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B-205438, Nov 12, 1981

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DIGEST: FEDERAL MEDIATION AND CONCILIATION SERVICE IS AUTHORIZED TO REIMBURSE FORMER EMPLOYEE FOR CONTEMPT OF COURT FINE LEVIED AGAINST HIM FOR REFUSAL TO TESTIFY ON MATTERS DISCUSSED AT MEDIATION SESSION AT WHICH HE WAS PRESENT, IF AGENCY ADMINISTRATIVELY DETERMINES THAT FINE WAS NECESSARILY INCURRED IN THE ACCOMPLISHMENT OF OFFICIAL BUSINESS.

WALTER B. TONER - REIMBURSEMENT FOR CONTEMPT FINE:

THE ACTING GENERAL COUNSEL, FEDERAL MEDIATION AND CONCILIATION SERVICE (FMCS), BY LETTER DATED NOVEMBER 6, 1981, HAS ASKED WHETHER THE FMCS MAY REIMBURSE A FORMER EMPLOYEE FOR A CONTEMPT OF COURT FINE LEVIED AGAINST HIM IN THE CIRCUMSTANCES OUTLINED BELOW. FOR THE REASONS THAT FOLLOW, WE CONCLUDE THAT IT MAY, BASED ON AN ADMINISTRATIVE DETERMINATION THAT THE FINE WAS NECESSARILY INCURRED IN THE ACCOMPLISHMENT OF OFFICIAL BUSINESS.

ON OCTOBER 6, 1981, MR. WALTER B. TONER RECEIVED A SUBPOENA FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, TO TESTIFY ON BEHALF OF THE DEFENDANT IN AN ANTITRUST SUIT. IT APPEARS THAT MR. TONER'S TESTIMONY IS BEING SOUGHT IN CONNECTION WITH ALLEGED ANTITRUST VIOLATIONS DISCUSSED IN THE COURSE OF LABOR-MANAGEMENT NEGOTIATIONS AT WHICH MR. TONER WAS PRESENT AS A MEDIATOR EMPLOYED BY THE FMCS. MR. TONER RETIRED FROM FMCS IN 1978.

THE FMCS DOES NOT WANT MR. TONER TO TESTIFY. THE AGENCY'S POSITION IS EXPRESSED IN 29 C.F.R. SEC. 1401.2(B) (1981):

"NO OFFICER, EMPLOYEE, OR OTHER PERSON OFFICIALLY CONNECTED IN ANY CAPACITY WITH THE SERVICE, CURRENTLY OR FORMERLY SHALL, IN RESPONSE TO A SUBPOENA, SUBPOENA DUCES TECUM, OR OTHER JUDICIAL OR ADMINISTRATIVE ORDER, *** DISCLOSE ANY INFORMATION ACQUIRED AS PART OF THE PERFORMANCE OF HIS OFFICIAL DUTIES OR BECAUSE OF HIS OFFICIAL STATUS, OR TESTIFY ON BEHALF OF ANY PARTY TO ANY MATTER PENDING IN ANY JUDICIAL, ARBITRAL OR ADMINISTRATIVE PROCEEDING, WITHOUT THE PRIOR APPROVAL OF THE DIRECTOR."

THE RATIONALE FOR THIS POSITION IS THAT AN EFFECTIVE SYSTEM OF LABOR MEDIATION MUST BE BASED ON THE IMPARTIALITY, BOTH ACTUAL AND PERCEIVED, OF THE MEDIATORS. SEE NATIONAL LABOR RELATIONS BOARD V. MACALUSO, 618 F.2D 51 (9TH CIR. 1980), UPHOLDING THE EXCLUSION OF MEDIATOR TESTIMONY IN AN ENFORCEMENT PROCEEDING BROUGHT BY THE NLRB.

THE FMCS FILED A MOTION TO QUASH THE SUBPOENA DIRECTED AT MR. TONER. THE COURT, HOWEVER, DENIED THE MOTION, DISTINGUISHING THE MACALUSO CASE ON SEVERAL GROUNDS.

THUS, THE QUESTION HERE BECOMES THIS: IF MR. TONER IS CALLED UPON TO TESTIFY IN THE ANTITRUST ACTION, IF, BASED ON THE REQUEST OF FMCS AND THE ABOVE-QUOTED REGULATIONS, HE REFUSES, AND IF THE COURT THEN LEVIES A FINE ON HIM FOR CONTEMPT OF COURT, CAN FMCS USE ITS APPROPRIATIONS TO REIMBURSE THE AMOUNT OF THE FINE?

AS A GENERAL PROPOSITION, APPROPRIATED FUNDS ARE NOT AVAILABLE TO REIMBURSE A GOVERNMENT EMPLOYEE FOR A FINE IMPOSED ON HIM FOR ACTIONS TAKEN IN THE PERFORMANCE OF OFFICIAL DUTIES. E.G., 31 COMP.GEN. 246 (1952), DENYING REIMBURSEMENT FOR A FINE RESULTING FROM A TRAFFIC VIOLATION. THE THEORY IS THAT, WHILE AN EMPLOYEE MAY HAVE CERTAIN DISCRETION AS TO PRECISELY HOW TO PERFORM A GIVEN TASK, THE RANGE OF PERMISSIBLE DISCRETION DOES NOT INCLUDE VIOLATING THE LAW. IF THE EMPLOYEE CHOOSES TO VIOLATE THE LAW, HE IS ACTING BEYOND THE SCOPE OF HIS AUTHORITY AND MUST BEAR ANY RESULTING LIABILITY AS HIS PERSONAL RESPONSIBILITY.

HOWEVER, THERE ARE SITUATIONS IN WHICH THIS GENERAL RULE WILL NOT APPLY. THUS, IN 44 COMP.GEN. 312 (1964), AN AGENT OF THE FEDERAL BUREAU OF INVESTIGATION REFUSED TO ANSWER CERTAIN QUESTIONS IN AN ACTION BROUGHT AGAINST THE BUREAU. THE AGENT BASED HIS REFUSAL ON JUSTICE DEPARTMENT REGULATIONS AND SPECIFIC INSTRUCTIONS FROM THE ATTORNEY GENERAL. THE AGENT WAS HELD IN CONTEMPT, FINED, AND THE CONTEMPT ORDER WAS AFFIRMED ON APPEAL. WE FOUND THAT THE AGENT HAD INCURRED THE FINE BY VIRTUE OF HIS COMPLIANCE WITH THE REGULATIONS AND INSTRUCTIONS AND WAS "WITHOUT FAULT OR NEGLIGENCE." THEREFORE, WE CONCLUDED THAT THE BUREAU COULD REIMBURSE THE AGENT FROM ITS "SALARIES AND EXPENSES" APPROPRIATION, AS A NECESSARY EXPENSE, IF THE BUREAU DETERMINED ADMINISTRATIVELY THAT THE FINE "WAS NECESSARILY INCURRED IN THE ACCOMPLISHMENT OF OFFICIAL BUSINESS FOR WHICH THE APPROPRIATION WAS MADE." 44 COMP.GEN. AT 314.

WE REITERATED AND APPLIED THESE PRINCIPLES IN B-186680, OCTOBER 4, 1976. THERE, A JUSTICE DEPARTMENT ATTORNEY HAD BEEN FINED FOR CONTEMPT FOR MISSING A COURT-IMPOSED DEADLINE. THE ATTORNEY ARGUED THAT HE HAD BEEN UNDER A NUMBER OF DEADLINES, THAT A SCARCITY OF RESOURCES MADE IT IMPOSSIBLE TO MEET THEM ALL, AND THAT HE THEREFORE HAD TO MAKE "VALUE JUDGMENTS" AS TO WHICH ONES TO MEET. WE CONCLUDED THAT, WHILE THE FINE MAY HAVE BEEN INCURRED IN THE PERFORMANCE OF OFFICIAL DUTIES, IT WAS NOT "NECESSARILY INCURRED" IN THE SENSE PROPOUNDED IN 44 COMP.GEN. 312. THE ATTORNEY HAD NOT BEEN ACTING IN COMPLIANCE WITH REGULATIONS OR INSTRUCTIONS, AND THE RECORD DID NOT SUPPORT A DETERMINATION THAT HE WAS WITHOUT FAULT OR NEGLIGENCE IN THE MATTER. THEREFORE, WE HELD THAT HE COULD NOT BE REIMBURSED FROM APPROPRIATED FUNDS.

APPLYING THESE CASES TO THE SITUATION AT HAND, IT SEEMS CLEAR THAT, IF MR. TONER WERE STILL AN EMPLOYEE OF THE FMCS, HIS CASE WOULD BE GOVERNED SQUARELY BY 44 COMP.GEN. 312, SUPRA. THE ONLY POSSIBLE DISTINCTION IS THAT, HERE, MR. TONER IS NO LONGER A GOVERNMENT EMPLOYEE AND THEREFORE NO LONGER SUBJECT TO THE DIRECT CONTROL OF THE FMCS. HOWEVER, IN THE CIRCUMSTANCES OF THIS CASE, WE DO NOT THINK THIS DISTINCTION WARRANTS A DIFFERENCE IN THE RESULT. THE ESSENCE OF 44 COMP.GEN. 312 IS THAT AN EMPLOYEE WHO ACTS PURSUANT TO AND WITHIN THE SCOPE OF OFFICIAL REGULATIONS OR INSTRUCTIONS SHOULD NOT BE REQUIRED TO BEAR ANY FINANCIAL RESPONSIBILITY RESULTING FROM THAT ACT. THIS RATIONALE APPLIES EQUALLY TO ONE WHO IS NO LONGER A GOVERNMENT EMPLOYEE WHEN THE LIABILITY ATTACHES. WHILE ANY FINE MR. TONER MAY INCUR WOULD NOT BE IN THE DIRECT PERFORMANCE OF OFFICIAL BUSINESS SINCE HE IS NO LONGER A GOVERNMENT EMPLOYEE, THERE IS NEVERTHELESS A DIRECT RELATIONSHIP IN THAT THE SUBJECT MATTER SOUGHT TO BE ELICITED IN THE TESTIMONY AROSE WHILE HE WAS PERFORMING OFFICIAL BUSINESS.

IN SUM, IF MR. TONER SHOULD REFUSE TO TESTIFY BASED ON A REQUEST FROM THE DIRECTOR OF THE FMCS AND ON THE FMCS REGULATIONS, AND IF THE COURT THEN FINDS MR. TONER IN CONTEMPT OF COURT AND LEVIES A FINE AGAINST HIM, THE CIRCUMSTANCES OF THIS CASE WOULD SUPPORT AN ADMINISTRATIVE DETERMINATION THAT THE FINE WAS NECESSARILY INCURRED IN CONNECTION WITH THE ACCOMPLISHMENT OF OFFICIAL BUSINESS (ALTHOUGH AS NOTED ABOVE, NOT IN THE DIRECT PERFORMANCE OF THAT BUSINESS). ACCORDINGLY, THE FMCS, UPON MAKING THE REQUIRED ADMINISTRATIVE DETERMINATION, WOULD BE AUTHORIZED TO REIMBURSE THE AMOUNT OF THE FINE.