Text as published on gao.gov, https://www.gao.gov/products/b-139703, archived 2026-07-17. GAO published no original file for this decision. Rendered by Comptroller Desk.

B-139703, March 21, 1980, 59 Comp.Gen. 313

Number: B-139703

Date: 1980-03-21

B-139703, MARCH 21, 1980, 59 COMP.GEN. 313

APPROPRIATIONS - JUSTICE DEPARTMENT - LITIGATION EXPENSES - JUSTICE DEPARTMENT V. ADMINISTRATIVE OFFICE - EXPERT WITNESS FEES - CRIMINAL PROCEEDINGS COMPENSATION OF EXPERT WITNESSES, APPOINTED BY THE COURT UNDER RULE 706, FEDERAL RULES OF EVIDENCE (PUBLIC LAW 93-595), IN CRIMINAL PROCEEDINGS IS PAYABLE FROM JUSTICE DEPARTMENT APPROPRIATIONS AS A LITIGATION EXPENSE. 39 COMP.GEN. 133, OVERRULED IN PART.

MATTER OF: PAYMENT OF COURT-APPOINTED EXPERT WITNESS - CRIMINAL PROCEEDING, MARCH 21, 1980:

THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (ADMINISTRATIVE OFFICE), HAS REQUESTED OUR DECISION ON THE PROPER SOURCE OF FUNDS FOR PAYMENT OF A $24,200 FEE OF MR. REYNOLDS COUCH. MR. COUCH WAS APPOINTED BY THE COURT UNDER RULE 706, FEDERAL RULES OF EVIDENCE (FRE) (PUB. L. NO. 93-595, 88 STAT. 1938, 28 U.S.C. APP.), TO MAKE AN APPRAISAL OF 15 PROPERTIES SUBJECT TO FORFEITURE UNDER THE PROVISIONS OF 18 U.S.C. 1961-1968(1976) IN A CRIMINAL PROCEEDING, UNITED STATES V. THEVIS (NO. CR- 78-180 A, N.D. GA.). FOR REASONS SET FORTH BELOW, WE CONCLUDE THAT DEPARTMENT OF JUSTICE APPROPRIATIONS SHOULD BE USED FOR SUCH PAYMENT.

MR. COUCH WAS APPOINTED IN JUNE, 1978, BY THE HONORABLE CHARLES A MOYE, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF GEORGIA, TO MAKE AN APPRAISAL FOR THE COURT OF VARIOUS PROPERTIES SUBJECT TO FORFEITURE IN THE ABOVE-NAMED CRIMINAL PROSECUTION. 18 U.S.C. 1963. A VOUCHER FOR THE APPRAISAL SERVICES, TOTALLING $24,200 WAS APPROVED BY THE COURT AND SUBMITTED TO THE ADMINISTRATIVE OFFICE FOR PAYMENT. HOWEVER, PAYMENT WAS DELAYED BECAUSE THE ADMINISTRATIVE OFFICE AND THE DEPARTMENT OF JUSTICE (JUSTICE) DISAGREED OVER WHICH AGENCY SHOULD MAKE PAYMENT. TO RESOLVE THIS DIFFERENCE, THE ADMINISTRATIVE OFFICE REQUESTED THIS DECISION.

SUBSEQUENTLY, THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ISSUED AN ORDER RECITING THAT MR. COUCH WAS APPOINTED PURSUANT TO RULE 706 AND DIRECTING JUSTICE TO PAY THE FEE. IN ORDER TO EXPEDITE PAYMENT TO MR. COUCH, JUSTICE AND THE ADMINISTRATIVE OFFICE REACHED AN AGREEMENT UNDER WHICH (1) JUSTICE PAID THE $24,200 FEE AND (2) THE ADMINISTRATIVE OFFICE WILL REIMBURSE JUSTICE IF IT SHOULD BE DECIDED THAT JUDICIARY APPROPRIATIONS SHOULD HAVE BEEN USED.

THE RELEVANT PARTS OF RULE 706 READ AS FOLLOWS:

(A) APPOINTMENT. THE COURT MAY ON ITS OWN MOTION OR ON THE MOTION OF ANY PARTY ENTER AN ORDER TO SHOW CAUSE WHY EXPERT WITNESSES SHOULD NOT BE APPOINTED, AND

MAY REQUEST THE PARTIES TO SUBMIT NOMINATIONS. THE COURT MAY APPOINT ANY EXPERT WITNESSES AGREED UPON BY THE PARTIES, AND MAY APPOINT EXPERT WITNESSES OF ITS OWN SELECTION. AN EXPERT WITNESS SHALL NOT BE APPOINTED BY THE COURT UNLESS HE CONSENTS TO ACT. A WITNESS SO APPOINTED SHALL BE INFORMED OF HIS DUTIES BY THE COURT IN WRITING, A COPY OF WHICH SHALL BE FILED WITH THE CLERK, OR AT A CONFERENCE IN WHICH THE PARTIES SHALL HAVE OPPORTUNITY TO PARTICIPATE. A WITNESS SO APPOINTED SHALL ADVISE THE PARTIES OF HIS FINDINGS, IF ANY; HIS DEPOSITION MAY BE TAKEN BY ANY PARTY; AND HE MAY BE CALLED TO TESTIFY BY THE COURT OR ANY PARTY. HE SHALL BE SUBJECT TO CROSS EXAMINATION BY EACH PARTY, INCLUDING A PARTY CALLING HIM AS A WITNESS.

(B) COMPENSATION. EXPERT WITNESSES SO APPOINTED ARE ENTITLED TO REASONABLE COMPENSATION IN WHATEVER SUM THE COURT MAY ALLOW. THE COMPENSATION THUS FIXED IS PAYABLE FROM FUNDS WHICH MAY BE PROVIDED BY LAW IN CRIMINAL CASES AND CIVIL ACTIONS AND PROCEEDINGS INVOLVING JUST COMPENSATION UNDER THE FIFTH AMENDMENT. IN OTHER CIVIL ACTIONS AND PROCEEDINGS THE COMPENSATION SHALL BE PAID BY THE PARTIES IN SUCH PROPORTION AND AT SUCH TIME AS THE COURT DIRECTS, AND THEREAFTER CHARGED IN LIKE MANNER AS OTHER COSTS.

AS A PRELIMINARY MATTER, JUSTICE QUESTIONS WHETHER MR. COUCH IS AN EXPERT WITNESS UNDER THE RULE. WITH REGARD TO MR. COUCH'S SERVICES. JUSTICE STATES--

* * * WE DO NOT BELIEVE THAT THE SERVICES PROVIDED * * * ARE TRULY WITHIN THE SCOPE OF RULE 706. MR. REYNOLDS COUCH WAS APPOINTED TO APPRAISE 15 PROPERTIES SUBJECT TO FORFEITURE UNDER THE PROVISIONS OF 18 U.S.C. 1961. THE PURPOSE OF THE APPRAISAL WAS TO ESTABLISH A PERFORMANCE BOND.

AS YOU KNOW, THE POSTING OF A PERFORMANCE BOND IS THE EQUIVALENT OF BAIL; THE EXPENSES OF SETTING BAIL ARE CLEARLY CHARGEABLE TO THE COURT SINCE SUCH EXPENSES ARE IN NO WAY RELATED TO THE LITIGATION. THE PRESENT VALUE OF THE PROPERTIES IS NOT AN ISSUE IN THE CASE, AND IT IS NOT ANTICIPATED THAT MR. COUCH WILL TESTIFY. IN OUR JUDGMENT, MR. COUCH CANNOT BE CONSIDERED AN EXPERT WITNESS IN THIS CASE UNDER RULE 706.

WHATEVER THE MERITS OF THIS ARGUMENT, THIS OFFICE MAY NOT QUESTION THE COURT'S INVOCATION OF RULE 706 AS ITS AUTHORITY TO APPOINT MR. COUCH. ITS ORDER DIRECTING PAYMENTS BY JUSTICE, THE COURT CITED RULE 706 AND HELD THAT MR. COUCH'S FEE WAS AN EXPENSE OF LITIGATION, NOT OF MAINTAINING THE COURT. THE PROPER FORUM FOR JUSTICE TO CHALLENGE THAT WAS AN APPEAL FROM THE ORDER.

ACCEPTING THE COURT'S DETERMINATION THAT SECTION 706 APPLIES, AND THAT MR. COUCH'S FEE WAS AN EXPENSE OF LITIGATION, WE CONCLUDE THAT THE JUSTICE DEPARTMENT APPROPRIATION SHOULD BE CHARGED.

AS STATED IN 58 COMP.GEN. 259(1979), THE COMPENSATION OF COURT APPOINTED EXPERT WITNESSES UNDER RULE 706 IS TREATED GENERALLY AS A LITIGATION EXPENSE, CHARGEABLE TO ANY OR ALL OF THE PARTIES IN SUCH PROPORTION AS THE COURT MAY DIRECT. WITH RESPECT TO CONDEMNATION CASES, WE CONCLUDED THAT THESE COSTS COULD NOT BE CHARGED AGAINST THE CONDEMNEE BUT THAT UNDER THE RULE, THEY REMAINED AN EXPENSE OF LITIGATION, RATHER THAN AN EXPENSE OF THE COURT. AS A RESULT, THE COMPENSATION OF COURT-APPOINTED EXPERT WITNESSES IN CONDEMNATION CASES WAS HELD TO BE CHARGEABLE TO THE LITIGATING AGENCY OF THE GOVERNMENT.

THE LANGUAGE IN RULE 706(B) FOR COMPENSATION IN CRIMINAL CASES IS THE SAME AS THAT FOR LAND CONDEMNATION CASES; THAT IS, THE RULE PROVIDES THAT COMPENSATION

"IS PAYABLE FROM FUNDS WHICH MAY BE PROVIDED BY LAW." WE SEE NO REASON WHY THE SAME RESULT SHOULD NOT BE REACHED HERE; IN CRIMINAL CASES ALSO, THE COST OF COURT-APPOINTED WITNESSES IS TO BE BORNE, AS AN EXPENSE OF LITIGATION, BY JUSTICE.

JUSTICE HAS ARGUED THAT THERE SHOULD BE A DISTINCTION BETWEEN THE TREATMENT OF COURT-APPOINTED EXPERTS IN CONDEMNATION CASES AND IN CRIMINAL CASES. THE LANGUAGE OF RULE 706, MAKING THESE EXPENSES, IN BOTH CRIMINAL AND CONDEMNATION CASES, "PAYABLE FROM FUNDS WHICH MAY BE PROVIDED BY LAW," DOES NOT CLEARLY SUPPORT SUCH A DISTINCTION.

UNDER THE RULE, COURT-APPOINTED EXPERTS IN CIVIL ACTIONS IN GENERAL ARE TO BE PAID BY THE PARTIES. CRIMINAL AND CONDEMNATION CASES ARE DISTINGUISHED ONLY IN THAT THE DEFENDANT OR THE CONDEMNEE, RESPECTIVELY, ARE NOT REQUIRED TO BEAR ANY OF THESE COSTS; THE LANGUAGE OF THE RULE DOES NOT OTHERWISE DISTINGUISH BETWEEN THESE TWO TYPES OF CASES. THE EFFECT OF THE RULE IS THUS NOT TO SHIFT THESE EXPENSES TO THE COURT, BUT MERELY TO PROVIDE THAT, AS BETWEEN THE PARTIES, ONLY THE GOVERNMENT SHOULD BEAR THEM.

WHILE THERE IS SOME SUPPORT IN THE LEGISLATIVE HISTORY OF RULE 706 FOR THE POSITION TAKEN BY JUSTICE, IT IS NOT UNEQUIVOCAL. UNDER THE CIRCUMSTANCES, WE ARE PERSUADED THAT IN CRIMINAL AND CONDEMNATION CASES, WHERE THE RULE PRECLUDES ASSIGNING ANY OF THE COST OF COURT APPOINTED EXPERT WITNESSES TO THE PRIVATE LITIGANT OR DEFENDANT, THESE COSTS SHOULD BE BORNE BY JUSTICE.

THERE IS, AFTER ALL, NO DOUBT THAT THE EXPENSES IN QUESTION ARE TO BE BORNE BY PUBLIC FUNDS; THE ONLY ISSUE IS WHICH OF TWO APPROPRIATIONS SHOULD BE CHARGED. SEEN IN THAT LIGHT, THIS RESULT-- THAT ALL SUCH EXPENSES SHOULD BE BORNE BY JUSTICE, RATHER THAN SOME BY JUSTICE AND SOME BY THE COURTS-- WHILE IT MAY REQUIRE SOME FISCAL ADJUSTMENTS BY JUSTICE, PROVIDES FOR PAYMENT OF THESE EXPENSES IN A MORE UNIFORM AND ORDERLY MANNER THAN THE ALTERNATIVE.

IN 39 COMP.GEN. 133(1959) WE HELD THAT, WHERE AN EXPERT WITNESS WAS APPOINTED BY THE COURT IN A CRIMINAL CASE UNDER FORMER RULE 28 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE (THE PREDECESSOR OF RULE 706), THE ASSOCIATED EXPENSES SHOULD BE CHARGED TO THE APPROPRIATION "FOR NECESSARY TRAVEL AND MISCELLANEOUS EXPENSES, NOT OTHERWISE PROVIDED FOR, INCURRED BY THE JUDICIARY." THE CITED HOLDING IN 39 COMP.GEN. 133 WILL NO LONGER BE FOLLOWED.

THE ADMINISTRATIVE OFFICE THEREFORE NEED NOT REIMBURSE THE DEPARTMENT OF JUSTICE FOR THE $24,200 PAID TO MR. COUCH.