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Decision

Matter of: United States Capitol Police—Current Rate for Operations Under the 2007 Continuing Resolution

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DIGEST

When calculating the current rate for operations under the 2007 Continuing Resolution for its General Expenses appropriation, the United States Capitol Police should include \$4,513,671 reprogrammed within its General Expenses appropriation in fiscal year 2006. It should not include \$5,486,329 transferred into its General Expenses appropriation from its Salaries appropriation in fiscal year 2006, nor should it include any unobligated no-year and multi-year balances held in the General Expenses appropriation at the end of fiscal year 2006.

DECISION

The General Counsel of the United States Capitol Police (USCP) has requested a decision regarding the amount appropriated to USCP under the Continuing Appropriations Resolution (CR), 2007, Pub. L. No. 109-289, div. B, 120 Stat. 1257, 1311 (Sept. 29, 2006). Letter from John T. Caulfield, General Counsel, USCP, to Gary L. Kepplinger, General Counsel, GAO, Dec. 19, 2006. Specifically, he asks whether \$10 million of unobligated no-year and multi-year balances that USCP made available for fiscal year 2006 operational needs is part of USCP's fiscal year 2006 "General Expenses" appropriation for purposes of calculating the current rate under the CR. USCP made these amounts available for fiscal year 2006 operational needs via a combination of reprogrammings within its General Expenses appropriation and a transfer from its "Salaries" appropriation to its General Expenses appropriation.

The question arises because of the formula contained in the CR for determining the amount of funds available during the pendency of the CR. For the reasons discussed below, we conclude that no-year and multi-year funds reprogrammed within the General Expenses appropriation are part of USCP's fiscal year 2006 General Expenses appropriation for purposes of calculating the current rate. On the other

hand, the no-year funds that USCP transferred from its Salaries appropriation to its General Expenses appropriation are not. The amount transferred should be used in calculating the current rate under the CR for USCP's Salaries appropriation.

BACKGROUND

All federal agencies are currently operating under a continuing resolution with the exception of the Departments of Defense and Homeland Security. The CR was enacted on September 29, 2006, and funded the agencies, including USCP, through November 17, 2006. Pub. L. No. 109-289, div. B, § 106. Congress has twice extended this CR's duration. The first extension came on November 17, 2006, making the CR effective until December 8, 2006. Pub. L. No. 109-369, 120 Stat. 2642 (Nov. 17, 2006). Congress further extended the CR, with various modifications not relevant here, until February 15, 2007. Pub. L. No. 109-383, § 1, 120 Stat. 2678 (Dec. 9, 2006). USCP is thus funded until February 15, 2007, under the continuing resolution first enacted on September 29, 2006.

USCP has two appropriations relevant to this decision: the General Expenses appropriation and the Salaries appropriation. Congress provided \$32 million in fiscal year funds for USCP's General Expenses appropriation in fiscal year 2006. Legislative Branch Appropriations Act, 2006, Pub. L. No. 109-55, title I, 119 Stat. 565, 572 (Aug. 2, 2005). A subsequent rescission reduced this amount to \$31.6 million. *See* Emergency Supplemental Appropriations Act to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza, 2006, Pub. L. No. 109-148, div. B, title III, ch. 8, § 3801, 119 Stat. 2745, 2791 (Dec. 30, 2005). The conference report accompanying the Legislative Branch Appropriations Act, 2006, stated that, in addition to the \$32 million, "\$10,000,000 from prior year unobligated balances [was] available upon the approval of the" congressional appropriations committees. H.R. Rep. No. 109-189, at 32-33 (2005).

On September 29, 2005, USCP submitted its operating plan for fiscal year 2006 to the congressional appropriations committees. Letter from Anthony J. Stamilio, Chief Administrative Officer, USCP, to The Honorable Jerry Lewis, Chairman, House Committee on Appropriations, *Subject: Approval Request for the FY 2006 United States Capitol Police Operating Plan and reprogramming of unobligated balances*, Sep. 29, 2005 (Stamilio Letter). USCP included in this document a proposal for making \$10 million in prior year unobligated balances available as mentioned in the conference report. *Id.* The \$10 million of no-year and multi-year funds was derived from a combination of reprogrammings within USCP's General Expenses appropriation and a transfer from its Salaries appropriation to the General Expenses appropriation. *Id.* The committees approved the operating plan, and in January 2006 USCP carried out its proposal to make the \$10 million available for General

Expenses.¹ E-mail from Maryjean Buhler, Chief Financial Officer, USCP, to Wesley Dunn, Staff Attorney, GAO, Jan. 5, 2007.

At the beginning of fiscal year 2006, USCP's General Expenses appropriation contained unobligated no-year and multi-year balances in addition to its 2006 fiscal year funds. *Id.* USCP received the no-year funds from supplemental appropriations in fiscal years 2002 and 2003, the Emergency Response Fund in prior fiscal years, and several other sources. *Id.* USCP also had multi-year funds derived from sales of USCP's surplus property made between March and September 2005.² Telephone conversation between Maryjean Buhler; Wesley Dunn; and Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, Jan. 3, 2007 (Telephone Conversation); E-mail from Maryjean Buhler to Wesley Dunn, Jan. 4, 2007. USCP kept the no-year and multi-year funds in respective subaccounts within the General Expenses appropriation to maintain their identity as no-year and multi-year funds separate from amounts appropriated as fiscal year General Expenses funds. Telephone Conversation. USCP reprogrammed a total of \$4,513,671 of these unobligated balances within its General Expenses appropriation to make this amount available for fiscal year 2006 operating expenses. Stamilio Letter.

At the beginning of fiscal year 2006, USCP's Salaries appropriation had available for obligation an unobligated balance of no-year funds. *Id.* USCP received these funds from the Emergency Response Fund. *Id.* USCP transferred \$5,486,329 from the unobligated no-year balances in its Salaries appropriation to its General Expenses appropriation to make this amount available for fiscal year 2006 operating expenses.³ *Id.*

The question here arises because of the CR's formula for determining the amount of funds available to USCP during the pendency of the CR. The CR provides that when an agency's appropriation act has been passed by only the House of Representatives and not by the Senate as of November 15, 2006, as is the case with USCP's

¹ Specifically, USCP used the reprogrammed and transferred balances to fund its Office of Information Services and pay for fuel costs during fiscal year 2006. Stamilio Letter.

² USCP may sell its surplus property and deposit the proceeds in its General Expenses appropriation. 2 U.S.C. § 1906. The funds remain available for obligation for the purposes of that appropriation during the fiscal year in which they are received and the following fiscal year. *Id.* In the present case, the funds were available for the portion of fiscal year 2005 following the sale, and all of fiscal year 2006.

³ USCP transferred this amount under authority of section 1001 of the 2006 Legislative Branch Appropriations Act. E-mail from Gretchen E. DeMar, Acting General Counsel, USCP, to Wesley Dunn, Jan. 4, 2007.

appropriations, the agency's projects and activities⁴ will continue "at a rate for operations not exceeding the current rate or the rate permitted by the action of the House, whichever is lower." Pub. L. No. 109-289, div. B, § 101(d)(1). USCP receives its funding through the annual Legislative Branch appropriations act, which as of November 15, 2006, had been passed by the House but not the Senate. The version of the Legislative Branch Appropriations Act for fiscal year 2007 passed by the House, H.R. 5521, provides \$38.5 million for General Expenses. If the full \$10 million made available for General Expenses is part of USCP's General Expenses appropriation for fiscal year 2006 for purposes of calculating the current rate, the current rate would be \$41.6 million (the \$31.6 million appropriated for fiscal year 2006 plus the \$10 million). In that case, under the CR formula of section 101(d)(1), the amount available for General Expenses would be \$38.5 million—the rate permitted by H.R. 5521 being lower than the current rate. However, if the full \$10 million is excluded, USCP has \$31.6 million,⁵ the current rate being lower than the rate permitted by H.R. 5521.

ANALYSIS

The issue before us is whether USCP should include the \$10 million for purposes of calculating the current rate under the CR for its General Expenses appropriation. The term "current rate" as used in the CR refers to the total funds appropriated for a program or activity in the previous fiscal year as well as any other amount that Congress made available for use in that fiscal year, such as unobligated no-year and multi-year funds carried forward into the fiscal year, less any unobligated balances available at the end of that fiscal year. 58 Comp. Gen. 530 (1979); B-152554, Oct. 9, 1970.

In determining the current rate for purposes of USCP's General Expenses appropriation, we must distinguish between the \$4,513,671 reprogramming and the \$5,486,329 transfer because reprogramming and transferring are fundamentally different transactions.

A reprogramming is the application of funds already in an appropriation for uses other than those contemplated at the time the funds were appropriated. B-164912, Dec. 31, 1977. In other words, reprogramming is the shifting of funds from one

⁴ When used in a continuing resolution to denote the level of funding provided, the term "projects and activities" refers to the appropriation as enacted in the previous fiscal year, as opposed to the various activities financed by that appropriation. B-204449, Nov. 18, 1981.

⁵ This amount represents only fiscal year funds, and does not include any other balances that may be available for inclusion in the current rate calculation for General Expenses.

object to another within an appropriation. Unless otherwise restricted by statute, agencies may reprogram funds as they wish to adapt to changing circumstances, and no statutory authority is necessary. *See Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). When Congress appropriates funds to an agency, it grants the agency authority to shift and to use the funds within that appropriation however the agency sees fit to accomplish the overall purpose of the appropriation. *Id.*

In fiscal year 2006, USCP reprogrammed \$4,513,671 of unobligated no-year and multi-year funds already held in the General Expenses appropriation to make them available for fiscal year 2006 operational needs, specifically to fund its Office of Information Services and pay for fuel. Because Congress had already made available the \$4,513,671 for General Expenses purposes (albeit without fiscal year limitation), USCP should consider this amount as part of its current rate under the CR. *See, e.g.*, 58 Comp. Gen. at 532-33. USCP properly carried these no-year and multi-year balances in the General Expenses appropriation forward into fiscal year 2006 from prior fiscal years; the only change that USCP effectuated with its reprogramming was to make the \$4,513,671 available for other General Expenses uses (that is, fiscal year 2006 operational needs) than those anticipated at the time Congress appropriated the funds to USCP.⁶

In contrast, a transfer is the shifting of funds between appropriations. *Cf.* 31 U.S.C. § 1532. Agencies may only transfer funds when Congress grants them statutory authority to do so. *Id.*; B-286929, Apr. 25, 2001. As is the case here, Congress frequently leaves to agency discretion the decision whether to transfer funds pursuant to such statutory authority.⁷ *See, e.g.*, B-222686, June 11, 1986 (law providing that Secretary concerned “may transfer” funds grants “broad discretionary authority . . . to transfer funds”); B-167656, June 18, 1971 (“may transfer” is “discretionary language” for purposes of funds transfer). In fiscal year 2006, USCP transferred \$5,486,329 from its Salaries appropriation to the General Expenses appropriation to satisfy fiscal year 2006 operational needs.

USCP also asks whether it may include the transfer from Salaries to General Expenses as part of its fiscal year 2006 General Expenses appropriation for purposes of calculating the current rate under the CR. In 1980, we considered whether an agency may include transfers when calculating the current rate and concluded that

⁶ Indeed, because the reprogrammed amounts were unobligated no-year and multi-year balances carried over into fiscal year 2006, the fact that USCP reprogrammed them is not central to our determination that USCP should include them when calculating the current rate.

⁷ Section 1001 of the 2006 Legislative Branch Appropriations Act provides that amounts appropriated to USCP for Salaries “may be transferred” to the General Expenses appropriation. Pub. L. No. 109-55, § 1001.

transfers made at an agency's discretion pursuant to its general transfer authority, and not directed by law, should not be included in the calculation. *See* B-197881, Apr. 8, 1980. In that case, the Department of the Treasury had asked about amounts appropriated to the Agency for International Development (AID) in fiscal year 1979 which AID transferred, pursuant to statutory authority but at its discretion, to a different account later in the fiscal year. *Id.* We determined that the fiscal year 1979 appropriation for purposes of calculating the current rate consisted of the entire amount originally appropriated in fiscal year 1979, including the amount AID subsequently transferred to another appropriation account. *Id.* Calculating the current rate as anything other than the amount originally appropriated "would distort the intent of Congress." *Id.* We reasoned that since it is for the Congress to decide the amount of an agency's appropriation, U.S. Const. art. I, § 9, cl. 7, and since AID transferred the funds upon an administrative determination, rather than pursuant to direction in law, to deduct the amount of this discretionary transfer from the amount Congress appropriated would in effect diminish Congress's power of the purse. *Id.* The logical corollary of this determination is that AID, when calculating the current rate for the account that *received* the transferred funds, could not include the transferred funds as part of the previous fiscal year's appropriation for the account that received the transfer.⁸

The same principle we formulated in B-197881 applies to the transfer of \$5,486,329 from USCP's Salaries appropriation to its General Expenses appropriation. Congress appropriated \$31.6 million to USCP for General Expenses in fiscal year 2006, as well as the no-year funds in the General Expenses appropriation at the beginning of fiscal year 2006. Pub. L. No. 109-55, 119 Stat. at 572. In contrast, Congress did not transfer in law the \$5,486,329, although the conference report signaled a willingness to consider favorably USCP's decision to transfer that amount. To include the transfer as part of USCP's fiscal year 2006 General Expenses appropriation would be inconsistent with the long-held understanding of "current rate" as the amount that Congress (not the agency) had made available, in this case, in fiscal year 2006. *See generally* 58 Comp. Gen. 530; B-152554. Therefore, for purposes of calculating the current rate for General Expenses under the CR, USCP should not include as part of its fiscal year 2006 appropriation the funds transferred from the Salaries appropriation to the General Expenses appropriation. Of course, consistent with the standard established in B-197881, USCP should include that amount in calculating the current rate for its Salaries appropriation.

Accordingly, to calculate the current rate for General Expenses under the CR, USCP should add \$31.6 million (the amount of fiscal year funds appropriated in fiscal year 2006), plus \$4,513,671 (the amount of no-year and multi-year balances reprogrammed


⁸ *Cf.* OMB Bulletin No. 06-04, *Apportionment of the Continuing Resolution(s) for Fiscal Year 2007, Attachment* (Sep. 29, 2006) (when calculating the current rate of an appropriation receiving a transfer, agencies include "transfers mandated by law").

within the General Expenses appropriation), plus any other unobligated amounts in the General Expenses appropriation carried over into fiscal year 2006. To the extent that USCP carried forward into fiscal year 2007 unobligated no-year or multi-year balances in its General Expenses appropriation, these balances must be deducted from USCP's determination of the current rate. *See* 58 Comp. Gen. 530 at 535; *Cf.* OMB Bulletin No. 06-04, *Apportionment of the Continuing Resolution(s) for Fiscal Year 2007, Attachment* (Sep. 29, 2006).

Section 101(d)(1) of the CR, as previously discussed, funds USCP at a rate for operations not exceeding the current rate or the rate permitted by the action of the House (\$38.5 million), whichever is lower. Therefore, if the current rate is greater than \$38.5 million, the CR appropriates \$38.5 million to USCP for General Expenses. If the current rate is less than \$38.5 million, the CR appropriates the lower amount for General Expenses.

CONCLUSION

Consistent with the foregoing analysis, funds reprogrammed in one fiscal year should be considered part of that year's appropriation for purposes of calculating the current rate for that appropriation under a continuing resolution for the following fiscal year. Funds transferred into an appropriation during one fiscal year by other than statutory direction should not be considered part of that year's appropriation when calculating the current rate for the receiving appropriation under a continuing resolution for the following fiscal year. Thus, of \$10 million made available for General Expenses through reprogramming and transfer, USCP should consider the reprogrammed \$4,513,671 as part of its 2006 General Expenses appropriation when calculating the current rate under the CR, but it must exclude the transferred \$5,486,329. USCP should include the \$5,486,329 when calculating the current rate for its Salaries appropriation.



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