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APPROPRIATIONS/FINANCIAL MANAGEMENT - Judgement Payments - Permanent/indefinite appropriation - Availability Burson v. Marine Corps Finance Center, Z-2898261 (B-239556): DIGESTS: 1. Consistent with 44 Comp.Gen. 312 (1964), in order to avoid defeating the purposes to be served by such awards, payment may not be made from the Judgment Fund, 31 U.S.C. Sec. 1304 (1988), for (a) criminal contempt fines intended to punish defiance of the courts and vindicate their authority, or (b) civil contempt fines intended to compel future compliance with court orders. However, payment from that fund is not precluded for (c) civil contempt awards intended to compensate plaintiffs for losses arising from defendants' failure to comply with court orders. APPROPRIATIONS/FINANCIAL MANAGEMENT - Judgement Payments - Attorney fees 2. The Judgment Fund, 31 U.S.C. Sec. 1304 (1988), may be used to pay judicial awards of attorney fees and costs in civil contempt proceedings because these awards, unlike those which were the subject of 44 Comp.Gen. 312, 314 (1964), are compensative in nature, and payment from that fund would not defeat the court's purposes in making such awards.

This responds to your request for advice on whether to certify payment from the Judgment Fund, 31 U.S.C. Sec. 1304 (1988), of attorney fees and costs awarded in the captioned case. The facts of the case are relatively simple: The government was attempting to collect a debt that had been discharged in bankruptcy proceedings. Since the government had been duly notified of this fact, the bankruptcy court found the government in "civil contempt," and assessed attorney fees and court costs in the amount of $2,500 against the government. No other amount was awarded by the court.

In submitting this case for our consideration, you asked whether, in view of the court's finding of "civil contempt," the award of attorney fees and costs was "tantamount to a fine," and therefore precluded from payment from the Judgment Fund pursuant to 44 Comp.Gen. 312 (1964). As explained below, we find that awards of attorney fees and costs in conjunction with civil contempt findings do not fall within the scope of the rule of 44 Comp.Gen. 312, and may be certified for payment from the Judgment Fund.

Discussion

The decision in 44 Comp.Gen. 312 concerned an FBI agent who, pursuant to agency regulations and specific directions from the Attorney General, refused to testify in court on certain subjects. The agent was found in criminal contempt and assessed a "fine." We advised the Justice Department that the government can, in appropriate circumstances, reimburse employees for such fines. However, we also ruled that the agency's appropriations, rather than the Judgment Fund,

would have to be used for that purpose. Our discussion of this latter issue was brief:

"With reference to the source of funds that may be used in payment of the fine, we wish to point out that while a fine imposed for a contempt of court is a judgment of the court, a fine in its nature, principle, and purpose is a very different thing from the judgments the payment of which the Congress had in view in enacting 31 U.S.C. Sec. 1304. Consequently, we do not believe the use of the Judgment Fund for payment of the contempt fine is proper." /1/

According to our research, the decision in 44 Comp.Gen. 312 represents the only time, either before or since it was rendered, that GAO has formally considered this issue. /2/ The decision tells us that the "contempt fine" under consideration there was not payable from the Judgment Fund because it differed fundamentally from the kinds of judgments that Congress had in mind when it set up the Judgment Fund. Although it went unspoken in the decision, the true nature of this difference seems clear: All criminal contempt fines and some civil contempt fines are awarded based, not upon the merits of a claim for money, but rather upon the failure of the penalized party to honor and obey the court's orders.

The Supreme Court has held that "sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court." /3/ The Court explained that "the interests of orderly government demand that respect and compliance be given to the orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril." /4/ The Court has also held that judicial sanctions in civil contempt proceedings may be employed:

"for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained. ... Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon the evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.

"But where the purpose is to make the defendant comply, the court ... must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." /5/

Obviously, where a pecuniary award is intended to punish improper behavior and assure that it does not recur in the future, those purposes would be frustrated if the defendant were allowed to simply pass the burden of the award on to someone else. /6/ In our view, this was the point of the distinction made in 44 Comp.Gen. 312. We recognize, of course, that the premise that such awards can have a significant effect upon the behavior of agencies (as opposed to individual persons) may be questioned on the bases that the agency's managers will not usually bear personal liability for or suffer other disciplinary action on account of those awards, and that it will be the taxpayers who will usually pay for such awards. Nevertheless, where the purposes of an award are primarily to punish defiance of the courts and deter similar behavior in the future, such an award would possibly have little effect upon an agency's behavior if the agency could simply resort to the Judgment Fund. At least where the agency is required to pay such awards from its own appropriations, its managers may be

required to account, both internally and to Congress, for their actions and for any resulting deficiencies in the agency's funding or program implementation. /7/

Consequently, it is our view that, under 44 Comp.Gen. 312, where a contempt award is intended to punish the agency, as is the case with criminal contempt fines, the Judgment Fund is not available to pay it. The same would be true for civil contempt awards which are intended to compel obedience to the court. However, assuming that the award is "not otherwise provided for" and meets all other applicable criteria, /8/ the Judgment Fund would be legally available for those contempt awards which merely provide compensation to the complainant. Under this circumstance, the general rule, to the effect that agency appropriations may not be used to pay monetary judgments, must be followed and the Judgment Fund must be used. /9/

Applying this analysis to the present case leads us to conclude that the prohibition established in 44 Comp.Gen. 312 does not apply to the present case. Since the awards at issue here, attorney fees and costs, are primarily compensative in nature, /10/ they may be paid from the Judgment Fund. Compare in this regard, the treatment accorded awards of attorney fees under the Equal Access to Justice Act, 28 U.S.C. Sec. 2412(b) (usually payable from the Judgment Fund) and Sec. 2412(d) (payable from the agency's appropriations where the court is unable to conclude that the government's position was (a) "substantially justified" or (b) that the award is not "unjust"). Of course, as your memorandum implies, it may be argued that awards of costs and attorney fees can have a punitive or coercive effect because no one wants to incur such assessments. However, the same can be said of any award made by a court. In our view, application of the rule in 44 Comp.Gen. 312 in that fashion would be untenable.

Conclusions

The rule established in 44 Comp.Gen.312 with respect to the availability of the Judgment Fund for payment of contempt fines does not apply to awards of costs and attorney fees resulting from civil contempt proceedings. Claims Group may certify payment from the Judgment Fund of the attorney fees and court costs awarded in the captioned case.

The cognizant Assistant United States Attorney, Mr. Robert Plaxico (619-293-5610), has asked that GAO expedite its processing of this matter. Please let us know if there is any reason why this cannot be done. course, if you have any further questions about this, please feel free to call Mr. Neill Martin-Rolsky or myself at 275-5644.

/1/ 44 Comp Gen. at 314. The citations omitted from the quotation consisted of two state court decisions and an excerpt from Words and Phrases-- each of which defined or discussed, with varying degrees of specificity, criminal contempt and "fines."

/2/ Your submission referred to a memorandum of February 21, 1986, from Jeremy Hutton which advised your office (with respect to Z 2872885) to certify payment from the Judgment Fund of a bankruptcy court's award of attorney fees and costs because the court did not assess a "fine" or explicitly find the government in "contempt." That case is distinguishable on the ground that the award was made, not under civil contempt, but rather, pursuant to 11 U.S.C. Sec. 362(h), which provides for "actual damages, including costs and attorneys' fees, and ...

punitive damages" upon violation of the "automatic stay" provisions of the Bankruptcy Code.

We are also aware of two other memoranda-- B-217990.37-O.M., June 15, 1988, and B-217990.34-O.M., Apr. 5, 1988-- which Claims has been citing for the proposition that the Judgment Fund may not be used to pay civil penalties or other judicially-imposed, punitive sanctions because the purposes of those sanctions would not be served if agencies could avoid their effects by resort to the Judgment Fund. While that view is consistent with the position taken in this memorandum, the case law cited in them does not support their results; consequently, you should cite this memorandum in the future.

/3/ United States v. UMWA, 330 U.S. 258, 302 (1947).

/4/ UMWA, 330 U.S. at 303.

/5/ UMWA, 330 U.S. at 303-304.

/6/ Cf. B-128843, Aug. 30, 1956; 56 Comp.Gen. 615, 620 (1977).

Cf. 56 Comp.Gen. 615, 620 (1977) (suggesting that, but for the fact that 26 U.S.C. Sec. 7423(2) authorizes the Treasury Department to reimburse "all damages and costs" awarded against its employees for actions taken in the performance of their official duties, reimbursement of punitive awards from Treasury's appropriations would be disallowed because "the punitive and deterrent values of the damages would be frustrated").

/7/ Cf. 56 Comp.Gen. at 620-621.

/8/ See 31 U.S.C. Sec. 1304.

/9/ E.g., 63 Comp.Gen. 470, 473 (1984).

/10/ Cf., e.g., In re Wagner, 74 Bankr. 898, 902 (E.D. Pa. 1987) (for civil contempt, a court can "1 impose a fine or in terrorem damages in order to coerce compliance with its orders; it may also 2 award damages to compensate the aggrieved party for any actual loss incurred, as well as attorney's fees and costs.").