case that the Division's EEO Director determined that the program, including the food offered at the program, served the agency's EEO objectives is her involvement in the program. The program flier submitted to us for the record announced that the "US Army Corps of Engineers, North Atlantic Division" sponsored the program, and identified the Division's EEO Office as the contact for additional information about the program. The EEO Director purchased the food and other items, and her office submitted the costs to the Corps' Finance Center for reimbursement. The transmittal letter identified the Division's EEO Office as the "Supported Activity." To conclude in this case that an appropriate Corps official made the necessary determination, we take notice of the facts that the Division's EEO Office was involved in the Division's program, and that it was the Division's EEO Director who asked for reimbursement for the costs of the program.

The second question, whether the food offered is a meal or a sampling, is often the more difficult of the two fundamental questions. Notwithstanding an agency official's determination that a cultural awareness program advances the agency's EEO objectives, if the food offered at the program constitutes a meal rather than a sampling, the agency's appropriations are not available for that purpose. As our case law establishes, we have no objection to an agency using its appropriations to provide food as part of a cultural awareness program. The agency, however, must ensure that the food is offered within the educational context of the program. As we explained in the 1999 decision, the concern presented in cases like the one presently before us is to distinguish between appropriate expenses for legitimate cultural awareness programs and the inappropriate use of appropriated funds to feed or entertain federal employees. A sampling of food serves the educational nature of the program; a meal serves the personal needs of public employees at taxpayer expense.

In this case, the Corps' certifying officers twice rejected the request for reimbursement for the food items. In matters such as this, we carefully consider the views of certifying officers who request a decision pursuant to 31 U.S.C. § 3529(a)(2), in addition to those positions advanced by the agency's program officials, because the agency's certifying officers are the agency officials who, statutorily, are responsible for the propriety of all expenditures. 31 U.S.C. § 3528(a)(3) ("A certifying official certifying a voucher is responsible for . . . the legality of a proposed payment under the appropriation or fund involved"). Unlike other agency officials,

³ See, e.g., B-278805, July 21, 1999.

certifying officers are personally financially liable for improper payments that they certify. 31 U.S.C. § 3528(a)(4) (“A certifying official certifying a voucher is responsible for . . . repaying a payment . . . (A) illegal, improper or incorrect because of an inaccurate or misleading certificate; (B) prohibited by law; or (C) that does not represent a legal obligation under the appropriation or fund involved”).

Here, a Corps certifying officer, at first, denied the request “on the basis that appropriated funds cannot be used to purchase food for government employees at the permanent duty station.” Blevins Letter. Subsequently, the Director asked for reconsideration on the basis that the food items were intended as samples. The Corps’ certifying officers found inadequate support for this view. They point out that the food was served between 11:30 a.m. and 1:30 p.m., when most people typically have lunch, and that there was no indication that attendees were advised to bring lunch. *Id.* Also, listing the food items served and the amounts paid for those items, the certifying officers concluded that the North Atlantic Division had served a full meal, not a food sampling. *Id.*

Many times, the answer to the second question will turn on an assessment of the circumstances in which the food was offered that indicate whether the food was a meal or a sampling. The Corps’ certifying officers considered two important factual circumstances here: the facts that the Division offered food at an event scheduled during ordinary lunch hours, and that the amount of food offered suggested a meal rather than samples. Viewing the totality of the circumstances, we agree that the certifying officers were right to deny reimbursement for the costs of the food. Although the program flier indicates that a sampling was to be served at the event, other facts, including the items of food offered and the time of the event, establish that, as a matter of fact, a meal was offered. The food offered represented all of the various courses of what would constitute a full meal, ranging from breads and vegetables to meats and desserts. The food was served during hours that in the American workplace we ordinarily consider to be lunch hours; yet, the Division did not advise attendees that they should make their own arrangements for lunch. The only evidence of the Director’s position that the food consisted only of a sampling is the language of the program flier. Unfortunately, the actual facts of the event belie the language of the flier.

Consequently, the Corps’ certifying officers should not certify the use of the Corps’ appropriation to reimburse the Director for the costs of the food items purchased for the program. While the record establishes that an appropriate agency official made the necessary determination that the program would advance Corps EEO objectives, the food offered constituted a meal, not a sampling.

As a final note, we would advise the Corps to develop appropriate guidance for the agency for matters such as this. As we stated earlier, we learned in our research that the Corps has no published policy addressing cultural awareness programs. While our case law does not insist that an agency require written approval before a cultural awareness program is offered, we would certainly expect an agency to require an

affirmative determination by a designated official that any such program advances the agency's EEO objectives. To ensure that any food planned for a cultural awareness program is consistent with the educational nature of the program, an agency might also require its designated authorizing officials to approve the food in advance of the event.

CONCLUSION

The Corps' certifying officers should not certify the use of the Corps' appropriation to reimburse the EEO Director of the North Atlantic Division for costs of food items served at the Division's February 2003 Black History Month program. While the record presented to us indicates that the Division's EEO Director likely made the necessary determination that the event would advance Corps EEO objectives, the record also indicates that a meal, not a food sampling, was served at the event. The only evidence in the record supporting the assertion that only a food sampling was offered is the language of the program flier; all other evidence in the record suggests that a meal was offered.

/signed/

Anthony H. Gamboa
General Counsel