

OGC Legal Opinion Regarding Protective Service Detail



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

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OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Legal Opinion Regarding Protective Service Detail

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THRU: Kevin S. Minoli, Principal Deputy General Counsel
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TO: Henry E. Barnet, Director
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The Office of General Counsel has been asked to opine on (1) the source of the Agency's legal authority to provide protective services for the Administrator, and (2) the basis of the protective service agents' authority to carry firearms, execute warrants, and make arrests, otherwise known as "law enforcement authority," while in the performance of their protective services duties. The Agency has authority to expend appropriated funds to provide protective services for the Administrator under 5 U.S.C. § 301. Further, the protective service agents derive law enforcement authority under 18 U.S.C. § 3063 provided they have responsibility for investigating environmental crimes. Together, these statutes authorize the Agency to provide a protective service detail to the Administrator comprised of protective service agents with full law enforcement authority to carry firearms, execute warrants, and make arrests.

Background

The U.S. Environmental Protection Agency employs a Protective Service Detail (“PSD”) staffed by agents responsible for providing personal protective services to the Agency’s Administrator.¹ The PSD is a separate component of the Criminal Investigation Division (“CID”) in the Office of Criminal Enforcement, Forensics, and Training (“OCEFT”), Office of Enforcement and Compliance Assurance. Across the federal government, federal law enforcement personnel such as PSD agents must possess authority to exercise law enforcement functions including carrying firearms, executing warrants, and making arrests. For instance, the criminal investigators in CID who conduct investigations of environmental crimes, derive their law enforcement authority from 18 U.S.C. § 3063, “Powers of the Environmental Protection Agency,” which states, in part:

Upon designation by the Administrator of the Environmental Protection Agency, any law enforcement officer of the Environmental Protection Agency with responsibility for the investigation of criminal violations of a law administered by the Environmental Protection Agency, may—

- (1) carry firearms;
- (2) execute and serve any warrant or other processes issued under the authority of the United States; and
- (3) make arrests without warrant for-
 - (A) any offense against the United States committed in such officer’s presence; or
 - (B) any felony offense against the United States if such officer has probable cause to believe that the person to be arrested has committed or is committing that felony offense.

This statute provides full law enforcement authority to carry firearms, execute warrants, and make arrests. This authority is broad, allowing CID criminal investigators to carry firearms and make arrests without warrants for offenses against the United States committed in their presence (or if

¹ Currently all PSD agents are classified as Criminal Investigators, GS-1811.

they have probable cause to believe that someone has committed or is committing a felony), even at times when they are not actively investigating environmental crimes.

We understand from OCEFT that when CID criminal investigators assigned to the PSD first undertook the performance of protective services in the wake of the September 11, 2001 terrorist attacks, they possessed law enforcement authority related to their criminal investigative work conferred by 18 U.S.C. § 3063. Nearly a decade later, the PSD began to employ law enforcement officers hired from outside the Agency who were not envisioned to have “responsibility for the investigation of criminal violations” of environmental laws — the prerequisite for § 3063 authority. OCEFT consulted with the Office of General Counsel (“OGC”) about this issue, and in 2010 obtained law enforcement authority for PSD agents through deputation by the U.S. Marshals Service. These deputations granted PSD agents law enforcement authority for a set period of time (as specified in the deputations). In the fall of 2016, OCEFT again consulted with OGC regarding transitioning PSD agents’ law enforcement authority back to 18 U.S.C. § 3063. OGC concurred with OCEFT’s view that PSD agents with actual “responsibility for the investigation of criminal violations” may appropriately rely on § 3063 for law enforcement authority.

Analysis

A. The Agency Has Authority to Expend Appropriated Funds on Protective Services

It is well established that the Agency has the authority to expend resources for the personal protection of the Administrator. Such authority is derived from 5 U.S.C § 301, commonly referred to as a “housekeeping statute.” Section 301 authorizes an agency head to “prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and

property.” 5 U.S.C. § 301. The Comptroller General of the United States, who also heads the U.S. Government Accountability Office (“GAO”), has interpreted this general grant of administrative authority as permitting federal agencies to expend appropriated funds to assign employees to provide protective services, and has advised that under § 301, an agency may authorize the use of its appropriated funds, personnel, and assets to protect agency officials.² The Comptroller General further advised that this authority extends to agencies without specific statutory authority for protective services. In a decision analyzing the authority of the U.S. Department of the Treasury to provide a protective service detail to the Secretary of the Treasury, the Comptroller General opined,

...if a Government official were threatened or there were other indications that he was in danger, and if it were administratively determined that the risk were such as to impair his ability to carry out his duties, and hence to affect adversely the efficient functioning of the agency, then funds of his agency, the use of which was not otherwise restricted, might be available to protect him, without specific statutory authority.

In re the Secret Serv. Prot. for the Sec'y of the Treasury, 54 Comp. Gen. 624, 628-29, (Jan. 28, 1975).³ The Comptroller General’s conclusion rests on the view that the deployment of security personnel is “an executive function essential to the management of a department and the performance of its business.” *Id.* at 628-29.

Additionally, in *In re the Secret Serv. Prot. for the Sec'y of the Treasury*, the Comptroller General stated that the GAO “would generally not object” to an agency providing protection

² See, e.g., *In re the Secret Serv. Prot. for the Sec'y of the Treasury*, 54 Comp. Gen. 624, 628-29, (Jan. 28, 1975), as modified, 55 Comp. Gen. 578, B-149372 (Dec. 18, 1975); *Matter of Home & Auto. Sec. Sys. for U.S. Customs Serv. Pers.*, B-251710 (July 7, 1993).

³ See also U.S. Gov’t Accountability Office, GAO/GGD/OSI-00-139, “Security Protection, Standardization Issues Regarding Protection of Executive Branch Officials,” B-283892, at 12 (July, 2000) (noting that agencies may provide protection to their officials “if it is administratively determined that the efficiency of the agencies would be affected because of threats or other legitimate concerns over the safety of officials that would impair their abilities to carry out their duties”).

services to its officials “where there is legitimate concern over the safety of an official and where the agency’s functioning may be impaired by the danger to that official - to an agency.” *Id.* at 629. On this basis, the GAO further opined that the “Secretary [of the Treasury] - in a proper case - may arrange for his protection by personnel of the Department of the Treasury or by the Secret Service, but in the latter case only on a reimbursable basis” even when the Secretary was not one of the officials the Secret Service was specifically authorized to protect under 18 U.S.C. § 3056. *Id.* at 630.⁴

Many federal agencies, like EPA, that lack specific statutory authority to provide protective services rely on the Comptroller General’s interpretation of 5 U.S.C. § 301 to justify the expenditure of appropriated funds on protective services.⁵ As the GAO noted in a report analyzing protection of executive branch officials across different federal agencies, “[f]rom fiscal years 1997 through 1999, ... security protection was provided to officials holding 42 executive branch positions at 31 executive branch agencies.” *Id.* at 2. The GAO catalogued security services provided to 14 Cabinet secretaries, four deputy or undersecretaries, and 24 other high-ranking officials. *Id.* at 7. Of these, “[o]nly two executive branch agencies ... —the Secret Service and the State Department—had specific statutory authority to protect executive branch officials, including the authority to carry firearms in carrying out their protective responsibilities.” *Id.* at 11. The report goes on to explain that “[a]lthough none of the other agencies cited specific statutory authority to

⁴ The Comptroller General’s reasoning has appeared in other cases reviewing the protective services of other federal agencies. *See e.g.*, U.S. Gov’t Accountability Off., GA0-04-261SP, Principles of Federal Appropriations Law (3d ed. 2004) (citing favorably to 54 Comp. Gen. 624 and *Matter of Home & Auto. Sec. Sys. for U.S. Customs Serv. Pers.*, B-251710 (July 7, 1993), in which the Comptroller General determined that the U.S. Customs Service may provide security devices for agents based on the risk created by their law enforcement responsibilities, the threat environment, and past threats against Customs personnel).

⁵ *See* GAO Report, Security Protection, Standardization Issues Regarding Protection of Executive Branch Officials, B-283892 (2000).

protect their officials, that does not mean that the agencies are not authorized to provide such services.” *Id.* The GAO cited to its prior opinions in the report, explaining:

In decisions of the Comptroller General, we have recognized that under certain circumstances, agencies can expend appropriated funds to protect their officials as a necessary expense. Such protection is warranted if it is administratively determined that the efficiency of the agencies would be affected because of threats or other legitimate concerns over the safety of officials that would impair their abilities to carry out their duties.

Id. at 11-12.

Accordingly, pursuant to 5 U.S.C. § 301 and the above noted Comptroller General decisions interpreting 5 U.S.C. § 301, the Agency has the authority to expend appropriated funds on the protection of the Administrator. We next turn to the issue of how agents that perform protective services for the Administrator derive their law enforcement authority to carry firearms, execute warrants, and make arrests.

B. PSD Agents Have Law Enforcement Authority Under 18 U.S.C. § 3063

In order for PSD agents to carry firearms, execute warrants, or make arrests in the performance of their protective duties, they must have law enforcement authority. There is no statutory provision that provides EPA with law enforcement authority specifically for law enforcement officers who solely provide protective services. As stated above, however, 18 U.S.C. § 3063 does provide law enforcement authority for EPA law enforcement officers “with responsibility for the investigation of” environmental crimes. Section 3063 specifically provides:

any law enforcement officer of the Environmental Protection Agency with responsibility for the investigation of criminal violations of a law administered by the Environmental Protection Agency, may—

- (1) carry firearms;
- (2) execute and serve any warrant...; and
- (3) make arrests...”.

Therefore, whether an agent can have law enforcement authority rests on whether he or she has been designated with “responsibility” for the investigation of environmental crimes. The most

important rule of statutory construction is to begin with the language of the statute.⁶ As the Supreme Court has stated, “we begin with the understanding that Congress ‘says in a statute what it means and means in a statute what it says there.’”⁷ “When the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms. [internal quotations omitted].”⁸ To determine the meaning of a statute’s text, judges evaluate the “natural reading”⁹ or “ordinary understanding”¹⁰ of disputed words. Courts often refer to dictionaries to find this ordinary meaning.¹¹

Here, the statute is clear. “[A]ny law enforcement officer ... with responsibility for investigat[ing]” environmental crimes has law enforcement authority under 18 U.S.C. § 3063. The statute is neither ambiguous nor otherwise unclear in its meaning. When considering the ordinary meaning of the text of the statute, “with responsibility” can be reasonably interpreted to mean that PSD agents are to be available to be called on and do perform environmental criminal investigatory work.¹²

⁶ See, e.g., *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249 (1992); *Mallard v. U.S.D.C. So. Dist. of Iowa*, 490 U.S. 296, 300 (1989).

⁷ *Hartford Underwriters Ins. Co.*, 530 U.S. at 6 (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. at 254).

⁸ *Id.* (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))); see also *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 93 (2007) (“[N]ormally neither the legislative history nor the reasonableness of the Secretary’s method would be determinative if the plain language of the statute unambiguously indicated that Congress sought to foreclose the Secretary’s interpretation.”).

⁹ *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 611 (1991).

¹⁰ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697 (1995). See also *Astrue v. Capato*, 132 S. Ct. 2021, 2030, 2130 (2012).

¹¹ E.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 227-29 (1994).

¹² In the Merriam-Webster dictionary, “responsibility” is defined as:

- 1: the quality or state of being responsible: such as
 - a: moral, legal, or mental accountability
 - b: reliability, trustworthiness

- 2: something for which one is responsible; burden

responsibility, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/responsibility>.

We understand from OCEFT that all PSD agents' position descriptions include criminal investigatory responsibilities. Further, according to OCEFT, PSD agents presently perform environmental criminal investigatory work in addition to their protective service duties. Their criminal investigatory work includes activities such as executing warrants; serving subpoenas; conducting witness interviews; analyzing documents relevant to environmental criminal investigations; and evaluating incoming tips on potential criminal environmental violations. In light of the plain language of the statute, PSD agents derive law enforcement authority under 18 U.S.C. § 3063 provided they have responsibility for performing environmental criminal investigative work.¹³

A PSD agent's supervisor is in the best position to determine the actual responsibilities of his or her employees. To aid a supervisor in documenting the conclusion that an employee has responsibility for the investigation of environmental crimes, we recommend OCEFT develop a system that documents and tracks the following: the percentage of time each employee is expected to spend on investigating environmental crimes each year; the nature of environmental criminal investigatory activities actually conducted each year; and the percentage of time actually spent on such activities each year. We also recommend that OCEFT continue to ensure that all agents investigating environmental crimes include those responsibilities as part of their position

The word "responsible," in turn, is defined as, as applicable here:

1a: liable to be called on to answer

1b(1): liable to be called to account as the primary cause, motive, or agent a committee responsible for the job

1b(2): being the cause or explanation mechanical defects were responsible for the accident

1c: liable to legal review or in case of fault to penalties ...

responsible, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/responsible>.

¹³ Where PSD agents have responsibility for the investigation of environmental crimes, they may carry firearms, make arrests, and execute warrants even at times when they are not carrying out criminal investigatory duties, such as when they provide protective services for the Administrator.

descriptions. There is no black letter law definition or answer as to what percentage of time or activities conducted are sufficient to conclude that an employee has “responsibility for” the investigation of environmental crimes. Ultimately, the extent to which an employee has responsibility for the investigation of environmental crimes is a judgment made by the employee’s supervisor.

Conclusion

In summary, the Agency’s authority to expend appropriated funds to provide protective services for the Administrator is derived from 5 U.S.C. § 301. Furthermore, PSD agents derive law enforcement authority from 18 U.S.C. § 3063 provided they have responsibility for performing environmental criminal investigative work. We recommend that OCEFT develop a system that documents and tracks the information identified above to aid the supervisor in documenting the conclusion that an employee has responsibility for the investigation of environmental crimes.