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B-289701, February 27, 2002

Number: B-289701

Date: 2002-02-27

B-289701, February 27, 2002

The Honorable Steve Chabot Chairman, Subcommittee on the Constitution Committee on the Judiciary House of Representatives

Dear Mr. Chairman:

This responds to your letter of January 15, 2002, regarding whether the U.S. Commission on Civil Rights (Commission) may use appropriated funds to employ outside legal counsel to intervene in United States v. Wilson /1/ and to pay the salary of a Commission member, Victoria Wilson, past November 29, 2001. Subsequent to your request, the U.S. District Court for the District of Columbia granted the Commission's motion to intervene. The order granting the Commission's motion, however, did not address the availability of the Commission's appropriations to employ outside counsel to represent it in the litigation. The court, in addition, ruled on the merits of the case in favor of Victoria Wilson. The Department of Justice (Justice) then filed a motion to appeal both court orders.

In our opinion, the Commission does not have statutory authority to use its appropriated funds to hire outside counsel. However, given the court's order granting the Commission's motion to intervene and Justice's appeal of the court's order, we plan to take no action with respect to the Commission's use of appropriated funds to pay outside counsel pending resolution of the appeals from the district court's ruling. If the appellate court upholds the district court order granting the Commission's motion to intervene, we will take no further action. In addition, the district court ruled that Ms. Wilson's term does not expire until January 2006. Given the district court's ruling on this point, the Commission may use its appropriation to continue to pay Ms. Wilson's salary pending resolution of the appeals from the district court's ruling.

BACKGROUND

This matter arises as a result of a dispute over the expiration of Commissioner Wilson's term in office. On December 6, 2001, President Bush appointed Peter A. Kirsanow to a 6-year term on the Commission. According to Justice, the Kirsanow appointment was to fill a vacancy created by the expiration, on November 29, 2001, of Ms. Wilson's term. When Mr. Kirsanow arrived for the next scheduled Commission meeting on December 7, 2001, the Commission, by a vote of five to three, refused to seat him. The Commission Chair and four other commission members (including Ms. Wilson) contended that Ms. Wilson's term had not expired on November 29 and would not expire until January 2006. Motion to Intervene on Behalf of Commission at 4.

Justice asserts that Ms. Wilson was appointed solely to complete the remainder of Commissioner A. Leon Higginbotham's term. Complaint at 1-2. President Clinton had appointed Ms. Wilson to the Commission in January 2000 to fill a seat that had been vacant for just over a year as a result of Judge Higginbotham's death in December 1998. Id. Judge Higginbotham's 6-year term would have expired on November 29, 2001. Ms. Wilson and the Commission argue that Ms. Wilson is entitled to a full 6-year term, expiring in January 2006. Defendant's Memorandum in Opposition to Motion for Summary Judgment at 2; Intervenor's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 2.

When the Commission refused to seat Mr. Kirsanow, Justice filed suit in the U.S. District Court for the District of Columbia against Ms. Wilson seeking a declaratory judgment that Mr. Kirsanow is entitled to a seat on the Commission and that Ms. Wilson is no longer entitled to a seat. Complaint at 7. The Commission staff director retained the law firm Paul, Weiss, Rifkind, Wharton & Garrison (Paul, Weiss) to intervene on behalf of the Commission in the lawsuit between the United States and Ms. Wilson. Memorandum from Les Jin, Staff Director, Commission on Civil Rights, to the Commission, Dec. 21, 2001. On January 27, 2002, the court granted the Commission the right to intervene but did not address the availability of the Commission's use of appropriated funds to employ outside counsel to represent it in litigation. Order Granting Intervenors' Motion to Intervene as Defendants at 1. Subsequently, on February 4, 2002, the court held that Ms. Wilson's term does not expire until January 2006. Order Granting Defendant's Motion for Summary Judgment, Feb. 4, 2002. Justice filed a notice of appeal on that same day, appealing both the court's order granting the Commission's motion to intervene and the court's order on the merits. Plaintiff's Notice of Appeal, Feb. 4, 2002.

DISCUSSION

Question 1: Are appropriations available for the U.S. Commission on Civil Rights to employ outside legal counsel to intervene in a suit between the Justice Department and Victoria Wilson regarding the expiration of Ms. Wilson's term in office?

It is well established that unless otherwise authorized by law, Justice has authority over the supervision and conduct of all litigation in which the United States, its agencies, or its officers have an interest. See, e.g., F.T.C. v. Guignon, 390 F.2d 323, 324 (8th Cir. 1968) (the Federal Trade Commission may not seek enforcement of its own subpoenaes in a federal district court without the aid or consent of the Attorney General); Mehle v. American Management Sys., 172 F. Supp. 2d 203, 206 (D.D.C. 2001) (describes the statutory grant of litigation authority to the Attorney General as "plenary"); Ocean Shipping Antitrust Litigation, 500 F. Supp. 1235, 1239 (S.D.N.Y 1980) (absent authorization or consent of Justice, the Federal Maritime Commission is without authority to move independently to intervene).

The heart of Justice's authority is 28 U.S.C. Sec. 516: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." /2/ Since 1870, Justice has had by statute nearly exclusive authority to perform or provide litigative services to agencies and their employees. See Act of June 22, 1870, Secs. 5, 14-17, 16 Stat. 162 (now codified at 28 U.S.C. Secs. 515-519, 543, 547; 5 U.S.C. Secs. 3106); United States v. Providence

Journal Co., 485 U.S. 693, 705 n.9 (1988) (sections 516 and 517 "create a general rule that applies unless contradicted in some other provision"). /3/ We have interpreted these statutes generally to preclude the use of appropriated funds, other than those appropriated to Justice, to employ or hire attorneys to represent the government's interest in a court action, unless otherwise authorized by statute. 70 Comp. Gen. 647, 649-650 (1991); 55 Comp. Gen. 408, 411 (1975).

As relevant to the facts and circumstances here, there are two situations in which an agency may use its appropriations to hire outside counsel for the conduct of litigation: (1) if the agency has specific statutory authority to litigate or hire outside counsel, or (2) if the Attorney General declines to provide the agency representation but agrees that representation is appropriate and approves the agency's hiring of outside counsel for representation.

The present circumstances satisfy neither of these conditions. The Commission did not cite statutory authority permitting it to conduct litigation in its own behalf or otherwise to hire outside counsel for litigative purposes. In our survey of the Commission's statutory authorities, we identified no authority that would permit the Commission to hire outside counsel for the conduct of litigation. The second circumstance in which an agency may engage outside counsel also is absent here. Justice expressly disagreed that outside representation is appropriate when it advised the Commission that it had no statutory authority to hire Paul, Weiss. Letter from Assistant Attorney General, Robert D. McCallum, Jr., Civil Division, Justice Department to Commission Chair, Dec. 6, 2001.

We have recognized that in some instances, an agency may use its appropriations to hire outside counsel if Justice approves. For example, we held that the Small Business Administration (SBA), with Justice approval, could use its appropriations to hire outside counsel to represent an SBA employee who was sued for acts performed within the scope of his employment. 55 Comp. Gen. 408 (1975) (Justice assigned a U.S. Attorney to the matter, but the U.S. Attorney had to withdraw from the case for administrative reasons). Nevertheless, our case law does not support an agency's use of its appropriations to pursue its own litigative policies that are inconsistent with the litigative policy of Justice. The Commission's litigative policy in this instance is inconsistent with Justice's. See Motion to Intervene on Behalf of Commission at 6 (the Commission stated that it has an interest in protecting Ms. Wilson from improper removal and preventing improper removal of its officers in the future). Section 516 of title 28 of the United States Code clearly reposes in the Attorney General the discretion and authority to define the litigative policies of the United States. Thus, the Commission lacks statutory authority to engage outside counsel for the conduct of litigation.

On January 27, 2002, the United States district court granted the Commission's motion to intervene. Order Granting Intervenors' Motion to Intervene as Defendants at 1. While it is somewhat anomalous to find an agency litigating a position inimical to the interests of the United States as defined by Justice, the court has recognized the Commission as a party to the lawsuit. The court's order does not reach the issues before us, however, that is the availability of the Commission's appropriations to engage outside counsel to represent it in litigation. Nevertheless, given the present posture of this case and in deference to the court and the judicial system, we plan no action concerning this matter pending resolution of any appeals. If the appellate court upholds

the district court order granting the Commission's motion to intervene, we would take no further action.

Question 2: Are appropriations available to pay Victoria Wilson's salary past November 29, 2001?

The district court ruled on February 4, 2002, that pursuant to the Civil Rights Commission Amendments Act of 1994, Pub. L. No. 103-419, 108 Stat. 4338, Ms. Wilson's appointment to the Commission is for a six-year term, not solely to fill the remaining years of Commissioner Higginbotham's term. As a result, Ms. Wilson's term will not expire until January 2006.

The Commission's appropriation for salary and expenses is available only to pay the salary and expenses of a commissioner. Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law. 31 U.S.C. Sec. 1301(a). Each member of the Commission, who is not otherwise in the service of the United States, receives a sum equivalent to the compensation paid at level IV of the Executive Schedule. 42 U.S.C. Sec. 1975b(b). An individual who is not a commission member may not receive this compensation. Given the district court's ruling on Ms. Wilson's term as a commissioner, the Commission may continue to use its appropriation to pay Ms. Wilson's salary, pending resolution of the appeals from the district court's ruling.

CONCLUSION

Because the district court granted the Commission's motion to intervene, we withhold our objections to the Commission's use of appropriated funds to retain outside counsel to intervene in United States v. Wilson. If the appellate court upholds the district court order granting the Commission's motion to intervene, we will take no further action. Further, pending resolution of the appeals of the district's court's ruling on the expiration of Ms. Wilson's term, the Commission may use its appropriation to continue to pay Ms. Wilson's salary. Under separate cover, we will notify the Commission and its fiscal officers of our findings. We trust that this responds to your request. Should you have any questions, please contact Ms. Susan Poling at (202) 512-2667.

We are sending copies of this letter to the Ranking Minority Member, Subcommittee on the Constitution; Chairman, House Committee on Judiciary; Ranking Minority Member, House Committee on Judiciary; Chairman, Senate Committee on Judiciary; Ranking Minority Member, Senate Committee on Judiciary, and other appropriate congressional parties.

Sincerely yours,

Anthony H. Gamboa General Counsel

1. No. 01-CV-2541 (D.D.C. filed Dec. 7, 2001).

2. The Commission is an agency for purposes of 28 U.S.C. Sec. 516. See 5 U.S.C. Sec. 105.

3. In Mail Order Ass'n of America v. United States Postal Service, 986 F.2d 509, 515 (D.C. Cir. 1993), the court of appeals found that the Postal Service could bring suit even though Justice refused to represent it or consent to the Postal

Service's use of outside counsel. However, in that case, the court of appeals specifically found that the Postal Service's governing statute permitted it to seek judicial review of specified rates. Accordingly, the court found that the Postal Service was otherwise authorized by law to conduct litigation in these circumstances.