

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

10,492

FILE: B-193536

DATE: June 18, 1979

MATTER OF: Securities and Exchange Commission - ABC 00199
[Request for Reimbursement of Legal Expenses Incident
to Internal Investigation]

- DIGEST: 1. As a result of its own investigation of misconduct charges initially made by a private party, SEC found possible merit to charges against three of eight SEC employees and appointed a hearing examiner who ultimately determined the misconduct allegations to be without merit. SEC may not reimburse attorney's fees incurred by the employee as a cost of providing legal representation, since, upon its determination to further pursue the matter, the case was no longer one in which the Government's interests were aligned with those of the employee in defending charges brought by a third party against the employee for conduct within the scope of his official responsibilities. Compare B-127945, April 5, 1979.
2. Where an SEC investigation of charges of misconduct against three SEC employees was ultimately resolved in favor of the employees, the employees' legal fees may not be reimbursed. Attorney's fees may be awarded to the prevailing party only when there is express authority for the payment of such fees, and there is no specific authority for award of attorney's fees in standards of conduct proceedings in the nature of those conducted by the SEC.

This action is in response to a request for a decision from the Securities and Exchange Commission (SEC) concerning its authority to reimburse reasonable attorney's fees paid by SEC employees incident to an SEC internal inquiry into allegations of misconduct filed against the employees by an outside party.

The request from the SEC states that in the course of administrative proceedings against a securities broker-dealer, a respondent in these proceedings charged that certain SEC employees had violated provisions of title 18 of the United States

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Code, violated or aided and abetted violations of the SEC Conduct Regulation (17 C.F.R. § 200.735-1 et seq.), and otherwise engaged in improper professional conduct in connection with the administrative proceedings. These allegations were also filed with the Internal Revenue Service, the United States Attorney's Office, and the Ethics Committee of the Bergen County, New Jersey, Bar Association. In addition, the respondent filed four separate lawsuits in United States District Court in which he raised substantially the same charges of misconduct by SEC staff. The SEC and its staff members were represented in these lawsuits by counsel from the SEC's Office of General Counsel, and all of these lawsuits were ultimately dismissed.

Under SEC procedures, the Office of General Counsel conducted an informal inquiry into these allegations of misconduct by three of the SEC employees and, upon the advice of that office, the SEC appointed an impartial hearing officer to conduct a formal inquiry. After a period of about 2 years, these two inquiries were completed, and the SEC accepted the hearing officer's conclusion that the allegations of misconduct were without merit. The SEC closed the matter with no adverse personnel action taken against the employees in question. At least two of the employees involved have requested that the SEC reimburse the legal fees they incurred in retaining private counsel to represent them in connection with the inquiries.

The request from the SEC states further that allegations of misconduct are taken very seriously and that where the allegations are found to have merit, the employee involved may be subject to an adverse personnel action. In addition, violation of the SEC's Conduct Regulation can lead to that person's temporary or permanent disqualification from appearing or practicing before the SEC. See 17 C.F.R. § 200.735-13. Since an employee who is the subject of an inquiry may find his career in jeopardy, the SEC believes it is not unreasonable for the employee to retain private counsel. Where the allegations of misconduct have been found to have been without merit, the SEC believes it is appropriate to reimburse reasonable attorney's fees paid by its employee. The SEC, therefore, asks to be advised whether it has the legal authority to reimburse attorney's fees under the circumstances described above.

The question of whether attorney's fees may be awarded to the successful or prevailing party in a particular proceeding is a

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matter to be resolved on the basis of whether there is express statutory authority for the payment of such fees. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975). There is no specific authority for award of attorney's fees in standards of conduct proceedings in the nature of those conducted by the SEC and we are unable to find that the SEC otherwise has statutory authority to award attorney's fees in administrative proceedings of this type. Compare 15 U.S.C. § 77k(e) and 78i(e). Therefore, we find that the SEC does not have authority to pay the attorney's fees of the employees based upon the fact that the administrative proceedings were resolved in their favor and that the allegations of misconduct were found to have been without merit.

However, we believe there is another aspect of this case that warrants consideration. While the hiring of an outside attorney to represent an employee is generally a private matter between the attorney and the client (55 Comp. Gen. 1418 (1976)), the Government may provide an employee with representation for private litigation when the United States' interest is at stake along with the employee's personal interest. B-130441, April 12, 1978. We have recognized that the Government has an interest in judicial proceedings brought by a private party against a Federal employee in his individual capacity arising out of conduct within the scope of his Federal employment and that the Government may properly provide representation in such proceedings. B-150136, May 19, 1978. Since the United States acts through its employees, advocating the legality of employee actions taken in furtherance of their official duties is in the interest of the Federal Government. Moreover, if agency employees knew that they would have to bear their own representation expenses in actions against them resulting from performance of their jobs, they would discharge their duties and exercise their discretionary functions less vigorously.

Generally, the Department of Justice provides its attorneys to represent employees in litigation under the authority of sections 516, 517, 518, and 547(b) of Title 28, United States Code. These sections charge the Department with the responsibility for representing the United States in all litigation in which it has an interest. The Attorney General interprets these provisions as giving the Department the statutory authority for its policy of representing Federal employees in court actions

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brought against them in their individual capacity because of acts performed within the scope of their employment. The Department implements this policy in accordance with its statement on representation found at 28 C.F.R. §§ 50.15 and 50.16.

However, the Department will not provide counsel to charged employees in administrative disciplinary proceedings. Subsection 50.15(a) of its policy statement specifies the kind of proceedings in which the Department will provide representation. It states:

"(a) Under the procedures set forth below, a Federal employee (herein defined to include former employees) may be represented by Justice Department attorneys in state criminal proceedings and in civil and Congressional proceedings in which he is sued or subpoenaed in his individual capacities, not covered by § 15.1 of this chapter."

In response to a recent request for the Attorney General's views regarding Department of Justice representation at the agency level in disciplinary and discrimination proceedings, the Assistant Attorney General explained that administrative disciplinary proceedings are not included in subsection 50.15(a) because:

"* * * It is the policy of the Civil Division, in this regard, that none of its attorneys may represent federal agency personnel in disciplinary or Title VII discrimination proceedings for the reason that the Civil Division will be responsible for defending the employing agency in the event the employee brings a civil action challenging the results of the proceeding. Representing the employee at the agency level proceeding would, therefore, create an unacceptable conflict."

In judicial actions in which the Attorney General declines to provide representation, agency appropriations are available to provide representation if otherwise proper. 55 Comp. Gen. 408, 412 (1975). In such cases, the agency must determine that representation is in the Government's interest and that the conduct in question was in furtherance of an agency function. In such cases, where the appropriate determinations have been made, the cost of an attorney may be considered a necessary

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expense incurred in performing that agency function. 53 Comp. Gen. 301, 306 (1973). Recently, in B-127945, April 5, 1979, we recognized that because of the unavailability of Department of Justice representation an agency may use its appropriations to provide counsel in connection with an administrative hearing of charges of misconduct by an employee in the performance of his official duties where the charges were initiated and pursued by a private party in that administrative forum.

In B-127945 the Nuclear Regulatory Commission (NRC) staff filed a motion for censure for alleged professional misconduct against a private attorney representing certain parties to a licensing-related proceeding. The private attorney filed a motion for disciplinary action against two NRC employees whom he charged with misconduct. In accordance with NRC's Rules of Procedure, the charges were referred to a special board for hearing. The NRC retained private attorneys to defend its employees in the two-party disciplinary proceeding against the charges brought and pursued by the private attorney. In concluding that the NRC could expend its appropriations for the necessary legal services, we stated:

"* * * an agency may properly charge against its appropriation the expenses of defending acts performed within the scope of agency employment. Here, 'the NRC Executive Legal Director determined that the employees involved were clearly acting within the scope of their authority.' It was therefore in the agency's interest to provide them with legal counsel, and since the Attorney General has declined representation in this type of proceeding, NRC appropriations would be available to supply counsel to the charged staff members.

"It was NRC's view that its own attorneys could not defend the charged staff members before the Special Board because their appearances might create conflicts of interest. The NRC's Office of General Counsel could not supply its attorneys because that Office would be responsible for advising the NRC in its review of the Board's decision in the proceeding. Although it is not clear from the Executive Director's letter, we have been advised informally that attorneys from the Office of Executive Legal Director (ELD) could not provide representation because the

intervenors who filed misconduct charges contended that ELD attorneys must prosecute all such charges. As a result, when it was necessary for NRC to decide whether to retain outside attorneys, the possibility existed that the Office of ELD would be prosecuting the same case, thus making that Office's representation of the accused attorneys inappropriate.

"Accordingly, since providing legal counsel to these NRC employees to defend conduct within the scope of agency employment is in furtherance of the agency's purpose, the NRC could properly expend its appropriations for the necessary legal services. * * *"

At the outset of the special proceedings, a determination was made by NRC that the conduct of its staff members was conduct within the scope of their employment and that it was in the interest of the Government to provide them legal representation to defend their actions against the charges brought and pursued by the private attorney. Outside legal counsel was retained by NRC at the outset of the special proceedings. Inasmuch as Department of Justice representation was unavailable and agency staff representation involved an apparent conflict of interest, payment of the legal expenses involved was sustained on the basis consistent with our decisions cited above, holding that the Government may provide legal representation in private litigation against an employee in proceedings arising out of conduct within the scope of his employment. In the prior cases and in the NRC proceeding, the conduct of the Federal employees was brought into issue and pursued by a third party and not by the Government itself.

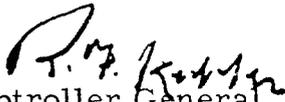
The SEC case here in issue differs significantly from the NRC case in that the charges of misconduct, while initially raised by an outside party, were pursued not by the outside party but by the SEC on the basis of its independent determination to investigate the conduct of three of its employees. Correspondence received from two of the three SEC attorneys involved indicates that the private respondent in the SEC administrative proceeding against the securities broker-dealer initially made allegations of staff misconduct against at least eight SEC employees. The SEC Office of General Counsel conducted a formal investigation into all of those allegations. With respect to at least one of the employees, the Office of General Counsel initially concluded that

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there was possible merit to the allegations and recommended that disciplinary action be taken. Because of additional information subsequently obtained, disciplinary proceedings were not in fact instituted but, upon the recommendation of the Office of General Counsel, the SEC appointed an independent hearing examiner to conduct a further inquiry into the matter. It was at this point that the employee retained private counsel. We understand that the other two SEC employees also retained private counsel at this point and that a transcribed hearing was held concerning the conduct of all three. The hearing examiner found the allegations of misconduct to be without merit and recommended that no action be taken with respect to any of the three.

Under these circumstances, the cost of providing counsel may not be considered a proper expenditure of appropriated funds. Upon SEC's determination that the matter should be further investigated with respect to three of the SEC employees, the situation was no longer one in which the Government's interest was aligned with the interests of the three employees against charges pressed by a third party, and thus it was no longer in the Government's interest to provide them with legal counsel. The SEC hearing was a formal agency fact-finding inquiry to determine whether its employees were guilty of misconduct. In fact, at that point, the situation was indistinguishable from that in which an agency itself initiates an investigation into the conduct of its own employees. That the employees were ultimately vindicated does not change the character of the proceeding.

The determination to provide an employee with legal representation is one to be made at the outset of proceedings initiated against him by an outside party based on a determination that the conduct in question was within the scope of his official responsibilities and that it is in the interest of the Government to provide for his representation. It is not a determination to be predicated on the employee's ultimate success in the particular proceeding.


Acting Comptroller General
of the United States