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B-217954, Jul 30, 1985

Number: B-217954

Date: 1985-07-30

B-217954, JUL 30, 1985

GENERAL ACCOUNTING OFFICE - DECISIONS - PENDING COURT, QUASI JUDICIAL, APPELLATE BOARD, ETC. ACTION DIGEST: SINCE THE QUESTION OF THE AUTHORITY OF THE AGENCY FOR INTERNATIONAL DEVELOPMENT (AID) TO INCLUDE A PROVISION IN ITS GRANT AGREEMENTS THAT WOULD PROHIBIT FOREIGN PRIVATE FAMILY PLANNING ORGANIZATIONS FROM BEING ELIGIBLE TO RECEIVE SUBGRANTS OF AID FUNDS IF THEY EITHER PERFORM OR PROMOTE ABORTIONS WITH FUNDS DERIVED FROM ANY SOURCE IS NOW BEFORE THE COURTS, OUR OFFICE CANNOT ANSWER THAT QUESTION. HOWEVER, IT HAS BEEN OUR POSITION IN OTHER CASES THAT POTENTIAL GRANTEES THAT ARE OTHERWISE ELIGIBLE FOR FEDERAL ASSISTANCE SHOULD NOT BE DECLARED INELIGIBLE FOR ENGAGING IN LAWFUL ACTIVITIES USING NON-FEDERAL FUNDS.

THE HONORABLE CHARLES WILSON: HOUSE OF REPRESENTATIVE

THIS IS IN RESPONSE TO YOUR LETTER OF MARCH 22, 1985, REQUESTING OUR OFFICE TO ANSWER TWO QUESTIONS RELATING TO "COOPERATIVE AGREEMENT GUIDELINES" THE AGENCY FOR INTERNATIONAL DEVELOPMENT (AID) IS PROPOSING TO IMPLEMENT IN CONNECTION WITH AID'S FAMILY PLANNING ASSISTANCE PROGRAM. THE "GUIDELINES" ARE ACTUALLY A DRAFT CLAUSE WHICH AID IS CONSIDERING FOR INSERTION IN ITS GRANTS AND COOPERATIVE AGREEMENTS.

YOUR LETTER EXPRESSES CONCERN THAT THESE CLAUSES "PROHIBIT FOREIGN PRIVATE FAMILY PLANNING ORGANIZATIONS FROM RECEIVING EITHER PRIVATE OR AID FUNDS IF THESE ORGANIZATIONS EITHER PERFORM OR PROMOTE ABORTIONS, EVEN IF SUCH ACTIVITIES ARE APPROVED BY THE HOST GOVERNMENT." YOU ALSO QUESTION AID'S AUTHORITY "TO PLACE SUCH ADMINISTRATIVE AND FINANCIAL RESTRICTIONS ON U.S.-BASED FAMILY PLANNING ORGANIZATIONS," WHICH MIGHT THEN BE HELD LIABLE FOR THE ACTIVITIES OF THEIR "SUB-GRANTEES AND SUB SUB-GRANTEES EVEN IF THE ACTIVITIES OF THESE FOREIGN-BASED AGENCIES ARE FULLY FUNDED FROM NON-AID SOURCES ***."

THE SPECIFIC QUESTIONS YOU ASKED US TO ADDRESS ARE AS FOLLOWS:

"1) WHETHER THE GUIDELINES ARE CONTRARY TO THE LEGISLATIVE INTENT OF CONGRESS UNDER THE FOREIGN ASSISTANCE ACT AND ARE THUS OUTSIDE THE SCOPE OF AID'S REGULATORY AUTHORITY. ***

"2) WHETHER THE ADMINISTRATIVE AND FINANCIAL REQUIREMENTS IMPOSED UNDER THE GUIDELINES CAN BE IMPLEMENTED BY FAMILY PLANNING ORGANIZATIONS SO AS NOT TO VIOLATE THE LAWS OF THE COUNTRIES IN WHICH THEIR RESPECTIVE SUB- GRANTEES AND SUB-SUB-GRANTEES ACTIVITIES ARE BASED."

IN ACCORDANCE WITH OUR USUAL PROCEDURES WHEN QUESTIONS ARE RAISED AS TO AN

AGENCY'S AUTHORITY TO UNDERTAKE A PARTICULAR ACTION, WE REQUESTED AID TO FURNISH US WITH A REPORT EXPLAINING THE LEGAL BASIS FOR ITS POSITION. WE HAVE ENCLOSED A COPY OF AID'S RESPONSE, DATED JUNE 13, 1985.

WHILE WE WERE AWAITING AID'S REPORT, A SUIT WAS FILED ON MAY 22, 1985, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, CHALLENGING WHAT DESCRIBED AS AID'S NEW POLICY OF RENDERING "INELIGIBLE FOR U.S. POPULATION ASSISTANCE FUNDS ANY FOREIGN NONGOVERNMENTAL ORGANIZATION THAT, IN PROGRAMS UNRELATED TO AID AND WITH FUNDS OTHER THAN THOSE APPROPRIATED BY CONGRESS, ENGAGES IN CERTAIN ACTIVITIES RELATING TO VOLUNTARY ABORTION ***." THE THREE PLAINTIFFS IN THAT SUIT - DKT MEMORIAL FUND LTD., A NONPROFIT ORGANIZATION INCORPORATED IN NEW YORK STATE, PARIVAR SEVA SANSTHA, A NON-PROFIT NONGOVERNMENTAL SOCIETY BASED IN INDIA, AND POPULATION SERVICES FAMILY PLANNING PROGRAMMES LTD., A NONPROFIT CHARITY REGISTERED IN THE UNITED KINGDOM-- "ARE SEEKING AN ORDER ENJOINING AID FROM IMPLEMENTING THE POLICY AND PROHIBITING DEFENDANTS FROM CONSIDERING PLAINTIFFS INELIGIBLE FOR U.S. POPULATION ASSISTANCE BASED ON THE POLICY." THE PLAINTIFFS ALSO SEEK A DECLARATORY JUDGMENT THAT "AID'S POLICY IS INCONSISTENT WITH, AND IN EXCESS OF THE FOREIGN ASSISTANCE ACT OF 1961 AND THE CONTINUING APPROPRIATIONS ACT, 1985 ***." /1/

IT IS CLEAR THAT THE BASIC ISSUE YOU HAVE ASKED US TO CONSIDER IS PRECISELY THE SAME QUESTION THAT IS NOW BEFORE THE DISTRICT COURT. IT IS THE LONGSTANDING POLICY OF OUR OFFICE TO REFRAIN FROM COMMENTING ON MATTERS THAT ARE THE SUBJECT OF ONGOING LITIGATION. SEE 63 COMP.GEN. 98, 99 (1983) AND 58 COMP.GEN. 282, 286 (1979). ONCE A COMPLAINT HAS BEEN FILED, WE BELIEVE THAT THE APPROPRIATE FORUM FOR RESOLVING THE MATTER IS THE COURT THAT HAS ACTUAL JURISDICTION OVER THE DISPUTE. ACCORDINGLY, WE MUST ADVISE YOU THAT WE ARE NOT NOW IN A POSITION TO ANSWER THE SPECIFIC QUESTIONS YOU SUBMITTED TO US.

NEVERTHELESS, WE DO HAVE SOME GENERAL COMMENTS AND OBSERVATIONS REGARDING THIS MATTER THAT MIGHT BE OF SOME HELP TO YOU. FIRST, AS THE ENCLOSED LETTER INDICATES, AID MAINTAINS THAT IT HAS NOT YET ADOPTED FINAL GUIDELINES CONCERNING ITS FAMILY PLANNING ASSISTANCE POLICY. AID STATES THAT THE PRECISE WORDING OF THE CLAUSE THAT IT WOULD USE TO IMPLEMENT THAT POLICY IS SUBJECT TO NEGOTIATION BETWEEN AID AND INDIVIDUAL FAMILY PLANNING ORGANIZATIONS. WHILE WE HAVE NO REASON TO DISPUTE AID'S CONTENTION IN THIS RESPECT, IT IS OUR UNDERSTANDING, BASED ON INFORMAL DISCUSSIONS WITH AID'S REPRESENTATIVES, THAT AID WOULD NOT ACCEPT ANY MODIFICATION OF THE PROPOSED CLAUSE THAT WOULD SUBSTANTIVELY DEVIATE FROM ITS ANNOUNCED POLICY.

SECOND, WITH RESPECT TO THAT POLICY, YOUR LETTER SUGGESTS THAT THE PROPOSED GUIDELINES COULD BE INTERPRETED AS RESTRICTING THE RIGHT OF UNITED STATES NONGOVERNMENTAL ORGANIZATIONS (USNGOS) THAT RECEIVE MONEY FROM AID FROM USING NON-AID MONEYS TO PROVIDE ASSISTANCE TO FOREIGN ORGANIZATIONS THAT PERFORM OR ACTIVELY PROMOTE ABORTIONS. AID MAINTAINS THAT THE PROPOSED LANGUAGE COULD NOT HAVE THAT EFFECT. INSTEAD, IT IS AID'S POSITION THAT UNDER THE NEW POLICY, "USNGO'S WOULD NOT BE PERMITTED TO MAKE SUBGRANTS OF AID FUNDS TO FOREIGN NONGOVERNMENTAL ORGANIZATIONS THAT PERFORM OR ACTIVELY PROMOTE ABORTION AS A METHOD OF FAMILY PLANNING IN OTHER NATIONS WITH FUNDS DERIVED FROM ANY SOURCE." BASED ON THE LANGUAGE CONTAINED IN THE PROPOSED CLAUSES YOU SUBMITTED TO US FOR OUR REVIEW, WE WOULD BE INCLINED TO AGREE WITH AID AS TO THE LEGAL IMPACT OF THE LANGUAGE IN QUESTION.

THIRD, WE NOTE THAT YOUR LETTER SUGGEST THAT THE PROPOSED GUIDELINES REPRESENT AN IMPROPER ATTEMPT BY AID TO IMPLEMENT THE SO-CALLED "HELMS AMENDMENT," SECTION

104(F)(1) OF THE FOREIGN ASSISTANCE ACT OF 1961, AS AMENDED, 22 U.S.C. SEC. 2151B(F)(1). THAT PROVISION READS AS FOLLOWS:

"NONE OF THE FUNDS MADE AVAILABLE TO CARRY OUT THIS SUBCHAPTER MAY BE USED TO PAY FOR THE PERFORMANCE OF ABORTIONS AS A METHOD OF FAMILY PLANNING OR TO MOTIVATE OR COERCE ANY PERSON TO PRACTICE ABORTIONS."

IN ITS LETTER TO US REGARDING THIS MATTER, HOWEVER, AID STATES THAT THE ELIGIBILITY RESTRICTIONS IT IS PROPOSING TO IMPOSE ON FOREIGN NONGOVERNMENTAL ORGANIZATIONS THAT SUPPORT ABORTION ARE NOT BASED ON 22 U.S.C. SEC. 2151B(F)(1). AID MAINTAINS THAT WHILE IT WOULD NOT BE FREE TO IMPLEMENT THE LAW IN A LESS RESTRICTIVE MANNER THAN THE "HELMS AMENDMENT" ENVISIONS, THERE IS NOTHING TO PREVENT IT FROM IMPOSING MORE RESTRICTIVE REQUIREMENTS. AID CLAIMS THAT ITS AUTHORITY TO IMPOSE THOSE RESTRICTIONS IS DERIVED FROM PRESIDENT'S RESPONSIBILITY TO CONDUCT FOREIGN AFFAIRS AND HIS BROAD STATUTORY DISCRETION UNDER 22 U.S.C. SEC. 2151B(B), "TO FURNISH ASSISTANCE ON SUCH TERMS AND CONDITIONS AS HE MAY DETERMINE FOR VOLUNTARY POPULATION PLANNING." WHETHER AID'S POSITION IN THIS RESPECT IS JUSTIFIED WILL PRESUMABLY BE DETERMINED BY THE DISTRICT COURT THAT IS NOW CONSIDERING THE MATTER.

WE HAVE ENCLOSED FOR YOUR INFORMATION A COPY OF OUR STATEMENT ON MARCH 1, 1983, BEFORE THE SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY OF THE HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, WHICH MAY BE RELEVANT TO AID'S PROPOSED ACTION HERE. THE STATEMENT MAKES THE POINT IN THE CONTEXT OF LOBBYING ACTIVITIES BY GRANTEES THAT POTENTIAL GRANTEES, OTHERWISE ELIGIBLE FOR FEDERAL ASSISTANCE, SHOULD NOT BE DECLARED INELIGIBLE BECAUSE THEY ENGAGE IN LAWFUL ACTIVITIES WHICH MAY BE CONTRARY TO CURRENT ADMINISTRATION POLICIES, AS LONG AS SUCH ACTIVITIES ARE FUNDED ENTIRELY BY NONGOVERNMENTAL RESOURCES.

ALSO WORTH NOTING IS A REPORT WE ISSUED ON SEPTEMBER 24, 1982 (GAO/HRD-82 -106), CONCERNING THE FAMILY PLANNING PROGRAM AUTHORIZED BY TITLE X OF THE PUBLIC HEALTH SERVICE ACT. THE ISSUE WAS WHETHER CERTAIN PLANNED PARENTHOOD CLINICS, WHICH CAREFULLY SEPARATED ABORTION RELATED ACTIVITIES, FUNDED STRICTLY FROM PRIVATE SOURCES, FROM THEIR OTHER ACTIVITIES FUNDED BY TITLE X GRANT FUNDS ON THEIR BOOKS OF ACCOUNT SHOULD NEVERTHELESS BE DECLARED INELIGIBLE FOR GRANT ASSISTANCE. THE REPORT STATES THAT:

"EVEN IF THE ABORTION-RELATED RECOMMENDATION TO THE SECRETARY (THAT HHS OPERATIONAL GUIDANCE BE CLARIFIED) IS IMPLEMENTED, TITLE X RECIPIENTS WOULD STILL BE ALLOWED TO CARRY OUT ABORTION ACTIVITIES-- NOT WITH TITLE X FUNDS, BUT AS PART OF THEIR OVERALL ACTIVITIES-- BY ORGANIZATIONALLY SEPARATING THE FAMILY PLANNING PROGRAM FROM THESE ACTIVITIES."

WE HOPE THAT THE FOREGOING INFORMATION WILL BE HELPFUL TO YOU. WE WILL MAKE THIS LETTER GENERALLY AVAILABLE IN 30 DAYS UNLESS YOUR OFFICE AGREES TO AN EARLIER RELEASE DATE.