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B-127945 April 5, 1979

Number: B-127945

Date: 1979-04-05

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The Honorable John D. Dingell, Chairman Subcommittee on Energy and Power Committee on Interstate and Foreign Commerce House of Representatives

Dear Mr. Chairman:

As you requested, we have reviewed your letter to the Chairman of the Nuclear Regulatory Commission (NRC) and the reply from its Executive Director concerning the disposition of motions for disciplinary action against a private attorney and two NRC staff members who participated in a licensing proceeding. You stated the issues in the form of five specific questions which we answer below.

The Executive Director's letter indicates that in 1976, acting on a petition for review, the United States Court of Appeals for the District of Columbia Circuit remanded an Atomic Energy Commission decision to the NRC for further adjudicatory proceedings on specific issues. The NBC reopened the hearing before an Atomic Safety Licensing Board. During the course of the reopened proceeding, the NRC staff filed a motion with the presiding Board for the censure of a private attorney representing certain interveners for alleged unprofessional conduct. The interveners then filed a motion with the Board for disciplinary action against two named MRC staff attorneys and against other unnamed members of the NRC staff for alleged misconduct. In accordance with the NRC's Rules of Practice, the Atomic Safety and Licensing Board referred the charges to a Special Board for hearing. The NRC retained private attorneys to represent the members

The Chairman of the Atomic Safety and Licensing Board Panel designated the members of the Special Board, and the Board held a preheating conference. However, we understand that the parties have since agreed to a settlement of this matter by mutually withdrawing all charges of misconduct.

You first ask,

"1. What is the statutory authority for the Nuclear Regulatory Commission to independently hear and rule upon complaints of 'professional misconduct' involving a) those who participated in an CHIC licensing proceeding and b) members of its own staff."

There is no statute which by its express terms authorizes the NRC to conduct disciplinary proceedings involving counsel who appear in licensing proceedings before it. We believe that this authority ma-y be implied from the NRC's derived general statutory authority to make rules and regulations.

The NRC was established by the Energy Reorganization Act of 1974, Pub. L. No. 93-438 The Act's basic purpose was to separate the regulatory functions of the Atomic Energy Commission (AEC) from its developmental and promotional functions, and divide them between two newly-created agencies, the Energy Research and Development Administration and NRC. Through the Transitional Provisions of Title III of the Energy Reorganization Act, the NRC has inherited the AEC's general rule-making authority. Under subsection 201(g) and section 304, whatever authority the AEC had with respect to licensing and regulation was transferred to the ARC and its officers and components.

At the time of enactment of the Energy Reorganization Act of 1974, 42 U.S.C. Sec. 2201(p) provided that in the performance of its functions the AEC was authorized to make such rules and regulations as may be necessary to carry out its statutory purposes. Included among the purposes were licensing and regulation. Accordingly, the AEC's authority to make rules and regulations would be included in the functions necessary to carry out licensing and regulation which have been transferred under subsection 201(g), and are now vested in the NRC.

Federal courts have construed statutes which give an administrative body the power to make rules and regulations necessary for the execution of its function as implied authority to take disciplinary action against attorneys who appear before it. Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S. Ct. 215, 70 L. Ed. 494 (1926); Koden v. United States Department of Justice, 564 F.2d 228 (7th Cir. 1977); Herman v. Dulles, 205 F.2d 715 (D.C. Cir. 1953); Schwebel v. Orrick, 153 F. Supp. 701 (D.C.D.C. 1957), aff'd on other grounds, 251 F.2d 919, cert. denied 356 U.S. 927 (1958); Camp v. Herzog, 104 F. Supp. 134 (D.C.D.C. 1952).

For example, in Camp v. Herzag, a case involving the power of the National Labor Relations Board to suspend or disbar a person from practicing before it, the Court mined 29 U.S.C. Sec. 156 which provided:

"The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter."

The Court interpreted this rule-making power as a grant by Congress of authority for the Board to make appropriate rules for disciplining attorneys who appeared before it.

A rationale for this construction was stated by the Supreme Court in Goldsmith v. United States Board of Tax Appeals, supra. That case involved the question of whether the Act creating the Board of Tax Appeals and granting the general authority to prescribe its rules of procedure, authorized the Board to set standards for determining who may practice before it. In holding that the grant of rule-making power did confer such authority, the Court said, at 121:

"We think that the character of the work to be done by the Board, the quasi judicial nature of its duties, the magnitude of the interests to be affected by its decisions, all require that those who represent the taxpayers in the hearings should be persons whose qualities as lawyers or accountants will secure proper service to their clients and to help the Board in the discharge of its important duties."

This principle appears equally applicable in this case.

In the light of these decisions, we conclude that when it provided the general statutory power to make regulations necessary for the execution of its functions, Congress also by implication conferred upon the NRC the authority to discipline attorneys who practice before it.

An agency may incur expenses which are necessary or incident to the accomplishment of an authorized activity. See 44 Comp. Gen. 312, 314 (1964). The proposed administrative proceeding would have enabled the NRC to obtain the facts, and hear the arguments which would have guided its determination of whether or not to discipline the attorneys in this case. Thus, the hearings are incident to the MRCIs exercise of authority to discipline counsel and the NRC is authorized to conduct them.

Your second question is,

"What is the statutory authority for the Nuclear Regulatory Commission's establishment of a special panel to hear these complaints."

Section 2243 of title 42 of the United States Code provides the HRC's statutory authority to establish a Special Board. It provides:

"(a) Notwithstanding the provisions of-7(a) and 8(a) of the Administrative Procedure Act, the Commission is authorized to establish one or more atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this chapter, any other provision of law, or any regulation of the Commission issued thereunder. The Commission may delegate to a board such other regulatory functions as the Commission deems appropriate. The Commission may appoint a panel of qualified persons from which board members may be selected.

"(b) Board members may be appointed by the Commission fromprivate life, or designated from the staff of the Commission or other Federal agency. Board members appointed from private life shall receive a per diem compensation for each day spent in meetings or conferences, and all members shall receive their necessary traveling or other expenses while engaged in the work of a board. The provisions of section 2203 of this title shall be applicable to board members appointed from private life." (Emphasis added.)

(The "Commission" referred to was the AEC. As we explained in our answer to question 1, AEC authority is made applicable to the NRC through the "transfer of functions" provision of the Energy Reorganization Act of 1974.)

By providing that the AEC could delegate to the boards "such functions as the Commission deems appropriate," Congress intended to authorize it to use the boards in exercising functions allied to its regulatory responsibility (i.e., in an advisory capacity in connection with rule- making). H.R. Rep. No. 1966, 87th Cong., 1st Sess. 5, 6 (1966). Orderly conduct by participants in licensing hearings in compliance with rules of procedure is allied to the NRC's regulatory

responsibility. This is because the public interest which the NRC serves through regulation is only protected when the participants in the regulatory process act in accordance with the rules governing that process. Departure from the rules can result in an unbalanced and inaccurate presentation of issues, leading to NRC decisions which would not necessarily serve the public interest. Accordingly, we believe that the NBC could establish a special panel to hear complaints of misconduct under the authority conferred by 42 U.S.C. Sec. 2243.

Your final three questions concern the proper attorneys to provide legal representation for the accused staff members before the special panel. You ask,

"3. What is the legal basis for the decision that it would not be appropriate for the accused staff members to be represented by an attorney from a) the Office of the Executive Legal Director or b) the Office of the General Counsel.

"4. What is tine' regal basis for the decision that the Justice Department's Regulations do not extend to the utilization of the Department attorneys to defend Federal agency personnel against charges of misconduct in Federal agency quasi-judicial administrative proceedings.

"5. What is the statutory authority of the Nuclear Regulatory Commission to contract with private attorneys to defend NRC employees in such proceedings."

The NRC position, as expressed by the Executive Director in his letter to you was as follows:

"A decision was made to retain private counsel for the charged members of the NRC for the following reasons. It was our judgment that legal counsel from outside the Office of the Executive Legal Director was appropriate in view of the existence of a potential conflict between the interests of the NRC attorneys charged with professional misconduct and the interests of the NRC staff members prosecuting the charges against Mr. Cherry. In reaching this decision we consulted with the NRC General Counsel.

"Consideration was given to having members of the staff of the NRC Office of the General Counsel serve as counsel for the charged members of the NRC staff. That was determined to be unacceptable because members of the Office of the General Counsel may be called upon by the Commissioners to assist them with the review of any decision of a Special Board.

"Consideration was also given to seeking the assistance of the Department of Justice. However, the Department's regulations do not extend to the utilization of Department attorneys to defend Federal agency personnel against charges of misconduct in Federal agency quasijudicial administrative proceedings, (28 CFR Part 50).

"With respect to your inquiry regarding NRC's authority to contract for private counsel, that authority is found in 5 U.S.C. 3109, and in the NRC Appropriation Act for fiscal year 1978, Pub. L. 95-96 (91 Stat. 797).

"In general, however, even with the authority to contract for such outside services, Federal agencies may not procure services on a contractual basis where regular employees of the Federal government are qualified and available to perform the stork involved. Thus, where a Federal agency has employees available to perform a particular task, it should not contract far the performance of that

task. Each Federal agency, however, is responsible for determining in each case whether the particular services could be performed by Federal agency employees. As discussed above, it was our judgment that the legal services required in defending the NRC staff members against charges of misconduct could not appropriately be performed by NRC employees. In reaching this judgment to employ outside counsel we relied on a recent decision of the Comptroller General of the United States which was issued on July 22, 1977 (B-133381)."

We believe that the NRC has authority to use funds appropriated for its necessary expenses to provide attorneys for the charged staff members because they performed the acts which are the basis of the proposed proceedings within the scope of their employment and conflicts of interest preclude Department of Justice and NRC attorneys from representing the employees.

While the hiring of an outside attorney to represent an employee is generally a private matter between the attorney and the client (57 Romp. Gen. 444 (1978), 55 Comp. Gen. 1418 (1976)), the Government may provide an employee with representation for private litigation when the United States' interest is at stake along with the employee's personal interest. B-130441, April 12, 1978.

The Government has an interest in proceedings arising out of conduct within the scope of Federal employment, and therefore the Government may properly provide representation in these proceedings. B-150130, May 19, 1978. Since the United States acts through its employees, advocating the legality of employee actions taken in furtherance of their official duties is in the interest of the Federal Government. Moreover, if agency employees knew that they would have to bear their own representation expenses in actions against them resulting from performance of their jobs, they would discharge their duties and exercise their discretionary functions less vigorously.

Generally, the Department of Justice provides its attorneys to represent employees in litigation under the authority of sections 516, 517, 518, and 547(b) of Title 28, United States Code. These sections charge the Department with the responsibility for representing the United States in all litigation in which it has an interest. The Attorney General interprets these provisions as giving the Department the statutory authority for its policy of representing Federal employees in court actions brought against them in their individual capacity because of acts performed within the scope of their employment. The Department implements this policy inaccordance with its statement on representation found at 28 C.F.R. Sec.(s) 50.15 and 50.16.

However, the Department will not provide counsel to charged employees in administrative disciplinary proceedings. Subsection 50.15(a) of its policy statement specifies the kind of proceedings in which the Department will provide representation. It states:

"(a) Under the procedures set forth below, a federal employee (herein defined to include former employees) may be represented by Justice Department attorneys in state criminal proceedings and in civil and Congressional proceedings in which he is sued or subpoenaed in his individual capacities, not covered by Sec. 15.1 of this chapter."

In response to our request for the Attorney Generalts views on this case, the Assistant Attorney General explained that administrative disciplinary proceedings are not included in subsection 50.15(a) because:

"* * * It is the policy of the Civil Division, in this regard, that none of its attorneys may represent federal agency personnel in disciplinary or Title VII discrimination proceedings for the reason that the Civil Division will be responsible for defending the employing agency in the event the employee brings a civil action challenging the results of the proceeding. Representing the employee at the agency level proceeding would, therefore, create an unacceptable conflict."

The Executive Director of NRC is thus correct in stating that the Department policy does "not extend to the utilization of Department attorneys to defend Federal agency- personnel against charges of misconduct in Federal agency quasi-judicial administrative proceedings * * *." Accordingly, Justice Department attorneys were not available to provide representation to the charged NRC staff members.

In cases in which the Attorney General declines to provide representation, agency appropriations are available to provide representation if otherwise proper. 55 Comp. Gen. 408, 412 (1975). The agency must make the expenditure in accordance with the principle discussed earlier, i.e., that the representation is in the Government's interest. Also, because the performance of the conduct was in furtherance of an agency function, the cost of an attorney may be considered a necessary expense incurred in performing that function. 53 Comp. Gen. 301, 306 (1973).

Therefore, an agency may properly charge against its appropriation the expenses of defending acts performed within the scope of agency employment. Here, "the NRC Executive Legal Director determined that the employees involved were clearly acting within the scope of their authority.' It was therefore in the agency's interest to provide them with legal counsel, and since the Attorney General has declined representation in this type of proceeding, NRC appropriations would be available to supply counsel to the charged staff members.

It was NRC's view that its own attorneys could not defend the charged staff members before the Special Board because their appearances might create conflicts of interest. The NRC's Office of General Counsel could not supply its attorneys because that Office would be responsible for advising the NRC in its review of the Board's decision in the proceeding. Although it is not clear from the Executive Director's letter, we have been advised informally that attorneys from the Office of Executive Legal Director (ELD) could not provide representation because the interveners who filed misconduct charges contended that ELD attorneys must prosecute all such charges. As a result, when it was necessary for ARC to decide whether to retain outside attorneys, the possibility existed that the Office of ELD would be prosecuting the same case, thus making that Office's representation of the accused attorneys inappropriate.

Accordingly, since providing legal counsel to these ARC employees to defend conduct within the scope of agency employment is in furtherance of the agency's purpose, the NRC could properly expend its appropriations for the necessary legal services. Cf. B-114868.18, February 10, 1978.

Sincerely yours,

R. F. Keller Deputy Comptroller General of the United States