



Decision

Matter of: Election Assistance Commission—Use of Grant Funds for Security Services

File: B-333826

Date: April 27, 2022

DIGEST

The Election Assistance Commission (EAC) asks whether it may permit states to use Help America Vote Act of 2002 (HAVA) grant funds to provide physical security services and social media threat monitoring to state or local election officials. HAVA authorizes the use of grant funds to states for, among other things, “[i]mproving the administration of elections for Federal office.” HAVA and the appropriations at issue do not explicitly authorize, nor do they explicitly prohibit, such expenditures. If not otherwise specified in law, an expense is authorized where it bears a reasonable, logical relationship to the purpose of the appropriation to be charged. Here, a decision to allow use of grant funds for the physical security services and social media threat monitoring would be within EAC’s legitimate range of discretion.

DECISION

On December 1, 2021, the Election Assistance Commission (EAC) requested our decision on whether states may use certain grant funds made available to them under Section 101 of the Help America Vote Act of 2002 (HAVA) to provide “physical security services and social media threat monitoring.”¹ As discussed below, we conclude that EAC has discretion to permit states to use grant funds in this manner.

¹ Letter from Executive Director, EAC, *et al.* to Comptroller General, Dec. 1, 2021, at 1 (Request Letter).

In accordance with our regular practice, we contacted EAC to seek additional factual information and its legal views on this matter.² EAC responded with its explanation of the pertinent facts and legal analysis.³

BACKGROUND

Congress assigned EAC responsibility for administering grants to states to improve the administration of federal elections.⁴ The funds at issue here were appropriated to EAC in fiscal years 2018 and 2020 for activities “to improve the administration of elections for Federal office.... as authorized by” section 101 of HAVA.⁵ In turn, section 101 of HAVA authorizes states to use grant funds for the purpose of “[i]mproving the administration of elections for Federal office.”⁶

In September 2021, the Colorado Department of State asked EAC whether it could use HAVA grant amounts to pay for physical security services and social media threat monitoring.⁷ The Colorado Department of State asserted that election officials cannot effectively perform their duties if they feel their safety is in jeopardy and, furthermore, that additional security protections were necessary to prevent

² GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 5, 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel for Appropriations Law, GAO to General Counsel, EAC, Feb. 2, 2022.

³ Letter from Interim Executive Director and Acting General Counsel, EAC to Assistant General Counsel for Appropriations Law, GAO, March 1, 2022 (Response Letter).

⁴ Help America Vote Act of 2002, Pub. L. No. 107-252, §§ 101, 102, and 251, 116 Stat. 1666, 1668-72. and 1692-93 (Oct. 29, 2002) *codified at* 52 U.S.C. §§ 20901, 20902, 21001. Although HAVA permanently vests in the Administrator of General Services the authority to administer these grants, Congress in the two relevant annual appropriations acts temporarily vested this authority in EAC. Financial Services and General Government Appropriations Act, 2020, Pub. L. No. 116-93, Div. C, Title V, 133 Stat. 2317, 2461 (Dec. 20, 2019) (“each reference to the ‘Administrator of General Services’ or the ‘Administrator’ in sections 101 and 103 shall be deemed to refer to the ‘Election Assistance Commission’”); Financial Services and General Government Appropriations Act, 2018, Pub. L. No. 115-141, Div. E, Title V, 132 Stat. 348, 562 (Mar. 23, 2018) (“each reference to the ‘Administrator of General Services’ or the ‘Administrator’ in sections 101 and 103 shall be deemed to refer to the ‘Election Assistance Commission’”).

⁵ Pub. L. No. 116-93, Div. C, Title V, 133 Stat. at 2461; Pub. L. No. 115-141, Div. E, Title V, 132 Stat. at 562; Response Letter at 1.

⁶ 52 U.S.C. § 20901(b)(1).

⁷ Request Letter at 1.

experienced election officials and employees from leaving the profession.⁸ Accordingly, the Colorado Department of State suggested that its use of HAVA grant amounts for the security services and social media threat monitoring would improve the administration of elections for federal office.

According to EAC, there has been an increase in the number of threats made against Federal, state, and local election officials.⁹ EAC currently maintains a detailed website focused on the personal security of election officials.¹⁰ As EAC noted in its request letter to us, the Senate Committee on Rules and Administration in October 2021 heard testimony from state and local election officials about the increase in threats against themselves and their colleagues.¹¹

DISCUSSION

At issue here is whether EAC may permit states to use HAVA grant funds for physical security services and social media threat monitoring on the basis that doing so would “improve” the administration of elections for federal office pursuant to section 101 of HAVA. Section 101 of HAVA does not explicitly authorize, nor does it explicitly prohibit, the use of grant funds to provide physical security services and social media threat monitoring.¹² Similarly, the fiscal year 2018 and 2020 appropriations themselves do not explicitly authorize, nor do they explicitly prohibit the use of grant funds for such purposes.¹³

Under the purpose statute, appropriated funds may only be used for their intended purposes.¹⁴ Each authorized expense need not be stated explicitly in an appropriation. When an appropriation does not specifically enumerate all the items for which it is available, we apply a three-part test, known as the necessary expense rule, to determine whether the appropriation is available for a particular expense. Under this rule, an appropriation is available for a particular purpose if the

⁸ Letter from Colorado Department of State to EAC, Sept. 29, 2021 (Request Letter, Attachment A) (Colorado Letter).

⁹ Request Letter at 1.

¹⁰ EAC, *Election Official Security*, available at <https://www.eac.gov/election-officials/election-official-security> (last visited Mar. 29, 2022).

¹¹ Request Letter at 1; *Emerging Threats to Election Administration, Hearing Before the Senate Comm. On Rules and Admin.*, 117th Cong. (2021), available at <https://www.rules.senate.gov/hearings/emerging-threats-to-election-administration> (last visited Apr. 12, 2022).

¹² 52 U.S.C. § 20901; Request Letter at 2; Response Letter at 2.

¹³ Pub. L. No. 116-93, Div. C, Title V, 133 Stat. at 2461; Pub. L. No. 115-141, Div. E, Title V, 132 Stat. at 562.

¹⁴ 31 U.S.C. § 1301(a).

obligation or expenditure: (1) bears a reasonable, logical relationship to the purpose of the appropriation to be charged; (2) is not prohibited by law; and (3) is not otherwise provided for. B-331419, July 1, 2021. This discussion focuses on step 1.¹⁵

Neither HAVA nor the appropriations at issue specifically defines “improve” or provides any additional details to specify which actions Congress believed would improve the administration of elections for federal office.¹⁶ We have long held that

[w]here a given expenditure is neither specifically provided for nor prohibited, the question is whether it bears a reasonable relationship to fulfilling an authorized purpose or function of the agency. This, in the first instance, is a matter of agency discretion. When we review an expenditure with reference to its availability for the purpose at issue, the question is not whether we would have exercised that discretion in the same manner. Rather, the question is whether the expenditure falls within the agency’s legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range.

B-223608, Dec. 19, 1988 (internal citations omitted).

We have previously recognized that, where an agency received appropriations to provide for “enhancement” of certain facilities, determining whether a particular expense actually resulted in an enhancement required the exercise of discretion by the responsible agency. B-332322, Oct. 19, 2021. Determining whether a particular expense provides an “improvement,” similar to determining whether an expense provides an “enhancement,” requires the responsible agency to exercise judgment.

¹⁵ We only address step 1 of the necessary expense analysis because steps 2 and 3 are not at issue. No law explicitly prohibits the use of the funds for these purposes and, in both FY 2018 and FY 2020, EAC only received one appropriation specifically for these grants. See, Pub. L. No. 116-93, Div. C, Title V, 133 Stat. at 2460; Pub. L. No. 115-141, Div. E, Title V, 132 Stat. at 562.

¹⁶ 52 U.S.C. § 20901; Pub. L. No. 116-93, Div. C, Title V, 133 Stat. at 2461; Pub. L. No. 115-141, Div. E, Title V, 132 Stat. at 562. The legislative history of these provisions does not detail the precise activities that Congress believed would, or would not, improve the administration of federal elections. See, 165 Cong. Rec. H10,992 (daily ed. Dec. 17, 2019) (explanatory statement regarding fiscal year 2020 appropriation); 164 Cong. Rec. H2,519 (daily ed. Mar. 22, 2018) (explanatory statement regarding fiscal year 2018 appropriation); H.R. Rep. No. 107-730 (2002) (Conf. Rep.).

Congress vested in EAC the authority to administer the HAVA section 101 grants.¹⁷ With this grant of authority, Congress also vested in EAC the authority to determine whether a particular grant expenditure helps “improv[e] the administration of elections for federal office.”¹⁸ Though the bounds of EAC’s discretion are not limitless, the statute’s use of the expansive term “improve” suggests that Congress vested EAC with greater discretion than what Congress sometimes affords when it uses a more specific word. See, e.g., 41 Comp. Gen. 255 (1961) (amounts available for the “replacement” of state roads were not available to make improvements to them).

Our prior decisions provide precedent for EAC’s exercise of discretion here. We have acknowledged that death threats or threats of violence directed at government employees or members of their families can have a significant impact on these employees and the performance of their duties. B-270446, Feb. 11, 1997. We have generally not objected to an agency using appropriated funds to protect an agency official where the agency has a legitimate concern for the safety of the official and where the functioning of the agency may be impaired by the danger to the official. 71 Comp. Gen. 4 (1991). We have also concluded that federal agencies may use appropriated funds to pay the costs of protecting threatened federal officials even when the funds in question were not explicitly appropriated for such security costs. B-251710, July 7, 1993. These prior decisions help illuminate EAC’s discretion even though they relate to threatened federal officials rather than (as here) to state or local officials carrying out responsibilities funded by federal grants.¹⁹ Just as the functioning of a federal program might be impaired by danger to a federal official with responsibility for the program, the functioning of a federally funded state or local program might be impaired by danger to a state or local official with responsibility for that program.²⁰

¹⁷ 52 U.S.C. § 20901; Pub. L. No. 116-93, Div. C, Title V, 133 Stat. at 2461; Pub. L. No. 115-141, Div. E, Title V, 132 Stat. at 562.

¹⁸ *Id.*

¹⁹ We have held that an agency could provide psychological assessment and referral services to family members of federal employees who received death threats and other threats of violence. Although the family members receiving these services were not federal employees, we agreed that this expense nevertheless benefitted the agency because the stress and anxiety faced by these individuals, if left unaddressed, could negatively impact the accomplishment of the agency’s mission. B-270446.

²⁰ We also note Office of Management and Budget guidance which states that “[n]ecessary and reasonable expenses incurred for protection and security of facilities, personnel, and work products are allowable. Such costs include, but are not limited to, wages and uniforms of personnel engaged in security activities; equipment; barriers; protective (non-military) gear, devices, and equipment; contractual security services; and consultants.” 2 C.F.R. § 200.457; see also,

In light of the information that EAC provided in its letter to us, EAC could reasonably conclude that providing physical security services and social media threat monitoring to election officials would “improve the administration of elections for federal office” and, therefore, that states may use grant funds for these expenses.²¹ Should EAC reach this conclusion, it would be within the legitimate range of discretion that the agency must exercise as it administers HAVA section 101. In reaching its conclusion, EAC may rely on the analysis underlying our prior decisions determining that agencies may use appropriated funds to provide security to threatened federal officials.²²

Should EAC conclude that states may use grant funds for these expenses, EAC would then be responsible for determining the reasonableness of any costs incurred and the proportion of such costs that are properly allocable to a jurisdiction’s HAVA grant funds. EAC would need to make this determination in light of each grantee’s specific circumstances, including any existing security measures.²³

31 U.S.C. § 6307 (authorizing the Director of the Office of Management and Budget to issue “interpretative guidelines” for federal grant agreements).

²¹ Because this conclusion must be reached in light of the specific circumstances, EAC may need to reevaluate should perceived threats to election officials’ safety significantly change in the future.

²² See, e.g., B-251710; B-243866.

²³ EAC also asked “[h]ow to appropriately assess the allocation of the physical security services specifically to the administration of elections for Federal office when officials have multiple duties and responsibilities” Request Letter at 2. In the case of physical security upgrades to a state or local facility that houses election offices, for example, EAC has only allowed the costs of those upgrades specifically related to the portion of the facility housing the election offices to be allocated to a HAVA grant. See, EAC, *HAVA Frequently Asked Questions*, available at <https://www.eac.gov/payments-and-grants/grants-fags> (last visited Apr. 12, 2022). However, the Colorado Department of State proposed allocating the entire cost of physical security services and social media threat monitoring to HAVA grant funds, noting that “[e]lections for federal office are the most visible and virtually all threats to date are related to elections for federal office. Stated another way, the only reason we require these additional services is because of federal elections and this request does not supplant existing state expenses.” Colorado Letter at 2.

Should it deem these costs allowable, EAC must determine the proper method of cost allocation, which could vary depending on various circumstances (such as the extent to which EAC determines these costs are allowable) and which could vary from one grantee to another.

CONCLUSION

HAVA authorizes the use of the grant funds for “[i]mproving the administration of elections for federal office.” Congress vested EAC with authority to administer the grant program. According to EAC, there has been an increase in the number of threats made against Federal, state, and local election officials. In light of this information, EAC could reasonably conclude that grantees could use the funds to provide physical security services and social media threat monitoring to election officials.

A handwritten signature in cursive script that reads "Edda Emmanuelli Perez".

Edda Emmanuelli Perez
General Counsel