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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Customs and Border Protection—Relocation Expenses

File: B-306748

Date: July 6, 2006

DIGEST

Customs and Border Protection's Salaries and Expenses appropriations are available to pay for relocation expenses that agency employees incur to relocate their primary residences from Canada and Mexico to the United States in order to comply with a new agency requirement that Customs employees assigned to duty stations in the United States maintain their primary residence in the United States. Customs has determined that U.S. residency enables its border workforce to better carry out its mission. Accordingly, GAO does not object to Customs using its appropriations to pay relocation costs if Customs chooses to do so.

DECISION

The Department of Homeland Security, U.S. Customs and Border Protection (Customs) has requested an advance decision under 31 U.S.C. § 3529 on whether it may pay the expenses that its employees who currently reside in Canada or Mexico will incur in order to comply with an agency directive that their primary residence be in the United States. The employees in question work at border stations within the United States. For reasons of national security, Customs is requiring that its employees who are stationed at the U.S. border live within the United States. As explained below, we would not object to Customs using its appropriated funds if it chooses to do so to pay the relocation costs that its employees incur to comply with the residency requirement.

BACKGROUND

Customs has employees who are assigned to border stations or ports within the United States but who reside across the border in Canada or Mexico. Letter from Anthony L. Smith, Certifying Officer, U.S. Customs and Border Protection, to the Comptroller General, GAO, Sept. 28, 2005 (Smith Letter). In the past, Customs did not have a policy addressing employee residence. However, as a result of the events of September 11, 2001, the agency views foreign residence as a security concern. *Id.*

Accordingly, in August 2005, the Commissioner issued a directive requiring employees assigned to duty stations in the United States to maintain their primary residence in the United States. U.S. Customs and Border Protection Directive No. 51332-016 (Aug. 22, 2005). Employees who fail to comply with the directive's requirement are subject to disciplinary action, including separation from employment. *Id.*

Customs asks if it may use its appropriated funds to pay the expenses that its employees will incur in moving their primary residences. It notes that the Federal Travel Regulation is silent on the question of benefits for employees' relocations that do not involve a change in duty station. 41 C.F.R. chs. 300–304. The agency argues that its appropriations should be available for the employees' expenses under the necessary expense rule. Smith Letter.

DISCUSSION

Appropriated funds are available only for the objects for which they were made except as otherwise provided by law. 31 U.S.C. § 1301(a). However, every item of expenditure need not be specified in an appropriation act. B-306424, Mar. 24, 2006. Under the necessary expense rule, appropriations are available for expenses which are necessary or incident to the proper execution or achievement of the object of the appropriation. B-303145, Dec. 7, 2005. The necessary expense rule recognizes that when Congress makes an appropriation for a particular purpose, by implication it authorizes the agency involved to incur expenses which are necessary or incident to the accomplishment of that purpose. *See* 6 Comp. Gen. 619, 621 (1927).

We employ a three-part test to determine whether an appropriation is available for a particular expenditure under the necessary expense rule: (1) the expenditure must bear a logical relationship to the purpose of the appropriation sought to be charged; (2) the expenditure may not be prohibited by law; and (3) the expenditure must not be provided for by another appropriation. 63 Comp. Gen. 422, 427–428 (1984). We identified no law prohibiting Customs from using funds appropriated to it to pay the expenses in question, nor any appropriation which specifically provides funds for that purpose. Accordingly, what remains to be determined is whether the relocation expenses at issue bear a logical relationship to the purpose of Customs' appropriation.

The Department of Homeland Security Appropriations Act, 2006, appropriated under the heading, "Customs and Border Protection Salaries and Expenses," (S&E) \$4,826,323,000, for "necessary expenses" for, among other things, the "enforcement of laws relating to border security." Pub. L. No. 109-90, title II, 119 Stat. 2064, 2066 (Oct. 18, 2005). Customs new residency requirement is related to the enforcement of border security.

Customs' request letter and residency directive set forth the agency's reasons behind its residency requirement. Customs' letter states that U.S. residency insures the

integrity of its workforce, maintains employee operational responsiveness in the post-9/11 environment, and protects its employees. Smith Letter. In addition, the agency's rationale for requiring its border guards to reside in the United States is set forth in its directive as follows:

"CBP employees who work in the United States but reside in a foreign country with and among foreign nationals may appear to have a conflict of interest between their official duties and the interests of the country in which they reside. They may also be at risk for knowingly or unknowingly compromising security practices and procedures, thus facilitating the illegal entry of foreign nationals, terrorists and/or terrorist weapons. In addition, CBP employees must be able to respond rapidly and effectively to operational mobilization in emergency situations, such as acts of terror, when borders may be tightened or closed."

U.S. Customs and Border Protection Directive No. 51332-016, ¶ 3.

It is well settled that agencies have reasonable discretion in determining how to carry out the objects of their appropriations. B-306424, Mar. 24, 2006. As the agency charged with securing U.S. borders, Customs is in the best position to determine whether foreign residency could compromise security procedures and practices. The impact, for example, on operational effectiveness of an emergency border closing is fairly obvious. The reasons that Customs gives for its directive support the conclusion that U.S. residency enhances border security law enforcement. Accordingly, we would not object to Customs' use of its Salaries and Expenses appropriations funds for this purpose if it chooses to do so.

This case is distinguishable from 61 Comp. Gen. 357 (1982). In that decision, the Merit Systems Protection Board (MSPB) sought to reimburse its incumbent appeals officers for their initial bar admission fees. MSPB had not required that its appeals officers be members of a bar, but in response to criticism leveled against the officers, MSPB imposed a new requirement that all appeals officers had to be attorneys admitted to a bar. MSPB argued that it should be allowed to pay the admission fees because the requirement was imposed as a condition of employment after the appeals officers had been hired and were doing their jobs for a period of time without having to meet the qualification of being an attorney. In response, the decision, sympathizing with the situation, states: "We have long held that each employee must bear the costs of qualifying him/herself for the performance of his/her official duties and that if a personal license is necessary, the employee must procure it. 22 Comp. Gen. 460 (1942)." 61 Comp. Gen. at 359. We concluded that the

Board's appropriations were not available to pay the appeals officers' bar admission fees. *Id.* at 360.¹

The situation presented in the MSPB case is distinguishable from the one presented here. The MSPB case concerned the use of appropriations for employees' personal professional credentials. The decision followed our longstanding rule that appropriated funds are not available for such expenses, and further held that we would not allow an exception where the government added a professional qualification requirement after employees had been performing the job in question without being required to hold the credential. U.S. residency, although required of Customs employees stationed at the borders, is not a personal professional credential qualification for employment. Accordingly, the MSPB decision is inapplicable.

In this decision, we do not address what items of cost Customs may consider to be relocation expenses. In that regard, we suggest that Customs use the General Services Administration regulations relating to relocation expenses as a guideline. Federal Travel Regulation, 41 C.F.R. pt. 302. Moreover, we note that Customs may not pay for any relocation expenses for which there is an absolute statutory prohibition.

CONCLUSION

Customs' Salaries and Expenses appropriations are available to pay relocation expenses that its employees incur to comply with a new agency requirement that Customs' employees assigned to duty stations in the United States must maintain their primary residence in the United States. Customs has determined that U.S. residency enables its border workforce to better secure the borders. Accordingly, we do not object to Customs using its appropriations to pay relocation costs.

A handwritten signature in black ink, appearing to read "Gary L. Kepplinger", with a long horizontal flourish extending to the right.

Gary L. Kepplinger
General Counsel

¹ After this decision, Congress passed legislation to permit agencies to pay employees' expenses of obtaining professional credentials, should the agencies choose to do so. Pub. L. No. 107-107, § 1112(a), 115 Stat. 1012, 1238-39 (Dec. 28, 2001), *codified at* 5 U.S.C. § 5757.