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Haubert
C.P.

DECISION



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

FILE: B-114868.18

DATE: February 10, 1978

MATTER OF: Navajo and Hopi Indian Relocation Commission

DIGEST: Navajo and Hopi Indian Relocation Commission, an independent commission, was granted statutory power to appoint and fix compensation of staff personnel and to employ experts and consultants pursuant to 5 U.S.C. 3109. Under that authority, Commission may employ attorney on full-time, part-time, or intermittent basis. In addition, the Commission may, under section 12(g)(2), Public Law 93-531, procure legal services by contract on a task or independent contractor basis where the usual supervision of an attorney hired as an employee is absent. Any such contract would be subject to Department of Justice's authority under 5 U.S.C. 3106 and 28 U.S.C. 514-519 and the limitations of 5 U.S.C. 3109.

By a letter dated November 10, 1977, Mr. Paul Urbano, Chairman of the Navajo and Hopi Indian Relocation Commission, requested our decision whether the Commission has the authority to hire outside legal counsel.

The Commission was created pursuant to Public Law 93-531, December 22, 1974, 88 Stat. 1712, as an independent entity in the executive branch. That public law was enacted for the purpose of providing for final settlement of the conflicting rights and interests of the Hopi and Navajo Tribes in lands which both tribes claimed and which had been established as a joint use area for both tribes. The statute authorized the United States District Court for the District of Arizona to make a final adjudication in the matter, including partition of the joint area. A partition order was entered by the court on February 12, 1977. The Commission is required by the statute to formulate a report to Congress and a plan to relocate Navajo and Hopi families living on the land partitioned to the other tribe. The report and plan must be completed within 2 years from the date of the partition order, and the Commission has an additional 5 years to execute the plan.

With respect to the operations of the Commission, section 12(h) of Public Law 93-531 provides that the Department of the Interior shall furnish, on a nonreimbursable basis, necessary

B-114868.18

administrative and housekeeping services for the Commission. In addition, section 12(g) thereof provides for the hiring of employees as follows:

"Subject to such rules and regulations as may be adopted by the Commission, the Chairman shall have the power to--

"(1) appoint and fix the compensation of an Executive Director, and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title; and

"(2) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed \$150 a day for individuals."

Mr. Urbano has explained the effect of the above provisions on the Commission's need for legal services, stating:

"The Commission considered the possibility of hiring a full-time attorney but discounted that possibility for several reasons. First, it was not felt, and the Commission still does not feel, that a full-time attorney is necessary to handle the legal work for the Commission. Hiring such an attorney would add a great deal of expense for the Commission in that office space, furniture, equipment and secretarial services would have to be provided. In addition, the Commission felt that they needed an attorney who was familiar with the area, familiar with the particular Indian problems faced by the Commission, and had

B-114868.18

some years of experience, in order to assist them in setting up the Commission and to deal with complex problems that go along with the relocation process. The possibility of hiring a permanent part-time attorney was discussed, and after exploring the possibility of obtaining such an attorney in the Flagstaff area, it was determined that none are available."

In view of the above, the Commission evidently decided that it would hire general counsel on an hourly basis. Since the Bureau of Indian Affairs (BIA) handled the housekeeping services for the Commission, BIA approved the contract for legal services from April 1, 1976, to March 31, 1977, under which an attorney was hired on an hourly basis. At the end of that period, the Commission's housekeeping services had been transferred to the office of the Secretary of the Interior. When a new contract for legal services was submitted, the Commission was informed that the contract could not be approved in view of our decision in the matter of Kelly Services, Inc., B-186700, January 19, 1977. Reiterating its belief that it would be impossible to hire an attorney on a part-time permanent basis, and that representation of the Commission by Interior Department attorneys would present a conflict of interest, the Commission has requested our decision whether it may hire outside legal counsel on an hourly basis.

As noted above, section 12(g)(1) of Public Law 93-531 grants to the Chairman of the Commission the power to appoint and fix the compensation of staff personnel without regard to certain provisions of title 5, United States Code. Under that authority, the Commission does have the power to hire an attorney as an employee on a full-time, part-time, or intermittent basis at a rate not in excess of the maximum rate for GS-18 of the General Schedule.

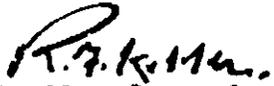
Further, section 12(g)(2), quoted above, empowers the Chairman to procure temporary and intermittent services of experts and consultants to the same extent as is authorized by 5 U.S.C. 3109. Thus, the Commission could execute a contract for legal services with an expert or consultant as an independent contractor--that is, one not subject to the Commission's supervision and control--under section 12(g)(2).

B-114868.18

Mr. Urbano's letter indicates, however, that the range of legal services necessary may be so broad that, in effect, an employer-employee relationship would be created. In such a case, the contract would be proscribed under existing law by the rule set forth in the Kelly Services decision to which the Commission has referred. However, assuming that the required services can be performed on a task or independent contractor basis--with the usual supervision of an attorney hired as an employee being absent--we would have no objection to a contract for intermittent services being executed with an attorney under section 12(g)(2) to carry out the necessary services.

The Commission should be certain that the furnishing of the necessary legal services does not conflict with the jurisdiction of the Attorney General over litigation, investigation of claims pending in agencies, or otherwise as expressed in 5 U.S.C. 3106 and 28 U.S.C. 514-519. If there is any doubt as to infringement on those authorities, clearance should be obtained from the Department of Justice.

In the event the necessary legal services cannot be obtained within the limitations expressed above, we suggest that specific legislation be obtained. The Small Business Administration, when faced with a somewhat similar situation several years ago, obtained specific legislation. See 15 U.S.C. 634(b)(7) (1970).


Deputy Comptroller General
of the United States