
United States International Trade Commission – Cultural Awareness, B-278805, July 21, 1999



Decision

Matter of: United States International Trade Commission – Cultural Awareness

File: B-278805

Date: July 21, 1999

DIGEST

1. Our decision at 60 Comp. Gen. 303 (1981) does not require that a program or event have a specific, advance written approval in a formal agency issuance to be a formal Equal Employment Opportunity program for which appropriated funds are available for artistic performances. It is sufficient that an authorized agency official determines that the artistic performance is part of a program or event that advances equal employment opportunity objectives.
2. An agency may reimburse a voluntary creditor who personally paid musicians for performing at a cultural awareness program if the ITC determines (1) that the underlying payment was authorized, (2) failure to act would have resulted in a disruption of relevant program activity, and (3) the transaction satisfied criteria for either ratification or *quantum meruit*, applied as if the musicians had not been paid.
3. The three year statute of limitation on our settlement of accountable officer accounts in 31 U.S.C. § 3526(c) (1994) does not bar paying a voluntary creditor's claim for reimbursement. The six-year statute of limitation on agency settlement of claims in 31 U.S.C. § 3702 (1994, Supp. III 1997) governs the claim.

DECISION

This decision is in response to separate requests from the Director, Office of Finance and Budget, and the Inspector General of the United States International Trade Commission (ITC) regarding the use of ITC funds to pay musicians performing at a cultural awareness program. The ITC officials essentially ask (1) whether ITC funds were available for a musical performance at a cultural awareness program for "Irish-American Heritage Month," (2) whether the ITC may reimburse the Director, Office of Equal Employment Opportunity, ITC, for personal funds paid to the musicians, and (3) whether reimbursement is now barred because more than three years have elapsed since the Director made the payments.

As discussed below, ITC funds are available to pay the musicians and, subject to ITC making the requisite findings, ITC may reimburse the Director for personal funds used to pay the musicians. Should ITC make the requisite findings, ITC is not now barred from reimbursing the Director by the three-year statute of limitation imposed by 31 U.S.C. § 3526(c) (1994).

Background

On March 8, 1994, the President proclaimed March 1994 as Irish-American Heritage Month, urging Americans to observe the month with appropriate ceremonies and activities. [1] On March 9, 1994, the Director, Office of Equal Employment Opportunity (OEEO), United States International Trade Commission (ITC), submitted a "Requisition for Supplies, Equipment, or Services," to procure the services of an Irish Band to perform for Commission employees on St. Patrick's day. The musicians were to be part of a program presenting factual information about the Irish culture, including an explanation by the musicians of the history of each song. The musicians were to be paid \$300. After reviewing the preliminary requisition for services, [2] the Director, Office of Finance and Budget (OFB), met with the OEEO Director on March 11, 1994, and advised the Director that appropriated funds were not available to pay the musicians an honorarium for participation in the planned program.

The OEEO Director proceeded with the program on March 16 and paid the musicians with personal funds. The Director also requested that OFB reconsider its verbal opinion denying payment. By memorandum to the OEEO Director, dated April 13, 1994, the OFB Director again denied the payment, reasoning that the ITC did not have a formal written Equal Employment Opportunity program that specifies as one of its objectives the promotion of cultural awareness as they believed 60 Comp. Gen. 303 (1981) required.

The matter arose again in June 1997 when the ITC General Counsel opined that the expense for the Irish Band was an allowable expense. Partly as a result of the General Counsel's opinion, the OEEO Director submitted a "Requisition for Supplies, Equipment, or Services," dated July 18, 1997, making "a request for reimbursement in the amount of \$300 for fees paid for musical program of Irish music and folk songs with narrative presentation relative to origin and cultural history of Irish Americans." The Inspector General subsequently issued a report on September 30, 1997, concurring in the General Counsel's opinion.

Because of differences of opinion within ITC, the OFB Director and later the IG submitted this matter to us for an advance decision.

Analysis

Equal Employment Opportunity Program

In 60 Comp. Gen. 303 (1981), we considered whether appropriated funds were available to pay for a performance of African dancers at a ceremony observing Black History Month. We concluded that appropriated funds would be available for

"a live artistic performance as an authorized part of an agency's Equal Employment Opportunity (EEO) effort if, as in this case, it is a part of a formal program determined by the agency to be intended to advance EEO objectives, and consists of a number of different types of presentations designed to promote EEO training objectives of making the audience aware of the culture or ethnic history being celebrated." 60 Comp. Gen. at 306.

In support of our conclusion we cited Office of Affirmative Employment Programs, Office of Personnel Management (OPM), guidelines for artistic presentations at agency sponsored Hispanic Heritage Week programs. After being advised that OPM intended the guidelines to be generic and therefore applicable to analogous ethnic or cultural special emphasis programs, we concluded that they provided a reasonable basis for distinguishing EEO special emphasis program artistic presentations from employee entertainment. 60 Comp. Gen. 306. [3] We subsequently indicated that such artistic presentations should be representative of a cultural or ethnic heritage with which all employees should be familiar. 64 Comp. Gen. 802, 804 (1985).

The concern presented by these cases is to distinguish between appropriate expenses for legitimate cultural awareness programs and the inappropriate use of appropriated funds to entertain federal employees. It is in the context of limiting the potential misuse of appropriated funds to entertain federal employees that the reference to "formal program" in 60 Comp. Gen. 303 should be understood. To help protect against abuse, we thought it important that before making appropriated funds available for an artistic performance, the agency should conclude that the performance was part of and would further a program that the agency determined would promote EEO objectives. We did not require that agencies describe in writing the subject or detail of a particular EEO program or event, nor did we define the characteristics of a "formal program."

Thus, 60 Comp. Gen. 303 does not require that the particular program or event receive specific, advance written approval in a formal agency issuance. What is required is that the agency through an authorized official determines that the planned artistic performance advances EEO objectives. The regulations of the Equal Employment Opportunity Commission relating to agency programs to promote equal opportunity provide that an agency should maintain a continuing affirmative program to promote equal opportunity and eliminate discriminatory practices and policies, including conducting a continuing campaign to eradicate every form of prejudice or discrimination from the agency's working conditions. 29 C.F.R. § 1614.102(a)(3) (Revised July 1, 1994). In this regard the OEEEO Director's responsibilities included developing, implementing, and coordinating specific plans including training programs to effect the equal employment goals and objectives of the ITC. [4] We recognized in 60 Comp. Gen. 303 that cultural awareness programs are a form of employee training intended to expand the awareness of employees of different cultures in order to meet EEO objectives. Thus one could reasonably conclude that the ITC authorized the OEEEO Director to determine whether a program commemorating Irish-American Month and a performance of musicians playing and explaining the history and meaning of Irish songs furthered EEO objectives by expanding employees' cultural understanding and awareness. [5]

Voluntary Creditor

A "voluntary creditor" is someone who makes a payment from personal funds, ostensibly on behalf of the government, which he or she is not legally required or authorized to make and then claims reimbursement from the government. [6] While the government is under no obligation to reimburse a voluntary creditor, there are situations where, as a matter of public policy, voluntary creditors may be reimbursed. Thus we have not objected to reimbursement where (1) the underlying expenditure itself is authorized, (2) failure to act would have resulted in a disruption of relevant program activity and (3) the transaction satisfied criteria for either ratification or *quantum meruit*, applied as if the contractor had not been paid.

The preceding section of our analysis addressed the first prong of our guidelines. The second prong is whether the voluntary payment meets the test of "public necessity." 62 Comp. Gen. 419, 424 (1983); 62 Comp. Gen. 595 (1983). The purpose of the test is to limit reimbursement to cases where there is a real need to act without delay to protect a legitimate government interest. The measure of the test is the extent to which the program or activity would have been disrupted had the voluntary creditor not taken prompt action. In the present case the OEEEO Director may meet this test since there were only two working days between the meeting with the OFB Director where she was informed that funds were not available to pay for the Irish Band, and the St. Patrick's Day program. (In this regard, we have held that the test was met where a voluntary creditor purchased replacement picture mats for a lounge at an Army facility because she thought using the normal procurement process would not result in delivery in time for scheduled inspection by base officials. B-242412, July 22, 1991.).

Once the "public necessity" test is satisfied, the agency should determine whether it could have ratified the transaction if the voluntary creditor had not made the payment. If the agency could have ratified the

transaction to pay the contractor for example, under the Federal Acquisition Regulation, 48 C.F.R. § 1-602-3(c), it may reimburse the voluntary creditor. As noted in footnote 5 above, the submission does not indicate that the OEEO Director actually entered into a contract on behalf of the government. Accordingly, the request for reimbursement may be considered under a quantum *meruit* or *quantum valebant* approach. For payment to be authorized on a *quantum meruit* or *quantum valebant* basis, the agency must determine that (1) using appropriated funds for the goods or services at issue is not prohibited, (2) the government received and accepted a benefit, (3) the claimant acted in good faith, and (4) the claimed amount represents the reasonable value of the benefit received. 62 Comp. Gen. at 424-425.

Effective June 30, 1996, Congress transferred our claims settlement authority under 31 U.S.C. § 3302 to the Director of the Office of Management and Budget (OMB) with the authority to delegate this function to such agency or agencies as he deemed appropriate. The Director, OMB delegated settlement of the type of claim presented here to the agency from whose activities the claim arose, in this case, the ITC. See Director of OMB's "Determination with Respect to Transfer of Functions Pursuant to Public Law 104-53," dated June 28, 1996, Attachment A and "Determination With Respect to Transfer of Functions Pursuant to Public Law 104-316," dated December 17, 1996, Attachment A. Accordingly, it is for the ITC to resolve the request for reimbursement consistent with the guidelines discussed above.

Statute of Limitations

The OFB Director asks whether the \$300 may now be paid in light of the fact that more than three years has passed since the OEEO Director paid the musicians. In this regard, the issue is whether the payment is barred by the three-year statute of limitations applicable to our authority to settle the accounts of accountable officers under 31 U.S.C. § 3526(c) (1994). The three-year limit on our account settlement authority relates to our authority to audit and disallow improper payments charged to an appropriation or fund account of the government. Since the question before this Office does not involve a payment that has been charged to an appropriation or fund account of the government, the matter is not governed by the three-year statute of limitations for our settling accountable officer accounts. See GAO, Policy and Procedures Manual for Guidance of Federal Agencies, tit. 7, §§ 8.5, 8.7 (T.S. No. 7-43, May 18, 1993). Instead, the six-year statute of limitation in 31 U.S.C. § 3702(b)(1) governs such claims.

Comptroller General
of the United States

Notes

1. Proclamation 6656, 3 C.F.R. § 16 (1994 Compilation).
2. The "Requisition" had not yet been processed through the ITC's formal procurement process.
3. Although OPM subsequently abolished the guidelines, agency use of similar criteria when making determinations regarding such matters would be reasonable.
4. See section 5b(1) of Directive 4502.2, dated April 15, 1993.
5. From the information submitted, the Director, OEEO apparently did not execute a contract with the Irish Band on behalf of the ITC. If the Director had done so, the ITC could ratify the agreement provided it met. See Federal Acquisition Regulation, 48 C.F.R. § 1.602-3(c) and B-251728.2, June 9, 1993. Furthermore, even if the Director, OEEO was not authorized to make the determination that cultural awareness program including the artistic performance of Irish music furthered the equal employment goals and objectives of

the ITC, the ITC could ratify the Director's action. See *United States v. Beebe*, 180 U.S. 343 (1901).

6. 3 GAO Principles of Federal Appropriations Law, 2d Ed., 12-138 (GAO/OGC 94-33, November 1994)