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DECISION



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

FILE: B-208333

DATE: August 31, 1982

MATTER OF: Copyright Royalty Tribunal--Commissioners'
Pay During Funding Gap

DIGEST: Upon passage of a supplemental appropriation, Commissioners of the Copyright Royalty Tribunal may be paid for the interim where the agency was without sufficient funds to pay them. Under 17 U.S.C. § 802, the Commissioners are presidential appointees. They are also exempt from the provisions of the Annual and Sick Leave Act, 5 U.S.C. § 6301 et. seq. As such, they are entitled to compensation simply by virtue of their status as officers, regardless of the availability of funds. In other words, for the purposes of the Antideficiency Act, the Tribunal is authorized by law to incur Commissioners' salary expenses even in the absence of available adequate appropriations to liquidate the obligation.

The Chairman of the Copyright Royalty Tribunal asks whether in the described circumstances, the Commissioners can be retroactively compensated for any period of time during which they worked without pay.

The Tribunal will exhaust its fiscal year 1982 appropriations by mid-August 1982. The Congress is currently considering a supplemental appropriation bill (H.R. 6863, 97th Cong., 2d Sess.), which, if enacted in its present form, will provide for the Tribunal's expenses, including Commissioners' salaries, for the remainder of the fiscal year. However, the Tribunal is concerned that this bill may not be enacted before the Tribunal exhausts its funds. The Chairman states that the Commissioners will continue in office in accordance with their commissions of office even in the absence of funds. However, she requests our decision as to whether they may be paid retroactively if the Congress provides sufficient funds to do so.

For the reasons discussed below, we conclude that payment to the Commissioners is authorized by law.

In general, the incurring of obligations, including those for employee compensation, in advance of appropriations is precluded by the Antideficiency Act, 31 U.S.C. § 655 (1976), which provides in subsection (a) as follows:

"No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law."

This Act was interpreted in the context of a "funding gap" caused by the failure of enactment of appropriations act in an April 25, 1980 opinion of the Attorney General. The opinion stated that on a lapse of appropriations, Federal agencies may not incur obligations, including those of employees' salaries, unless such obligations are otherwise authorized by law. 43 Op. Atty. Gen. No. 24 (1980). In a subsequent opinion letter dated January 16, 1981, the Attorney General more fully analyzed the nature of the functions which may be carried out during a shutdown.

The Commissioners' terms of appointment are set forth in 17 U.S.C. § 802, which states in subsection (a) that:

"The Tribunal shall be composed of five commissioners appointed by the President with the advice and consent of the Senate for a term of seven years each * * *. Commissioners shall be compensated at the highest rate now or hereafter prescribe[d] for grade 18 of the General Schedule pay rates (5 U.S.C. § 5332)." (Emphasis added.)

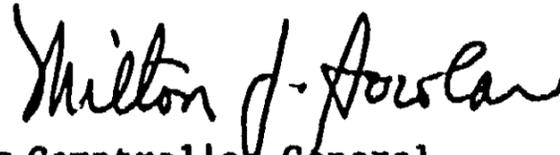
As Presidential appointees in the legislative branch the Commissioners are exempt from the Annual and Sick Leave Act 5 U.S.C. § 6301(2) (Xiii). Officers who hold their positions based on presidential appointments, and who are exempt from the Annual and Sick Leave Act, 5 U.S.C. § 6301 et. seq. (1976), are entitled to compensation based on their status as officers rather than for the performance of a function based on the amount of hours they spend engaged at their jobs. This distinction was clearly

enunciated in United States v. Grant, 237 F.2d 511 (7th Cir. 1956), wherein the court held that failure to perform his duties did not deprive an officer appointed by the president with the advice and consent of the Senate, and exempt from the leave act, of his salary. He was entitled to compensation by virtue of his status as an officer.

Further, 5 U.S.C. § 5508 (1976) states that "officer[s] * * * [covered under the Annual and Sick Leave Act] are not entitled to the pay of the officers solely because of their status as officers." The importance of that section for our purposes is that as stated above the converse, that officers who are not so covered are entitled to compensation solely because of their status as officers, is also true.

Because the Commissioners are presidential appointees and are not covered by the Annual and Sick Leave Act, their salaries attach by virtue of their status as officers, regardless of the availability of funds at a given time. In other words, the incurring of obligations for the Commissioners' pay in the absence of sufficient available appropriations to liquidate them is authorized by law within the meaning of the Attorney General's Opinions.

Therefore, we conclude that the payment of the Commissioners for work performed in the absence of funds is permissible once the supplemental appropriation has been passed.



Acting Comptroller General
of the United States