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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Architect of the Capitol—Reimbursement of Office of Compliance Investigating and Monitoring Costs

File: B-308774

Date: March 15, 2007

DIGEST

Under the Congressional Accountability Act (CAA), the Office of Compliance (Compliance) is responsible for investigating and litigating compliance with the Occupational Safety and Health Act (OSHA) with regard to legislative branch entities, including the Architect of the Capitol (AOC), and it receives an appropriation to carry out these activities. In view of Compliance's statutory responsibility to investigate, prosecute, and monitor alleged violations of the CAA, and absent any specific statutory authority to the contrary, Compliance lacks authority to accept reimbursement of its costs from AOC as part of an agreement to settle a Compliance complaint alleging violations of the OSHA provision of the CAA. Any acceptance of such reimbursement by Compliance would improperly augment appropriations made to it by Congress. Conversely, AOC's appropriation is not available to cover costs properly incurred by Compliance in discharging its statutory responsibilities.

DECISION

The Architect of the Capitol (AOC) has requested an advance decision under 31 U.S.C. § 3529 on the propriety of using its appropriated funds to reimburse certain costs incurred by the Office of Compliance (Compliance) General Counsel in resolving a formal complaint filed under the Congressional Accountability Act. Under a proposed settlement agreement, AOC would reimburse Compliance for its costs of investigating, prosecuting, and monitoring the alleged violations and the planned abatement actions. As explained below, Compliance is required by statute to enforce Occupational Safety and Health Act standards in the legislative branch, and it receives an annual appropriation to fund its activities. Because Compliance's authorizing statute does not specifically authorize it to accept reimbursement for its costs in the performance of its statutory responsibilities, any such reimbursement would be an improper augmentation of Compliance's appropriation. In the same

vein, AOC is not authorized to use its appropriated funds to reimburse Compliance. Paying Compliance's expenses is not a purpose for which AOC receives an appropriation.

Our practice when rendering decisions is to obtain the views of the relevant federal agencies to establish a factual record and to elicit the agency's legal position on the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal.htm. In this regard, AOC and Compliance both provided additional information on facts underlying this dispute and on their views regarding the legal issues involved. Letter from Peter M. Kushner, General Counsel, Architect of the Capitol, to Thomas H. Armstrong, Assistant General Counsel, GAO, Feb. 9, 2007; Letter from Peter Ames Eveleth, General Counsel, Office of Compliance, to Thomas H. Armstrong, Assistant General Counsel, GAO, Feb. 9, 2007 (Eveleth Letter).

BACKGROUND

The Office of Compliance is the legislative branch entity tasked with administering and enforcing the Congressional Accountability Act of 1995 (CAA). Pub. L. No. 104-1, 109 Stat. 3 (Jan. 23, 1995), *codified at* 2 U.S.C. §§ 1301–1438; *see* Office of Compliance, *Who We Are and What We Do*, *available at* www.compliance.gov/organization/organization.html (last visited Mar. 13, 2007). This act incorporated many significant statutes involving employee rights and protections not otherwise applicable to the legislative branch and extended coverage of these statutes to Congress and legislative branch agencies and offices. 2 U.S.C. §§ 1301–1302. Included among the employee protection statutes incorporated into the CAA is section 5 of the Occupational Safety and Health Act of 1970 (OSHA), Pub. L. No. 91-156, 84 Stat. 1590 (Dec. 29, 1970).[1] 2 U.S.C. § 1341(a)(1). Section 5 requires employers to maintain working environments that are free from recognized hazards and health risks. 29 U.S.C. § 654.

AOC is the legislative branch agency responsible for managing and maintaining Capitol Hill buildings and facilities such as the U.S. Capitol, congressional office buildings, and the Library of Congress buildings. 2 U.S.C. §§ 141, 1811. It is covered by the CAA. 2 U.S.C. § 1301(5). Among other responsibilities, AOC maintains the Capitol Power Plant, 2 U.S.C. § 2162, which provides steam and chilled water to other buildings on Capitol Hill through a series of underground pipes and tunnels. Compliance became aware of the deteriorating and potentially dangerous condition of these tunnels in 1999, and began monitoring AOC's efforts to remedy the hazards. GAO, *Capitol Power Plant Utility Tunnels*, GAO-07-227R (Washington, D.C.: Nov. 16, 2006). On the basis of a reinspection in mid-2005, Compliance General Counsel

[1] GAO is subject to Compliance's enforcement authority under the OSHA provision of the CAA. 2 U.S.C. § 1341(a)(2).

concluded that sufficient progress had not been made and issued a formal complaint against AOC in February 2006 as authorized under 2 U.S.C. § 1341(c)(3) for violations of the OSHA provision of the CAA. *See* 2 U.S.C. § 1341; GAO-07-227R, at 1–2. The hazards alleged in the complaint as violations of the OSHA provision of the CAA included falling concrete, inadequate communications systems, and insufficient emergency exits. AOC and the Compliance General Counsel are currently in negotiations to settle this complaint as well as two additional citations involving potential asbestos exposure and heat stress risks. GAO-07-227R, at 1-2. Compliance General Counsel has proposed that the settlement agreement contain the following provision entitled "Costs":

> "A. Within sixty (60) days of the Effective Date of this Agreement, and then annually thereafter, Complainant [Compliance General Counsel] shall submit to Respondent [AOC] its costs and contractor, consultant, and attorney fees, incurred since June 2005, and ongoing, related to this litigation, and any inspection, monitoring, and compliance with the matters identified in Section I.C of this Agreement.
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> "B. Within 30 days of receipt of the bill of costs, Respondent shall reimburse Complainant."[2]

Letter from Alan M. Hantman, FAIA, Architect of the Capitol, to the Honorable David Walker, Comptroller General of the United States, Dec. 14, 2006, at 2 (Hantman Letter).

AOC believes that this provision would result in an unauthorized augmentation of Compliance's appropriation. It cites 61 Comp. Gen. 419 (1982) as supporting the principle that, absent specific statutory authority, one agency may not reimburse another for performing a function for which the second agency receives appropriations. Hantman Letter, at 3. Compliance General Counsel argues that the proposed transaction is broader than a reimbursement or transfer of funds between agencies and is more appropriately viewed as "a corrective action for violations of … the Congressional Accountability Act that occurred and were not abated in a timely manner by AOC." Eveleth Letter, at 1. Compliance General Counsel believes that the CAA provides the necessary statutory authority to support the proposed reimbursement of costs. *Id.*

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[2] Section I.C of the proposed agreement defines the "Covered Matters" in the agreement as including the existing hazards identified in the Compliance General Counsel's Complaint and Citations, as well as any other hazards that may be identified as a result of further audits by AOC. Draft Settlement Agreement, *Eveleth v. Office of the Architect of the Capitol*, Case No. OSH-9011, Citation 24 (Off. Compliance, Feb. 9, 2007), at 2.

Although, as a matter of policy, we normally do not render decisions on matters currently in litigation, *see* GAO-06-1064SP, at 8, we believe that policy to be inapplicable here because the issue we have been asked to address is separate from the merits of the complaint filed by Compliance General Counsel. We are concerned only with the propriety of the use of AOC's appropriated funds to reimburse costs already incurred and to be incurred in the future by Compliance General Counsel in investigating, prosecuting, and monitoring this complaint. We express no opinion on the merits of this complaint or on any other portion of the proposed settlement agreement.

DISCUSSION

Two related issues are presented in this case. The first is whether Compliance may receive and retain appropriated funds from AOC to cover Compliance General Counsel's litigating and monitoring costs related to its complaint against AOC. The second issue is whether AOC can use its appropriated funds to pay Compliance for these costs.

Under its authorizing statute, Compliance is required to inspect and investigate OSHA compliance, 2 U.S.C. § 1341(c)(1), (e); to issue citations and complaints, 2 U.S.C. § 1341(c)(2); and to litigate or settle such complaints as appropriate, 2 U.S.C. §§ 1341(c)(3), 1414. To the extent that settlements require Compliance to monitor continued compliance with their terms, these monitoring costs are a necessary expense inherent in Compliance's authority to inspect and settle cases. For these and other activities, Compliance receives an annual appropriation from Congress "to carry out the functions of the Office" as described in the CAA.[3] 2 U.S.C. § 1385. The proposed provision shifts the costs of the investigation and litigation begun in June 2005 from Compliance, which is charged with these responsibilities, to the target of the investigations, here, the AOC.

It is well settled that a federal agency may not reimburse another agency for services which the latter is required to provide and for which the providing agency receives appropriations. 61 Comp. Gen. 419, 421 (1982) (Merit Systems Protection Board may not accept reimbursement of its hearing officers' travel costs from the federal agencies involved in personnel appeals); 16 Comp. Gen. 333 (1936) (Department of Justice may not accept reimbursement from the War Department for its administrative expenses in acquiring land for War Department projects). Compliance seeks reimbursement for all costs "related to this litigation," including

[3] Compliance is currently operating under a continuing resolution, Pub. L. No. 110-5, § 101, 121 Stat. 8, 8–9 (Feb. 15, 2007), which appropriates funds to the agency for the remainder of fiscal year 2007 under the same terms as those provided in the Legislative Branch Appropriations Act of 2006, Pub. L. No. 109-55, 119 Stat. 565, 576–77 (Aug. 2, 2005).

"contractor, consultant, and attorney fees." Hantman Letter, at 2. The litigation has been conducted pursuant to the Compliance General Counsel's responsibility to investigate, prosecute, and monitor possible OSHA violations within the legislative branch, for which Compliance receives an annual appropriation. Thus, reimbursement for the activities as described in the proposed settlement agreement would augment Compliance's appropriation and would be improper without specific statutory authorization. A contrary interpretation would compromise the basic integrity of the appropriations process itself. 61 Comp. Gen. at 421. It would be a usurpation of Congress's power of the purse for a federal agency like Compliance to operate beyond the level it can finance with its appropriations with funds derived from another source unless that source is specifically approved by Congress. *Id.* An agency cannot shift its costs to another appropriation without specific authority to do so.[4]

Although Compliance acknowledges that it receives appropriations to carry out its duties to investigate, prosecute, and monitor violations of the OSHA provision of the CAA, it argues that the CAA provides the authority for AOC to reimburse Compliance's litigation costs. To this effect, Compliance General Counsel cites the "Payments" provision of the CAA, 2 U.S.C. § 1415(b), and states that "Congress made specific provision for responsible Employing Offices to fund the 'administrative, personnel, and similar expenses' needed to correct the violations." Eveleth Letter, at 2. Compliance General Counsel argues that this provision, in conjunction with the provision requiring that "funds to correct violations of [the OSHA provision of the CAA] may be paid only from funds appropriated to the employing office or entity responsible for correcting such violations," 2 U.S.C. § 1415(c), indicates Congress's intent that the employing offices fund the indirect costs, that is, Compliance's costs, "in lieu of the civil and criminal penalties provided to OSHA."[5]

We do not agree with Compliance General Counsel's construction of these provisions of the CAA, and we find nothing in the CAA or its legislative history that supports this view. First, section 1415(b) specifically refers to "administrative, personnel, and similar expenses of employing offices which are needed to comply with [the CAA]." The statute refers to the expenses of the *employing offices*, not the Office of Compliance. Section 1415(c) also does not help. It simply states that the employing office must pay to correct the violations that gave rise to the OSHA complaints or citations. Compliance General Counsel's interpretation necessarily requires one to read the phrase "funds to correct violations" in section 1415(c) expansively to include the costs of Compliance litigating its complaint and

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[4] *See* 31 U.S.C. § 1532 (prohibiting transfer of funds between appropriations without specific statutory authority).

[5] OSHA, as applied to private employers, includes civil and criminal penalties for violations. 29 U.S.C. § 666.

monitoring the agency's effort to remedy it. The word "correct" is not defined in the CAA. To correct a violation is to "alter or adjust [it] so as to bring [it] to some standard or required condition"—in this case, to remedy whatever hazardous condition was cited. Merriam-Webster, *Collegiate Dictionary,* 280 (11th ed. 2004). Nothing in the phrase indicates that "correct" includes Compliance's costs of litigation. The CAA refers to the correction of violations several times, but nothing in the surrounding context of any of these uses suggests that the term refers to anything other than the actual remedy of the hazardous condition cited. *See* 2 U.S.C. §§ 1331(f)(2), 1341(b), 1341(c)(2). Compliance's argument that Congress intended the employing office to fund these costs in lieu of OSHA's civil and criminal penalties has no basis in the CAA.

Compliance General Counsel also seeks to distinguish the Comptroller General decision involving the Merit Systems Protection Board (MSPB) cited above by noting that the role of MSPB hearing officers and the role of Compliance differ because MSPB hearing officers have no role in monitoring. Eveleth Letter, at 2-3. This factual difference actually underlines the appropriation law principle. To the extent Compliance concludes that it must continue to monitor AOC's compliance, it has an appropriation available to do so. Similarly, AOC may incur costs to monitor for its own purposes compliance with the settlement agreement and OSHA standards, but these are AOC's costs, not Compliance's. What the Costs provision of the proposed settlement agreement seeks to do is shift Compliance's costs to AOC, and perhaps in the future, other congressional agencies. Compliance needs specific statutory authority to do so, which it does not have.

Compliance links the authorization for funds for the employing offices to correct violations with Congress's decision not to subject legislative branch agencies to civil and criminal penalties and concludes that Congress intended the employing offices to bear the costs of enforcing the CAA as well as those to ameliorate the hazardous conditions "in lieu of the civil and criminal penalties provided to OSHA." Eveleth Letter, at 2. However, the CAA says nothing about an employing office that commits an OSHA violation paying the costs of enforcing the CAA against itself. In the executive branch, civil and criminal penalties are not assessed. OSHA enforcement is done largely internally, so that each employing agency pays for enforcement of and compliance with the Act out of its own appropriated funds. 29 U.S.C. § 668(a); 29 C.F.R. pt. 1960. Congress did not follow this model of internal enforcement with the CAA. Instead, Congress created Compliance, gave it the responsibility to enforce OSHA, and appropriated funds to it for that purpose. 2 U.S.C. §§ 1341, 1381, 1385.

The second issue looks at the same facts from AOC's perspective: can AOC use its appropriation to pay Compliance for these costs? Having thoroughly analyzed and disposed of the first issue, we find it easy to dispose of the second. The answer is no. AOC's appropriation is not available to pay Compliance's costs of litigating this complaint against AOC. As noted above, it is well settled that a federal agency may not reimburse another agency for services which the latter is required to provide and for which the providing agency receives appropriations. 61 Comp. Gen. 419, 421

(1982); 16 Comp. Gen. 333 (1936). Also as noted above, the CAA requires that AOC pay its own costs in remedying the alleged violations. This is not an Economy Act transaction in which the AOC is an ordering agency asking Compliance to perform a service. *See* 31 U.S.C. §§ 1535–1536. Rather, Compliance is carrying out its statutory responsibilities under the CAA. Paying these expenses is not a purpose for which AOC receives appropriations. 31 U.S.C. § 1301(a). In other words, there is no authority for AOC to reimburse Compliance for the activities Compliance is statutorily required to perform. AOC cannot agree to a corrective action that requires it to pay Compliance's costs.

CONCLUSION

Under its authorizing statute, the CAA, Compliance is responsible for investigating and litigating OSHA compliance with regard to legislative branch entities, and it receives an appropriation to carry out these activities. Thus, Compliance may not be reimbursed for its costs in enforcing the CAA. Similarly, AOC may not reimburse Compliance for Compliance's investigation, litigation, and monitoring costs, because AOC's appropriation is not available for these purposes.



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