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B-22494 January 10, 1942

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Director of Selective Service, Selective Service System.

My Dear General Hershey:

There has been considered your letter of December 5, 1941 (your reference 9-12.5-75), as follows:

"Dr. Edward Y. Ussell, the examining physician for a local board in Camden, New Jersey, while attempting to examine a registrant's ear found it to be full of wax and proceeded to wash it out so that he could complete his examination, but because the registrant complained of pain the removal of wax was not completed. Dr. Ussell is now being sued for damages allegedly resulting from this attempted examination and his defense is being handled by attorneys provided by the insurance company with which he is insured.

"Many examining physicians for the various local boards are watching the progress of this case which to them is a test case representing the type and extent of assistance that might reasonably be expected from the Selective Service System in the event that similar cases should arise. It is provided in the Selective Service Regulations that all persons appointed as local board examining physicians shall serve without compensation. For this reason, it is extremely necessary to cultivate the goodwill of such persons in every practicable manner or else run the risk of losing the benefits of their voluntary services. The resignation and resulting difficulty of replacement of many examining physicians is anticipated if the Selective Service System does not provide such reasonable assistance as is requested in this and similar cases.

"In view of the above, your decision is requested as to the following questions:

"(1) Are funds appropriated for the operation and maintenance of the Selective Service System available for the payment of such expenses in the assistance of the defense as might be considered necessary by the Director of Selective Service, including expenses incurred for the transportation of or fees payable to expert witnesses?

"(2) May persons not otherwise connected with the Selective Service System, and who receive no other compensation from the United States, who agree to appear in the defense of an action arising as above, be considered as persons serving in advisory capacity to the Director of Selective Service for whom actual transportation expenses and to whom not to exceed $10.00 per diem in lieu of

subsistence and other expenses would be payable?"

Paragraphs 512 and 513 of the Selective Service Regulations, so far as here pertinent, provide:

"512. Voluntary services.--Voluntary services in the administration of the selective service law may be accepted and should be encouraged. Persons performing voluntary services, having been appointed or designated, according to law and these Regulations, shall sign a Waiver Of Pay (DSS Form 257) and shall be considered to be persons engaged in the administration of the selective service system.

"513. Uncompensated services.--The services of the following persons engaged in the administration of the selective service system shall be uncompensated by the selective service system. Each shall sign a waiver of pay (par. 512).

"Examining physicians."

The suit against Dr. Ussell apparently was filed on the basis that the registrant sustained injury as a result of improper or negligent conduct on the part of said physicians in conducting the examination. The interest or concern of the United States with respect to this suit appears to arise from the fact that the injury complained of is said to have been sustained while the physician was acting for and on the behalf of the United States as a person "engaged in the administration of the Selective Service System." Although, the services of examining physicians are rendered without compensation, it may be conceded, for present purposes, that Dr. Ussell in examining registrants acts as an officer or agent of the United States. See 21 Comp. Gen. 377, 380-81.

In an opinion of the Attorney General reported in 9 Op. Atty. Gen. 51, it is stated:

"When an officer of the United States is sued for doing what he was required to do by law, or by the special orders of the Government, he ought to be defended by the Government. This is required by the plain principles of justice as well as by sound policy. No man of common prudence would enter the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits, which he must carry on at his own expense. For this reason it has been the uniform practice of the Federal Government, ever since its foundation, to take upon itself the defense of its officers who are sued or prosecuted for executing its laws."

Also, see 6 Comp. Gen. 214, and cases there cited.

However, it does not follow that such services may be furnished directly by your agency and paid for from funds appropriated for "Operation and Maintenance of the Selective Service System." Sections 306, 310, 312, 313, 314, and 316 of Title 5, United States Code, provide:

"Sec. 306.***The officers of the Department of Justice, under the direction of the Attorney General, shall give all opinions and render all services requiring the skill of persons learned in the law necessary to enable the President and heads of departments, and the heads of bureaus and other officers in the departments, to discharge their respective duties; and shall, on behalf of the United States, procure the proper evidence for, and conduct, prosecute, or

defend all suits and proceedings in the Supreme Court and in the Court of Claims, in which the United States, or any offices shall be allowed or paid to any other attorney or counselor at law for any service herein required of the officers of the Department of Justice, except in the cases provided by section 312 of this title.***"

"Sec. 310. ***The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought.***"

"Sec. 312. ***The Attorney General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings.***

"Sec. 313. ***Whenever the head of a department or bureau giv3es the Attorney General due notice that the interests of the United States require the service of counsel upon the examination of witnesses touching any claim, or upon the legal investigation of any claim, pending in such department or bureau, the Attorney General shall provide for such service.***

"Sec. 314. ***No compensation shall be allowed to any person, besides the respective district attorneys and assistant district attorneys for services as an attorney or counselor to the United States, or to any branch or department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney General that such services were actually rendered, and that the same could not be performed by the Attorney General, or Solicitor General, or the officers of the Department of Justice, or by the district attorneys.***"

"Sec. 316. ***The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.***"

In the case of Perry v. United States, 28 Ct. Cls. 483, 491, the court, after quoting several of the above statutes, stated:

"These provisions are too comprehensive and too specific to leave any doubt that Congress intend to gather into the Department of Justice, under the supervision and control of the Attorney General, all the litigation and all the law business in which the United States are interested ***and to break up the practice of frequently employing unofficial attorneys in the public service. ***"

Attention is invited, also, to the case of Eslick v. United States, 51 Ct. Cls. 266. In that case, an attorney, Mr. Eslick, was employed by order of the Secretary of the Interior to perform certain legal services in connection with suits to be filed in the name of the United States on behalf of the Creek Tribe

of Indians. The employment was pursuant to the terms of a statute (34 Stat. 144) by which the Secretary of the Interior was authorized to bring suits in the name of the United States for the use of certain Indian tribes and "to pay from the funds of the tribe interested any costs and necessary expenses insured in maintaining and prosecuting such suits." A controversy arose respecting certain salary payments said to be due to Mr. Eslick, with the result that suit was filed against the United States for the amount claimed. In its opinion, the court recognized that "The employment was by the Secretary of the Interior", that the Secretary of the Interior might "have directed the payment of the amount which we believe to be legitimately due to Mr. Eslick's estate, out of Creek tribal funds", and that "if a judgment in this case should be rendered against the United States the United States might be reimbursed out of the tribal funds and the transaction in the Department of the Interior would become nothing more than a mere matter of bookkeeping." Nevertheless, the court ruled that the legislation in question did not authorize the Secretary of the Interior to bind the United States for the payment from public funds of compensation to attorneys, and stated:

"The legislation which gave to the Secretary of the Interior his powers in these matters authorized the bringing of suits in the name of the United States for the use of the tribes named, conferred jurisdiction on the United States courts in the Indian Territory, and authorized the payment of any necessary expenses out of the funds of the tribe interested. It did not authorize, or assume to authorize, or inferentially authorize, the Secretary of the Interior to enter into any contracts of employment with attorneys on behalf of and to be paid by the United States, and it is our opinion that the Secretary of the Interior had no power to make any such contract.

" ***It would seem, in the first instance, that the duty to prosecute these suits was by statute placed upon the United States district attorneys, for section 1771 /771/, Revised Statutes, makes it the duty of district attorneys, among other things, to prosecute 'all civil actions in which the United States are concerned.'

"In this connection it is material to observe that the employment of attorneys on behalf of the United States is a power which has been vested in the Attorney General and which may not be otherwise exercised except when specifically authorized. ***"

(The court then quoted sections 363 and 365 of the Revised Statutes, 5 U.S.C. 312 and 314).

So far as is known, there is nothing in the terms of existing law which authorizes employment by your agency of attorneys for the purpose of providing legal services of the character outlined in your letter. Accordingly, the proper procedure in this case would appear to be for your agency to bring this matter to the attention of the Attorney General and request that he furnish such legal services, etc., as are considered necessary in the public interest. Of course, any costs incident to the furnishing of such services, including expenses of expert witnesses, etc., would be for payment from funds provided by the Congress for such purpose rather than from the appropriation "Operation and Maintenance of the Selective Service System." In this connection, see the Judiciary Appropriation Act, 1942, Public Law 135, 77th Congress, pages 40-42.

Respectfully,

Lindsay C. Warren Comptroller General of the United States.