

Corporation for
**NATIONAL &
 COMMUNITY
 SERVICE** 

MEMORANDUM FOR DAVID EISNER

FROM: Frank R. Trinity *Frank R. Trinity*
 General Counsel

SUBJECT: Inspector General Memorandum dated April 15, 2008

DATE: April 23, 2008

Over the past year we have engaged in extensive discussions with the Inspector General on how the Corporation should handle improper end of term service hour certifications for AmeriCorps members. We seem to have agreement with the Inspector General that, in the absence of a member's affirmative culpability and in the interest of equity, we should leave undisturbed a member's good faith reliance on the end of term certification. We also seem to have agreement on reducing the responsible entity's liability to a pro-rated amount for relatively small errors (with Education Award Programs' liability capped at the per member grant amount).

Please disregard the views ascribed to me in the Inspector General memorandum dated April 15, 2008, as the memorandum contains several material misstatements. My views on this subject are set out herein and in a previous General Counsel memorandum to Chief Financial Officer Jerry Bridges dated June 14, 2007.

The Inspector General expresses concern about three issues:

- (1) Under what circumstances are State Commissions liable for debts associated with improper service hour certifications executed by subgrantee programs?
- (2) What action may we take to protect the Government's financial position if the member has not yet used the education award at the time we identify the error?
- (3) May recovered funds in excess of payments from the Trust be returned to the National Service Trust instead of being paid into Treasury's General Fund as miscellaneous receipts?

State Commission liability

In a State Commission-funded program, there are two entities potentially liable in connection with an improper service hour certification: (1) the state commission; and (2)



the subgrantee organization. The principal legal authority for pursuing recovery of funds in connection with improper service hour certifications provides as follows:

Any individual who makes a materially false statement or representation in connection with the approval or disbursement of an education award or other payment from the National Service Trust may be liable for the recovery of funds and subject to civil and criminal sanctions.

45 C.F.R. 2526.10(e).

In most cases, a program director or other representative of the subgrantee organization signs the end of term certification, documenting the number of service hours completed by the member. Under this regulation, our strongest case for liability is against the subgrantee organization, the entity that actually executes and transmits the certification to the Government. The draft guidance document therefore focuses on the subgrantee organization. Having said that, the draft guidance document explicitly puts State Commissions on notice that they may also be held accountable for an improper certification. In establishing a debt against a State Commission we would rely on, among other authorities, the sub-statutory provisions cited in the Inspector General's memo. Our decision in a given situation whether to pursue recovery from a State Commission rather than a subgrantee certifying program will be informed by the specific facts surrounding the improper certification, and the Inspector General will have an opportunity to make a recommendation at that time.

Collectible debt vs. contingent claim

The Corporation may establish a debt in connection with any improper payment by the Government. See United States v. Wurts, 303 U.S. 414, 415 (1938) ("The Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid"). The amount of the improper payment determines the amount of the debt. As explained by the Government Accountability Office,

... a 'debt,' for purposes of the Federal Claims Collection Act and Standards, requires two elements: there must be an amount of money or property which is owed to the United States, and the government must be entitled to receive it immediately. If it is not immediately payable (as, for example, in the case of loan payments which have not yet become due), then there is no 'debt' upon which collection action can be taken

Government Accountability Office, Principles of Appropriations Law, volume III, page 13-15 (1994). To the extent the National Service Trust has disbursed funds based on an improper certification, we may establish and collect that amount under our debt collection procedures.

By law, a member has seven years to use the education award. 42 U.S.C. 12602(d). Trust records show that members draw down relatively substantial amounts during the first three years with a precipitous drop-off in usage in the last four years of eligibility. Roughly 20% of the amount reserved for education awards goes unrequested at the end of the seven-year period.

If a member has not yet drawn down all or part of an education award, and if we leave undisturbed the member's good faith reliance on the certification of hours, we may assert a contingent claim against the party responsible for the improper certification. The claim would ripen into a collectible debt if and when the member uses the education award. We share the Inspector General's concern about the administrative burdens associated with the contingent nature of the claim. However, we have no legal authority to collect an amount as a debt before there has been an actual loss to the Government. To the extent we wish to collect a debt before the disbursement of funds, we would need to request such authority from Congress in law.

Recovered funds payable to the National Service Trust or to Treasury's General Fund.

Under the Miscellaneous Receipts Act, 31 U.S.C. 3302(b), if any agency collects a debt, the agency must deposit the funds in the Treasury as miscellaneous receipts unless the agency has statutory authority to credit the receipt to an account such as the National Service Trust.

A long-recognized exception to the Miscellaneous Receipts Act is a "refund" representing "amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed." Government Accountability Office, Principles of Appropriations Law, volume II, pages 6-170-171 (2006). Refunds are defined by the Government Accountability Office as "repayments for excess payments . . . directly related to previously recorded expenditures . . ." Id., at 6-170. While we may retain "refunds" of improper payments in the National Service Trust, we do not have legal authority to adopt a blanket policy of returning all recovered funds to the Trust. To the extent that the recovered funds reflect disbursements from the National Service Trust, we may return them to the Trust. To the extent that the recovered funds reflect the settlement of a contingent liability or civil liability greater than the actual loss to the Government, however, they must be deposited in the Treasury as miscellaneous receipts.

Failure to comply with the Miscellaneous Receipts Act can have serious consequences, including the removal of the responsible federal employee, and can result in the improper augmentation of the credited appropriation.

IG's proposal to hold contingent repayments in the National Service Trust

When an improper certification is discovered before a member has drawn down the education award, the Inspector General proposes to make the National Service Trust whole

... by having the responsible grantee pay to the Trust Fund the full amount of the Education Award on its award, thus neutralizing the reduction of available Trust Funds from the award, subject to remitting back amounts determined after seven years not to have been necessary due to the subsequent non-takedown by the eligible member.

April 15, 2008, memorandum, at 4.

The Inspector General further says there is “no exact standard or binding opinion from a legal authority that addresses what ought to occur when improper payments are made from it.” That is incorrect. When improper payments are made, we have clear authority to retain recovered funds equal to the amount of the improper payments in the National Service Trust. The Inspector General’s proposal does not involve the recovery of “improper payments.” His proposal addresses the situation in which no payment has been made or may ever be made. Where there has been no improper payment, there is both an “exact standard” for disposing of recovered funds -- the Miscellaneous Receipts Act -- and “binding opinion” -- the long line of Comptroller General decisions and Office of Legal Counsel Opinions. (“The requirement [in the Miscellaneous Receipts Act] safeguards the separation-of-powers principle embedded in the Appropriations Clause that is fundamental to our constitutional structure.” Matter of Maritime Administration, B-287738, 2002 U.S. Comp. Gen. LEXIS 277, *6 (May 16, 2002); “The Constitution commits to the legislative branch of government control over public expenditures. U.S. Const. Art. I. Sec. 8, cl. 1; *id.*, Art. I, Sec. 9, cl. 7. Congress has passed various statutes designed to ensure that congressional prerogatives under this constitutional scheme are not diminished by executive action.” 4 Op. Off. Legal Counsel (vol. B) 684, *4 (June 13, 1980)).

Under current law, we may establish a contingent claim against the responsible entity for the amount potentially available for the member’s use. If we receive an amount greater than the actual payment in error, we must remit the difference to the general fund of the Treasury.

The Inspector General’s proposal would also run afoul of the specific statutory provisions governing the National Service Trust. By law, the Trust may consist only of (1) appropriated funds; (2) donations; and (3) interest on Trust investments. 42 U.S.C. 12601(a). Amounts in the Trust may only be used to pay for specific educational expenses, to repay qualified student loans, and related student loan interest payments. 42 U.S.C. 12601(c), 42 U.S.C. 12604(a). We have no authority to hold in the National Service Trust a payment from a responsible entity in excess of an actual loss to the Government, or to pay to the responsible entity an unclaimed amount from the National Service Trust at the expiration of the seven-year period of education award availability.

The Inspector General’s proposal offers practical ideas on resolving improper service hour certifications when they are discovered. We would be well-advised to consider his

ideas in pursuing statutory authority for a process that meets our shared goals of equity, practicality, and appropriate stewardship of the Federal fisc. For now, however, we may administer the National Service Trust only as authorized in statute.

IG's concluding recommendation

Finally, I draw your attention to several concluding paragraphs in the Inspector's General's memorandum:

In conclusion, the issue comes down to whether the funds recovered are labeled a "refund" or a "miscellaneous receipt." This labeling decision is outcome-determinative in that refunds go back to the Trust while miscellaneous receipts go to the Treasury.

We believe that "refund" is the appropriate label, for the reasons discussed above. But to the extent the answer is not clear, the Corporation should consider its interests, the equities, and likely downside consequences or risks. The Corporation's interests are served when the funds recovered are called "refunds" and go back into the Trust. The equities favor the Corporation doing precisely that: The Corporation will be making the Trust whole with funds recovered from a certifying program or member, not entitled to keep them. The downside risk is that someone will disagree – but who? And why? Someone would have to pick that fight, and the Corporation's position defending the Trust is eminently defensible, particularly as it would be relying on OIG's advice. The Corporation should do so.

April 15, 2008, memorandum, at 6.

The Inspector General's recommendation is unfortunate in at least two respects. First, the recommendation fails to show due regard for the prerogatives held by Congress in the area of appropriations and public expenditures, as well as our responsibilities to abide by the statutory provisions that embody those prerogatives. Second, the recommendation appears to offer the Inspector General himself as a substitute for the agency General Counsel on a matter of law. In my view, that type of substitution is inappropriate under these circumstances and will ultimately impair the Inspector General's effectiveness. I am communicating directly with the Inspector General on my concerns. But for purposes of this memorandum, I advise you to disregard the concluding recommendation.

CC: Gerald Walpin
Jerry Bridges