

December 3, 2002

MEMORANDUM FOR FRANK TRINITY

From: Nicola Goren

Re: Trust enrollments and the Antideficiency Act

Question Presented

You have asked for an opinion as to whether the Corporation may have violated the Antideficiency Act (31 U.S.C. § 1341) (“Act”) in approving more AmeriCorps positions than it may have projected as available in the National Service Trust (“Trust”).

Short Answer

While the Corporation may have approved more AmeriCorps positions than it may have projected as available in the Trust, the Corporation has not incurred an obligation at the time it approves AmeriCorps positions, and thus, cannot have violated the Act at that point in time. The Corporation only incurs an obligation with respect to AmeriCorps positions in the Trust at the point of enrollment, or arguably, at the point a member reaches 15% of his term of service. Based on our current Trust enrollment data, the Corporation never incurred obligations in excess of what was projected as available in the Trust.

Discussion

A. The Corporation incurs an obligation no earlier than when a member is enrolled in the Trust.

Before an AmeriCorps member can use an education award that would result in an outlay from the Trust, at least five different actions must occur. First, the Corporation approves national service positions. 42 U.S.C. § 12581(f). Second, a member begins serving and is enrolled in the Trust. Third, a member serves at least 15% of his term, making the member eligible for at least a pro-rated award assuming he is not released for cause. 45 C.F.R. § 2526.20. Fourth, the member completes his term of service. 42 U.S.C. § 12602(a)(1). Finally, the member draws down his education award within 7 years of earning it, or later if the Corporation approves. 42 U.S.C. §§ 12602(c) and 12604. The question is: At which of these points in time does the Corporation incur an obligation?

An agency incurs an obligation when it makes a “definite commitment which creates a legal liability of the Government for the payment of appropriated funds for goods and services ordered or received.” GAO Redbook, p. 7-3, citing B-116795, June 18, 1954. See also B-265901, October 14, 1997; B-272191, November 4, 1997. At the

time the Corporation issues a grant award and, therein, approves a certain number of AmeriCorps positions, that number of positions is a projection, based on the Corporation's formula, of the number of positions it needs to approve (x) to end up with a final number of enrolled members (y). The Corporation's formula anticipates and incorporates the fact that the number of members ultimately enrolled will always be less, by some percentage, than the number of positions approved – or, put another way, y will always be smaller than x. The Corporation's use of a formula in this manner is contemplated by section 129(f) of the National and Community Service Act of 1990, as amended (NCSA). 42 U.S.C. § 12851(f).

In addition, the Corporation may, as it has done in recent weeks, suspend authority to enroll individuals in positions, to avoid a shortfall in the Trust. Based on these facts, the Corporation has not, at the point of approving the positions, made a “definite commitment which creates legal liability of the Government for the payment of appropriated funds,” and consequently has not incurred an obligation at that point.

The Corporation does not incur an obligation until a member is actually enrolled in the Trust – at the earliest. Until that point in time, the Corporation has no firm commitment to pay an education award to a member upon completion of his or her service. Arguably, given that a member is not eligible to receive even a pro-rated award if he does not serve at least 15% of his term, the Corporation has made no definite commitment that creates legal liability for payment of an award from the Trust until a member reaches the 15% mark. Thus, the Corporation could, arguably, choose to record the obligation at that point in time, instead of upon a member's enrollment in the Trust.

B. The Corporation's approval of positions in excess of what was projected as available in the Trust did not violate the Antideficiency Act.

The Antideficiency Act prohibits an agency from “(A) mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation or (B) involv[ing] [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. . . .” 31 U.S.C. § 1341. Given that the Corporation neither makes or authorizes either an expenditure or obligation, nor involves the government in a contract or obligation at the time it approves AmeriCorps positions, the Corporation did not violate the Act at that point of time.¹

¹ It appears, based on the information the CFO has gathered, that the Corporation did not comply with its own authorizing legislation, which states that the Corporation may not approve national service positions “in excess of the number of such positions for which the Corporation has sufficient available funds in the National Service Trust” based on the Corporation's projection of necessary amounts under its formula. 42 U.S.C. § 12581(f). However, non-compliance with this provision does not, in and of itself, constitute a violation of the Antideficiency Act.

Conclusion

The Corporation does not incur an obligation simply by approving positions at the time of the grant award. The Corporation incurs an obligation when a member is enrolled in the Trust, or when that member serves 15% of his term of service. Consequently, based on the information gathered by our Chief Financial Officer (CFO) to date, the Corporation did not violate the Antideficiency Act because available Trust funds are sufficient to pay projected education awards for all enrolled members. In addition, based on current CFO numbers, at no time did the Corporation obligate more funds than it had available in the Trust, or in anticipation of a future appropriation.