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United States Government Accountability Office
Washington, DC 20548

B-307382

September 5, 2006

The Honorable Harold Rogers, Chairman
Subcommittee on Homeland Security
Committee on Appropriations
House of Representatives

The Honorable Martin Sabo, Ranking Member
Subcommittee on Homeland Security
Committee on Appropriations
House of Representatives

Subject: *Department of Homeland Security—Use of Management Directorate
Appropriations to Pay Costs of Component Agencies*

This responds to your letter of February 1, 2006, in which you requested our legal opinion regarding the Department of Homeland Security's (DHS) use of its Management Directorate appropriations to pay for certain costs of several DHS component agencies. In considering a reprogramming request submitted by DHS, the Committee on Appropriations learned that in fiscal year 2005 the department had charged the costs of mail operations, employee transit benefit subsidies, parking, and executive sedan services for various DHS component agencies¹ to the department's Management Directorate appropriations, rather than charging those costs to specific appropriations which those components receive directly for "management and administration" expenses.

As we explain below, either DHS's Management Directorate appropriations or the various "management and administration" appropriations for the subcomponents may be reasonably construed as available to pay the costs of administrative activities

¹ Those component agencies were the Office of State and Local Government Coordination and Preparation (SLGCP); the Office of the Under Secretary for Information Analysis and Infrastructure Protection (IAIP); and Office of the Under Secretary for Science and Technology (S&T). Under recent reorganizations, SLGCP and IAIP were abolished. IAIP's functions were divided into two new components—Analysis and Operations and the Preparedness Directorate. See H.R. Conf. Rep. No. 109-241, at 30 (2005) (discussing recent DHS reorganization under the agency's "Second Stage Review").

such as mail operations, parking, and executive sedan services incurred by component agencies. Having elected to use the Management Directorate appropriations to pay the costs of mail operations, parking, and executive sedan services for SLGCP, IAIP, and S&T *ab initio*, DHS should continue to use that same appropriation to the exclusion of any other for the same purpose unless DHS, at the beginning of the fiscal year, informs Congress of its intent to change for the next fiscal year.

In fiscal year 2005, DHS charged the costs of employee transit benefit subsidies to *both* the Management Directorate appropriations and the “management and administration” appropriations for the three component agencies, SLGCP, IAIP and S&T. As stated above, while both appropriations may be reasonably construed to be available for the cost of employee transit benefits, an agency must elect one and use it to the exclusion of the other. Continued use of the same appropriation to the exclusion of any other for the same purpose is required to provide for consistency, regularity, and predictability in the execution of the appropriations provided by Congress. DHS should elect to charge the costs of transit benefit subsidies incurred by those three component agencies to either the Management Directorate appropriations or the “management and administration” appropriations for the respective DHS subcomponent and adjust its fiscal year 2005 accounts accordingly.

Consistent with our customary practice when rendering opinions, upon receipt of your request, we wrote a letter to DHS’s General Counsel to establish a record on the matter you put before us. Letter from Susan A. Poling, Managing Associate General Counsel, GAO, to Philip J. Perry, General Counsel, DHS, March 3, 2006. We requested factual information and posed a series of questions to the General Counsel designed to permit us to assess DHS’s legal justification for charging such costs to the appropriations accounts in question. We received a response from DHS on April 24, 2006. Letter from Eugene Schied, Acting Chief Financial Officer, DHS, to Susan A. Poling, GAO, March 30, 2006 (Schied Letter).

BACKGROUND

Under the Homeland Security Act of 2002, the Under Secretary for Management is responsible for the management and administration of DHS, including, *inter alia*, the budget, appropriations, expenditure of funds, accounting, and finance; procurement; human resources and personnel; facilities, property, equipment, and other material resources; and any other management duties that the Secretary may designate. *See* 6 U.S.C. § 341(a). DHS receives annual appropriations “for necessary expenses of the Office of the Under Secretary for Management,” as authorized by section 341. Department of Homeland Security Appropriations Act, 2005, Pub. L. No. 108-334, title I, 118 Stat. 1298 (Oct. 18, 2004). *See also* Department of Homeland Security

Appropriations Act, 2006, Pub. L. No. 109-90, title I, 119 Stat. 2064 (Oct. 18, 2005).² Various DHS component agencies also received specific, direct appropriations for “management and administration” for fiscal year 2005. The Office of State and Local Government Coordination and Preparation (SLGCP), for example, received a specific “Management and Administration” appropriation available “for necessary expenses” of that office. Pub. L. No. 108-334, title III, 118 Stat. at 1309. Further, the Office of the Under Secretary for Information Analysis and Infrastructure Protection (IAIP) received a specific “Management and Administration” appropriation available for “salaries and expenses” of the office “and for management and administration of programs and activities.” *Id.*, title IV, 118 Stat. at 1314. Similarly, the Office of the Under Secretary for Science and Technology (S&T) received a specific “Management and Administration” appropriations available for “salaries and expenses” of the office “and for management and administration of programs and activities.” *Id.*, at 1315.

For fiscal year 2005, DHS charged the costs of mail operations, parking, and executive sedan service³ for SLGCP, IAIP, and S&T to the Office of the Under Secretary for Management. Schied Letter. DHS charged some of the costs of transit benefit subsidies of SLGCP, IAIP, and S&T for fiscal year 2005 to the Management Directorate appropriations and some costs of transit benefit subsidies to the respective component appropriations. *Id.* According to DHS, the Management Directorate paid for these costs because that directorate was responsible for providing these services to the new start-up organizations when DHS was created. *Id.*

The question arises whether fiscal year 2005 appropriations for the DHS Office of the Under Secretary for Management were available to pay the costs of mail operations, employee transit benefit subsidies, parking, and executive sedan services incurred by these three DHS component agencies that received separate, direct appropriations available for “management and administration.”

² The Office of the Under Secretary for Management and its subordinate offices (*i.e.*, the offices of the Chief Financial Officer, Chief Information Officer, Chief Human Capital Officer, Chief Administrative Services Officer, Chief Procurement Officer, and Chief Security Officer) are referred to collectively within DHS as the “Management Directorate,” consistent with the other “directorates” established by the Homeland Security Act of 2002. *See* 6 U.S.C. §§ 341–345. *See also* “DHS Organization, Department Structure, Directorate for Management” *available at* http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0096.xml (last visited Aug. 2, 2006). Throughout this opinion, references to the “Management Directorate” appropriations and appropriations for the “Office of the Under Secretary for Management” are synonymous and used interchangeably.

³ Although DHS did not define “executive sedan service,” for purposes of this decision we presume that the service refers to the provision of local transportation for official, authorized uses.

DISCUSSION

An agency may use appropriated funds only for the purposes for which appropriated. 31 U.S.C. § 1301(a). Even if a particular expenditure is not specifically provided for in the appropriation, the expenditure may be permissible under the “necessary expense doctrine” if it will contribute materially to the effective accomplishment of the function. B-301721, Jan. 16, 2004. We apply a three-part test to determine if the Management Directorate appropriation is available for these purposes. First, the expenditure must be reasonably related to the purposes that Congress intended the appropriation to fulfill; second, the expenditure must not be prohibited by law; and third, the expenditure must not fall within the scope of another appropriation or funding source. *See* 63 Comp. Gen. 422, 427–28 (1984); B-251887, July 22, 1993.

When we consider the costs of mail operations, employee transit benefit subsidies, parking, and executive sedan services, we find that these costs meet the first two prongs of the necessary expense doctrine. *Id.* These costs are reasonably related to the purpose that Congress intended the Management Directorate appropriations to fulfill. *See* 6 U.S.C. § 341(a). *See also* Pub. L. No. 108-334, 118 Stat. at 1298, 1309, 1314, 1315. Our cases, for example, have long found that mail operations are reasonably related, and contribute materially, to the effective management and administration of the programs administered by DHS and its component agencies. *See, e.g.*, 4 Comp. Gen. 256 (1924) (purchase of air mail stamps for the transmittal of official matter may be properly regarded as a necessary miscellaneous item of expense); B-212745, Apr. 15, 1985; B-194851, Apr. 8, 1980. *Cf.* 39 U.S.C. § 3206.⁴

Federal agencies, including DHS, have specific authority to provide employee transit subsidies, 5 U.S.C. § 7905, and executive sedan services, *see* 40 U.S.C. §§ 601–611. We have also found that appropriated funds are available for the cost of parking.⁵ *See*

⁴ Section 3206(a) permits agencies to reimburse the Postal Service for penalty mail “out of any appropriations or funds available to them.” This statute permits federal agencies to use appropriations for one component to pay penalty mail costs of another component funded under a separate appropriation and does not constitute an unauthorized transfer of appropriations or augmentation of funds. 33 Comp. Gen. 216 (1953). Penalty mail means official mail, other than franked mail, which is authorized by law to be transmitted in the mail without prepayment of postage. 39 U.S.C. § 3201(1). To the extent that costs of mail operations may include such reimbursement to the Postal Service, we would not object to DHS charging *any* appropriation available to the agency for the costs of penalty mail. 39 U.S.C. § 3206(a); 33 Comp. Gen. 216.

⁵ While appropriated funds are available to provide parking facilities generally, employee parking expenses incident to ordinary commuting are personal expenses and thus not payable from appropriated funds. 63 Comp. Gen. 270 (1984). An agency may provide employee parking facilities if it determines that the lack of parking facilities will significantly impair the operating efficiency of the agency and will be detrimental to the hiring and retention of personnel. 72 Comp. Gen. 139 (1993).

72 Comp. Gen. 139 (1993). *See also* 55 Comp. Gen. 897 (1976). The costs of mail operations, employee transit benefit subsidies, parking, and executive sedan services are not prohibited by law, and such expenditures are reasonably related to the purposes that Congress intended DHS's various management and administration appropriations to fulfill.

Under the third prong—what is at issue here—an expenditure must not fall within the scope of another appropriation or funding source. 63 Comp. Gen. at 427–28. Even an expenditure that may be reasonably related to a general appropriation may not be paid out of that appropriation where the expenditure falls specifically within the scope of another appropriation. *See, e.g.*, B-291241, Oct. 8, 2002; B-290005, July 1, 2002; B-289209, May 31, 2002. The question arises as to which appropriation account is available to DHS for the costs at issue—DHS's "Management Directorate" appropriations or appropriations specifically available to the component agencies for "management and administration."

Where one can reasonably construe two appropriations as available for an expenditure not specifically mentioned in either appropriation, we will accept an administrative determination as to which appropriation to charge. 68 Comp. Gen. 337 (1989). *See also* 5 Comp. Gen. 479 (1926). In 68 Comp. Gen. 337, we considered whether the Railroad Retirement Board should use its general appropriation or a separate appropriation for the Board's Office of Inspector General (OIG) to pay for performance awards to members of the OIG's Senior Executive Service (SES). Because the head of the Board makes determinations regarding performance awards under the Civil Service Reform Act, we found that one could reasonably construe the Board's general appropriation as available for payment of OIG SES performance awards in the same manner and to the same extent as non-OIG SES performance awards. 68 Comp. Gen. 337.

Alternatively, we found that one may reasonably construe the OIG appropriation as available for payment of OIG performance awards; we opined that the payment of performance awards from the appropriation available for the activity which presumably benefited from the performance being rewarded is not an unreasonable proposition. *Id.* Also, the Board could view SES performance awards for OIG employees as akin to salaries and thus chargeable to the OIG appropriation. *Id.* We concluded that the Railroad Retirement Board could elect to use either appropriations to pay the OIG SES performance awards because both appropriations could be reasonably construed as available for that purpose. *Id.* However, once an election is made, continued use of the same appropriation to the exclusion of any other for the same purpose is required. 59 Comp. Gen. 518 (1980).

Similarly, we find that that either DHS's "Management Directorate" appropriation or the "management and administration" appropriations for DHS components are available to pay the costs of mail operations, employee transit benefit subsidies,

parking, and executive sedan services. DHS could reasonably construe either appropriation as available for these costs. Under provisions of the Homeland Security Act of 2002, the Under Secretary for Management is responsible for the “management and administration” of DHS, including, for example, the centralized provision of services associated with such costs. *See* 6 U.S.C. § 341(a). Alternatively, DHS could reasonably construe the various “management and administration” appropriations for the SLGCP, IAIP, and S&T components as available for such “necessary expenses.” *See, e.g.*, Pub. L. No. 108-334, title III, 118 Stat. at 1309.

In this case, DHS elected to use the Management Directorate appropriations to pay the costs of mail operations, parking, and executive sedan services for the various start-up components *ab initio*. Schied Letter. We find this construction reasonable. *See* 68 Comp. Gen. 337. Having elected to use the Management Directorate appropriations, DHS should continue to use that same appropriation to the exclusion of any other for the same purpose, unless DHS, at the beginning of the fiscal year, informs Congress of its intent to change for the next fiscal year. *See* B-272191, Nov. 4, 1997.

With regard to transit subsidy benefits for employees of IAIP, S&T and SLGCP, DHS charged those costs to *both* the Management Directorate appropriations and the management and administration appropriations for those subcomponents. Schied Letter. As we mention above, continued use of the same appropriation to the exclusion of any other for the same purpose is required. 59 Comp. Gen. 518. This rule provides for consistency, regularity, and predictability in the execution of appropriations provided by Congress. U.S. General Accounting Office, *Unsubstantiated DOE Travel Payments*, GAO/RCED-96-58R at 3 (Washington, D.C.: Dec. 28, 1995). In the absence of such a rule, Congress might have to resort to the cumbersome and detailed appropriations acts common many decades ago. *Id.*

Consistency is also required because, in addition to providing necessary funding for federal programs and activities, an appropriation establishes a maximum authorized program level. *See* B-300248, Jan. 15, 2004; 72 Comp. Gen. 164 (1993). That is, the agency’s ability to elect between two appropriations available to pay for an expenditure does not mean that an agency can elect to use (or exhaust) first one and then the other of the two appropriations for the same class of expenditures. 10 Comp. Gen. 440, 447 (1931). *See also* 23 Comp. Gen. 827 (1944) (“The use of the appropriations must be consistent.”).

DHS should elect to charge the costs of transit benefit subsidies to either the Management Directorate appropriations or the “management and administration” appropriations for the respective subcomponent agency. Under the authority of 31 U.S.C. § 1553(a), DHS should then adjust its fiscal year 2005 accounts accordingly. Section 1553(a) permits agencies, after the end of the period of availability for

obligation of a fixed appropriation account and before the closing of that account under section 1552(a) of title 31 of the U.S. Code, to record, adjust, and liquidate obligations properly chargeable to that account.⁶

CONCLUSION

DHS's Management Directorate appropriations or the various "management and administration" appropriations for the subcomponents may be reasonably construed as available to pay for the costs of mail operations, parking for official agency vehicles, and executive sedan services incurred by component agencies. Having elected to use the Management Directorate appropriations to pay these costs *ab initio*, DHS should continue to use that same appropriation to the exclusion of "the management and administration" appropriations of the various components unless DHS, at the beginning of the fiscal year, informs Congress of its intent to change for that next fiscal year.

In fiscal year 2005, DHS improperly charged the costs of employee transit benefit subsidies to both the Management Directorate appropriations and the "management and administration" appropriations for the three subcomponent agencies, SLGCP, IAIP and S&T. DHS should elect to charge the costs of transit benefit subsidies to either the Management Directorate appropriations or the "management and administration" appropriations for the respective DHS subcomponent and adjust its fiscal year 2005 accounts accordingly.



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⁶ DHS could temporarily charge the costs of transit benefit subsidies to the Management Directorate appropriations during fiscal year 2005 under the authority of 31 U.S.C. § 1534, which permits agencies to make adjustments at any time during the fiscal year between appropriations.

DIGESTS

1. Where one can reasonably construe two appropriations as available for an expenditure not specifically mentioned under either appropriation, we will not question an administrative determination as to which appropriation to charge. Either Department of Homeland Security's Management Directorate appropriations or the various "management and administration" appropriations for DHS subcomponents, may be reasonably construed as available to pay the costs of mail operations, parking for official agency vehicles, and executive sedan services incurred by component agencies. Having elected to use the Management Directorate appropriations to pay such costs, DHS must now continue to use that same appropriation to the exclusion of the management and administration appropriations of the various components.
2. DHS charged fiscal year 2005 costs of employee transit benefit subsidies to *both* the Management Directorate appropriations and the "management and administration" appropriations for three subcomponent agencies, SLGCP, IAIP and S&T. Continued use of the same appropriation to the exclusion of any other for the same purpose is required to provide for consistency, regularity, and predictability in the execution of the appropriations provided by Congress. DHS should elect to charge these costs to either the Management Directorate appropriations or the "management and administration" appropriations for the respective DHS subcomponent. DHS should then adjust its fiscal year 2005 accounts accordingly under the authority of 31 U.S.C. § 1553(a).