

Memorandum

March 3, 1986

RELEASED

TO : Associate Director, RCED - John Luke

FROM : Associate General Counsel, OGC - Rollee H. Efos *RE*

SUBJECT: FEMA's Year End Fund Transfers--B-222009-O.M.

On January 24, 1986, you asked us for our views on the Federal Emergency Management Agency's (FEMA) practice of year-end transfers of selected obligations from its Salaries and Expenses (S&E) account to the account entitled "Funds Appropriated to the President--Disaster Relief." You also asked whether salaries of "temporary" staff employed at headquarters and regional offices on a more or less permanent basis could be paid from the same Disaster Relief appropriation. In view of your commitments to provide the respective appropriations committees with information and questions in time for FEMA's fiscal year 1987 appropriations hearings (Senate, March 5 and House, April 8, 9, and 10, 1986), we are expediting our response to you so you can provide it to the Committees as a briefing document.

In our view, FEMA's actions in making the year-end transfers in question are illegal. They violate the laws governing appropriation availability, the statutory prohibition against transferring funds from one appropriation account to another, and the so-called Antideficiency Act. For some of the same reasons, using the Disaster Relief appropriation to pay the salaries of "temporary" headquarters and regional employees is also improper.

I. FEMA'S YEAR-END TRANSFERS

According to information you have developed, at the end of each fiscal year, the FEMA Comptroller's office makes ledger entries to shift obligations for selected administrative and operating costs from its S&E account to the Disaster Relief account. The cost items that have been shifted are portions of the 1) Standard Level User Charge (SLUC) for headquarters office space (object code 2310); 2) other rents, utilities and communications (object code 2320) in headquarters and in regional offices and; 3) supplies and materials (object codes 2600 and 2610) for headquarters.

The amount of funds shifted is a percentage, calculated annually, arrived at by taking the ratio of disaster assistance employees to all full time FEMA personnel. In fiscal year 1984, the percentage of these selected costs reallocated to the Disaster Relief appropriation was 14.08, and in fiscal year 1985, the percentage was 11.35. Further information you have developed shows that but for these year end adjustments, FEMA's S&E account would have been "overdrawn" in each of those years.

We should state at the outset that specific statutory authority is required to transfer funds from one appropriation to another. 31 U.S.C. § 1532. As far as we can tell, FEMA has not been given transfer authority in its appropriations acts, or authorizing legislation and therefore the end of year reallocations violate that prohibition.

It might be argued that no violation occurred because obligations and not funds were transferred by FEMA, but we see no meaningful difference between the two. The result of transferring obligations to Disaster Relief or transferring funds to S&E are identical. The law generally prohibits indirect accomplishment of that which cannot be done directly, and similar violations have been found before. B-179708-O.M., Dec. 13, 1976.

FEMA'S SALARIES AND EXPENSES APPROPRIATION

FEMA's S&E account was created in 1982. Prior to that time, administrative costs of the various programs were integrated into the program accounts. FEMA's 1982 Budget Justifications showed its planned spending pattern before the S&E account was created.

Two subaccounts within the Hazard Mitigation and Disaster Assistance appropriation--disaster relief administration and management and administration--were identified to bear all the administrative costs related to disaster relief. The Disaster Relief appropriation estimate, on the other hand, contained no entries for administrative costs. All the funds in this appropriation were designated for "grants subsidies, and contributions" and "other services." Hearings before the HUD and Independent Agencies Subcommittee of the House Appropriations Committee, 97th Cong., 1st Sess., Part 4 at 434, 443 and 463 (1981) ("Hearings").

The Congress relied on the information in the FEMA Budget Justifications for fiscal year 1982 in establishing the S&E account. The House Appropriations Committee, which proposed

the change, indicated that the new appropriation was to "include all direct personnel costs and administrative requirements." H.R. Rep. No. 162, 97th Cong., 1st Sess. 22 (1981). The report included a table indicating that funds for the S&E appropriation were being transferred entirely from FEMA's requests for the Emergency Planning, Preparedness and Mobilization and the Hazard Mitigation and Disaster Assistance accounts; no funds were to be transferred from the Disaster Relief appropriation. The Senate Appropriations Committee, in agreeing to the change, stated that the new account was to "include all staff and supporting expenses" requested by FEMA in those two appropriations, and a table included in the committee report indicated that the entire amounts requested by FEMA for the disaster relief administration and management and administration subaccounts were being transferred to the new appropriation. S. Rep. No. 163, 97th Cong., 1st Sess. 51 (1981). All subsequent appropriations were handled in this manner.

We think it is clear from this history that the S&E appropriation is intended to contain all the funds made available by the Congress for the administration of FEMA's disaster relief activities.

FEMA'S ARGUMENTS

Notwithstanding the information FEMA provided to the Congress in its 1982 Budget Justifications, in a March 25, 1983 memorandum to FEMA Comptroller Dennis Boyd, Associate General Counsel George Watson explained that the pre-1982 practice had been to charge administrative costs directly related to disasters to the President's Disaster Relief appropriation. According to the memorandum, this practice was the result of a January 1979 FEMA-OMB agreement to discontinue the accounting device utilized before FEMA's creation in 1978, which paid administrative costs from a reserve fund consisting of 3 percent of the funds allotted to each declared disaster.

The memorandum admitted that the pre-1982 system of direct charges either caused or perpetuated serious accounting and internal controls problems which prompted the Congress to create the separate S&E account for FEMA's administrative expenses. (See also H.R. Rep. No. 162, cited above, at 24.) Nonetheless, the memorandum concluded "the 1982 changes did not disturb the practice of charging disaster related [administrative] expenses to the disaster fund." The memorandum advances two theories in support of that conclusion. We cannot agree with either.

First, the memorandum argues that the fiscal year 1982 change only consolidated "regular" FEMA administrative expenses into the new S&E account. The change, it asserts, was not intended to affect FEMA's practice of charging to the Disaster Relief appropriation the administrative expenses attributable to specific disasters. The memorandum offers no support for that statement. As discussed above, we think that the legislative history indicates that the Congress intended for the S&E account to contain all funds for FEMA's administrative expenses. There is further support in a detailed examination of FEMA's fiscal year 1982 Budget Justifications.

The two subaccounts which were incorporated completely into the S&E account in the fiscal year 1982 changeover were management and administration, and disaster relief administration. FEMA's Budget Justifications indicate that the management and administration subaccount funded FEMA's general operating expenses, rather than the expenses of implementing any particular program. Such agency-wide functions as public affairs, regional coordination, equal opportunity, congressional relations, general counsel, and finance and administration were funded from this subaccount. See generally, Hearings at 435-43. The disaster relief administration subaccount, on the other hand, contained funds specifically for FEMA's disaster relief activities. Among the activities funded by this subaccount was "administer[ing] the President's Disaster Relief Fund." Hearings at 432.

In transferring both of these subaccounts into the S&E appropriation in their entirety, the Congress was consolidating both "regular" costs, as the FEMA memorandum describes them, and the specific costs of FEMA's disaster relief activities. We see nothing in either the fiscal year 1982 appropriation or its legislative history which would support the memorandum's position that the Congress intended for FEMA to continue its practice of charging some administrative costs to the Disaster Relief appropriation.

The memorandum's second argument is based on a general rule of appropriations law that if two appropriations are equally available for the same purpose, either one may be charged, provided that once an election is made, only the selected account may be charged for that purpose in the future. The memorandum then asserts that after the 1982 change, FEMA was free to choose which of the appropriations--S&E or Disaster Relief--to charge with administrative costs. This analysis has three flaws.

First, our study of the legislative history of the origins of the S&E accounts shows that the Disaster Relief appropriation was intended to be available for the purposes of funding grants, subsidies and contributions, and providing other direct services to disaster victims, and not for administrative costs. Second, we gather that the administrative costs in question were reallocated from the S&E appropriation to the Disaster Relief appropriation because the S&E account to which they were originally charged was fully obligated. This indicates that, assuming FEMA was free to choose either appropriation initially, it elected to use the S&E account. Under the rule cited by FEMA, charges could not subsequently be switched simply because the first selected account had run out of money. Third, the FEMA rule is not applicable to this case.

The correct rule of appropriations law which controls the choice of appropriations in this case is that an appropriation made specifically available for a particular purpose must be charged for that purpose to the exclusion of other, more general appropriations available, among other things, for a similar or compatible purpose. See, e.g., 64 Comp. Gen. 138, 140 (1984); 4 Comp. Gen. 476, 478 (1924). Moreover, exhaustion of the specific appropriation does not provide a basis for charging excess amounts to the other, more general appropriation. 36 Comp. Gen. 526, 528 (1957). As we indicated above FEMA's S&E appropriation was made specifically available for the administrative costs of implementing the disaster relief program. Therefore FEMA may not charge the Disaster Relief appropriation for this purpose.

Subsection 1301(a) of title 31, United States Code, provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise authorized by law." The use of appropriated funds for a purpose for which they are not available violates this statute. See, e.g., 62 Comp. Gen. 692, 699 (1983); 37 Comp. Gen. 472, 473-74 (1958). We have concluded that the President's Disaster Relief appropriation is not available for FEMA's administrative expenses. Therefore, in charging a portion of its administrative costs to the Disaster Relief appropriation, FEMA has violated 31 U.S.C. § 1301(a).

ANTIDEFICIENCY ACT VIOLATIONS

The Antideficiency Act prohibits a Federal official from making or authorizing an obligation in advance of or for an amount greater than has been made available in an appropriation. 31 U.S.C. § 1341.

Since no funds were available for administrative expenses in the Disaster Relief appropriation, as discussed above, the attempted obligation of that account for administrative expenses constituted a violation of the Act. Moreover, information you have gathered indicates that even if, by means of an accounting adjustment, FEMA now tries to charge its administrative costs to its S&E account, as required by the law, it would still be in violation of the Antideficiency Act because the S&E account has insufficient funds to cover these additional obligations.

When the Antideficiency Act is violated, the head of the agency concerned must report the violation to the President and the Congress immediately. 31 U.S.C. § 1351. We should urge FEMA to prepare its report immediately.

II. Salaries of "Temporary" Personnel

You have indicated that FEMA hires some 90 long-term "temporary employees" in its headquarters and regional offices and pays their salaries from the Disaster Relief account. These "temporary" employees are retained for periods in excess of a year and they perform general administrative tasks such as processing contract payments and staffing FEMA's Emergency Interim Communications Center.

In our opinion, the Disaster Relief appropriation is not available to pay the salaries of these FEMA temporary employees. We reach this conclusion for the same reason as our conclusion above on administrative costs. FEMA receives an appropriation, S&E, which is specifically available for paying the salaries of its employees. Those salaries may not be charged to any other appropriation, including Disaster Relief.^{1/} See B-206573, Aug. 16, 1982.

We note that, the Disaster Relief Act of 1974 authorizes each Federal agency to hire temporary personnel to respond to specific emergencies and declared disasters. The statute allows such appointments to be made "without regard to the provisions of title 5 governing appointments in the competitive service." 42 U.S.C. § 5149(b)(1)(1982). The duties

^{1/} As was the case with other administrative costs, charging salaries of approximately 90 temporary employees to the Disaster Relief fund would also violate the Antideficiency Act and the "purpose" requirement of 31 U.S.C. § 1301(a) discussed earlier.

these temporary personnel are permitted to perform are outlined in section 5146 of title 42. They include, among other things: search and rescue emergency medical care, transportation and distribution of food and emergency supplies, necessary construction and demolition, and essential community services, such as public information and warning of further risks.

When other agencies such as the Department of Housing and Urban Development perform these services, they may be reimbursed by FEMA from the Disaster Relief appropriation. 42 U.S.C. § 5147 (Presumably these reimbursements constitute the object class "other services" for which the account is specifically available.) However, in our view, FEMA cannot reimburse itself for these services, as all of its salaries and expenses are required to be funded from the S&E account.

Moreover, you have informed us that the 90 temporary employees whose salaries are now being charged to the Disaster Relief appropriation are not protecting life and property on the scene of declared disasters and emergencies as the authorizing statute envisioned. They are instead running computers and answering telephones in FEMA headquarters and regional offices. In our view, salaries of such employees, are required to be charged to the S&E account.

Attachments

APPROPRIATIONS

Transfers

Between appropriations

APPROPRIATIONS

Transfers

Propriety