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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Election Assistance Commission—Obligation of Requirements Payments

File: B-316915

Date: September 25, 2008

DIGEST

Generally, under 31 U.S.C. § 1501, when entitlement to funds is established by statutory formula for a state, the obligation arises by operation of law and the amount should be recorded. B-164031(3).150, Sept. 5, 1979. At issue here is whether statutory preconditions, which must be met before the Election Assistance Commission (EAC) may distribute funds to states, affect when an obligation is incurred. Under the Help America Vote Act of 2002 (HAVA), the EAC must pay states statutory formula payments if they file a statement certifying they have met certain preconditions. We conclude that these HAVA funds are amounts “required to be paid” within the meaning of 31 U.S.C. § 1501(a)(5)(A) and the obligation arose by operation of law.

DECISION

The Election Assistance Commission (EAC) Inspector General (IG) has requested a decision regarding EAC’s obligation of certain payments made under the Help America Vote Act of 2002 (HAVA). Letter from Curtis W. Crider, IG, EAC, to Gary L. Kepplinger, General Counsel, GAO, July 23, 2008 (Crider Letter).¹ HAVA authorizes EAC to make payments to states, under a formula, for certain enumerated purposes, including meeting the requirements of Title III of HAVA. HAVA refers to these

¹ In July 2008, EAC initiated a telephone conference in which it inquired about the obligation of requirements payments. Telephone Conversation between Curtis Crider, IG, EAC; Roger Larouche, Deputy IG, EAC; Gavin Gilmour, Deputy General Counsel, EAC; Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO; and Monica Anatalio, Senior Staff Attorney, GAO, July 15, 2008 (EAC Conversation).

payments as “requirements payments” that a state may receive if it certifies that it has met certain preconditions under the statute including *inter alia* that it has filed a state plan, filed an administrative complaint procedure plan, and appropriated matching funds. At issue in this decision is whether HAVA’s preconditions on a state’s receipt of the requirements payments affect when EAC incurs an obligation of its requirements payments appropriation. We conclude that despite the preconditions, the requirements payments are “required to be paid” within the meaning of 31 U.S.C. § 1501(a)(5)(A) and are thus obligated by operation of law.

Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and the agency’s legal position on the subject matter of the request.² The IG included in its request for a decision in this matter EAC’s legal views and relevant factual material. Memorandum from Office of the General Counsel, EAC, to Curtis Crider, IG, EAC, July 22, 2008 (EAC OGC Memorandum).³

BACKGROUND

The Help America Vote Act of 2002 established the EAC to assist in the administration of federal elections and charged the EAC with distributing payments to states under its authorized funding programs. Pub. L. No. 107-252, 116 Stat. 1666 (Oct. 29, 2002); 42 U.S.C. §§ 15301–15545. HAVA authorizes payments to states for certain enumerated purposes, including meeting the requirements of Title III of HAVA. These payments are called “requirements payments.” HAVA provides that EAC shall make requirements payments in an amount determined by a specified allocation formula to each state that meets the statutory preconditions for the receipt of the requirements payments. 42 U.S.C. § 15401. For fiscal year 2008, Congress appropriated \$115,000,000 for requirements payments under part 1 of subtitle D of title II of the Help America Vote Act of 2002. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1996 (Dec. 26, 2007).

HAVA contains an allocation formula based on the voting age population in a state to determine the amount of the requirements payment that each state is to receive. 42 U.S.C. § 15402. Before a state may receive its statutory allocation, it must file a certification that it has met certain requirements, including compliance with state

² GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html.

³ In the EAC OGC Memorandum, EAC cites B-214937 for the proposition that GAO has specifically held 31 U.S.C. § 1501(a)(5)(A) applicable to formula grant programs that had elements like matching fund certifications and state plans. However, this decision did not directly address whether section 1501 was applicable when the state must meet statutory preconditions before receiving the funds.

plan requirements, an administrative complaint procedure plan, and have appropriated funds for carrying out the HAVA-prescribed activities equal to five percent of the amount to be spent for such activities (matching requirement). 42 U.S.C. § 15403.

The IG informed GAO that EAC recorded obligations for the 2008 requirements payment appropriation of \$115 million pursuant to 31 U.S.C. § 1501(a)(5)(A). EAC Conversation.⁴ EAC also advised us that it was unlikely the requirements payments would be made before the end of the 2008 fiscal year and that the obligation would preserve funds to make requirements payments when the states satisfied the preconditions. *Id.* EAC acknowledged that if a state did not satisfy the statutory preconditions through a certification, then the state would not receive the requirements payment. *Id.*

On August 20, 2008, EAC sent letters to state chief election officials to inform them that OIG has requested this decision, and on August 21, 2008, EAC sent a similar letter to the Office of Legal Counsel at the Department of Justice.⁵

DISCUSSION

An agency is required to properly record its obligations. 31 U.S.C. § 1501. The standards for the proper recording of obligations are found in 31 U.S.C. § 1501(a). B-300480.2, June 6, 2003. Under 31 U.S.C. § 1501(a)(5)(A), an amount shall be recorded as an obligation when supported by documentary evidence of, as relevant to our situation, a grant payable from appropriations that is “required to be paid in specific amounts fixed by law or under formulas prescribed by law.” Section 15402 of HAVA specifies the formula that determines the amount of the requirements payment. However, EAC is to make the requirements payment to the state only if the state certifies it has met certain preconditions including a state plan, an administrative complaint procedure, and matching requirements. 42 U.S.C. § 15403.

The question here is whether the requirements payment is an amount “required to be paid” under section 1501 despite the preconditions set out in section 15403 of HAVA. In a 1979 decision, we addressed a somewhat similar situation. B-164031(3).150, Sept. 5, 1979. This decision involved Medicaid grants to states to cover a share of the total amount expended by states for medical assistance under an approved state

⁴ As has been its practice, the EAC did not enter into grant agreements with states in order to obligate or issue the requirements payments. EAC OGC Memorandum.

⁵ In its two letters, EAC misstates some facts. To clarify one misstatement, it was OIG that questioned EAC’s obligation of requirements payments before certification of statutory preconditions, not GAO. We explained to EAC and the IG that an official GAO position on matters of appropriations law is available through GAO’s formal decision process. We are always available to discuss issues by phone.

plan. The Secretary of Health, Education, and Welfare (HEW) (now Health and Human Services) was required to make quarterly payments to states. The Secretary underestimated the Federal matching fund amounts and recorded as an obligation an incorrectly low figure. We distinguished between the government's legal obligation and the amount to be paid under the obligation. We stated that the obligation arose by operation of law and the Secretary's failure to record the actual amounts owed did not alter the government's obligation to pay correct amounts.

Similarly, in this case we distinguish between the legal obligation and the payment of the obligated amount. The preconditions do not render uncertain the entitlement. Under HAVA, states are eligible for an amount readily determinable by application of an allocation formula. The uncertainty here, such as it is, goes to whether EAC may disburse the obligated amount. In our view, the entitlement is set by law; the disbursement is set by a state's submission of the requisite certification. EAC has no evaluative role. States must simply file a statement that the governor, or chief executive officer of the state, "hereby certifies that it is in compliance with the requirements" under HAVA. 42 U.S.C. § 15403(a). Whether a state will so certify is the only uncertainty and only affects EAC payment and the state's receipt of its formula amount.

An obligation serves as the basis for the scheme of funds control that Congress envisioned in the various fiscal laws, including the Antideficiency Act. *See* B-300480, Apr. 9, 2003. For that reason, the eventual payment is not determinative of when an agency should record an obligation. Here, by operation of law, the state may fulfill the preconditions and be entitled to receipt of the funds through no actions on the part of the agency. Thus EAC has an obligation by operation of law and should record the obligation in its funds control system.

In that regard, EAC's recording of its obligation for the requirements payments in fiscal year 2008 was appropriate. 42 Comp. Gen. 733, 734 (1963); *see also McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 295, 301 (1997). While there is the possibility that the state might not comply with HAVA's certification, state plan, administrative complaint procedure, and matching preconditions, compliance is within the state's, not EAC's, control. The preconditions do not implicate EAC's obligation of the requirements payments because EAC is not in control of whether the states satisfy those preconditions.

CONCLUSION

HAVA's preconditions of a state certifying compliance with various preconditions, including having a state plan, an administrative complaint procedure, and having met matching requirements, do not implicate EAC's obligation of requirements payments.

The preconditions do not affect the fact that the requirements payments are “required to be paid” within the meaning of 31 U.S.C. § 1501(a)(5)(A) and are thus obligated by operation of law.

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger
General Counsel