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# Decision

**Matter of:** Customs Service – Authority to Fund Overtime and Premium Pay Activities from COBRA User Fees

**File:** B-279865

**Date:** April 22, 1999

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## DIGEST

The U.S. Customs Service (Customs) collects fees for services under 19 U.S.C. § 58c(a). Eight of these fees are known as “COBRA user fees,” having been originally established by the Comprehensive Omnibus Budget Reconciliation Act (COBRA) of 1985. Pub. L. No. 99-272, 100 Stat. 82, 308 (1986); 19 U.S.C. § 58c(a)(1)-(8) (1994 & Supp. 1997). Section 58c(f)(3)(A)(i) of title 19, U.S. Code (1994 & Supp. 1997), requires Customs to use the COBRA user fees to reimburse appropriations for the agency’s cost of overtime, portions of premium pay, and other specified expenses. The Office of the Inspector General of the U.S. Department of the Treasury questions the use of those fees to cover the cost of activities unrelated to the services for which the COBRA user fees are paid. Recourse to a common understanding about the meaning of the term “user fee” or to general expressions of a law’s “basic tenet” cannot overcome the plain meaning of the law’s unambiguous language. Accordingly, it is our opinion that Customs may under current law properly use its COBRA user fees to cover expenses as specified by 19 U.S.C. § 58c(f) (1994 & Supp. 1997), regardless of their relation to services for which COBRA user fees are paid.

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## DECISION

The Office of the Inspector General (OIG) of the U.S. Department of the Treasury asks whether user fees collected by the Secretary of the Treasury through the U.S. Customs Service (Customs) under the authority of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, as amended, are available to fund costs of inspection services unrelated to the services provided to those parties who pay the user fees.

Section 58c(f)(3)(A)(i) of title 19, U.S. Code (1994 & Supp. 1997), requires the Secretary of the Treasury to reimburse appropriations from the COBRA user fees for the costs of Customs overtime compensation, portions of premium pay, certain civil service retirement and disability contributions, preclearance services, and foreign language proficiency awards. We find that the statute does not limit reimbursement to only those activities associated with providing services to COBRA user fee payers. Accordingly, it is our opinion that Customs may under current law properly use its COBRA user fees to cover expenses as specified by

19 U.S.C. § 58c(f) (1994 & Supp. 1997), regardless of their relation to services for which COBRA user fees are paid.

## BACKGROUND

The Customs Service enforces customs and related laws, including collecting duties and processing people, vehicles, and goods entering or departing from the United States. In the 1985 COBRA, Congress established a system of fees to recover a significant portion of the costs of Customs activities. Pub. L. No. 99-272, 100 Stat. 82, 308 (1986). Prior to that time, annual appropriations acts largely provided funding for Customs operations, although fees supported some Customs activities. For example, and relevant to the present matter, after-hours customs inspections were a for-fee service under the Act of February 13, 1911. Pub. L. No. 61-350, 36 Stat. 899, 901.<sup>1</sup>

The 1985 COBRA instituted processing fees for: (1) commercial vessels; (2) commercial trucks; (3) railroad cars; (4) passengers traveling on private vessels or aircraft; (5) passengers traveling on commercial vessels or aircraft; (6) dutiable mail; and (7) customs broker permits. Pub. L. No. 99-272, 100 Stat. 82, 308 (1986); codified as amended, 19 U.S.C. § 58c(a)(1)-(7) (1994 & Supp. 1997). Within a year, the Tax Reform Act of 1986 created an additional fee for processing barges and bulk carriers from Canada and Mexico. Pub. L. No. 99-514, 100 Stat. 2085, 2927 (1986); codified as amended, 19 U.S.C. § 58c(a)(8) (1994). Together, these eight fees are commonly referred to as the “COBRA user fees.”<sup>2</sup>

Current law requires COBRA user fee revenues to be applied in the following manner. First, Customs must reimburse appropriations for overtime compensation. 19 U.S.C. § 58c(f)(3)(A)(i)(I) (1994). Second, Customs may transfer up to \$18 million to the Treasury’s General Fund for deficit reduction purposes. 19 U.S.C. § 58c(f)(3)(A) and (c)(iii)

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<sup>1</sup>Reimbursement for overtime services had, in fact, been the law since at least 1799, when an act of Congress provided for the payment of Customs officer salaries by ship owners for night or overtime inspections. *Overtime and Premium Pay for U.S. Customs Service Inspectors*, Barbara L. Schwemle, Congressional Research Service, June 11, 1991, at 2. The “1911 overtime” reimbursement requirement was effective until the establishment of a new customs officer pay system by the Omnibus Budget Reconciliation Act (OBRA) of 1993. Pub. L. No. 103-66, 107 Stat. 312, 668 (1993); discussed below.

<sup>2</sup>The Omnibus Budget Reconciliation Act (OBRA) of 1986 also amended the 1985 COBRA to create a second category of Customs fees called the “merchandise processing fee” (MPF) for formal and informal entries of merchandise into the country. Pub. L. No. 99-509, 100 Stat. 1874, 1965 (1986); codified as amended, 19 U.S.C. § 58c(a)(9) & (10) (1994). Because the MPF is calculated and disposed of differently than the COBRA user fees, it is not an issue in the present matter.

(1994 & Supp. 1997); see H.R. Rep. No. 103-111, at 575 (1993). Third, Customs must reimburse appropriations for certain premium pay costs, retirement and disability contributions, preclearance services, and foreign language proficiency awards. 19 U.S.C. § 58c(f)(3)(A)(i)(II)-(V) (1994 & Supp. 1997). Fourth, once such reimbursements are made, Customs can use surplus funds to pay for Customs salaries and equipment to enhance services to COBRA fee payers. 19 U.S.C. § 58c(f)(3)(A) and (A)(ii) (1994 & Supp. 1997). Fifth, Customs can use remaining funds, to the extent provided for in an appropriations act, to offset other costs of processing commercial vehicles and cargo. 19 U.S.C. § 58c(f)(2) (1994). Sixth, after paying the costs of such commercial activities, Customs is to use remaining fee receipts to maintain \$30 million to cover future Customs costs. 19 U.S.C. § 58c(f)(3)(C)(ii) (1994). Finally, Customs is to carry over any remaining surplus for the following fiscal year in the Customs User Fee Account maintained in the Treasury. GAO, *Customs Service: Information on User Fees*, at 12 (GAO/GGD-94-165FS).

It should be noted that the current COBRA user fee system is the product of significant legislative revision over the years. For example, under the 1985 COBRA, overtime was the only cost to be directly reimbursed. Pub. L. No. 99-272, § 13031(f), 100 Stat. 82, 310 (1986). The Omnibus Budget Reconciliation Act (OBRA) of 1986 made COBRA fees the exclusive means of charging for customs services. Pub. L. No. 99-509 § 8101(c), 100 Stat. 1874, 1966-7 (1986). The 1987 OBRA added direct reimbursement of preclearance services. Pub. L. No. 100-203, § 9501(a)(3), 101 Stat. 1330, 1330-379 (1987). The Customs and Trade Act of 1990 modified the scope of COBRA user fee reimbursement, established the \$30 million contingency fund, and authorized the use of certain surplus funds to enhance services to fee payers. Pub. L. No. 101-382, § 11(c), 104 Stat. 629, 638 (1990). The 1993 OBRA revised references to overtime consistent with its reform of customs officer pay, and added direct reimbursement of premium pay, retirement and disability contributions, and foreign language proficiency awards, as well as the deficit reduction transfer. Pub. L. No. 103-66, § 13813, 107 Stat. 312, 671 (1993).

The question before us involves the scope of activities to be directly reimbursed pursuant to 19 U.S.C. § 58c(f)(3)(A)(i) (1994 & Supp. 1997), that is, the costs of Customs overtime compensation, portions of premium pay, certain retirement and disability contributions, preclearance services, and foreign language proficiency awards.

The issue arises out of an OIG audit of Customs' COBRA user fee practices. "Audit of U.S. Customs Service's Oversight of Consolidated Omnibus Budget Reconciliation Act User Fees" (OIG-98-096), July 1, 1998. In its audit report, the OIG made a number of findings critical of Customs practices, including that COBRA user fees do not reflect actual Customs costs and that they are vulnerable to misuse and abuse. According to the OIG report, Customs agreed with several OIG recommendations to improve its management of its COBRA user fee activities. Customs disagreed, however, with the OIG view that it was improperly using COBRA user fees to pay costs associated with inspection activities

unrelated to those for which COBRA user fees are collected. As a consequence, the OIG requested an opinion of this office regarding the reimbursement of overtime and other specified costs.<sup>3</sup>

## ANALYSIS

The OIG “believes Customs’ interpretation and practices are not clearly supported by the [COBRA] legislation and are contrary to the basic tenet of the Act; i.e., that the fees were meant to reimburse the Government for the cost of providing service. The OIG believes that using COBRA user fees to pay the cost of services not related to those paying the fees is incongruous with the intent of the Act.” Letter of Richard B. Calahan, Deputy Inspector General, Department of the Treasury, to James F. Hinchman, Acting Comptroller General, U.S. General Accounting Office. Customs, on the other hand, believes that “the plain language of the statute” supports reimbursement of the overtime and other costs “from the collected fees without regard to whether or not services are provided to fee payers.” Letter of Raymond W. Kelly, Commissioner of Customs, to Gary L. Kepplinger, Associate General Counsel, U.S. General Accounting Office. We agree with Customs.

The 1985 COBRA, as amended, does not have a controlling “basic tenet,” but rather provides a set of very precise, albeit complex, statutory requirements. The statutory provision in question, 19 U.S.C. § 58c(f)(3)(A)(i) (1994 & Supp. 1997), requires Customs to directly reimburse appropriations out of COBRA user fees for costs incurred in:

- “(I) paying overtime compensation under section 267(a) of this title,
- (II) paying premium pay under section 267(b) of this title . . . [but only up to a certain amount],
- (III) paying agency contributions to the Civil Service Retirement and Disability Fund to match deductions from the overtime compensation paid under subclause (I),
- (IV) providing all preclearance services for which the recipients of such services are not required to reimburse the Secretary of the Treasury, and
- (V) paying foreign language proficiency awards under section 267a(b) of this title.”

This language is, as Customs points out, quite plain on its face. At the heart of the dispute is overtime and premium pay. Section 267(a) and (b) of title 19, U.S. Code (1994), govern Customs overtime and premium pay, respectively, and section 58c(f)(3)(A)(i) (1994 & Supp. 1997) provides for the reimbursement of their costs. Nothing in either section suggests that

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<sup>3</sup>By formulating the request in the context of overtime and premium pay, the OIG appears to be concerned only with the scope of reimbursement of overtime, premium pay, and retirement and disability contributions under 19 U.S.C. § 58c(f)(3)(A)(i)(I)-(III) (1994), and not preclearance services and foreign language proficiency awards under 19 U.S.C. § 58c(f)(3)(A)(i)(IV)&(V) (1994). For the sake of clarity and simplicity, we discuss this matter in terms of the reimbursement required under subparagraphs (I) – (V).

the origin of the funds or the manner of collection somehow affect the scope of reimbursement. The preclearance services and foreign proficiency award provisions are likewise not qualified by any reference to services for which the COBRA user fees are paid. Accordingly, the OIG's assertion that "COBRA authorizes Customs to use the money collected from these fees . . . to fund certain expenses related to the special services provided to those who pay the user fees" is incorrect. Calahan, at 1 (emphasis added).<sup>4</sup> Again, current law quite clearly provides for reimbursement from the COBRA user fees of Customs overtime, portions of premium pay, and other enumerated costs. The law does not limit or in any other way qualify the reimbursement by any reference to Customs services for which COBRA user fees are paid.

Notwithstanding that COBRA user fees are termed "user fees," which are generally understood to be a charge by an agency for a service that is collected from the recipient of the service, Congress has designated those fees as the source of reimbursement for all Customs overtime and other specified costs. We need not address any arguments that the use of the term "user fee" implicitly requires the application of the fees in a particular manner. Congress specifically said what the fees would be used for. It is not proper to imply a limitation that is not in the statute. Mallard v. District Court, 490 U.S. 296 (1989).

Furthermore, the statute is quite clear that COBRA user fees are the exclusive means by which Customs may charge fees for services or otherwise recover the costs of its operations:

"Notwithstanding any other provision of law, during any period when fees are authorized under subsection (a) [i.e., including the COBRA user fees in subsection (a)(1)-(8)], no charges, other than such fees, may be collected for—

(A) any cargo inspection, clearance, or other customs service performed (regardless whether performed outside of normal business hours or on an overtime basis); or

(B) any customs personnel provided; in connection with the arrival or departure of any commercial vessel, vehicle or aircraft or its passengers, crew, and cargo, in the United States." Pub. L. No. 99-509, § 8101(c), 100 Stat. 1874, 1966 & 67 (1986); codified as amended, 19 U.S.C. § 58c(e)(6) (1994).

Given the clear statutory provisions of 19 U.S.C. § 58c(f)(3)(A)(i), as well as 19 U.S.C. § 58c(e)(6) (1994), we can only conclude that Customs may properly use the funds collected as fees under 19 U.S.C. § 58c(a)(1)-(8) (1994 & Supp. 1997) to pay the cost of overtime

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<sup>4</sup>The OIG is also wrong when claiming that Customs is required to recommend "adjustments to the [COBRA] fees so that they reflect the cost to the Government for providing those special services." Calahan, enclosure, at 3. The statute actually requires Customs to recommend fees that "reflect the actual costs to the . . . Government for the commercial services provided by [Customs]." 19 U.S.C. § 58c(f)(4) (1994) (emphasis added).

compensation, premium pay, agency retirement and disability contributions, preclearance services, and foreign language proficiency awards as specified in 19 U.S.C. § 58c(f)(3)(A)(i)(I)-(V) (1994 & Supp. 1997).

Apart from the requirements of the statute, the OIG suggests that legislative history recommends that Customs' use of COBRA user fees are limited to reimbursing costs of those activities for which the fees are paid. Given the plain meaning of current law, there is no need to resort to legislative history as a basis for our decision. See, e.g., Mallard v. District Court, 490 U.S. 296. We do believe, however, that a review of legislative history would be helpful given its role in the OIG's argument and the complexity of the statute. "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." United States v. American Trucking Associations, Inc., 310 U.S. 534, 543-44 (1940).

A review of the legislative history of the COBRA user fee reimbursement provisions reveals no congressional intent to limit COBRA reimbursement to COBRA fee activities. In fact, contrary to the OIG's characterization of the "basic tenet" of the Act, Congress has consistently used the COBRA user fees to recover costs of Customs operations beyond those associated with the activities for which COBRA user fees are paid.

Initially, Congress required reimbursement for "overtime customs inspectional services for which the recipient of such services is not required to reimburse the Secretary of the Treasury." Pub. L. No. 99-272, § 13031(f)(2)(A), 100 Stat. 82, 310.<sup>5</sup> If anything, this language from the 1985 Act shows that Congress was concerned not about limiting the scope of reimbursable activities under COBRA, but rather about curtailing the amount of Customs overtime that was escaping reimbursement under the "1911 overtime" law.<sup>6</sup>

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<sup>5</sup>This limitation of reimbursement for overtime services not otherwise required to be reimbursed was added in conference. 131 Cong. Rec. 38198 & 38304 (1985), see also H. Conf. Rep. 99-453, at 630 (1985). This language modified a Senate floor amendment that would have required reimbursement for overtime services in an amount "equivalent to the amount of such expenses." 131 Cong. Rec. 31291 (1985). In other words, while the Senate floor amendment would have provided for reimbursement out of COBRA user fees for all Customs overtime expenses, the final COBRA language explicitly excepted services that were already being reimbursed, i.e., overtime services reimbursed under the 1911 Act.

<sup>6</sup>For a reflection of congressional concern that the 1911 Act was barely covering half of Customs' overtime costs, see, *Fiscal Year 1985 Authorizations for the U.S. Customs Service, International Trade Commission, U.S. Trade Representative; and Trade Recommendations for Report to the Budget Committee*, Hearing before the Subcommittee on Trade, Committee on Ways and Means, House of Representatives, 98th Cong., Serial 98-60, at 45, 53 & 57-58 (1984).

In subsequent legislation, Congress repeatedly modified the COBRA user fee reimbursement provisions. But rather than limiting the scope of COBRA reimbursement, Congress expanded it by progressively limiting reliance on reimbursement of overtime under the 1911 overtime law.

First, in the 1986 OBRA, Congress made COBRA user fees the exclusive source of reimbursement for all customs services. Pub. L. No. 99-509, § 8101(c), 100 Stat. 1874, 1966 and 1967; 19 U.S.C. § 58c(e)(6) (1994); quoted above. This effectively precluded recovery of overtime costs under the 1911 overtime law.

Four years later in the Customs and Trade Act of 1990, Congress eliminated the initial 1985 COBRA qualification that the user fees only reimburse overtime not otherwise required to be reimbursed. Henceforth, the limitation would apply only to preclearance services. Pub. L. No. 101-382, § 111(c)(3)(A), 104 Stat. 629, 638 (1990); 19 U.S.C. § 58c(f)(3)(A)(i)(IV) (1994). This ended the notion of COBRA user fees supplementing 1911 overtime reimbursement.<sup>7</sup>

Finally, in the 1993 OBRA, Congress replaced the 1911 overtime provisions with a new overtime and premium pay system and amended the COBRA user fee provisions to simply require reimbursement of Customs overtime and premium pay under the new system, namely all Customs overtime and premium pay. Pub. L. No. 103-66, § 13811, 107 Stat. 312, 671 (1993).<sup>8</sup>

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<sup>7</sup>The 1990 Customs and Trade Act also authorized the use of funds left over after making the reimbursements at issue in this matter to be used for salaries and equipment “that enhance customs services for those persons or entities that are required to pay [COBRA user fees] . . . (distributed on a basis proportionate to the fees collected . . .).” 19 U.S.C. § 58c(f)(3)(A)(ii) (Supp. 1997). It may be that this surplus fund provision is the origin of the OIG’s mistaken impression that COBRA user fees may “be used to pay only the cost of services provided to those who pay fees into that category account.” Calahan, enclosure at 3.

<sup>8</sup>It would appear that at least the relevant House oversight subcommittee viewed this as a mere technical correction to bring the law in line with already accepted practice: “[T]he historical justification for the 1911 Act was that individual importers and shippers reimbursed Customs directly for inspectional overtime services on an ‘as needed’ basis, and therefore, the Federal Government did not incur any expense. However, this method of covering the cost of overtime was changed by the Comprehensive Omnibus Budget Reconciliation Act of 1985 (COBRA). User fees were imposed by COBRA on arriving passengers and conveyances, and are deposited into a fund from which inspectional overtime is paid. . . . These user fees are not based on the amount of overtime services provided, but rather spread the cost of Customs’ overtime services between those who require and use Customs’ overtime

Whatever inconsistencies there had been between overtime reimbursement under the 1985 COBRA and the 1911 law, after 1993 the statutory scheme was quite clear and internally consistent. Overtime reimbursement under the 1911 law was eliminated, leaving only COBRA user fees for “paying overtime compensation under section 267(a) of [title 19, U.S. Code].” 19 U.S.C. § 58c(f)(3)(A)(i)(I) (1994).

#### Conclusion

User fees collected under the authority of the 1985 COBRA, as amended, can be used to fund the cost of overtime, premium pay, and other costs specified in 19 U.S.C. §58c(f)(3)(A)(i) (1994 & Supp. 1997). The relevant statute is very clear on its face. Section 58c(f)(3)(A)(i) of title 19, U.S. Code (1994 & Supp. 1997), requires the Secretary of the Treasury to reimburse appropriations from the COBRA user fees for the costs of Customs overtime compensation, portions of premium pay, certain civil service retirement and disability contributions, preclearance services, and foreign language proficiency awards. The statute does not limit reimbursement to activities associated with providing services to COBRA user fee payers. Legislative history supports this reading. Accordingly, it is our opinion that Customs may under current law properly use its COBRA fees to cover expenses of non-COBRA Customs activities, as specified by 19 U.S.C. § 58c(f) (1994 & Supp. 1997).

  
 Comptroller General  
of the United States

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services and those who do not.” *Abuse and Mismanagement of Inspector Overtime Pay by the U.S. Customs Service*, Oversight Initiative Report from the Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, 102<sup>nd</sup> Cong., Report No. 3 (WMCP:102-17), at IV-V & 2 (1991). See also, H. Rep. No. 102-486, Part I, at 22 (1992).