



Decision

Matter of: Office of Congressional Workplace Rights—Availability of a Permanent Indefinite Appropriation for Agency Expenses Incident to Back Pay Awards

File: B-332003.1

Date: October 5, 2022

DIGEST

Under authority vested in it by the Congressional Accountability Act of 1995 (CAA), the Office of Congressional Workplace Rights awarded back pay against the United States Capitol Police (USCP) in two employment disputes. CAA Section 415(a) established a permanent indefinite appropriation that is available for certain payments under CAA, including back pay awards.

Under the employment disputes at issue here, the Section 415(a) appropriation is available only for amounts that constitute back pay. USCP's employer tax payments under the Federal Insurance Contributions Act, and its employer contributions under the Federal Employees' Retirement System Act of 1986, are not back pay and thus not proper parts of the awards. Therefore, the Section 415(a) appropriation is unavailable for such expenses and should be paid from the employing agency's appropriations for such employer contributions.

DECISION

The Office of Congressional Workplace Rights (OCWR) asks whether a permanent indefinite appropriation for paying legislative branch awards and settlements is also available for paying certain award-related employing agency expenses of the United States Capitol Police (USCP).¹ USCP is the employing agency in two employment

¹ Letter from General Counsel, OCWR, to General Counsel, GAO (Mar. 16, 2020) (Request Letter), at 1–2; see 2 U.S.C. § 1415(a). A “permanent indefinite” appropriation is one that both (1) remains available for specified purposes, with no fiscal-year limitations and with no need for additional congressional action to authorize its use; and (2) is for an unspecified amount of money. In this case, Section 415 appropriates “such sums as may be necessary.”

disputes.²

We conclude below that the permanent indefinite appropriation is unavailable for paying USCP's award-related tax payments under the Federal Insurance Contributions Act (FICA)³ and contributions under the Federal Employees' Retirement System Act of 1986 (FERSA).⁴ The appropriation is available only if the amounts in question constitute back pay. However, the expenses at issue are neither "pay" nor "back pay" and, therefore, they are not part of the awards for which the appropriation is available.

Our regular practice when rendering decisions is to obtain facts and legal views from the relevant agencies.⁵ OCWR provided information and its views in its request letter and through follow-up communications.⁶ USCP also provided information and its views at our request.⁷

BACKGROUND

The Congressional Accountability Act of 1995 (CAA)⁸ provides workplace protections to covered legislative branch employees by incorporating by reference 13 civil rights, labor, and workplace safety laws.⁹ OCWR provides a means of dispute resolution for legislative branch employees alleging CAA violations, and

² Request Letter, at 4.

³ 26 U.S.C. §§ 3101–3134.

⁴ 5 U.S.C. §§ 8351 and 8401–8480.

⁵ 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.

⁶ Request Letter; Email from General Counsel, OCWR, to Senior Attorney, GAO, *Subject: RE: Letter of acknowledgment and request for additional information* (Aug. 10, 2020) (attaching relevant back pay awards and orders) (OCWR 2020 Email); Telephone Conversation with General Counsel, OCWR, Assistant General Counsel for Appropriations Law, GAO, and Senior Attorney, GAO (June 25, 2021); Email from General Counsel, OCWR, to Assistant General Counsel for Appropriations Law, GAO, and Senior Attorney, GAO, *Subject: RE: OCWR -- Your GAO legal decision request* (July 27, 2021) (OCWR 2021 Email).

⁷ Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, USCP (Aug. 11, 2020) (requesting information); Letter from Employment Counsel, USCP, to Assistant General Counsel for Appropriations Law, GAO (Aug. 25, 2020) (Response Letter).

⁸ Pub. L. No. 104-1, 109 Stat. 3 (Jan. 23, 1995), 2 U.S.C. §§ 1301–1438.

⁹ 2 U.S.C. § 1302.

those determinations may result in an employee (the prevailing employee) of an agency (the employing agency) being entitled to back pay. CAA Section 415(a) created a permanent indefinite appropriation (the Section 415(a) appropriation) to make payments under the Act.¹⁰ OCWR administers this appropriation, and asks whether it is available for paying certain award-related expenses of USCP.

This request arises from two separate employment disputes that resulted in awards of back pay. In brief, USCP fired two officers for their off-duty conduct.¹¹ But arbitrators ordered their reinstatement with back pay, among other things.¹² USCP did not implement the orders.¹³ The matters reached the United States Court of Appeals for the Federal Circuit, which granted OCWR's enforcement applications in

¹⁰ 2 U.S.C. § 1415(a). As noted above, *supra* note 1, the Section 415(a) appropriation is a permanent, indefinite appropriation. CAA provides that, with certain exceptions, "only funds which are appropriated to an account of the Office in the Treasury of the United States for the payment of awards and settlements may be used for the payment of awards and settlements," and that "[t]here are appropriated for such account such sums as may be necessary to pay such awards and settlements." *Id.*

¹¹ See *generally* OCWR 2020 Email, Attachments titled "Arbitration Award, Bd Decision Denying Exceptions, Arbitrator's Order" (Case 1 Arbitration Awards) and "Arbitrator's [*sic*] Award, Bd Decision Denying Exceptions, Arbitrator's Order" (Case 2 Arbitration Awards).

¹² OCWR 2020 Email, Case 1 Arbitration Awards, at 28, 41; Case 2 Arbitration Awards, at 1, 37. In the first case, the arbitration award directed that, among other things, the prevailing employee "be made whole for lost wages and benefits, less other payroll-related earnings from the time of his termination to the present." OCWR 2020 Email, Case 1 Arbitration Awards, at 28. A later order found that USCP owed the prevailing employee "\$340,487.70 in back pay, less offsets, plus interest," and directed payment of that amount. *Id.* at 41. In the second case, an arbitrator awarded back pay, and later ordered USCP to pay "\$380,095.41 in total back pay and interest owed to" the prevailing employee. OCWR 2020 Email, Case 2 Arbitration Awards, at 1, 37. We find no clear indication in the record as to whether these amounts included FICA or FERSA expenses.

¹³ *United States Capitol Police v. Office of Compliance*, 913 F.3d 1361, 1364–65 (Fed. Cir. 2019) (Case 1 Court Decision); *United States Capitol Police & Fraternal Order of Police, D.C. Lodge No. 1 U.S. Capitol Police Labor Comm.*, No. 15-LMR-02 (CA), 2017 WL 4335143, at *12 (C.A.O.C. Sept. 25, 2017).

both.¹⁴ OCWR ordered payment of the amounts specified in the arbitration awards from the Section 415(a) appropriation.¹⁵

OCWR now seeks our decision on the scope of the availability of the Section 415(a) appropriation.¹⁶ OCWR maintains the appropriation is unavailable for USCP's award-related expenses.¹⁷ USCP disagrees, saying the appropriation must pay such costs under OCWR precedent.¹⁸

DISCUSSION

At issue here is whether the Section 415(a) appropriation is available for paying certain award-related employer taxes and fringe benefits. More specifically, OCWR asks whether, in the context of the two employment disputes discussed above, the appropriation is available for paying USCP's share of FICA taxes and its contributions toward the employees' Federal Employees' Retirement System (FERS) benefits, including their Thrift Savings Plan (TSP) benefits.¹⁹

As an initial matter, we note that the purpose availability of an appropriation depends on the relevant statutory framework governing the appropriation itself. In this case, the Section 415(a) appropriation is available to make the payments at issue only if the appropriation itself, read in concert with other applicable laws, makes amounts available for this purpose. The Section 415(a) appropriation does not become

¹⁴ Case 1 Court Decision, 913 F.3d at 1371; *United States Capitol Police v. Office of Compliance*, 916 F.3d 1023, 1028 (Fed. Cir. 2019) (Case 2 Court Decision). The court also upheld findings that USCP committed unfair labor practices in both cases. Case 1 Court Decision, 913 F.3d at 1371; Case 2 Court Decision, 916 F.3d at 1028.

¹⁵ *United States Capitol Police & Fraternal Order of Police, D.C. Lodge No. 1 U.S. Capitol Police Labor Comm.*, No. 15-LMR-02 (CA) (O.C.W.R. Nov. 18, 2019), slip op. at 5; *United States Capitol Police & Fraternal Order of Police, D.C. Lodge No. 1 U.S. Capitol Police Labor Comm.*, No. 16-LMR-01 (CA), 2020 WL 5880185, at *3 (C.A.O.C. Feb. 6, 2020).

¹⁶ Request Letter, at 1–2. In a decision arising from the same request letter, we addressed OCWR's authority to transfer amounts from the Section 415(a) appropriation to the appropriations of other agencies. B-332003, Oct. 5, 2021.

¹⁷ Request Letter, at 7.

¹⁸ Response Letter, at 1–2.

¹⁹ OCWR 2021 Email. Because TSP is part of the FERS statutory scheme, see Chapter 84 of Title 5 of the United States Code, we treat them together.

available for a particular purpose solely because an arbitrator's award makes brief mention of the payment of employee "benefits."²⁰

We further note that the awards here are in none of the categories for which the permanent indefinite appropriation known as the Judgment Fund, 31 U.S.C. § 1304, is available. They are not, for example, judgments of a court or compromise settlements made or authorized by the Attorney General. See 31 U.S.C. § 1304(a)(3); 28 U.S.C. § 2414.²¹

Therefore, we turn first to the text of the Section 415(a) appropriation. It makes amounts available "for the payment of awards and settlements under" CAA. CAA incorporates parts of the Federal Service Labor-Management Relations Statute (FSLMRS), which governs labor relations between federal agencies and their employees.²² In turn, FSLMRS requires covered agencies to "take the actions required by an arbitrator's final award," including paying back pay under the Back Pay Act of 1966.²³

Both final awards at issue here awarded back pay to the prevailing employee.²⁴ Furthermore, back pay is the only form of payment an arbitrator can order under this statutory framework.²⁵ Therefore, as we determine whether the Section 415(a) appropriation is available for payment of the tax and benefit amounts at issue, the

²⁰ In particular, in the two cases at issue here, one arbitrator's decision mentioned "benefits" but the other did not. OCWR 2020 Email, Case 1 Arbitration Awards, at 28; Case 2 Arbitration Awards, at 39.

²¹ In a prior decision that bears some factual similarities to those at issue here, we considered the availability of the Judgment Fund for payment of agency contributions to the Civil Service Retirement Fund. 58 Comp. Gen. 115 (1978). Key to our analysis in that decision was whether the judgment directed the government to make the contribution. We concluded that if the judgment ordered the government to make the contribution, then the Judgment Fund was available to make the payment, but if the judgment was silent on the matter, the contribution was payable only from the agency's appropriations and not from the Judgment Fund. We are not applying that holding in this decision, however, because it concerned the Judgment Fund rather than the statutory framework at issue here.

²² 2 U.S.C. § 1302(a)(7); see also *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 91 (1983) ("[FSLMRS] contains the first statutory scheme governing labor relations between federal agencies and their employees."); 5 U.S.C. §§ 7101–7135 (codifying FSLMRS).

²³ 5 U.S.C. § 7122(b); see also 5 U.S.C. § 5596 (codifying the Back Pay Act).

²⁴ OCWR 2020 Email, Case 1 Arbitration Awards, at 28, 41; Case 2 Arbitration Awards, at 1, 37.

²⁵ See also 5 U.S.C. § 7118(a)(7).

central question is whether these amounts are indeed back pay. As explained below, USCP's FICA and FERS expenses are not back pay and thus not part of the awards. Therefore, the Section 415(a) appropriation is unavailable for their payment.

USCP's FICA Payments

Two arbitration awards required USCP, as the employing agency, to make back pay. As a result of the payments of back pay, USCP owes associated FICA taxes.²⁶ We find that USCP's FICA tax contributions are not "pay" to an employee, and therefore they are neither "back pay" nor part of the awards for purposes of CAA.

We interpret terms that Congress has not defined in statute according to their ordinary meaning, which may be ascertained by consulting dictionaries. See *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013); *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009) (referring to dictionaries to determine the ordinary meaning of the term "now"); B-329605, June 2, 2022. The ordinary meaning of "pay" is money for services rendered. See, e.g., *The American Heritage Dictionary of the English Language* (5th ed. 2018) (defining "pay" in part as "[m]oney given in return for work done; salary; wages"); *Merriam-Webster's Collegiate Dictionary* (defining "pay" in part as "something paid for a purpose and especially as a salary or wage: REMUNERATION"), available at <https://merriam-webster.com/dictionary/pay> (last visited Sept. 27, 2022). As these dictionary definitions reflect, "pay," in common parlance, refers to the remuneration an employer provides to an employee as compensation.

FICA imposes an "excise tax" on "every employer," including federal agencies. 26 U.S.C. §§ 3111(a)–(b), 3122. When the federal government is the employer, the agency head or designee is responsible for the "return and payment" of FICA taxes. *Id.* § 3122. FICA levies this tax on the employer, not on the employee. Accordingly, an employing agency bears the cost of paying its FICA expenses from its own appropriation, both in addition to and separate from the cost of paying its employees. This cost arises from the agency's legal obligation to pay its share of FICA taxes directly to the Internal Revenue Service (IRS).²⁷

²⁶ USCP's share of FICA taxes at issue "amounts to 6.2% of the first \$137,700 paid in back pay (OASDI) plus 1.45% of the total back pay amount (HI)." OCWR 2021 Email.

²⁷ By statute, the Treasury Secretary "collect[s]" FICA taxes and pays them into the United States Treasury as internal revenue collections. 26 U.S.C. § 3501(a). The IRS, within the Treasury Department, is the agency that collects FICA taxes. See GAO, *Social Security: Coverage for Medical Residents*, HEHS/GGD-00-184R (Aug. 31, 2000). An employer generally pays its FICA taxes by making electronic deposits monthly or semi-weekly. See 26 U.S.C. § 6302(h); 26 C.F.R. § 31.6302-1(a) (2021). The IRS collects these amounts from federal (continued)

As a result, the employer's share of FICA taxes are not deducted from the employee's pay. That is so because they are not remuneration for the services provided. Rather, they are the employer's share of the tax on that remuneration. Accordingly, the plain meaning of "pay" does not encompass an employing agency's FICA contributions and, therefore, these contributions are not "back pay" for which the Section 415(a) appropriation is available.

FICA also imposes "on the income of every individual a tax." 26 U.S.C. § 3101. Only FICA tax that USCP owes as an employing agency, and not the tax that FICA imposes directly on employees, is at issue in this decision. Nevertheless, FICA's tax on individuals provides an illustrative contrast: FICA requires the employer to "collect" the tax from the employee "by deducting the amount of the tax from the wages as and when paid." *Id.* § 3102. Though the employee tax is deducted from the employee's pay, the employer tax is not, precisely because while FICA imposes the employee tax on the individual's income, it imposes the employer tax on the employer itself.

Regulations that implement the Back Pay Act are consistent with the statutory provisions of FICA. The regulations require employing agencies to deduct an employee's FICA taxes from a gross back pay award. 5 C.F.R. § 550.805(e)(3)(ii) (2021). The regulations do not, however, permit the agency to deduct the cost of its own FICA tax payment from the gross back pay award. *See id.* (allowing only "authorized deductions of the type that would have been made from the employee's pay" to be deducted from the back pay award). Permitting such a deduction would impermissibly shift to the employee the cost of the employer's FICA tax, a cost that FICA assigns to the employing agency.

An agency does not deduct the cost of the employer's FICA tax either from an employee's regular pay or from a back pay award because the employer's FICA tax is an expense the employer, not the employee, must bear. Thus, the employing agency's FICA tax is not part of an employee's pay or back pay. Therefore, this expense is not part of the arbitration awards here and cannot be paid from the Section 415(a) appropriation.

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agencies in a manner similar to that which it uses for private employers. U.S. Department of the Treasury, Internal Revenue Service, Publication No. 15 (Circular E), *Employer's Tax Guide* (Dec. 16, 2021), at 5, 11, *available at* <https://www.irs.gov/pub/irs-pdf/p15.pdf> (last visited Sept. 27, 2022) ("[t]he information in this publication, including the rules for making federal tax deposits, applies to federal agencies").

USCP's FERS Contributions

USCP's FERS contributions similarly are not payable from the Section 415(a) appropriation because they are not back pay and thus not part of the awards.

FERSA created FERS, a retirement system for federal employees. FERSA requires each agency with covered employees to make “[g]overnment contributions” to the Civil Service Retirement and Disability Fund (CSRDF). 5 U.S.C. § 8423(a). FERSA also created the TSP and requires an employing agency to make two different categories of contributions to the Thrift Savings Fund. First, each pay period, “the employing agency shall contribute to the Thrift Savings Fund for the benefit of” the employee the amount equal to one percent of the employee’s basic pay. *Id.* § 8432(c)(1)(A). Second, where the employee chooses to make contributions, the agency must also “make a contribution to the Thrift Savings Fund for the benefit of” the employee, in an amount specified by law. *Id.* § 8432(c)(2). Here, USCP must make both CSRDF and Thrift Savings Fund contributions incident to the two arbitration awards at issue.²⁸

As with the FICA employer tax contributions, FERSA imposes directly upon the employing agency, and not upon the employee, a legal duty to make the specified contributions to the Thrift Savings Fund and to the CSRDF. The employing agency bears this expense from its own appropriation, both in addition to and separate from the cost of paying its employees. 5 U.S.C. § 8432(e) (employing agency contributions shall be paid from the appropriation or fund available to the agency for payment of the employee’s salary). As with the FICA employer tax contributions, the amount of the employing agency’s payments to the Thrift Savings Fund and to the CSRDF are not deducted from the employee’s pay, because these amounts are not remuneration for services the employee provided. Rather, the payments are the employing agency’s share of legally required contributions to the CSRDF and to the Thrift Savings Fund. Accordingly, the plain meaning of “pay” does not encompass these employing agency contributions and, therefore, these contributions are not “back pay” for which the Section 415(a) appropriation is available.²⁹

²⁸ USCP’s share of FERS contributions to the CSRDF “is 10.7% of pay for each year that each employee was terminated.” OCWR 2021 Email. Its share of TSP contributions “would include the automatic 1% of pay as a contribution as well as up to an additional 3% of matching payments should the employees decide to divert some of their back pay to their TSPs.” *Id.*

²⁹ The regulations implementing the Back Pay Act support this interpretation. The employing agency cannot deduct the employing agency’s retirement contributions from the employee’s gross back pay award. Instead, the employing agency must deduct only “authorized deductions of the type that would have been made from the employee’s pay,” including “mandatory *employee* retirement contributions.” 5 C.F.R. § 550.805(e)(3)(i) (emphasis added).

FERSA also permits employees to make contributions to the Thrift Savings Fund. *Id.* § 8432(a)(1). Only the employing agency contributions to the Thrift Savings Fund and to the CSRDF, and not the employee's contributions, are the subject of this decision. Nevertheless, the contributions that employees may make provide an illustrative contrast: by law, the employee, rather than the employing agency, makes these contributions. *Id.* Employee contributions are deducted from an employee's pay.³⁰ In contrast, the employing agency uses its appropriations to bear the additional, separate cost of employer contributions. See 5 U.S.C. § 8432(e) (employing agency contributions "shall be paid from the appropriation or fund available to such agency for payment of" the employee's salary). An agency does not deduct the cost of employing agency contributions from the employee's pay because such a deduction would impermissibly shift to the employee the cost of the employer's contributions, a cost that FERSA assigns to the employing agency.

Accordingly, just as an employing agency's FICA tax payments are not part of an employee's pay or back pay, so too are an employing agency's legally required contributions to the CSRDF and Thrift Savings Fund also not part of an employee's pay or back pay. *Accord* 5 C.F.R. § 550.803 (explaining that "[a]gency and employee contributions to a retirement investment fund, such as the Thrift Savings Plan, are not covered" by the definition of "[p]ay, allowances, and differentials"). Therefore, all these expenses cannot be paid from the Section 415(a) appropriation.

Availability of USCP Annual Appropriations

In light of the unavailability of the Section 415(a) appropriation, we next consider whether USCP's annual appropriations are available for payment of FICA taxes and FERS contributions at issue.³¹ Congress generally appropriates amounts annually

³⁰ See 5 C.F.R. § 1690.1 (2021) (describing "employee contributions" as "deducted from compensation paid to the employee"); see also Federal Retirement Thrift Investment Board, Form TSP-1, *available at* www.tsp.gov/forms/tsp-1.pdf (last visited Sept. 27, 2022) (employee contributions "come out of" the employee's pay).

³¹ In its request to us, OCWR relied on Section 415(b) of CAA to argue that the payroll taxes and fringe benefits at issue here are payable only from USCP's annual appropriations. Request Letter, at 7. Section 415(b) authorizes, with certain exceptions, the appropriation of sums necessary for the "administrative, personnel, and similar expenses" of employing offices needed to comply with CAA. 2 U.S.C. § 1415(b). In OCWR's view, Section 415(b) indicates not only that the Section 415(a) appropriation is not available for the payments at issue here, but also that USCP's appropriation is the only one properly available for these payments. Request Letter, at 7. But subsection (b), captioned "Compliance," concerns expenses that are the "costs of adhering to the act, but not costs of complying with adjudicative decisions remediating violations, which are addressed in section 415," per a section-by-section analysis of CAA entered into the (continued)

for salaries of USCP employees, “including . . . [g]overnment contributions for health, retirement, social security, professional liability insurance, and other applicable employee benefits. . . .” See, e.g., Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. I, title I, 134 Stat. 1182, 1642 (Dec. 27, 2020).

The Back Pay Act deems an aggrieved employee for all purposes to have performed service during the period of the unjustified or unwarranted personnel action, absent certain exceptions. 5 U.S.C. § 5596(b)(1)(B). In this respect, the law considers the action to have never happened. See B-209349, Apr. 9, 1984 (Army employees’ separations “are regarded as never having occurred and they are deemed for all purposes to have rendered service during the period covered by the corrective personnel action”).

Accordingly, USCP should pay FICA taxes and FERS contributions from the same appropriation it would have used if the contested personnel actions had never occurred—that is, from the same appropriation that would have been properly available to pay these expenses at the time the employees would have performed the service for which they were awarded back pay.³²

CONCLUSION

The Section 415(a) appropriation is unavailable for the purpose of paying either USCP’s share of the Federal Insurance Contributions Act taxes or its contributions

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Congressional Record. 141 Cong. Rec. S622, S631 (daily ed. Jan. 9, 1995). Funding management-side labor negotiations under CAA, for instance, would be a valid Section 415(b) expense. *Id.* at S631. We therefore read Section 415(b) as referring to an agency’s general CAA compliance costs, not to costs arising from settlements or awards.

³² USCP must pay these amounts using appropriations with proper availability as to time. Because some of the service at issue may have been performed some time ago, USCP must properly apply the account closing statute, which establishes rules concerning the availability of prior-year balances. 31 U.S.C. §§ 1551–1553; see generally GAO, *Principles of Federal Appropriations Law*, 3rd ed., GAO-04-261SP (Washington, D.C.: Jan. 2004), Ch. 5, § D (discussing disposition of appropriation balances).

under the Federal Employees' Retirement System Act that are associated with two back pay awards.

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

Edda Emmanuelle Perez
General Counsel