



U.S. ELECTION ASSISTANCE COMMISSION
OFFICE OF INSPECTOR GENERAL
1335 East-West Highway
Suite 4300
Silver Spring, Maryland 20910

**Via Electronic
Transmission**

Date: May 10, 2016

To: Thomas Hicks, Chairman
U.S. Election Assistance Commission

Subject: Management Advisory Report: Nature of HAVA Funds and the Applicability of Federal Criteria (Project Number E-NS-NH-07-16)

Dear Chairman Hicks:

The purpose of this report is to bring to the attention of the U.S. Election Assistance Commission questions regarding the nature of HAVA funds and the applicability of Federal laws, regulations, and Government-wide guidance to the payments made under HAVA. The report contains one recommendation for the Commission to consider the nature of the payments of HAVA funds, which would in turn determine the applicability of Federal laws, regulations, and other Government-wide criteria, such as those published by the Office of Management and Budget (OMB), to those payments.

In more than 50 audits of HAVA payments to States the Office of Inspector General (OIG) has completed since its inception, the HAVA funds have been viewed as grant awards, regardless of the section of HAVA under which the funds were paid. We believe the OIG position was consistent with EAC's usual treatment of HAVA funds.

This year, one audited entity has taken exception to the traditional OIG position. In an e-mail responding to our agenda for the audit entrance conference, Mr. Anthony Stevens, Assistant Secretary of State for the State of New Hampshire, stated:

1) **Conference Agenda, "Background... Grant Project..., Grant Period ... and Grant Award/Disbursements"**: In your description of the scope of the audit, you used: "HAVA Grant Programs – Sections 101, 102 and 251."

State concern: The term “grant” is not used in HAVA Sections 101, 102 or 251. In HAVA Sections 101 and 102, the applicable term is “payment.” In HAVA Section 251, the applicable term is “requirements payment.”

In HAVA Section 902, where Congress authorizes the “office” making a grant or payment under this Act to “audit and examine any recipient of a grant or payment,” an express categorical distinction is made between “grant” and “payment.”

2) **Conference Agenda, “Grant Award/Disbursements...” and “The Audit Process:”** “Phase I is the assessment of internal controls over the administration of HAVA awards. Phase II will occur at a later date and will include audit tests to further evaluate compliance with award terms and conditions and relevant laws and regulations.”

State concern: The term “award” is not used in HAVA Sections 101, 102, and 251. The term “payment” is applicable. OMB Circular A-87 (see below) applies where there is an “awarding agency.” The EAC, and its predecessor, the Administrator of General Services, had no discretion to “award” States payments under HAVA. Rather, HAVA mandated that States receive payments in accordance with the provisions outlined in HAVA.

3) **Conference Agenda, “Audit Objectives”:**

“OMB Circular A-87 (2 CFR 225) Cost Principles for State, Local, and Indian Tribal Governments;”
“OMB Circular A-102 Grants and Cooperative Agreements with State and Local Governments
 (“Common Rule” – 41 CFR 105-71);”
“Key requirements in the Common Rule are that Grantees and Subgrantees...”

State concern: HAVA Section 209 states: “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 of 1993 (42 U.S.C. 1973gg-7(a)).”

New Hampshire is not subject to the National Voter Registration Act. In this context, the term “CFR” refers to the Code of Federal Regulations, the codification of Federal rules and regulations. Under HAVA Section 209 above, as it applies to New Hampshire, the EAC does not have authority to issues rules and regulations, or take any action which imposes any requirement on any State or unit of local government.

New Hampshire has used the underlying principles in the above OMB circulars as a guide.

In responding to our request for “Prepared-by-Client” (PBC) information relevant to the current audit, Mr. Daniel Cloutier, Assistant Secretary of State for the State of New Hampshire also objected to our use of the term “award”:

There are four PBCs (2, 4, 5, and 14) that reference awards received from the EAC. New Hampshire has not received any awards from the EAC. The term award is not used in HAVA Sections 101 or 251. If the auditor is requesting information regarding payments and requirements payments, which is the term used in HAVA, please let me know as soon as possible so we can include that information in our response.

Mr. Cloutier later amended the above statement to note that the document request actually included six items that referenced the term “award” instead of payment or requirements payments.

The State of New Hampshire has long disagreed with the characterization of payments under HAVA as grants. In a November 4, 2011 letter from Mark A. Robbins, then General Counsel of EAC, to Mr. Stevens, Mr. Robbins memorialized the substance of a conversation with Mr. Stevens. According to the letter, EAC and the State of New Hampshire had reached an impasse regarding the distribution of \$251 funds for the years 2008-2010. Mr. Robbins characterized New Hampshire’s position as follows:

The State of New Hampshire (State) objects to the EAC requirement that it enter into a grant agreement which requires certification of compliance with various Federal laws and regulations concerning the use of Federal money. The State contends that the EAC is limited in its ability to require certification to those provisions contained in HAVA. The EAC believes that it is obligated to follow not just the requirements of HAVA when distributing the requirements payments, but also guidance issued by other relevant and controlling Federal authorities, including circulars issued by the Office of Management and Budget.

At that time, the EAC lacked a quorum of Commissioners, so agency staff members were unable to raise the issue to that level for decision. To break the stalemate between the EAC and the State of New Hampshire, Mr. Robbins described the following compromise:

I have agreement from the current remaining two commissioners and the executive director to offer the following compromise to move this matter forward. If the State will execute the grants agreement without any iteration, but accompanies it with a formal protest outlining its objections (in line with correspondence we have already exchanged), the EAC will release the 2008-2010 requirements payments allotted to New Hampshire, and will agree to present this issue to the full Commission when a quorum is restored, and request its referral of the matter to a body of competent jurisdiction for resolution, such as the U.S. Government Accountability Office, or any other such entity that the EAC and the State agree upon. In the meantime, the EAC will formally note the State’s protest and will not take the position that the signed grant agreement in any way estops the State from asserting its stated position.

We have informed the State of New Hampshire that we are conducting the audit in accordance with *Government Auditing Standards*. Those standards require us to identify criteria against which to evaluate the facts, circumstances, records, and other items we review. Because we have traditionally evaluated States’ uses of HAVA funds against OMB Circulars, we intend to apply those criteria during the audit. However, as auditors, we are not in a position to make a legal determination as to whether the requirements payments and other payments made to States in accordance with HAVA are made under the umbrella of a grant award to each State, nor whether the States are legally required to comply with other Federal laws, regulations, and government-wide guidance pertaining to grants, such as the OMB Circulars. We anticipate that at least some portion of our audit could reach an impasse similar to the one EAC and the State of New Hampshire encountered in 2011 unless a body of competent jurisdiction reaches a definitive decision concerning the nature of HAVA funds and the criteria applicable to those funds. It is conceivable that such an impasse could result in a limitation of the scope of our

audit or force us to report deficiencies to which the State of New Hampshire would be unwilling to respond, and which could not be resolved until such a definitive decision was reached.

I have attached a complete copy of the November 4, 2011 letter from Mr. Robbins to Mr. Stevens for your consideration.

Recommendation: I recommend that the issues raised by the State of New Hampshire be presented to the full Commission for decision as to whether the HAVA funds are grants and thus whether the related payments are grant payments. By extension, the decision should also determine the applicability of Federal laws, regulations, and guidance. I further recommend that the issue, as necessary, be referred to another body of competent jurisdiction for resolution, such as the U.S. Government Accountability Office, or any other such entity that the EAC and the State agree upon, in accordance with the 2011 agreement between EAC and the State of New Hampshire.

Sincerely,



Patricia L. Layfield
Inspector General
U.S. Election Assistance Commission

cc: Matthew Masterson, Vice Chair, U.S. Election Assistance Commission
Christy A. McCormick, Commissioner, U.S. Election Assistance Commission
Anthony Stevens, Assistant Secretary of State, New Hampshire Department of State
Daniel Cloutier, Assistant Secretary of State, New Hampshire Department of State



U.S. ELECTION ASSISTANCE COMMISSION
1201 NEW YORK AVENUE, N.W., SUITE 300
WASHINGTON, D.C. 20005

November 4, 2011

Anthony Stevens
Assistant Secretary of State
State of New Hampshire 107 North Main Street, Suite 204
Concord, NH 03301

Dear Secretary Stevens:

This will confirm the substance of our discussion on September 21, 2011 in which we tentatively agreed, pending the approval of our supervisors, to move beyond the present impasse between the U.S. Election Assistance Commission (EAC) and New Hampshire's Secretary of State with regard to the distribution of §251 Help America Vote Act (HAVA) requirements payments for the years 2008-2010.

The State of New Hampshire (State) objects to the EAC requirement that it enter into a grant agreement which requires certification of compliance with various Federal laws and regulations concerning the use of Federal money. The State contends that the EAC is limited in its ability to require certification to those provisions contained in HAVA. The EAC believes that it is obligated to follow not just the requirements of HAVA when distributing the requirements payments, but also guidance issued by other relevant and controlling Federal authorities, including circulars issued by the Office of Management and Budget.

Further complicating this pending matter is the EAC's present lack of a quorum of commissioners.

I have agreement from the current remaining two commissioners and the executive director to offer the following compromise to move this matter forward. If the State will execute the grants agreement without any iteration, but accompanies it with a formal protest outlining its objections (in line with correspondence we have already exchanged), the EAC will release the 2008-2010 requirements payments allotted to New Hampshire, and will agree to present this issue to the full Commission when a quorum is restored, and request its referral of the matter to a body of competent jurisdiction for resolution, such as the U.S. Government Accountability Office, or any other such entity that the EAC and the State agree upon. In the meantime, the EAC will formally note the State's protest and will not take the position that the signed grant agreement in any way estops the State from asserting its stated position.

If these terms are acceptable to the State, please proceed with execution of the grant agreement, and I will instruct EAC staff to begin processing transfer of the State's 2008-2010 requirements payments.

Sincerely,

A handwritten signature in blue ink that reads "Mark A. Robbins".

Mark A. Robbins
General Counsel

cc: U.S. Department of Justice
Civil Rights Division, Voting Section
U.S. Attorney for the District of New Hampshire