

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL  
KARL A. RACINE

Legal Counsel Division

MEMORANDUM

**TO:** Benidia A. Rice  
Deputy Attorney General  
Child Support Services Division

**FROM:** Janet M. Robins *JMR*  
Deputy Attorney General  
Legal Counsel Division

**DATE:** April 27, 2016

**SUBJECT:** Request for Legal Advice Concerning Whether the Child Support Services Division May Award Gift Cards or T-Shirts to All Employees As Awards for Meeting Performance Goals for the Past Five Years (AL-16-197)

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This memorandum responds to your request for legal advice concerning whether the Child Support Services Division ("CSSD") may use appropriated funds to purchase either T-shirts or \$50 gift cards for distribution to all CSSD staff at an upcoming All Hands Meeting.<sup>1</sup> The items purchased would be given as incentive awards to all staff in recognition of CSSD's satisfaction of all applicable performance goals for the past five years. Based on our analysis of the applicable law, we have concluded that CSSD may use appropriated funds to purchase and give away either \$50 gift cards or T-shirts if it can meet the criteria for group incentive awards stated in 6 DCMR § 1906.

**I. Appropriations Restrictions**

The first issue that relates to providing T-shirts or gift cards to all CSSD staff is whether there are any legal restrictions on using appropriated funds for this purpose. Principles of

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<sup>1</sup> This meeting was originally scheduled for May 5, 2016, but CSSD has decided to postpone it, possibly until September, to accommodate training currently planned for May.

federal appropriations law govern the expenditure of District funds,<sup>2</sup> and these principles provide that appropriated funds may only be used for the purposes for which they were appropriated, with the purpose determined by the language and (sometimes) the legislative history of the relevant appropriations act. See U.S. General Accounting Office, *Principles of Federal Appropriations Law* at 4-6-7, 4-9-13 (Third Edition – Volume I) (January 2004) (Federal Appropriations). Where the purpose of an appropriation is stated generally, an expenditure of appropriated funds will be authorized if it falls within the “necessary expense” doctrine, which requires that the expense be necessarily incident to accomplishing the objective of the appropriation, not otherwise prohibited by law, and not otherwise provided for. *Id.* at 4-19-30.

In the absence of specific statutory authority, appropriated funds may not be used to provide personal gifts to employees, potential employees, or members of the public. *Id.* at 4-155-59. Ashtrays, key chains, candy, T-shirts, pens, and a variety of other items given away as morale boosters, recruitment devices, awards to employee conference attendees, are not sufficiently related to the achievement of a purpose authorized by the underlying agency appropriation to satisfy the necessary expense doctrine.<sup>3</sup>

Exceptions to this rule have been found where the distribution of the item served a specific agency function, such as where the item distributed had little intrinsic value but conveyed a message to employees that was important in supporting the mission of the organization. For example, in GAO Decision B-257488 (1995), the Comptroller General found that the Food and Drug Administration could not use appropriated funds to distribute mugs, pens, and other items as “awards” to employees attending a conference, but could use appropriated funds to distribute buttons saying “No Red Tape” to employees to support the agency’s management objective of providing good customer service.

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<sup>2</sup> Section 446 of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 801, D.C. Official Code § 1-204.46 (2006 Repl.), provides that, with limited exceptions relating primarily to the Water and Sewer Authority and borrowed funds, “no amount may be obligated or expended by any officer or employee of the District of Columbia unless such amount has been approved by Act of Congress, and then only according to such Act.” Because District funds for Fiscal Year 2016 were appropriated by Congress, principles of federal appropriations law apply to their expenditure. In light of recent court decisions concerning the District’s budget autonomy, it remains to be seen whether these restrictions will continue to apply in future fiscal years.

<sup>3</sup> See GAO Decision B-247563.3 (1996) (shoelaces, pens, and scissors distributed to potential employees did not serve a valid recruiting function); GAO Decision B-257488 (1995) (appropriated funds could not be used to distribute mugs, pens, and other inexpensive mementos to federal employees attending a conference); 70 Comp. Gen. 248 (1991) (appropriated funds could not be used to award a T-Shirt to employees making donations in the Combined Federal Campaign); 57 Comp. Gen. 385 (1978) (novelty candy conference give-aways were personal gifts); GAO Decision B-192423 (1978) (promotional buttons distributed to the public in support of program were personal gifts); 54 Comp. Gen. 976 (1975) (key chains given away at conference as promotional items were gifts for which agency could not use appropriated funds); 53 Comp. Gen. 770 (1973) (promotional ashtrays given to federal employees at inter-agency conference were not a necessary expense).

Similarly, relying on this decision, GAO itself has distributed mugs printed with its logo and core values to new employees as part of a campaign to inculcate these values in its workforce. *See* GAO Non-Decision Letter B-287241 (2001) (additional material expressing GAO's core values, such as post-it notes, letterhead, etc. had previously been distributed to all employees). Thus, if the item provided has little value and the distribution serves a legitimate agency function that goes beyond merely benefiting the recipient, the agency's use of appropriated funds to support its distribution may be justified.<sup>4</sup> We have therefore previously concluded that the Office of the Attorney General ("OAG") may not distribute OAG T-shirts or polo shirts to all staff, but may provide them to employees who attend community events so that the public can readily identify OAG representatives. *See* Memorandum to Nadine Chandler Wilburn, Chief Counsel, Personnel, Labor, and Employment Division, from Janet M. Robins, Deputy Attorney General, Legal Counsel Division, May 22, 2015, "Request for Legal Advice Concerning Whether OAG May Use Appropriated Funds to Purchase and Distribute OAG T-Shirts."

Although CSSD may not use appropriated funds to make gifts to CSSD staff, Congress has authorized agencies to use appropriated funds to make incentive awards to employees. Employee awards are authorized by 5 U.S.C. § 4503, which provides that "[t]he head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of an employee who (1) . . . by . . . personal effort contributes to the efficiency, economy, or other improvement of Government operations . . . or (2) performs a special act or service in the public interest in connection with or related to his official employment."<sup>5</sup> In GAO Decision B-270327 (March 12, 1997), the Comptroller General noted that the implementing regulations for this statute delegate wide discretion to agencies in structuring their incentive awards programs, and approved an award granted agency-wide to all employees of the Defense Reutilization and Marketing Service for the agency's exceptional performance during a fiscal year. It therefore appears that an incentive award to all staff members for their contribution to CSSD's overall performance would be consistent with federal appropriations law.

## II. District Incentive Awards Programs

In addition to federal appropriations law, CSSD's division-wide award must be permissible under District statutes and regulations relating to incentive awards programs. Section 1901 of the District of Columbia Government Comprehensive Merit Personnel

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<sup>4</sup> *See also* GAO Decision B-193769 (January 4, 1979) (allowing the Department of the Interior to use appropriated funds to give lava rocks to members of the public to discourage them from taking rocks from volcanos on public land); GAO Decision B-230062 (December 22, 1988) (allowing the Army to award \$25 framed recruiting posters as prizes in drawings at recruiting events where attendees' entry forms provided contact information for further recruiting efforts).

<sup>5</sup> This section is part of section 1 of the Government Employees Incentive Awards Act, which is made applicable to the District by 5 U.S.C. § 4501. This section defines "agency" to include the government of the District of Columbia.

Act of 1978 (“CMPA”), effective March 3, 1979, D.C. Law 2-139, D.C. Official Code § 1-619.01 (2012 Repl.), requires the Mayor to:

issue rules and regulations authorizing the granting of cash and honorary awards to employees for their suggestions, inventions, superior accomplishments, length of service, and other meritorious efforts which contribute to the efficiency, economy, or otherwise improve the operation of the District government.

These rules are found in Chapter 19 of Title 6 of the DCMR, which permit each personnel authority to authorize the making of monetary, non-monetary, and group incentive awards. 6 DCMR § 1902. Monetary awards may include, among other things, Exemplary Performance Awards, Special Act or Service Awards, and Suggestion or Invention Awards, and non-monetary awards may consist of Tangible Item Awards, Time-Off Awards, Honorary Awards, and Length of Service Awards. 6 DCMR § 1902. Tangible Item Awards, which would include T-shirts or gift cards, may be substituted for any other category of incentive award,<sup>6</sup> and, in the past, OAG has provided these kinds of items in lieu of monetary awards for exemplary performance and special acts or services. 6 DCMR § 1905.2(c).

Although it might seem appropriate to provide the T-shirts or gift cards to staff as Exemplary Performance Awards to reward CSSD’s recent performance, there are several reasons why this would not be the best approach. Exemplary Performance Awards are considered monetary awards under 6 DCMR § 1902.1(a)(1), and even though the items given would not be monetary, the rules associated with these awards might arguably still apply. Pursuant to 6 DCMR § 1903.3, an employee cannot receive more than one monetary award in a 12-month period. Any CSSD employee who received an Exemplary Performance Award or another monetary award at the OAG awards ceremony on December 4, 2015 would not be eligible to receive another. In addition, monetary awards must be made no later than the second quarter of the fiscal year, 6 DCMR § 1903.2(5), and Exemplary Performance Awards are intended for employees whose performance accomplishments significantly exceed the satisfactory performance requirements for his or her official position. 6 DCMR § 1904.2(a). It is also against the policy of the District’s incentive awards program to grant awards to employees who have exhibited behavior problems within the past year, such as excessive absenteeism, tardiness, or insubordination. 6 DCMR § 1900.4. If CSSD has employees who have exhibited behavior problems or who have not exceeded basic job standards, it would not be appropriate to recognize them for exemplary performance.

A better method for rewarding the overall performance of CSSD staff would be to make a Group Award pursuant to 6 DCMR § 1906. Group Awards are “granted to recognize and reward a team of employees . . . who collectively make a significantly contribution to the

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<sup>6</sup> Under 6 DCMR § 1905.2(a), a Tangible Item Award has a total monetary value of no more than \$50 and “is an object such as a pin, plaque, or mug; a gift certificate worth monetary value; or a ticket to an activity or event worth monetary value.” Note that a \$50.00 gift card would constitute a Tangible Item Award, but a \$50 Visa card might be considered a monetary award. Under 6 DCMR § 1903.2(5), a monetary award may be paid no later than the second quarter of a fiscal year for the prior year’s performance.

financial or operational success of the District government.” 6 DCMR § 1906.1. Each group member receives an equal award for the group’s contribution, “as determined by pre-established and approved plan provisions at the time of adoption by an agency Group Awards Steering Committee.” 6 DCMR § 1907.2(d). As an independent personnel authority, OAG should have a Group Awards Steering Committee that reviews and approves project plans and prospective payouts.<sup>7</sup> CSSD should contact this Committee to establish the basis for a Group Award and obtain the Committee’s approval for the distribution of T-shirts or gift cards to CSSD staff. It should be noted that only one non-monetary award, including Tangible Item Awards, may be given to the same employee in a six month period, and that Group Awards may only be awarded if the Steering Committee approves a project plan for the award prior to the commencement of the project. *Id.* CSSD’s decision to postpone the All Hands meeting until September should provide enough time to address both of these concerns.

I hope this memorandum is helpful to you in planning for the recognition of CSSD employees. If you have questions about this memorandum, please call Laurie Ensworth, Senior Assistant Attorney General, Legal Counsel Division, at 724-5537, or me at 724-5524.

JMR/lac

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<sup>7</sup> OAG issued group awards as part of its incentive awards ceremony on December 4, 2015. It is likely that that Steering Committee is still in place.