

From: [REDACTED]
Sent: Friday, August 03, 2012 3:34 PM
To: Bailey, Jon
Cc: Fredericks, Barbara; Guenther, John; Fleming, Bill; Herbst, Ellen; Carlson, Britt
Subject: FW: NOAA Officers Corps

Hi Jon,

At long last I am sending on the informal opinion from Justice on the NOAA corps. They are authorized to remain in an active status during a shutdown, so we will have this going forward! OMB is on board with it.

Good news!

[REDACTED]

[REDACTED]

Office of General Counsel

Department of Commerce

[REDACTED]

From: Thompson, Karl (OLC) [mailto:Karl.Thompson@usdoj.gov]
Sent: Tuesday, July 03, 2012 3:53 PM
To: [REDACTED]
Cc: Guenther, John; Bershteyn, Boris; 'Berger, Sam'; Roberts, Matthew (OSG)
Subject: NOAA Officers Corps

Dear [REDACTED]:

This e-mail memorializes the informal oral advice we provided in response to the Department of Commerce's ("Commerce's") request, submitted on behalf of the National Oceanic Atmospheric Administration ("NOAA"), for our views on whether members of NOAA's Commissioned Officer's Corps may continue to work during an appropriations lapse, notwithstanding provisions of the Antideficiency Act that generally prohibit the Government from incurring obligations in advance of appropriations, 31 U.S.C. § 1341(a)(1)(b), or accepting voluntary services, 31 U.S.C. § 1342, except where "authorized by law." *See* Letter for Virginia Seitz, Assistant Attorney General, Office of Legal Counsel, Department of Justice, from Barbara S. Fredericks, Assistant General Counsel for Administration, Commerce (Aug. 2, 2011). As we explained on the phone, we believe that NOAA Corps members may continue to work during an appropriations lapse, albeit for reasons somewhat different from those proposed in Commerce's letter requesting our views.

Commerce's letter suggests that, under the reasoning of a prior opinion of this office, *Participation in Congressional Hearings During an Appropriations Lapse*, 19 Op. O.L.C. 301 (1995) ("*Congressional Hearings Opinion*"), NOAA Corps members may continue to work during an appropriations lapse because, as officers of the United States appointed by the President with the advice and consent of the Senate, they are entitled to their pay solely by virtue of their offices, and thus are implicitly "authorized by law" to continue working during a lapse. In our view, notwithstanding what may be implied by certain parts of the *Congressional Hearings Opinion*, *see id.* at 301-302, the fact that an officer is Presidentially-appointed and Senate-confirmed ("PAS") does not necessarily mean that the officer is entitled to his or her pay solely by virtue of his or her office, or that the officer may continue to work during an appropriations lapse. As we explained in a more recent opinion, the traditional common-law rule is that a public officer is entitled to the compensation attached to an office solely by virtue of his or her title to the office, and the incumbent's right to compensation does not depend on the performance of the functions of the office. *See Memorandum for the Counsel to the President, from Karl R. Thompson, Deputy Assistant Attorney General, Re: Authority to Employ White House Office Personnel Exempt from the Annual and Sick Leave Act Under 5 U.S.C. § 6301(2)(x) and (xi) During an Appropriations Lapse*, at 3 (Apr. 8, 2011) ("*White House Personnel Opinion*"). Under that common-law rule, officers of the United States are generally entitled to their salaries by virtue of their status as officers. Congress can, however, alter the common-law rule by statute, and Congress has in fact done so for numerous federal officers, including some PAS officers. *See White House Personnel Opinion* at 4; *United States v. Grant*, 237 F.2d 511, 514 (7th Cir. 1956). Thus, the mere fact that NOAA Corps members are PAS officers does not mean that they are entitled to their salaries solely by virtue of their status as officers.

We also do not believe that the fact that Corps members are not covered by the Annual and Sick Leave Act of 1951 ("ASLA"), as amended, 5 U.S.C. § 6301 *et seq.*, necessarily means that they are entitled to their salaries solely by virtue of their status as officers. We concluded in the *White House Personnel Opinion* that 5 U.S.C. § 5508 gives rise to the implication that executive branch officers who are exempted from the ASLA under 5 U.S.C. § 6301(2)(x) and (xi) are entitled to their salaries solely by virtue of their offices. *See White House Personnel Opinion* at 4. But NOAA Corps Members are not exempted from the ASLA under those provisions. Nor are they exempted from the ASLA by any other provisions enacted in 1953, when Congress enacted section 5508. Instead, NOAA Corps members were never covered by the ASLA in the first place, because they have their own independent leave system. *See ASLA*, Pub. L. No. 82-233, ch. 631, tit. II, § 202(a) and (b)(1)(E)-(F), 65 Stat. 679. Accordingly, we do not believe that they are encompassed by the implication that we recognized in the *White House Personnel Opinion*.

We further note that, although we have not exhaustively analyzed the issue, there are at least some reasons to be skeptical that NOAA Corps members are entitled to their salaries solely by virtue of their status as officers. Although 37 U.S.C. § 204(a)(1) states that uniformed services members on active duty are "entitled" to pay at specified rates, this provision does not

unequivocally establish that uniformed services members are entitled to pay regardless of whether they perform the functions of their offices. Numerous other statutes use the same terminology in specifying the salary levels associated with federal jobs even though the employees holding those jobs are not entitled to their salaries solely by virtue of their positions, but rather have to perform the duties of their positions before being entitled to their pay. *See, e.g.,* 5 U.S.C. § 5332(a). Moreover, under Title 37 of the United States Code, uniformed services members are entitled to a limited amount of leave, and if they are absent without leave or over leave, they are not entitled to their pay. *See* 37 U.S.C. § 503.

We need not resolve, however, whether or not NOAA Corps members are entitled to their pay solely by virtue of their status as officers because, even assuming that they are not, we believe that they may continue to work during an appropriations lapse for another reason. Commerce has represented to us that it has no statutory authority to place NOAA Corps members on furlough, or in any other status in which they would not be entitled to pay, based on a temporary funding lapse. Moreover, although we have not performed a comprehensive search, we have not located any statute that provides such authority. In contrast, express statutory authority exists for federal agencies to furlough employees in the competitive and excepted services, as well as members of the Senior Executive Service. *See* 5 U.S.C. §§ 3595a, 7511 *et seq.* Based on Commerce's representation that it has no authority to furlough NOAA Corps members, we believe that the statutory authority to hire uniformed services members, coupled with the absence of any authority to place them in a non-pay status in response to a temporary funding lapse, is implicit "authoriz[ation] by law" to incur salary obligations for uniformed services members during such a lapse. *Cf. White House Personnel Opinion* at 5-6. If Commerce did not have that implicit authority, its only alternative would be permanently to discharge the NOAA Corps members in order to avoid incurring salary obligations. Even assuming Commerce has such discharge authority (which is not clear), we do not believe that Congress expected it to take this extraordinary and highly disruptive action in the event of a temporary appropriations lapse. *Cf. id.* at 7. Our conclusion on that score is reinforced by the longstanding practice of requiring uniformed services members to continue to work during temporary appropriations lapses, a practice that Congress has not sought to curtail. *Cf. id.*

For these reasons, we believe that NOAA Corps members may continue to work during an appropriations lapse consistent with the restrictions imposed by the Antideficiency Act.

Please let us know if we may be of any further assistance.

Best regards,

Karl

Karl R. Thompson

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