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B-246294, Feb 26, 1992, Office of General Counsel

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DIGEST: Agency appropriations are not available to reimburse a federal employee private legal fees and expenses related to a state criminal proceeding when the agency and the Department of Justice have determined that the employee's actions which gave rise to the proceeding were not within the scope of federal employment and that representation would not be in the interest of the United States.

Robert M. McRae, Esq.:

This responds to your August 30, 1991 request that we examine the June 11, 1991 decision made by the Forest Service, United States Department of Agriculture (Agriculture), to deny reimbursement of Mr. Gail Herrmann's legal fees. Mr. Herrmann, a former special agent employed by the Forest Service, incurred legal fees and expenses in connection with civil and criminal proceedings related to charges of sexual misconduct during his investigation of a forest fire believed to be the result of arson in the State of Nevada. As explained more fully below, we have no legal basis upon which to question Agriculture's decision.

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). Otherwise, 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)] B-242891, Sept. 13, 1991.

Except as otherwise authorized, federal law reserves the conduct of litigation to the Department of 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 (1988). 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 it determines that one, the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's duties and, two, providing representation would be in the government's interest. 28 C.F.R. Sec. 50.15 (1991).

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); B-277601, July 22, 1991. In such a case, the cost of legal representation may be considered a "necessary expense" of the agency. 67 Comp.Gen. 37 (1987). Nonetheless, payment is not a legal liability on the part of the agency, but is essentially a discretionary payment.

In this case, we see no reason to disagree with the determinations of Agriculture and Justice. Justice denied Mr. Herrmann's request for representation in the civil proceeding, questioning whether Mr. Herrmann was acting within the scope of his employment, and concluding, nevertheless, that representation would not be in the interest of the United States. Agriculture has concluded, also, that Mr. Herrmann was not acting within the scope of his employment. The record submitted to us includes, among other things, a factual finding by Agriculture's Office of the General Counsel that Mr. Herrmann "engaged in acts of sexual misconduct with a female minor" after interviewing her in connection with his investigation of a forest fire (memorandum of May 31, 1991, to Branch Chief, Fiscal Management, Fiscal and Public Safety, Forest Service, from Assistant General Counsel, Research and Operations Division regarding Gail A. Herrmann; Reimbursement of Private Attorney's Fees); information that Agriculture settled a claim based upon this incident filed by the minor's mother under the Federal Torts Claims Act; and, a judgment of a Justice Court of the State of Nevada, entered September 19, 1988, against Mr. Herrmann for contributing to the delinquency of a minor. /1/ Based upon this record, we cannot conclude that Mr. Herrmann was acting within the scope of his employment when the incident occurred. /2/ Moreover, we have no basis upon which to question Justice's and Agriculture's findings that representation was not in the interest of the United States.

If you have any additional questions concerning this matter, please call Andrea Levine of my staff at 202-275-5644.

/1/ An Agriculture Assistant General Counsel notes that this charge was filed and other charges of sexual misconduct were dismissed as a result of a plea bargain.

/2/ Many courts have held, as a matter of law, that the sexual misconduct of an employee is outside the scope of employment. See e.g. Andrews v. United States, 732 F.2d, 366, 370 (4th Cir. 1989); Gambling v. Cornish, 426 F.Supp. 1153 (N.D. Ill. 1977) (sexual assault by police officer was outrageous conduct, motivated by personal gratification, and one without intent of furthering the city's business).