



Decision

Matter of: Election Assistance Commission—Payments to States under the Help America Vote Act of 2002

File: B-328615

Date: May 9, 2017

DIGEST

Payments made to states under the Help America Vote Act of 2002 (HAVA) are grants. Such payments are distributed “to carry out a public purpose of support or stimulation authorized by a law of the United States” and the federal government does not expect “substantial involvement” when states carry out activities authorized by HAVA. 31 U.S.C. § 6304.

DECISION

The Election Assistance Commission (EAC) makes payments to states under the Help America Vote Act of 2002 (HAVA). The General Counsel of EAC asks whether such payments are grants.¹ Letter to General Counsel, GAO, from General Counsel, EAC, *Subject: HAVA Payment Funding Interpretation* (Nov. 18, 2016) (Request Letter). We conclude that they are. The payments are distributed “to carry out a public purpose of support or stimulation authorized by a law of the United States” and the federal government does not expect “substantial involvement” when states carry out activities authorized by HAVA. 31 U.S.C. § 6304.

BACKGROUND

In the aftermath of the 2000 presidential election, Congress and the President enacted the Help America Vote Act of 2002. Pub. L. No. 107-252, 116 Stat. 1666

¹ The General Counsel of EAC requested a decision from our office under 31 U.S.C. § 3529. The request letter included facts and EAC’s legal views. See GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP.

(Oct. 29, 2002). HAVA established EAC to distribute and monitor payments to eligible states for federal election reforms, among other things. 52 U.S.C. § 20921–20922. HAVA tasked the General Services Administration (GSA) with distributing some payments in 2003 while EAC “became fully operational.” Request Letter, at 1; 52 U.S.C. §§ 20901, 20902. EAC is considered the disbursing office for the purposes of auditing all HAVA payments. 52 U.S.C. § 21142(b)(3).

HAVA authorizes three distinct funding programs. Section 101 of HAVA directs GSA to make payments “for activities to improve administration of elections,” such as educating voters on voting technology, training election officials, and improving the accessibility and quantity of polling places. 52 U.S.C. § 20901. Section 102 of HAVA directs GSA to make payments to replace punch card or lever voting machines. *Id.* § 20902. Section 251 of HAVA directs EAC to make “requirements payments,” that is, payments to meet the requirements of title III of HAVA, such as implementing provisional voting, providing information in polling places, developing and maintaining a computerized voter registration list, and implementing identification requirements for first-time voters who register by mail. *Id.* §§ 21001–21008, 21081–21085. HAVA contains a formula to determine the amount under each section. 52 U.S.C. § 20901(d), 20903 (section 101 payments), 20902(c), 20903 (section 102 payments), 21002 (section 251 payments).

EAC characterizes these payments as grants. Request Letter, at 2–3. EAC advises states that certain Office of Management and Budget (OMB) guidance pertaining to such grant awards are instructive “on the appropriate uses of the federal payments, appropriate administrative principles that should be applied to the use of these funds, and the audit requirements that the states could expect as a result of taking these funds.”² Request Letter, at 2. EAC’s Office of Inspector General (OIG) uses this OMB guidance as criteria to evaluate state use of HAVA payments. *Id.*; Letter from Inspector General, EAC, to Chairman, EAC, *Subject: Management Advisory Report: Nature of HAVA Funds and the Applicability of Federal Criteria (Project Number E-NS-NH-07-16)*, May 10, 2016 (EAC OIG Memorandum), at 3, available at www.eac.gov/assets/1/28/E-NS-NH-07-16%20EAC%20Management%20Advisory%20Nature%20of%20HAVA%20Funds.pdf (last visited May 4, 2017).

The state of New Hampshire has long disagreed with EAC’s characterization. EAC OIG Memorandum, at 3. An Assistant Secretary of State for New Hampshire points out that HAVA authorizes “payments” to states under sections 101, 102, and 251,

² EAC cites OMB Circular No. A-87, OMB Circular No. A-102, and OMB Circular No. A-133. Request Letter, at 2. We note that these circulars have been superseded by OMB’s *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, commonly called “Uniform Guidance.” 2 C.F.R. pt. 200.

but separately authorizes “grants” to eligible entities in other sections. *Id.*, at 2. See, e.g., 52 U.S.C. § 21051 (grants for pilot programs for new voting technologies), 52 U.S.C. § 21071 (grants for National Student and Parent Mock Election). The Assistant Secretary of State also takes issue with EAC’s application of OMB guidance, given section 209 of HAVA: “The (Election Assistance) Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under [section 9 of the National Voter Registration Act (NVRA) of 1993].”³ EAC OIG Memorandum, at 2; 52 U.S.C. § 20508(a) (section 9 of NVRA), 20929 (section 209 of HAVA).

DISCUSSION

The question is whether payments under sections 101, 102, and 251 of HAVA are grants. While we have not directly analyzed this issue before, we have previously characterized payments under section 251 as grants. B-316915, Sept. 25, 2008, at 3 (“[A]n amount shall be recorded as an obligation when supported by documentary evidence of, *as relevant to our situation, a grant payable from appropriations* that is ‘required to be paid in specific amounts fixed by law or under formulas prescribed by law’”) (emphasis added).

As always, we begin our analysis with the language of the statute. When the language of a statute is clear on its face, it is the plain meaning of that language that controls. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997). Here, while HAVA does not define “payment,” it does directly address the legal instruments available to a disbursing office to carry out financial assistance to the states. HAVA states that recipients of “grants or other payments under this Act, whether by direct *grant, cooperative agreement, or contract* under [HAVA] or by subgrant or subcontract from primary grantees or contractors under [HAVA]” are subject to audit or examination. 52 U.S.C. § 21142(b)(2) (emphasis added).

³ New Hampshire officials have repeatedly taken this position in documented interactions with EAC officials, in a statement at an EAC public meeting, and in congressional testimony. EAC OIG Memorandum; EAC Public Meeting & Hearing, *Panel Discussion of July 19, 2009 NASS Resolution on Help America Vote Act of 2002 (HAVA) Grant and Payment Distinction* (Sept. 2, 2009) (written statement of New Hampshire Assistant Attorney General), available at <http://archives.eac.gov/News/docs/09-02-09-testimony-james-kennedy-nh-doj-public-meeting/> (last visited May 4, 2017); *H.R. 672, To Terminate the Election Assistance Commission, Hearing Before the Subcommittee on Elections of the Committee on House Administration*, 112th Cong. 24–44 (2011) (testimony of New Hampshire Secretary of State), available at www.gpo.gov/fdsys/pkg/CHRG-112hrg67345/pdf/CHRG-112hrg67345.pdf (last visited May 4, 2017). We relied on the views stated in these records.

The Federal Grant and Cooperative Agreement Act of 1977 (FGCAA) establishes criteria to differentiate among grants, cooperative agreements, and contracts.⁴ Pub. L. No. 95-224, 92 Stat. 3 (Feb. 3, 1978), *codified at* 31 U.S.C. §§ 6301–6308. The differences hinge on the purpose of the relationship and the degree of involvement of the federal government. Per FGCAA, an agency must use a grant agreement when the principal purpose of the relationship is to transfer a thing of value, like money, property, or services, to the recipient “to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government,” and “substantial involvement is not expected” between the agency and the recipient when carrying out the contemplated activity. 31 U.S.C. § 6304. An agency must use a cooperative agreement when the principal purpose of the relationship is to transfer a thing of value to the recipient “to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government,” and “substantial involvement is expected” between the agency and the recipient when carrying out the contemplated activity. *Id.* § 6305. Finally, an agency must use a contract when “the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the *direct benefit or use* of the United States Government.” *Id.* § 6303 (emphasis added).

Under that framework, it is clear that the HAVA payments are “grants” and EAC has properly selected the correct funding instrument. EAC distributes amounts to a state “to carry out a public purpose of support or stimulation authorized by a law of the United States,” here, federal election reform. *See id.* § 6304. Importantly, EAC does not expect to have substantial involvement after it distributes the amount. EAC explains that “states are left to their own discretion on how to implement the statutory directives,” such as how to establish provisional voting or how to develop a statewide voter registration list. Request Letter, at 4. EAC states that it has “no involvement with the implementation of the HAVA requirements, other than disbursing the payments, receiving reports from the recipients, and auditing the expenditures.” *Id.*

More specifically, these grants are formula grants. Formula grants allocate federal funds to states in accordance with a statutory formula or administrative regulation.

⁴ It is important for agencies to choose the proper funding instrument because contracts are subject to certain statutes and regulations that generally do not apply to grants and cooperative agreements. B-406738, Aug. 15, 2012. *See also, e.g.*, B-262110, Mar. 19, 1997; 61 Comp. Gen. 428 (1982). An agency should not use a grant or cooperative agreement to evade competition requirements, for instance. Conversely, an agency should not be burdened with the formalities of a contract where it intends to engage in financial assistance. B-406738.

GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 60. See, e.g., 63 Comp. Gen. 525 (1984); B-164031(3).150, Sept. 5, 1979. HAVA payments are distributed to states based on formulas in the law. 52 U.S.C. § 20901(d), 20903 (section 101 payments); 20902(c), 20903 (section 102 payments); 21002 (section 251 payments).

HAVA authorizes other grants as well, such as grants for pilot programs for new voting technologies and for the National Student and Parent Mock Election. 52 U.S.C. §§ 21051, 21071. Amounts distributed under those sections would be properly characterized as project grants. Project grants allocate federal funds “for fixed or known periods for specific projects or the delivery of specific services or products.” *Glossary*, at 60-61.

Contrary to the position taken by the state of New Hampshire, HAVA’s use of the term “payments” for some amounts and “grants” for other amounts is not conclusive upon the question of whether payments under sections 101, 102, and 251 of HAVA are grants.⁵ The word “payment” is not a term of art. Congress uses the word “payment” in various contexts. For instance, Congress authorizes “payments” to states to finance some of the costs of highway construction. 23 U.S.C. § 121. Congress also historically makes a “payment” to the surviving family of a Member who dies in office. See 2 U.S.C. § 4506. In addition, Congress makes a number of “payments” to finance the operations of the District of Columbia each year. See, e.g., Pub. L. No. 114-113, div. E, title IV, 129 Stat. 2242, 2443–47 (Dec. 18, 2015). Therefore, it is important to evaluate the term “payment” in the framework of the statute. *Robinson*, 519 U.S. at 341 (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole”). Here, HAVA plainly states that amounts distributed under the act are to be distributed by “direct grant, cooperative agreement, or contract.” 52 U.S.C. § 21142(b)(2). Given that context, as well as the context provided by the FGCCA’s definitions of grants, cooperative agreements, and contracts, it is clear that HAVA payments are grants.⁶

⁵ The legislative history of HAVA does not indicate why Congress used the term “payments” for some amounts and “grants” for other amounts. H.R. Rep. No. 107-730 (2002) (joint explanatory statement); H.R. Rep. No. 107-329 (2001) (committee report).

⁶ Generally, grants are governed by OMB’s Uniform Guidance, which establishes consistency and uniformity among federal agencies in the management of grants. See 2 C.F.R. pt. 200 (OMB’s Uniform Guidance). EAC should address any questions on the guidance to OMB.

CONCLUSION

Federal payments under sections 101, 102, and 251 of HAVA are grants. Such amounts are distributed “to carry out a public purpose of support or stimulation authorized by a law of the United States” and the federal government does not expect “substantial involvement” when states carry out activities described in HAVA. 31 U.S.C. § 6304.

A handwritten signature in black ink, appearing to read "S. Poling". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Susan A. Poling
General Counsel