Text as published on gao.gov, https://www.gao.gov/products/b-251141, archived 2026-07-10. GAO published no original file for this decision. Rendered by Comptroller Desk.

Department of Health and Human Services, Food and Drug Administration - Reimbursement of Employees for Private Attorney Fees Incurred in Federal Criminal Investigation

Number: B-251141

Date: 1993-05-03

Matter of: Department of Health and Human Services, Food and Drug Administration - Reimbursement of Employees for Private Attorney Fees Incurred in Federal Criminal Investigation File: B-251141 Date: May 3, 1993

In the absence of Department of Justice approval, agency appropriations may not be used to reimburse federal employees for private attorney fees incurred incident to a federal criminal investigation.

DECISION

The Department of Health and Human Services (HHS), Food and Drug Administration (FDA), has requested our opinion on whether agency appropriations may be used to reimburse FDA employees for private attorney fees incurred incident to a federal criminal investigation. For reasons set forth below, we conclude that, in the absence of Department of Justice (Justice) approval, HHS appropriations may not be so used. FDA should refer the employees' requests to Justice.

BACKGROUND

During the course of an investigation of a California investment firm, the Securities and Exchange Commission (SEC) found the names and business telephone numbers of several FDA employees in the firm's business records. The SEC, concerned that the employees may have engaged in insider trading, relayed this information to the HHS Office of the Inspector General and the United States Attorney for the District of Maryland. Both offices conducted separate investigations to determine whether these employees had provided confidential product approval information to the firm, and the U.S. Attorney convened a grand jury.

The employees, asserting that the investigation focused on acts that fell within the scope of their employment, requested legal representation by the HHS Office of General Counsel. A number of the employees are employed in FDA's Office of Public Affairs and were responsible for answering public inquiries about routine FDA business. They claimed that they had responded only to routine inquiries from the investment firm. The Office of General Counsel denied the requests on the ground that the criminal investigation raised potential conflicts of interest between the employees and HHS. The requests for representation were not referred to Justice. Subsequently, the employees retained private counsel.

The Inspector General found that six of the employees had improperly disclosed information, although without criminal intent. None of the employees has been

disciplined. The grand jury did not indict any of the employees. All investigations of the employees have concluded and no finding of criminal misconduct has been made.

HHS recommends reimbursement of the attorney fees, ranging from $3,000 to $6,000, because no civil or criminal charges resulted from the investigations and, as it turned out, the matters at issue concerned the performance of agency functions.

DISCUSSION

Agencies, other than Justice, are generally precluded from using appropriations to hire attorneys to represent employees; federal law reserves the conduct of litigation to 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. 5 U.S.C. Sec. 3106; 28 U.S.C. Sec. 516 (1988). Justice provides for the defense of the employee when the actions at issue 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. 50.15(a) (1990). In limited circumstances, where Justice determines that representation of a federal employee is appropriate but is unable to provide representation, agency appropriations may be used to pay for legal work that Justice determines to be in the government's interest. 50 Comp.Gen. 408, 412-413 (1975); 28 C.F.R. Sec. 50.16(d)(1).

Justice representation generally is not available in federal criminal proceedings. 28 C.F.R. Sec. 50.15(a)(4). Justice will provide representation to a federal employee in such instances only where the Attorney General or his designee determines that representation is in the government's interest and subject to applicable limitations in 28 C.F.R. Sec. 50.16. Id. Under Justice's procedures, unless the employing agency concludes that representation is clearly unwarranted, it should submit to Justice a statement containing its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation. 50 C.F.R. Sec. 50.15(a)(1).

The FDA states that HHS did not submit the employees' requests for representation to Justice, explaining that with regard to criminal matters, it lacks the means "for making the requisite examination to determine whether the activities in question are reasonably within the scope of employees' duties." Since Justice's guidelines do not specifically address the reimbursement of attorney fees that were incurred without Justice's advance approval, FDA asks whether it may reimburse the employees for the attorney fees as a necessary expense of its appropriations under our decisions in 67 Comp.Gen. 37 (1987) and 61 Comp. Gen. 515 (1982). [1]

Our decisions have consistently recognized that Justice has exclusive authority to determine whether agency appropriations may be used to reimburse employees for private attorney fees incurred in federal criminal proceedings. E.g., 70 Comp.Gen. 628 (1991). Therefore, it would not be appropriate for our Office to determine whether FDA may reimburse the employees at issue here. Our Office will determine whether agency appropriations may be so used only where Justice defers to the employing agency, and the agency, in turn, requests our opinion. Id.

The decisions of this Office cited by HHS as possibly authorizing the use of FDA

appropriations are not relevant here. In both 67 Comp.Gen. 37 and 61 Comp.Gen. 515, we approved the use of agency appropriations to pay for attorney fees because Justice does not provide federal employees with representation in administrative proceedings. This case does not involve an administrative proceeding.

In a March 4, 1993 letter to this Office, the Acting Attorney General articulated Justice's policy regarding the reimbursement of attorney fees in instances, such as here, where reimbursement is claimed after the conclusion of a criminal investigation. The Acting Attorney General noted that, generally, employees are required to make a timely request for representation rather than retaining private counsel and later requesting reimbursement of fees incurred. Nevertheless, he explained, in rare instances, Justice may agree to reimbursement where a private attorney has been retained without advance approval, if all of the following circumstances are present:

-- the employee made a timely request for representation or did not do so because he was not informed of its availability;

-- the request was delayed or denied for reasons of inadvertence, neglect, or mistake;

-- the exigencies of the litigation required that the employee protect his interests by retaining counsel before receiving approval from Justice; and,

-- representation of the employee either by a Justice Department attorney or by a private attorney retained at Department expense would have been appropriate.

In view of the above, FDA's request for reimbursement of the attorneys' fees should be referred to Justice for consideration. Justice has the responsibility for determining the interests of the United States in litigation. Our cases do not support and were not intended to allow agencies to pursue their own litigative policies. Instead they recognize the availability of agency appropriations, where otherwise necessary and proper, for uses consistent with the litigative policies established for the United States by the Attorney General. Allowing the reimbursement of the attorneys' fees, in this case, as a necessary expense of HHS appropriations would place this Office and HHS in the position of contradicting the clearly expressed intent of the Congress to centralize control of government litigation under the Attorney General. 70 Comp. Gen. 647, 650 (1991).

Comptroller General of the United States