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B-242891, Sep 13, 1991

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DIGEST: Department of the Army appropriations may not be used to pay attorneys' fees incurred by three civilian employees as defendants in a federal criminal proceeding that was prosecuted by the Department of Justice. these circumstances, it is not in the government's interest to provide representation at government expense since the attorneys' fees for which reimbursement is sought merely advanced the personal interest of the three employees rather than that of the government.

William C. Dee, Robert E. Lentz and Carl E. Gepp - Requests for Payment of Attorneys' Fees:

A Finance and Accounting Officer, Department of the Army (Army), U.S. Army Armament, Munitions and Chemical Command, Picatinny Arsenal, New Jersey, has requested an advance decision pursuant to 31 U.S.C. Sec. 3529 (1988) on the propriety of paying attorneys' fees for Messrs. William C. Dee, Robert E. Lentz and Carl E. Gepp, civilian employees of the U.S. Army Chemical Research, Development and Engineering Center (CRDEC), a tenant organization at the Aberdeen Proving Ground (APG), Maryland. Each employee incurred exactly $108,000 in legal expenses as the result of their indictment by a federal grand jury for the District of Maryland on five counts pertaining to the violation of the criminal provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. Sec.6901 et seq., and trial in the U.S. District Court for the District of Maryland. /1/

For reasons set forth below, we conclude that Army appropriations may not be used for payment of the attorneys' fees.

BACKGROUND

From June 1983 to August 1984, the period of time covered by the indictments, Messrs. Dee, Lentz, and Gepp, chemical engineers, were involved in the development of chemical warfare systems at the CRDEC. Mr. Gepp was responsible for operations and maintenance of a facility known as the Pilot Plant. /2/ Messrs. Dee and Lentz were Mr. Gepp's superiors. Counts One through Three charged the three employees with violating RCRA by illegally storing, treating and disposing of hazardous wastes at the Pilot Plant, i.e., without a RCRA permit. Count Four alleged violations of RCRA at another facility, the "Old Pilot Plant", a separate building complex that was closed in 1978. Count Five alleged that the defendants negligently discharged sulfuric acid into navigable waters without a permit in violation of the Clean Water Act, 33 U.S.C. Sec. 1251 et seq.

Messrs. Dee, Lentz, and Gepp requested, but were denied, representation by the Department of Justice. Mr. Dee was convicted of one count, and Messrs. Lentz and Gepp were convicted of three counts pertaining to the storage and/or disposal of hazardous waste.

On appeal, the Court of Appeals for the Fourth Circuit affirmed the District Court's decision. United States v. Dee, 912 F.2d 741 (4th Cir. 1990), cert. denied, 111 S. Ct. 1307 (1991). The court found that the defendants "knowingly" violated the criminal provisions of RCRA, and also found no merit in the defendants' contention that they were immune from the criminal provisions of RCRA because of their status as federal employees working at a federal facility. In this regard, the court stated that "even where certain federal officers enjoy a degree of immunity for a particular sphere of official actions, there is no general immunity from criminal prosecution for actions taken while serving their office." Id. at 744.

The court pointed out that both APG and CRDEC, during the times relevant to the indictment, had procedures governing the management and disposal of hazardous wastes. APG had an umbrella RCRA permit for management of hazardous waste materials at the Proving Ground. Under the permit, three separate areas at APG were designated for storage of hazardous wastes. However, the permit did not allow storage, treatment or disposal of hazardous wastes at the Pilot Plant or the Old Pilot Plant. APG Regulation No. 200-2 (1 May 1982), which established policies and procedures for management and disposal of solid and hazardous waste materials at the Proving Ground, required compliance with all federal, state, interstate and local regulations, and specifically referenced the RCRA statute and implementing regulations. APG 200-2 listed, in detail, all chemicals that were likely to be hazardous and required tenant organizations, such as CRDEC, to identify and store those materials in the permitted storage areas.

CRDEC's standard operating procedure, SOP 710-1 (7 Sept. 1982), also required identification of all RCRA wastes and compliance with APG 200 2. As heads of their respective departments, the court stated, the three employees were responsible for the implementation of the provisions of APG 200-2 and SOP 710-1. Id. Additionally, the court noted that "criminal conduct is not part of the necessary functions performed by public officials." Id.

Notwithstanding the Court of Appeals' affirmation of the District Court's decision, the three employees claim that the Army should reimburse them for their attorneys' fees because the acts for which they were indicted and convicted were either within the scope of their employment or were incident to the proper performance of their duties. The claim was forwarded to our Office for consideration.

DISCUSSION

The hiring of an attorney is a matter between the attorney and the client, and absent express statutory authority, an agency may not use its appropriations to reimburse the attorney's fees. 55 Comp.Gen. 1418, 1419 (1976). However, in those instances where an officer or employee of the United States is sued in his individual capacity for something he did (or failed to do) while performing his official duties, and the interest of the United States in advocating the legality of its employee's actions or inaction coincides with the employee's interest, the United States may bear the expense of defending that suit. See 58 Comp.Gen. 613, 615 (1979); 6 Comp.Gen. 214, 215 (1926).

Except as otherwise authorized, federal law reserves the conduct of litigation to the Department of Justice (Justice) where the United States, an agency, or an officer or employee of an agency is either a party or has an interest in the litigation. 28 U.S.C. Sec. 516 (1988). Agencies, other than Justice, are therefore generally precluded from using appropriations to hire attorneys to represent employees. 5 U.S.C. Sec. 3106. When a present or former employee is sued for actions performed as part of his official duties, Justice provides for the defense of the employee when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's duties and Justice determines that providing representation would be in the government's interest. 28 C.F.R. Sec. 50.15a (1990). Representation, however, generally is not available in federal criminal proceedings. C.F.R. Sec. 50.15(a)(4).

In limited circumstances, where Justice determines that representation is appropriate but is unable to provide representation, the employee's agency's appropriations may be available to pay private attorney's fees to defend the employee. 55 Comp.Gen. 408, 412-413 (1975). In these circumstances, reimbursement for private attorney's fees is limited to fees incurred for legal work that is determined to be in the interest of the United States. 28 C.F.R. Sec. 50.16(d)(1).

In this case, the Army Office of the Judge Advocate General (JAG) requested Justice representation for the three employees soon after the indictments were handed down by the federal grand jury. The Army JAG also requested, in the alternative, permission from Justice to use Army funds to pay the employees' legal expenses because the employees were allegedly being prosecuted in lieu of the Army. Justice, citing 28 C.F.R. Sec. 50.15(b), declined both requests, stating that it could not provide representation directly by its own attorneys or indirectly by funding private representation in federal criminal proceedings. Justice also stated that 5 U.S.C. Sec. 3106 expressly prohibits other federal agencies from retaining private counsel to conduct litigation and denied the Army's request to use its funds to provide for the defense of the three defendants in the federal criminal proceeding.

In response to our request for the Army's legal opinion on this matter, the Army Office of General Counsel (OGC) concurred in Justice's conclusion that Army funds may not be used to pay the attorneys' fees, stating that the three employees were acting outside the scope of their employment by engaging in the unpermitted storage, treatment and disposal of hazardous chemicals in violation of Army regulations and the criminal provisions of RCRA. Army OGC letter, Aug. 1, 1991.

Based upon the record submitted to us, we see no reason to disagree with the determinations of Justice and Army OGC. Upon the commencement of investigation by Justice of possible criminal violation of federal laws, the interest of the government was no longer aligned with that of the three employees. Messrs. Dee, Lentz, and Gepp were tried and convicted in a federal criminal proceeding that was prosecuted by Justice. In these circumstances, it is not in the government's interest to provide representation at government expense. 28 C.F.R. Sec. 50.15(a)(4). Since the attorneys' fees for which the three employees seek reimbursement merely advanced their personal interest rather than that of the government, Army appropriations may not be used to pay their legal expenses. 28 C.F.R. Sec. 50.16(d)(1).

/1/ RCRA provides a comprehensive scheme for regulating storage, treatment and disposal of hazardous waste, requiring that it be managed to prevent leakage, spillage, hazardous chemical reactions, and migration of toxins into the soil, water, or air. The Act creates criminal liability for persons who knowingly handle hazardous waste without a RCRA permit. 42 U.S.C. Sec. 6928(d).

/2/ The Pilot Plant complex included a four-story building, an office building, scrubbing towers and a storage area.