



Legal Opinion L-2005-04
February 28, 2005

U.S. Railroad Retirement Board Phone: (312) 751-7139
844 North Rush Street TTY: (312) 751-4701
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

TO : Frank Buzzi
Chief Actuary

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Payment of Professional Association Membership Fees

This is in reply to your inquiry of February 15, 2005, regarding my opinion as to whether the Bureau of Actuary may pay the individual membership fees to the American Academy of Actuaries and to the Society of Actuaries on behalf of employees of the Railroad Retirement Board. For the reasons set forth below, in my opinion the Bureau of Actuary has authority to pay membership fees effective December 28, 2001. Use of appropriated funds for payment of membership fees prior to that time was not authorized.

The American Academy of Actuaries internet web site states that it was organized in 1965, and that it establishes, maintains and enforces professional standards of qualification, practice and conduct for actuaries. The Academy also develops continuing education opportunities, and advocates on behalf of public policies which are actuarially sound. Membership requirements include meeting "the basic educational requirements for the associateship designation in the Casualty Actuarial Society or Society of Actuaries." The Society of Actuaries describes itself on its internet web site as a nonprofit organization which provides education in fundamental actuarial principles, advanced education, and continuing education for practicing actuaries. Both the Academy and the Society assess membership fees on a calendar year basis, payable early in the year. I note that section 15(f) of the Railroad Retirement Act specifies that the members of the Actuarial Advisory Committee¹ "shall hold membership in the American Academy of Actuaries."

Determining whether the Board may pay membership fees of its employees to these organizations is a two-step process. The first step to determine whether the agency has authority under the Railroad Retirement Act to pay individual membership fees. In this regard, section 7(b)(9) of the Act specifically grants to the Board the following powers:

- (9) The Board shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities, and employ such individuals and provide for their compensation and expenses as may be necessary for the proper discharge of its functions. * * *

Section 7(b)(9) includes both a mandate to the Board, and a grant of discretion. On the one hand, the term "shall" imposes a requirement that the agency maintain offices, and hire and compensate employees, including compensation for expenses. On the other hand, the remaining clause "as may be necessary * * *" implies the Board has discretion to determine whether an expenditure is related to the agency's duties. The effect of the full sentence is thus to require the Board to pay employee expenses, once the Board determines the expense is necessary to administration. Employment of actuaries is clearly necessary to the Board's administration of the Railroad Retirement Act. Given that in Congress' judgment members of the independent body which advises and reviews agency actuarial statements must hold membership in the American Academy of Actuaries, in my opinion it is within the Board's discretion to conclude that the agency actuaries who advise the Board and prepare the statements reviewed by the Actuarial Advisory Committee must be equally credentialed, and that the fees necessary to hold this credential are an employee expense necessary to the "proper discharge" of the agency's actuarial duties in administering the Act. If membership is determined to be a necessary employee expense, then the pursuant to section 7(b)(9) the Board must pay it, unless prohibited from doing so by another law.

¹ The Actuarial Advisory Committee was established by section 15(c) of the Railroad Retirement Act of 1937 (Public No. 162, 75th Cong. Chapter 382, 1st Session, 50 Stat. 307 at 317). The Committee is comprised of three actuaries, one selected by the Board from recommendations of railroad labor, a second from recommendations by railroad employers, and third designated by the Secretary of the Treasury. The Committee is authorized to examine the actuarial reports of the Board and recommend changes in actuarial methods as necessary. The requirement for membership in the Academy was added with enactment of the Railroad Retirement Act of 1974. See P.L. 94-445, section 15(f), (88 Stat. 1305, 1348-49).



Legal Opinion L-2005-04 February 28, 2005

U.S. Railroad Retirement Board Phone: (312) 751-7139
844 North Rush Street TTY: (312) 751-4701
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

The second step in analysis is therefore to determine whether the agency is otherwise prevented from paying individual membership fees to the Academy and the Society by a restriction imposed on use of funds appropriated by Congress. Beginning again with the Railroad Retirement Act itself, I note that Congressional appropriation of funds to the Board for administration of the Railroad Retirement Act is authorized by section 15(a) of the Act, which states:

15(a) The Railroad Retirement Account established by section 15(a) of the Railroad Retirement Act of 1937 shall continue to be maintained in the Treasury of the United States. There is hereby appropriated to such Account for each fiscal year * * * to provide for payment of benefits to be made from such Account in accordance with the provisions of section 7(c)(1) of this Act, and to provide for expenses necessary for the Board in the administration of all provisions of this Act, an amount equal to amounts covered into the Treasury (minus refunds) during each fiscal year under the Railroad Retirement Tax Act.

Section 15(h) of the Act further explicitly states:

(h) There are hereby authorized to be appropriated from time to time such sums as may be necessary to provide for the expenses of the Board in administering the provisions of this Act.

Congress provides annual appropriations to the Board in terms consistent with sections 15(a) and 15(h). See, e.g., Consolidated Appropriations Act, 2004, P.L. 108-199, at Title IV (118 Stat. 3 at 273), allocating a sum "For necessary expenses for the Railroad Retirement Board for administration of the Railroad Retirement Act and the Railroad Unemployment Insurance Act".

The Comptroller General of the United States has held that an expenditure from an appropriation is justified if (1) it bears a logical relationship to the appropriation charged, (2) it is not prohibited by law, and (3) the item of expenditure is not provided for by another appropriation or statutory funding scheme. 60 Comp. Gen. 422, 427-28 (March 14, 1996). As discussed above, maintenance of the credentials of the agency's actuaries clearly logically relates to an appropriation for administrative expenses under the Act.

Regarding the second criteria, section 1112(a) of the National Defense Authorization Act for Fiscal Year 2002, P.L. 107-107, (115 Stat. 1238)(December 28, 2001), added to Title 5 of the United States Code new section 57572, which provides as follows:

§ 5757. Payment of expenses to obtain professional credentials

- (a) An agency may use appropriated funds or funds otherwise available to the agency to pay for—
 - (1) expenses for employees to obtain professional credentials, including expenses for professional accreditation, State-imposed and professional licenses, and professional certification; and
 - (2) examinations to obtain such credentials.
- (b) The authority under subsection (a) may not be exercised on behalf of any employee occupying or seeking to qualify for appointment to any position that is excepted from the competitive service because of the confidential, policy-determining, policy-making, or policy-advocating character of the position.³

The General Accounting Office has interpreted section 5757 in Scope of Professional Credentials Statute, B-302548, August 20, 2004. An accountant had asked her employing agency to pay for her Certified Public Accountant License and her membership in the California Society of Certified Public Accountants. The agency requested advice of the Comptroller General. The General Accounting Office found section 5757(a)(1) uses "terms ordinarily used and commonly understood to refer to permission conferred on an individual by a regulatory body to

² On November 2, 2002, Public Law 107-273 enacted a second section 5757 of Title 5, dealing with extended assignment incentives. See 116 Stat. 1779. As a result, the United States Code currently appears to include two sections 5757. This memorandum concerns only the amendment enacted by P.L. 107-107.

³ Positions described by subsection 5757(b) are classified as "Schedule C" by the Office of Personnel Management. See 5 CFR 213.3301(a).



Legal Opinion L-2005-04 February 28, 2005

U.S. Railroad Retirement Board Phone: (312) 751-7139
844 North Rush Street TTY: (312) 751-4701
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

engage in the practice of a regulated profession” which would “include annual state bar memberships, CPA licenses, medical licenses

*** teacher certifications, and other certifications that permit an employee to practice in a professional area.” It was also noted that section 5757 would include state bar association membership where such membership is a requirement for a license to practice law, but not professional associations such as the American Bar Association, which are not a condition for a license.

With respect to the Board’s actuaries, membership fees in the American Academy of Actuaries are necessary to professional accreditation by the Academy. Membership in the Society of Actuaries or a similar organization is also a necessary prerequisite to membership in the Academy. Accordingly, in my opinion section 5757(a)(1) authorizes the Board to pay the annual membership fees to both organizations.

Prior to enactment of section 5757 by Public Law 107-107, however, payment of employee accreditation expenses was governed for over a century by the principal stated by the Supreme Court that “*** it is the duty of persons receiving appointments from the government *** to qualify themselves for the office.” United States v. Van Duzee, 140 U.S. 169, 171 (1891). The Comptroller General echoed this rule: “That which is required of a person to become invested with an office must be done at his own expense unless specific provision is made by law for payment by the Government.” 2 Comp. Gen. 262, 263 (1895). A series of decisions have applied this rule to hold annual fees for an attorney’s continued membership in a State bar, required as condition for licensing, were a matter of personal qualification. See, e.g., 51 Comp. Gen. 701 (1972). More specifically, the General Accounting Office advised in B-286026 (June 12, 2001) that the Pension Benefit Guaranty Corporation had no authority to pay for the cost of an actuarial accreditation examination because professional accreditation is personal to the employee.

Based on my review of the foregoing authorities, it is my opinion that prior to the amendment to Title 5 of the United States Code enacted by Public Law 107-107 on December 28, 2001, individual membership fees to the American Academy of Actuaries and the Society of Actuaries would have been considered a personal expense. Accordingly, the Board was prohibited from paying such fees on behalf of its employees by restrictions imposed on use of funds appropriated by Congress for administration of the Railroad Retirement Act.