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B-201260, May 6, 1981, 60 Comp.Gen. 440

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APPROPRIATIONS - DEFICIENCIES - ANTI DEFICIENCY ACT - VIOLATIONS - STATUTORY RESTRICTIONS - VIOLATION INCURRING OBLIGATION FOR PURPOSE FOR WHICH FUNDS ARE SPECIFICALLY MADE NOT AVAILABLE BY APPROPRIATION ACT CONSTITUTES VIOLATION OF ANTIDEFICIENCY ACT. BY INCURRING OBLIGATION FOR ADMINISTRATIVE EXPENSES TO PAY OVERTIME TO INDIVIDUAL IN EXCESS OF $20,000, FOR WHICH PURPOSE FUNDS WERE NOT AVAILABLE UNDER FISCAL YEAR 1980 APPROPRIATION ACT, CUSTOMS SERVICE VIOLATED ANTIDEFICIENCY ACT.

MATTER TO: CUSTOMS SERVICE PAYMENT OF OVERTIME PAY IN EXCESS OF LIMIT IN APPROPRIATION ACT, MAY 6, 1981:

THE COMMISSIONER OF CUSTOMS HAS REQUESTED OUR OPINION AS TO WHETHER THE CUSTOMS SERVICE'S VIOLATION OF A PROVISO IN ITS FISCAL YEAR 1980 APPROPRIATION ACT RELATING TO THE PAYMENT OF OVERTIME PAY ALSO CONSTITUTES A VIOLATION OF THE SO-CALLED ANTIDEFICIENCY ACT, 31 U.S.C. 665(1976). THE PROVISO IN QUESTION, WHICH IS ATTACHED TO THE APPROPRIATION MAKING FUNDS AVAILABLE FOR THE NECESSARY EXPENSES OF THE CUSTOMS SERVICE, STATES:

PROVIDED, THAT NONE OF THE FUNDS MADE AVAILABLE BY THIS ACT SHALL BE AVAILABLE FOR ADMINISTRATIVE EXPENSES TO PAY ANY EMPLOYEE OVERTIME PAY IN AN AMOUNT IN EXCESS OF $20,000.

THE TREASURY DEPARTMENT APPROPRIATIONS ACT, 1980, PUB. L. NO. 96-74, 93 STAT. 559, 560.

FOR THE REASONS INDICATED BELOW WE CONCLUDE THAT BY INCURRING AN OBLIGATION FOR ADMINISTRATIVE EXPENSES TO PAY OVERTIME COMPENSATION TO AN INDIVIDUAL IN EXCESS OF $20,000 IN FISCAL YEAR 1980, THE CUSTOMS SERVICE HAS VIOLATED THE ANTIDEFICIENCY ACT.

OVERTIME PAY FOR CUSTOMS OFFICERS AND EMPLOYEES IS AUTHORIZED BY 19 U.S.C. 267(1976). UNDER THIS PROVISION, THE OVERTIME COMPENSATION IS ULTIMATELY PAID BY THE MASTER, OWNER, AGENT, OR CONSIGNEE OF THE VESSEL OR VEHICLE WHICH REQUIRES THE OVERTIME SERVICE.

IN FISCAL YEAR 1980 ONE CUSTOMS INSPECTOR WAS INADVERTENTLY PERMITTED TO WORK AN OVERTIME ASSIGNMENT WHICH, WHEN ADDED TO HIS OTHER ASSIGNMENTS FOR THE YEAR, ENTITLED HIM TO TOTAL OVERTIME COMPENSATION OF $20,194.17. THE CUSTOMS SERVICE PAID THE INSPECTOR FOR THE OVERTIME ASSIGNMENT, INCLUDING THE $194.17 IN EXCESS OF $20,000, AND WAS REIMBURSED BY THE USER OF THE OVERTIME SERVICES.

THE OVERTIME ASSIGNMENT IN EXCESS OF $20,000 OCCURRED DESPITE SAFEGUARDS INSTITUTED BY THE CUSTOMS SERVICE TO PREVENT SUCH ASSIGNMENTS, BEING CAUSED BY ERRONEOUS CALCULATIONS OF THE AMOUNT OF OVERTIME PAY THAT HAD ALREADY BEEN EARNED BY THE INSPECTOR. THE CUSTOMS SERVICE HAS NOT DETERMINED THE AMOUNT OF EXPENSES WHICH IT MAY HAVE INCURRED IN VIOLATION OF THE APPROPRIATION ACT PROVISO (I.E., THE ADMINISTRATIVE EXPENSES OF PAYING THE EXCESS $194.17 IN OVERTIME COMPENSATION) BUT ESTIMATES THAT THESE EXPENSES WERE MINIMAL.

THE SO-CALLED ANTIDEFICIENCY ACT PROVIDES THAT:

NO OFFICER OR EMPLOYEE OF THE UNITED STATES SHALL MAKE OR AUTHORIZE AN EXPENDITURE FROM OR CREATE OR AUTHORIZE AN OBLIGATION UNDER ANY APPROPRIATION OR FUND IN EXCESS OF THE AMOUNT AVAILABLE THEREIN; NOR SHALL ANY SUCH OFFICER OR EMPLOYEE INVOLVE THE GOVERNMENT IN ANY CONTRACT OR OTHER OBLIGATION, FOR THE PAYMENT OF MONEY FOR ANY PURPOSE IN ADVANCE OF APPROPRIATIONS MADE FOR SUCH PURPOSE, UNLESS SUCH CONTRACT OR OBLIGATION IS AUTHORIZED BY LAW. (31 U.S.C. 665(A).)

THIS, AND SIMILAR STATUTES,

* * * EVIDENCE A PLAIN INTENT ON THE PART OF THE CONGRESS TO PROHIBIT EXECUTIVE OFFICERS, UNLESS OTHERWISE AUTHORIZED BY LAW, FROM MAKING CONTRACTS INVOLVING THE GOVERNMENT IN OBLIGATIONS FOR EXPENDITURES OR LIABILITIES BEYOND THOSE CONTEMPLATED AND AUTHORIZED FOR THE PERIOD OF AVAILABILITY OF AND WITHIN THE AMOUNT OF THE APPROPRIATION UNDER WHICH THEY ARE MADE; TO KEEP ALL THE DEPARTMENTS OF THE GOVERNMENT, IN THE MATTER OF INCURRING OBLIGATIONS FOR EXPENDITURES, WITHIN THE LIMITS AND PURPOSES OF APPROPRIATIONS ANNUALLY PROVIDED FOR CONDUCTING THEIR LAWFUL FUNCTIONS, AND TO PROHIBIT ANY OFFICER OR EMPLOYEE OF THE GOVERNMENT FROM INVOLVING THE GOVERNMENT IN ANY CONTRACT OR OTHER OBLIGATION FOR THE PAYMENT OF MONEY FOR ANY PURPOSE, IN ADVANCE OF APPROPRIATIONS MADE FOR SUCH PURPOSE * * * . (42 COMP.GEN. 272, 275(1962); SEE B-197841, MARCH 3, 1980.)

THE PROVISO IN THE CUSTOMS SERVICE APPROPRIATION ACT LIMITS THE AVAILABILITY OF FUNDS FOR THE EXPENSES OF PAYING OVERTIME COMPENSATION. IN OTHER WORDS, UNDER THE LANGUAGE OF THE PROVISO CONGRESS HAS NOT APPROPRIATED FUNDS FOR THE ADMINISTRATIVE EXPENSES OF PAYING OVERTIME COMPENSATION TO ANY INDIVIDUAL IN EXCESS OF $20,000 IN ONE YEAR.

WHEN AN APPROPRIATION ACT SPECIFIES THAT AN AGENCY'S APPROPRIATION IS NOT AVAILABLE FOR A DESIGNATED PURPOSE, AND THE AGENCY HAS NO OTHER FUNDS AVAILABLE FOR THAT PURPOSE, ANY OFFICER OF THE AGENCY WHO AUTHORIZES AN OBLIGATION OR EXPENDITURE OF AGENCY FUNDS FOR THAT PURPOSE VIOLATES THE ANTIDEFICIENCY ACT. SINCE THE CONGRESS HAS NOT APPROPRIATED FUNDS FOR THE DESIGNATED PURPOSE, THE OBLIGATION MAY BE VIEWED EITHER AS BEING IN EXCESS OF THE AMOUNT (ZERO) AVAILABLE FOR THAT PURPOSE OR AS IN ADVANCE OF APPROPRIATIONS MADE FOR THAT PURPOSE. IN EITHER CASE THE ANTIDEFICIENCY ACT IS VIOLATED.

THE COMMISSIONER HAS ENCLOSED A MEMORANDUM FROM THE CHIEF COUNSEL OF THE U.S. CUSTOMS SERVICE GIVING HIS OPINION THAT VIOLATION OF THE APPROPRIATION ACT PROHIBITION DOES NOT CONSTITUTE VIOLATION OF THE ANTIDEFICIENCY ACT. IN HIS MEMORANDUM THE CHIEF COUNSEL EXAMINES DECISIONS OF THE ATTORNEY GENERAL AND OF THE COMPTROLLER GENERAL AND STATES THAT THE ANTIDEFICIENCY ACT WAS INTENDED ONLY TO CONTROL DEFICIENCY SPENDING AND OBLIGATIONS BEYOND AVAILABLE APPROPRIATIONS. HE CONCLUDES:

WE BELIEVE THE ANTIDEFICIENCY ACT SHOULD BE VIEWED AS RESTRICTING THE OBLIGATION OF FUNDS WHICH ARE NOT APPROPRIATED AND THUS NOT AVAILABLE, REQUIRING CONGRESS TO APPROPRIATE FUNDS IN THE FUTURE TO MEET THE OBLIGATION, WHILE NOT DEALING WITH THE CIRCUMSTANCE OF THE OBLIGATION OF AVAILABLE FUNDS CONTRARY TO A STATUTORY LIMITATION. * * *

WE CANNOT AGREE WITH THE CHIEF COUNSEL'S CONCLUSION. IN OUR OPINION THE ANTIDEFICIENCY ACT PROHIBITS NOT ONLY EXPENDITURES WHICH EXCEED THE AMOUNT APPROPRIATED, BUT ALSO EXPENDITURES WHICH VIOLATE STATUTORY RESTRICTIONS OR LIMITATIONS ON OBLIGATIONS OR SPENDING.

WE CONCLUDE THAT BY INCURRING AN OBLIGATION FOR ADMINISTRATIVE EXPENSES TO PAY OVERTIME COMPENSATION IN EXCESS OF $20,000 TO AN INDIVIDUAL, THE CUSTOMS SERVICE HAS VIOLATED THE ANTIDEFICIENCY ACT.