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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: National Science Foundation—Disposition of False Claims Act Recoveries

File: B-310725

Date: May 20, 2008

DIGEST

The Inspector General (IG) for the National Science Foundation (NSF) may not credit to the IG appropriation amounts recovered pursuant to the False Claims Act that represent investigative costs incurred by the office. Recovery of these costs cannot be characterized as a repayment of an appropriation—the narrow exception to the miscellaneous receipts rule, 31 U.S.C. § 3302(b). Congress appropriates a specific amount to the IG for costs to carry out its duties under the Inspector General Act of 1978, including investigations of payments made pursuant to a false claim. Crediting the IG appropriation with these amounts recovered for investigative costs without specific statutory authority would violate the miscellaneous receipts statute and constitute an improper augmentation of the IG appropriation.

DECISION

The Inspector General (IG) for the National Science Foundation (NSF) has requested a decision regarding the disposition of recoveries under the False Claims Act, 31 U.S.C. § 3729. Specifically, the IG has asked whether amounts the government recovers that represent investigative costs incurred by the IG may be credited to the IG appropriation. For the reasons stated below, we conclude that the recoveries for investigative costs may not be credited to the IG appropriation, but should be deposited into the Treasury as miscellaneous receipts.

Our practice when rendering decisions is to obtain the views of the agency to establish a factual record and to elicit the agency's legal position in 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/resources.html. In

this regard, we spoke with several NSF officials to obtain factual information and solicit NSF's legal views.¹ We also had telephone conversations and e-mail correspondence with Counsel to the IG to obtain factual information.²

BACKGROUND

The False Claims Act establishes liability for knowingly presenting to the U.S. government, or causing to present, a false or fraudulent claim for payment. 31 U.S.C. § 3729. Under the Act, the government may impose a civil penalty of \$5,000 to \$10,000 “plus 3 times the amount of damages which the Government sustains because of the act of that person” *Id.* The agency that sustained the damages may credit to its appropriation that portion of amounts recovered that represent amounts it erroneously disbursed as a result of the false claim. *See, e.g.*, 69 Comp. Gen. 260, 262 (1990).

Both IG and agency officials explained to us that IG staff, as part of their duties, investigate all potential False Claims Act claims for NSF and refer appropriate cases to the Department of Justice (DOJ) for litigation. Record of Interview, at 1; Chason E-mail. At NSF, most False Claims Act investigations involve false statements made to NSF by NSF grantees. Once DOJ reaches a settlement resolving a claim, IG staff notify the NSF Office of Budget, Finance, and Award Management (Budget Office) that a settlement will be forthcoming and advise the Budget Office of the amount of the settlement representing recovery for direct loss to NSF and the amount representing recovery of the IG investigative costs. Chason e-mail, attach. 2; Record of Interview, at 1.

Upon settlement, DOJ forwards a check to the Budget Office for the amount of the settlement.³ Referring to the settlement breakdown received from IG staff, the Budget Office credits amounts representing direct loss to the NSF appropriation

¹ Record of Interview of John Lynsky, Deputy Director, Office of Budget Finance and Award Management (Budget Office), Margie Yanchuk, Acting Deputy Director Budget Office, Karin Dasuki, Branch Chief, Accounting Operations Branch, and Sandy Scholar, Assistant General Counsel, NSF, by Thomas H. Armstrong, Assistant General Counsel, and Sheila Rajabiun, Senior Attorney, GAO, Feb. 1, 2008.

² E-mail from Kenneth Chason, Counsel to NSF-IG, to Thomas H. Armstrong, Assistant General Counsel, and Sheila Rajabiun, Senior Attorney, GAO, Jan. 11, 2008 (Chason e-mail).

³ DOJ deducts a 3-percent fee for its services from the total recovery. *See* 28 U.S.C. § 527.

from which the payment was originally made.⁴ Record of Interview, at 1. The Budget Office deposits amounts identified as investigative costs into the Treasury as miscellaneous receipts. Record of Interview, at 1–2. The IG would like to credit amounts representing recovery of its investigative costs to the IG appropriation. Request, at 2–3. Congress appropriates a specific amount to the IG. *See, e.g.*, Science Appropriations Act, 2008, Pub. L. No. 110-161, div. B, title III, 121 Stat. 1844, 1921–2 (Dec. 26, 2007).

DISCUSSION

Under 31 U.S.C. § 3302(b), also known as the miscellaneous receipts statute, agencies are required to deposit moneys received for the United States into the general fund of the Treasury unless otherwise authorized by law. Retention of moneys without proper statutory authority would violate the miscellaneous receipts statute and constitute an improper augmentation of an agency’s appropriation. B-308476, Dec. 20, 2006. We have not identified, nor has the IG identified, any relevant statutory provision that would permit the IG to retain and credit to its appropriation amounts recovered in a False Claims Act settlement.

GAO has recognized an exception to the miscellaneous receipts statute for repayments. There are two types of receipts that are classified as repayments: reimbursements and refunds. Amounts that qualify as reimbursements are limited to “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; *see also* 65 Comp. Gen. 666, 670 (1986) (Job Training Partnership Act and the annual appropriations act authorized the Job Corps Center to retain receipts from the sale of various commodities). The amounts collected from False Claims Act settlements, whether they represent recovery of actual loss or investigative costs, do not constitute amounts collected for commodities or services provided by NSF, and the IG has no statutory authority to retain a reimbursement. Accordingly, the recovery for investigative costs cannot be credited to the IG appropriation as a reimbursement.

Refunds are defined as “amounts collected from outside sources for payments made in error, overpayments, or adjustment for previous amounts disbursed.” 65 Comp. Gen. 600, 602 (1986), *citing* Treasury Department-GAO Joint Regulation No. 1, later

⁴ If the appropriation account has expired at the time recovery is received, the Budget Office adjusts the accounts in the corresponding expired appropriation account. Record of Interview, at 1. If the expired appropriation account has closed, the Budget Office deposits these amounts in the Treasury as miscellaneous receipts. *Id.* at 1–2.

reprinted in GAO, *Policy and Procedures Manual for Guidance of Federal Agencies*, title 7, appendix II (Washington, D.C.: May 1, 1993).⁵ A refund “simply restores to the appropriation amounts that should not have been paid from the appropriation” in the first place. B-302366, July 12, 2004, at 4. In the context of False Claims Act recoveries, the refund exception to the miscellaneous receipts statute allows agencies to retain the portion of a settlement that represents amounts erroneously disbursed due to a false claim. 69 Comp. Gen. at 262. Certainly, this exception would include the direct loss to NSF, that is, the payment that NSF made from the NSF appropriation due to the false claim. *See id.* The IG investigative costs, however, are not payments made in error, overpayments, or otherwise adjustments to amounts previously disbursed. On the contrary, the investigative costs are payments properly made from an appropriation that is available for incurring costs for such investigations.

Congress appropriates a specific amount to the IG for the necessary expenses of carrying out its duties under the Inspector General Act of 1978, as amended. Pub. L. No. 110-161, 121 Stat. at 1922. As part of its duties, the IG conducts audits and investigations of NSF programs and operations, including False Claims Act investigations. 5 U.S.C. App. 3 § 4. The IG properly charges this appropriation for any costs incurred during the investigation of NSF’s programs and operations under the Inspector General Act. In an analogous case, B-308476, Dec. 29, 2006, we found that the Federal Motor Carrier Safety Administration (FMCSA) could not retain a judicial award of criminal restitution calculated to cover its costs of investigating and prosecuting motor carrier safety regulation infractions. Crediting the agency’s appropriation with the restitution award would not restore to the appropriation amounts that should not have been paid. Congress provided FMCSA with an appropriation to pay for costs of investigations. Thus, were FMCSA to retain the restitution amounts, FMCSA would violate the miscellaneous receipts statute and would improperly augment its appropriation. *Id.*

Here, as with FMCSA, the investigative costs are necessary expenses of carrying out IG responsibilities for which the IG receives an appropriation. The time spent by IG staff or contractors on a matter like this is a cost contemplated by its underlying authority, the Inspector General Act. In enacting a specific sum to be available for IG expenses, Congress established a maximum authorized level at which the IG should operate, including investigations of false claims. *See* B-300248, Jan. 15, 2004. Crediting any recovery for costs incurred by the IG during such investigations, without statutory authorization, would violate the miscellaneous receipts statute and improperly augment the IG appropriation, allowing the IG to operate at a level above the maximum level that Congress established.

⁵ Available at www.gao.gov/special.pubs/ppm.html (last visited May 12, 2008).

The IG cited two GAO cases to support its view that recovery of investigative costs should be credited to the IG appropriation: B-281064, Feb. 14, 2000 (Tennessee Valley Authority), and 69 Comp. Gen. 260 (1990) (National Insurance Development Fund). In B-281064, we concluded that the Tennessee Valley Authority (TVA) Fund could retain amounts from a False Claims Act settlement representing recovery of investigative costs. Congress established TVA as a wholly-owned government corporation to sell electric power to state and local entities and private individuals and businesses in seven states. 16 U.S.C. § 831i; 31 U.S.C. § 9101(3)(N). Congress directed TVA to charge its customers rates for power that would produce sufficient revenue to finance the operations of TVA. TVA deposits this revenue into the TVA Fund to be available for TVA business operations without further appropriation. 16 U.S.C. §§ 831n-4(f), 831y. TVA is engaged in the business of selling power, and all costs TVA incurs, including the cost of False Claims Act investigations, are financed by TVA's customers through rates charged by TVA. TVA customers—state and local governments, businesses and individuals—would bear the costs of investigating false claims by paying higher rates for electricity if TVA were not permitted to retain recoveries of its investigative costs.

Similarly, in 69 Comp. Gen. 260, we concluded that the Federal Emergency Management Agency could credit the National Insurance Development Fund with amounts from a False Claims Act settlement representing administrative and investigative costs. Congress authorized the federal crime insurance program to provide crime insurance in areas in which insurance would not otherwise be available. To fund the operations of this program, Congress directed the agency to collect premiums and other related fees and charges from those seeking insurance and to deposit those collections in the National Insurance Development Fund, where they were available without appropriation. Similar to TVA, if the recovered moneys are not credited to the National Insurance Development Fund, the insurance program participants—individuals and businesses—would bear the burden of these costs through adjustments in premiums and related fees and charges. *Id.*

In both B-281064 and 69 Comp. Gen. 260, Congress established funding streams for the business activities of selling power and crime insurance, authorizing each agency to charge customers and retain and use amounts collected to cover costs of operation. The IG, however, is not financed by collections from nonfederal entities or private individuals. As noted above, Congress appropriates a specific amount each year for IG operations. Crediting recoveries of investigative costs to the IG appropriation would constitute an improper augmentation, permitting the IG to operate at a level greater than it could with its appropriations. Accordingly, recovery of amounts representing investigative costs incurred by the IG must be deposited in the Treasury as miscellaneous receipts under 31 U.S.C. § 3302(b).

CONCLUSION

Recovery of IG investigative costs does not meet the narrow exception to the miscellaneous receipts rule that allows agencies to retain amounts characterized as repayments. Congress appropriates a specific amount to the IG for costs incurred in carrying out its duties under the Inspector General Act of 1978, including investigations of payments made pursuant to a false claim. In such case, crediting this appropriation with amounts recovered for investigative costs under the False Claims Act without specific statutory authority would violate the miscellaneous receipts statute and constitute an improper augmentation of the IG appropriation.

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