

Comptroller General
of the United States

Washington, D.C. 20548

Decision

AF/CP

Matter of: Steven Levy
File: B-245648.2
Date: July 24, 1992

DIGEST

An employee's personal conduct in connection with his official duties became the subject of an investigation by his employing agency as an outgrowth of a request made by a congressional subcommittee. The employee secured the services of private counsel to assist him and seeks reimbursement for those expenses. Even though a third party precipitated the investigation, since the agency conducted the investigation, the government's interest was not aligned with the employee's interest. Therefore, the attorney's fees incurred may not be reimbursed.

DECISION

This decision is in response to a request from the Regional Counsel - North Atlantic Region, Internal Revenue Service (IRS), Department of the Treasury.¹ It concerns the entitlement of Special Agent Steven Levy, Criminal Investigation Division, IRS Manhattan District, to be reimbursed for legal expenses incurred for private counsel obtained by him incident to an investigation of him by the IRS Inspection Service and the Department of Justice. For the reasons that follow, we hold that the employee may not be reimbursed for those legal expenses.

In 1989, Special Agent Levy became the subject of a "conduct" investigation² by the IRS Inspection Service. This investigation was an outgrowth of a request by the Chair, Commerce, Consumer, and Monetary Affairs Subcommittee, Committee on Government Operations, to the Department of Justice to investigate two allegations of

¹Agatha L. Vorsanger, Esquire.

²The purpose of a "conduct" investigation is to determine all pertinent facts and provide a report to IRS management so that a decision can be made to take disciplinary action against an employee or clear him of all charges.

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possible misconduct by Special Agent Levy in connection with missing IRS documents needed by the Subcommittee.³ The Public Integrity Section, Criminal Division, Department of Justice, then contacted IRS to coordinate the investigation of the subcommittee's allegations. As a result of that request, the IRS converted its previously initiated "special inquiry" investigation to a "conduct" investigation of Special Agent Levy. Although no charges were made against Special Agent Levy when the "conduct" investigation was initiated or during its resolution, Special Agent Levy secured the services of private counsel to help him defend himself against any charges which might be brought as a result of that investigation.

Based, in part, on information supplied by Special Agent Levy, the IRS Inspection Service found no evidence of misconduct or improper action on his part, and in November 1990 the Department of Justice declined "further prosecutive action" based on its review of the IRS Inspection Service's findings. In March 1991, the Director, IRS Manhattan District issued Special Agent Levy a "clearance letter," based on the Inspection Service's report of investigation.

In April 1991, Special Agent Levy submitted a claim for legal fees in the amount of \$15,000. Those fees were disallowed by the IRS on the basis of our decision at 58 Comp. Gen. 613 (1979),^X in which we held that, where the government's interests are not aligned with those of an employee on charges of misconduct brought against him, legal fees for private counsel secured by the employee may not be paid.

On appeal, Special Agent Levy, through counsel, argues that the investigation conducted by the IRS was not done at its own initiative, but was done at the request of the House of Representatives Subcommittee. Further, he contends that the IRS made no independent determination that his conduct merited investigation; it merely acceded to the demand of the Subcommittee to cooperate with the Department of Justice investigation, which was also demanded by the Subcommittee.

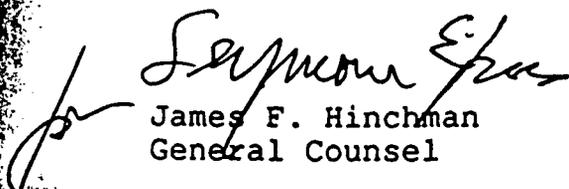
In decision Reimbursement for Banking Charges and Attorney's Fees, B-212487, Apr. 17, 1984,^X we ruled, in part, that an agency may not reimburse attorney's fees incurred by an employee in every case involving allegations of personal

³The matter of the missing IRS documents was the subject of a "special inquiry" investigation previously initiated by the IRS to determine if there was any issue requiring further investigation.

misconduct in the performance of official duties raised by an outside party. Where the allegations of misconduct are not pursued by the outside party, and the agency determines that the matter should be further investigated and pursues that investigation, the government's interest is no longer deemed aligned with that of the employee as it would be if charges of misconduct were pursued by the outside party. Based on that analysis, we concluded in that case that the legal fees for an attorney hired by the employee may not be paid. See also Albert J. Beaudreault, B-245712.3, May 20, 1992, citing to Leo D. Thiels, 70 Comp. Gen. 628 (1991) *J. 7*

~~In the present situation, while the House Subcommittee independently raised the issue of Special Agent Levy's possible misconduct involving the missing records needed by the Subcommittee, the conduct of the investigative action was pursued by his employing agency. In this regard, it is noted that at no time during the pendency of the investigation was Special Agent Levy charged with misconduct. The investigation was to determine whether there was sufficient evidence to support allegations of possible misconduct.~~

Even though Mr. Levy was cleared of all suspicions of misconduct, his legal fees may not be deemed incurred in furtherance of the government's interest because the government's interest was not aligned with his personal interest. Therefore, he may not be reimbursed for his attorney's fees.


James F. Hinchman
General Counsel