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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Election Assistance Commission—Availability of Funds for Purchase of Replacement Voting Equipment

File: B-316107

Date: March 19, 2008

DIGEST

Section 251 of the Help America Vote Act of 2002 (HAVA), 42 U.S.C. § 15401, authorizes the Election Assistance Commission (EAC) to provide payments to states for a variety of enumerated purposes, including procurement of HAVA-compliant voting systems to improve the administration of federal elections. HAVA leaves to the states what type of voting equipment the individual states should use, as long as the equipment complies with HAVA. At issue in this decision is whether under section 251 of HAVA a state may fund the replacement of HAVA-compliant voting systems, originally purchased with HAVA funds, with a different kind of HAVA-compliant voting system. We conclude that EAC's proposed policy to permit such expenses is within EAC's discretion in its exercise of statutory authority under HAVA.

DECISION

The Election Assistance Commission (EAC) has requested a decision regarding its Proposed Policy to permit use of Help America Vote Act of 2002 (HAVA) funds to purchase a HAVA-compliant voting system even though the system replaced was originally purchased with HAVA funds.¹ Letter from Rosemary E. Rodriguez, Chair, Election Assistance Commission, to David M. Walker, Comptroller General of the United States, Feb. 21, 2008 (Rodriguez Letter). At issue in this decision is whether

¹ Election Assistance Commission, *Proposed Policy Clarification On the Allowable Uses of Help America Vote Act Funds Authorized Under Titles I and II* (Mar. 20, 2008), available at www.eac.gov/News/meetings/march-20-2008-public-meeting (last visited Mar. 17, 2008) (Proposed Policy).

payments made to states under section 251 of HAVA (42 U.S.C. § 15401) are available to fund the replacement of HAVA-compliant voting systems, originally purchased with HAVA funds, with a different kind of HAVA-compliant voting system. HAVA does not expressly state whether funds can be used for this purpose. We conclude that it is within EAC's legitimate range of discretion to determine that section 251 funds may be used to replace systems that are already HAVA-compliant and were purchased with HAVA funds. Accordingly, we would not object to the Proposed Policy.

EAC included in its request for an expedited decision in this matter its legal views and relevant factual material. To supplement the record, we held a telephone conference call with EAC officials on March 6, 2008. 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.

BACKGROUND

The Help America Vote Act of 2002 (HAVA) established the EAC to assist in the administration of federal elections and charged the EAC with distributing payments to states under its authorized funding programs. Pub. L. No. 107-252, 116 Stat. 1666 (Oct. 29, 2002); 42 U.S.C. §§ 15301–15545. HAVA established three programs for the EAC² to distribute money to the states to implement HAVA, including the purchase of HAVA-compliant voting systems. These programs are set out in section 101 (42 U.S.C. §15301), section 102 (42 U.S.C. §15302), and section 251 (42 U.S.C. §15401) of HAVA. The funding program that is relevant to this decision is the section 251 program.

Section 251 authorizes payments to states, referred to as “requirements payments,” for certain enumerated purposes, including improving the administration of elections for federal office. HAVA provides that states may use requirements payments to implement provisional voting; provide information to voters in the polling place; procure voting systems that comply with the requirements of Title III of HAVA;³

² Before the formation of EAC, the General Services Administration (GSA) distributed payments under Title I of HAVA. 42 U.S.C. §§ 15301–15306.

³ Title III of HAVA requires voting systems to permit the voter to verify the vote selected before the voter casts the ballot and to change the vote before the ballot is cast and counted; notify the voter if the voter has selected more than a single candidate and the impact of selecting more than one candidate, and allow the voter to correct the ballot; provide a voter education system for jurisdictions that use a paper ballot, punch card, or central count voting systems; produce an auditable record; be accessible for individuals with disabilities; provide alternative language accessibility; and meet minimum error rates for counting ballots. 42 U.S.C. § 15481.

develop and implement a computerized statewide voter registration list; implement identification requirements for first-time voters who register to vote by mail; and improve the administration of elections for federal office. In addition, HAVA section 251(b)(2) allows a state to use section 251 payments to improve the administration of elections for federal office if the state has certified to EAC that it has met the requirements of Title III.⁴ EAC received appropriations in fiscal years 2003, 2004, and 2008 for requirements payments.⁵ EAC distributed requirements payments to states between June 2004 and December 2005,⁶ and they are maintained in the election fund of the individual state. Requirements payments are allocated among the states based on the relative size of the state's voting age population.⁷

In addition to distributing payments to states under the HAVA funding programs, EAC oversees and administers states' use of funds. HAVA also authorizes EAC to audit or examine the recipient of a grant or other payment made under HAVA. As part of its audits, EAC may examine records relating to the amount and disposition of HAVA payments. 42 U.S.C. § 15542. EAC is required to provide information and training on the management of the payments and grants. 42 U.S.C. § 15322. In addition, a condition of receipt of requirements payments is the states' submission to EAC of a state plan that accounts for the use of the payments. 42 U.S.C. §§ 15403–15404. States must submit a report to the EAC about the activities conducted with the funds including a list of expenditures, the number and type of voting equipment obtained with the funds, and an analysis and description of the activities funded under section 251. 42 U.S.C. § 15408.

⁴ Sections 251 and 252 also permit states to use section 251 funds to improve the administration of elections for federal office if they certify that they will not spend more than the amount of the minimum payment available to the state under section 252(c). 42 U.S.C. §§ 15401–15402.

⁵ In fiscal year 2003, EAC received \$830 million for requirements payments. Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, div. N, 117 Stat. 11, 537 (Feb. 20, 2003). In fiscal year 2004, Congress appropriated \$1.5 billion for requirements payments. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. F, div. H, 118 Stat. 3, 327, 451 (Jan. 23, 2004). According to EAC officials, after a rescission, EAC received \$1,498,200,000. In fiscal year 2008, EAC received \$115 million for requirements payments. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1996 (Dec. 26, 2007).

⁶ Election Assistance Commission, *Report to Congress on State Governments' Expenditures of Help America Vote Act Funds*, July 2007.

⁷ Section 252 provides the formula for allocation of the money to the states. 42 U.S.C. § 15402.

In May 2007, the EAC responded to an inquiry from the state of Florida concerning the expenditure of section 251 funds to improve the administration of elections for federal office. Letter from Juliet T. Hodgkins, General Counsel, Election Assistance Commission, to Kurt Browning, Secretary of State of the State of Florida, May 2, 2007 (May 2007 Policy).⁸ Florida had approximately \$91 million of section 251 funds available in its election fund and asked whether it was permissible to use HAVA funds to purchase HAVA-compliant voting systems to replace existing HAVA-compliant voting systems acquired with HAVA funds. Specifically, Florida wanted to replace touch screen voting systems, previously funded in part with HAVA funds, with optical scan voting systems. EAC's May 2007 Policy denied the request and stated that under Office of Management and Budget (OMB) Circular No. A-87 cost principles, while it was reasonable to fund the purchase of HAVA-compliant voting equipment one time, it was not reasonable to fund that expense twice.⁹

In its submission to us, EAC referenced the House Appropriations Committee report accompanying the Financial Services and General Government Appropriations bill for Fiscal Year 2008, directing EAC to reconsider its ruling in the May 2007 Policy. H.R. Rep. No. 110-207, at 56 (2007). In a letter dated January 23, 2008, the Subcommittee on Financial Services and General Government asked the EAC to reverse the May 2007 Policy. Proposed Policy, at 3. EAC's Proposed Policy would reverse the May 2007 Policy, concluding that OMB Circular No. A-87 does not prohibit a state's use of HAVA funds to replace voting systems purchased with HAVA funds, as long as such purchases comply with HAVA.

DISCUSSION

HAVA neither expressly authorizes nor prohibits the use of section 251 funds to purchase replacement voting systems. Where a given expenditure is neither specifically provided for nor prohibited, an agency's appropriation is available so long as the proposed expenditure bears a reasonable relationship to fulfilling an authorized purpose or function of the agency. B-286457, Jan. 29, 2001. The question for the agency is whether the proposed use 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-304718, Nov. 9, 2005. This

⁸ May 2007 Policy, available at <http://www.eac.gov/News> (search "Florida Use of HAVA Funds"; then follow "05/02/07 – EAC Reply to Florida" hyperlink) (last visited Mar. 17, 2008).

⁹ OMB Circular No. A-87 addresses the use of federal funds to purchase goods for state and local governments. OMB Cir. No. A-87, *Cost Principles for State, Local and Indian Tribal Governments* (May 10, 2004). When EAC distributed section 251 payments to states, EAC subjected states' use of the payments to OMB Circular No. A-87. Under OMB Circular No. A-87, costs paid with HAVA funds must be allowable, allocable, and reasonable. Proposed Policy, at 2.

determination, in the first instance, is a matter of agency discretion, B-223608, Dec. 19, 1998, which we will accept so long as reasonable, *see* B-285066.2, Aug. 9, 2000.

Here, the question is whether EAC's proposed policy decision to permit a state's use of HAVA funds, appropriated for the purpose of improving the administration of federal elections, is a reasonable exercise of EAC's discretion in administering these funds. There is no provision in HAVA, in section 251 or otherwise, that addresses the issue of whether states can use section 251 funds to purchase HAVA-compliant voting systems to replace HAVA-compliant voting systems originally purchased with HAVA funds. HAVA only requires that voting systems comply with the requirements of Title III. EAC's Proposed Policy is consistent with HAVA's statutory scheme. Section 251 clearly authorizes a state to use a requirements payment to carry out activities to improve the administration of elections for federal office if the state has met the certification condition. Importantly, HAVA does not require or recommend a specific type of voting system, and states are free to choose the type and model of voting equipment that they wish to use, as long as that system meets or exceeds the requirements of HAVA. 42 U.S.C. §15481(c)(1).¹⁰ Consistent with HAVA, EAC's Proposed Policy does not direct or otherwise imply that states select one type of voting system over another. EAC's Proposed Policy only requires that the systems selected be HAVA-compliant.

In 2007, EAC applied the cost principle of reasonableness of OMB Circular No. A-87. In the Proposed Policy, EAC reconsidered that application. EAC's reconsideration is a reasonable exercise of its discretion concerning the use of its appropriations under section 251. Here, OMB Circular No. A-87 cost principles must be understood within the statutory scheme of section 251, and a determination of reasonableness under those cost principles, once made, should not be viewed as an insurmountable obstacle to EAC's review and exercise of its discretion under section 251 to improve the administration of elections for federal office.

CONCLUSION

Section 251 of HAVA provides payments to states for a variety of enumerated purposes, including procurement of voting systems that are HAVA-compliant for the purpose of improving the administration of federal elections. HAVA leaves to each

¹⁰ *See also* 42 U.S.C. § 15485 (stating that methods of implementation are left to the discretion of the state) and 42 U.S.C. § 15329 (EAC shall not have authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any state, except to the extent permitted under section 9(a) of the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-7(a), which requires the EAC to promulgate regulations for the development of a mail voter registration form).

state the decision on what type of voting equipment the state wishes to use, as long as the equipment complies with HAVA. EAC's proposed policy to permit states to use section 251 funds to replace HAVA-compliant voting systems even if the systems were originally purchased with HAVA funds is within EAC's legitimate range of discretion in its exercise of statutory authority under HAVA.

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