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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Federal Motor Carrier Safety Administration—Retention of Court-Ordered Restitution

File: B-308476

Date: December 20, 2006

DIGEST

The Federal Motor Carrier Safety Administration (FMCSA) has no authority to retain the amounts of an award of criminal restitution that a federal district court ordered to be paid to FMCSA. The miscellaneous receipts statute, 31 U.S.C. § 3302(b), requires that absent specific authority, federal agencies must deposit money received for the government into the Treasury as miscellaneous receipts. Although GAO recognizes a limited exception for certain amounts that constitute repayments, the restitution awarded here may not be characterized as such. Therefore, FMCSA must deposit money constituting the restitution award into the general fund of the Treasury.

DECISION

The Chief Counsel of the Federal Motor Carrier Safety Administration (FMCSA) requests an advance decision,¹ asking whether FMCSA may retain a restitution award ordered by a federal court. Letter from Suzanne M. Te Beau, Chief Counsel, Federal

¹ Our practice when rendering decisions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006). In this instance, FMCSA responded to questions from our office regarding the nature of the restitution award, instances of similar awards to FMCSA or other agencies, and the specific regulations violated by the defendants in the case. Letter from Suzanne M. Te Beau, Chief Counsel, Federal Motor Carrier Safety Administration, to Thomas H. Armstrong, Assistant General Counsel, GAO, *Re: Disposition of Criminal Restitution Payable to the Agency*, Nov. 9, 2006 (Te Beau Letter).

Motor Carrier Safety Administration, to Gary L. Kepplinger, General Counsel, GAO, Sept. 28, 2006 (FMCSA Request). The miscellaneous receipts statute, 31 U.S.C. § 3302(b), requires federal agencies to deposit into the federal Treasury any moneys received for the government. Although there are statutory and nonstatutory exceptions to the general rule, those exceptions do not apply to the restitution awarded to FMCSA. The agency lacks statutory authority to retain the restitution, and the award does not qualify as a repayment. Bound by the provisions of section 3302(b), FMCSA must deposit the restitution award in the general fund of the Treasury as soon as practicable.

BACKGROUND

FMCSA, an administration within the Department of Transportation, is responsible for improving the safety of commercial vehicle operations. *See* 49 U.S.C. § 113(b). As such, FMCSA's "primary mission is to reduce crashes, injuries, and fatalities involving large trucks and buses." Federal Motor Carrier Safety Administration, *About FMCSA*, available at www.fmcsa.dot.gov/about/aboutus.htm (last visited Dec. 12, 2006). In carrying out its function, FMCSA issues and enforces motor carrier safety regulations concerning specified commercial trucking and bus operations. *See* 49 U.S.C. § 113(f).

A trucking company's officers recently pleaded guilty to violating Department of Transportation regulations regarding maintenance of false logs, as well as a criminal statute concerning conspiracy to commit false statement offenses. FMCSA Request. Accepting the plea, the United States District Court for the District of Nebraska ordered, among other penalties, the defendants to pay restitution to FMCSA in the amount of \$20,000. *United States v. Vyhnalek*, No. 19168-047 (D. Neb. Jan. 4, 2006); *United States v. Vyhnalek*, No. 19167-047 (D. Neb. Jan. 4, 2006); *United States v. Crawford*, No. 19166-047 (D. Neb. Jan. 5, 2006). FMCSA explains that the restitution was ordered to "compensate the agency for the costs of investigation [, including] time spent by FMCSA investigators and attorneys developing the case for submission to the U.S. Attorney, and support for the prosecution as needed." Te Beau Letter. FMCSA received and deposited an initial payment of \$4,000 from the defendants into a budget clearing account. FMCSA Request.

DISCUSSION

The question before us is whether FMCSA's retention of court-imposed restitution would violate the miscellaneous receipts statute, 31 U.S.C. § 3302(b), which requires federal agencies that receive any money in addition to appropriated funds to deposit those amounts into the general fund of the United States Treasury. *See* 47 Comp. Gen. 70, 72 (1967). Specifically, the statute requires those receiving "money for the Government from any source [to] deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). Retention of such funds without authority would constitute an improper augmentation of the agency's appropriation. Agencies are generally prohibited from augmenting their appropriations with other funds without statutory authority to do

so. Congressional appropriations “establish[] a maximum authorized program level, meaning that an agency cannot, absent statutory authorization, operate beyond the level that can be paid for by its appropriations.” B-300248, Jan. 15, 2004. Supplementing an appropriation with funds obtained in addition to those provided by Congress would usurp Congress’s fiscal control over agency programs.²

In circumstances similar to those here, we held that the miscellaneous receipts statute prohibits the National Labor Relations Board (NLRB) from retaining court costs awarded in civil litigation. 47 Comp. Gen. 70. In that case, the United States Court of Appeals for the First Circuit ordered a company to pay the costs NLRB incurred in printing material related to the agency’s appeal. *Id.* Finding no authority “which makes available for expenditure . . . moneys derived from a judgment for costs awarded in favor of the United States,” we held that the agency must comply with the miscellaneous receipts statute and deposit the awarded costs into the general fund of the Treasury.³ *Id.* at 72.

FMCSA has not identified any relevant statutory provision permitting the agency to retain the court-imposed restitution at issue to supplement its appropriation, nor are we aware of any such authority.

FMCSA explains that the district court awarded restitution in order to compensate the agency for investigative costs. *Te Beau Letter*. GAO recognizes an exception to the general rule when receipts are properly classified as repayments. B-305402, Jan. 3, 2006; 69 Comp. Gen. 260, 261–62 (1990). The restitution amounts awarded FMCSA, however, do not constitute a repayment.

Repayments are classified as either a reimbursement or a refund. “Reimbursements are amounts collected from outside sources for commodities or services furnished, which by law may be credited directly to the appropriations.” B-305402, Jan. 3, 2006. The restitution award at issue here does not constitute an amount collected for “commodities or services furnished.” The investigation and subsequent prosecution of the defendants cannot be considered a service provided to the defendants.

Refunds are directly related to previous agency expenditures. Specifically, they constitute “amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed.” 65 Comp. Gen. 600, 602 (1986), *citing* Treasury Department-GAO Joint Regulation No. 1, *reprinted as* appendix II to title 7 of GAO’s *Policy and Procedures Manual for*

² *See generally* B-300248, Jan. 15, 2004; 72 Comp. Gen. 164, 165 (1993); 61 Comp. Gen. 419, 421 (1982).

³ *Cf.* 65 Comp. Gen. 666 (1986) (statutory authority permitted the Department of the Interior’s Job Corps Civilian Conservation Centers to retain for program purposes proceeds from the sales of meals, tool kits, and clothing, *etc.*).

*Guidance of Federal Agencies.*⁴ The refund exception “simply restores to the appropriation amounts that should not have been paid from the appropriation.” B-302366, July 12, 2004. *See also* B-257905, Dec. 26, 1995.

We have applied the refund exception to permit federal agencies to retain portions of damage awards or settlements obtained pursuant to actions brought under the False Claims Act. B-281064, Feb. 14, 2000; 69 Comp. Gen. 260 (1990). The False Claims Act permits government recovery of treble damages. 31 U.S.C. § 3729. Agencies may retain recoveries representing actual losses (single damages), interest on those actual losses, and administrative expenses incurred in connection with the payment and recovery of the claims. 69 Comp. Gen. 260. Any funds representing amounts in excess of that must be deposited into the Treasury as miscellaneous receipts. B-281064, Feb. 14, 2000; 69 Comp. Gen. at 264. The False Claims Act cases highlight an important component of the refund exception: the necessity of an improper payment. In each of those cases, the agency would not have made a payment but for the false claim.

The restitution award at issue is not properly classified as a refund. The restitution ordered was meant to “compensate the agency for the costs of the investigation [, including] time spent by FMCSA investigators and attorneys developing the case . . . and support for the prosecution as needed.” Te Beau Letter. FMCSA makes no claim that the restitution compensates the agency for a payment made in error or an overpayment. Nor does FMCSA claim that the restitution constitutes an adjustment for a previous amount disbursed. Importantly, crediting the agency’s appropriation with the restitution award would not “restore[] to the appropriation amounts that should not have been paid.” B-302366, July 12, 2004.

FMCSA receives an appropriation each year to pay for costs of investigations such as the one conducted here. *See, e.g.*, Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, 119 Stat. 2396, 2409 (Nov. 30, 2005). FMCSA’s authorizing statute, 49 U.S.C. § 31104(i), permits expenditures for “personnel costs; administrative infrastructure; rent; information technology; programs for research and technology, information management, regulatory development, the administration of the performance and registration information system management, and outreach and education; other operating expenses; and such other expenses as may from time to time become necessary.” 49 U.S.C. § 31104(i)(2). FMCSA’s costs of investigation are necessary expenses of enforcing the agency’s safety regulations. The time spent by investigators and attorneys to prepare the case is a personnel cost contemplated by the authorizing statute. FMCSA’s support in the prosecution of the case constitutes “other operating expenses.” As such, crediting a restitution award to FMCSA’s appropriation would improperly contribute financial resources that supplement those already provided

⁴ *Available at* www.gao.gov/special.pubs/ppm.html (last visited Dec. 12, 2006).

for the agency by Congress. If FMCSA were to retain the \$20,000 in restitution, the agency would improperly augment its appropriation. FMCSA must therefore remit all amounts it receives in connection with the restitution award to the United States Treasury as miscellaneous receipts.

FMCSA asks whether our recent decision involving a settlement agreement between the Office of Federal Housing Enterprise Oversight (OFHEO) and Freddie Mac, B-306860, Feb. 28, 2006, would permit FMCSA to retain the restitution award at issue. FMCSA Request. That decision is not apposite. OFHEO brought administrative charges against Freddie Mac and former executive officers for the undue compensation of those officers. B-306860, Feb. 28, 2006. As part of an agreement to settle charges brought against Freddie Mac, including a dispute regarding adequacy of discovery production, Freddie Mac agreed to pay the costs associated with formatting certain documents sought in discovery in a manner agreeable to both parties. *Id.* We found no improper augmentation of appropriations. *Id.* The settlement agreement satisfied a prosecutorial objective and “Freddie Mac [was] not defraying an obligation of OFHEO.” *Id.* The same rationale does not apply here. If FMCSA is permitted to credit the restitution award to its appropriation, the award would work to defray FMCSA’s obligations. Costs that would otherwise be borne by FMCSA’s appropriation would then be borne by the restitution award.

CONCLUSION

FMCSA lacks authority to credit to its appropriation an award of criminal restitution ordered by a federal court. The miscellaneous receipts statute, 31 U.S.C. § 3302(b), requires federal agencies, absent specific authority, to deposit money received for the government into the Treasury as miscellaneous receipts. Although GAO recognizes a limited exception for certain amounts that constitute repayments, the restitution awarded here may not be characterized as such. Consequently, amounts associated with the restitution award must be deposited into the general fund of the Treasury as soon as practicable.

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

Gary L. Kepplinger
General Counsel