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DECISION

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

FILE: B-192018

DATE: October 22, 1979

MATTER OF: [Use of Penalty Mail by Court Reporters in
Mailing Official Court Correspondence.]
Addressee: Penalty Mail Use by Court Reporters

DIGEST: 1. United States court reporters must pay for postage and associated expenses of mailings of official court correspondence pursuant to their duties under 28 U.S.C. § 753, because of the requirement that they must furnish all supplies at their own expense. The statute allowing official mail of officers of the United States (39 U.S.C. § 3202) to be sent without postage prepaid does not exempt the court reporters from bearing the ultimate costs of the postage. The reporters may be permitted by the Administrative Office of the United States Courts to use penalty mail on a reimbursable basis in connection with the part of their duties which does not involve sale of transcripts for a fee.

2. Court reporters may not use penalty mail envelopes for fee-generating correspondence even though they reimburse the Administrative Office of the United States Courts if Office determines that such activities are not official business. 39 U.S.C. § 3202 permits use of penalty mail only for official business.

The Administrative Office of the United States Courts (Administrative Office) requests our decision on whether United States court reporters (court reporters) can use the "penalty mail" privilege for the mailing of court documents. The penalty mail privilege includes the use, pursuant to 39 U.S.C. § 3202 (1976), of envelopes preprinted with the words "Postage and Fees Paid," followed by the name of the Government agency and an identifying number. Postal Service Manual, § 137.24. It is used to send official Government mail without prepayment of postage. Official mail of departments and agencies must also carry the legend "Official Business," and must specify the penalty for unlawful use (39 U.S.C. § 3203(a)). Hence, it is referred to as "penalty mail."

A Government agency which uses penalty mail must pay the costs of the postage from its appropriations. 39 U.S.C. § 3205

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(1976). In this case, the use of penalty mail by the court reporters, if permitted, would be charged against the appropriations of the Administrative Office. Because the penalty mail indicia are preprinted on envelopes at agency expense, and the reporters are apparently provided with the preprinted envelopes by the Administrative Office, this request raises the additional questions, even assuming that the reporters are entitled to mail without bearing the cost of postage, whether they must pay for the printing and the envelopes.

We find that the court reporters may be permitted to use the penalty mail privilege in the mailing of official matter, not connected with their fee-generating activities, but only if they reimburse the Administrative Office for all associated costs. For mailings in connection with their fee-generating activities, the court reporters may not use penalty mail on any basis.

We have received submissions from the Administrative Office, the United States Court Reporters Association, and the United States Postal Service (Postal Service) supporting their respective views on this matter. Each submission is primarily concerned with the relationship between two statutes, the so-called Court Reporters Act, 28 U.S.C. § 753 (1976), and 39 U.S.C. § 3202 (1976), dealing with penalty mail.

The pertinent excerpt from 39 U.S.C. § 3202, relating to the use of penalty mail, is as follows:

"(a) * * * there may be transmitted as penalty mail --

"(1) official mail of --

"(A) officers of the Government of the United States other than Members of Congress;

* * * * *

"(c) This section does not apply to officers who receive a fixed allowance as compensation for their services including expenses of postage."

The pertinent provisions of the Court Reporters Act are as follows:

"(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of

the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: * * * [various specified judicial proceedings] .

* * * * *

"* * * Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

"The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

* * * * *

"(c) The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

* * * * *

"(e) Each reporter shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States. All supplies shall be furnished by the reporter at his own expense.

"(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. * * *" (Emphasis added.)

The Court Reporters Act establishes the Federal court reporting system, which is unique with regard to the compensation of Federal employees. Under the Act, for each Federal judicial district one or more official salaried court reporters are to be appointed. The court reporters are officers and employees of the court and their work is under the supervisory control of the judiciary. They are compensated by a yearly salary for attending and recording official proceedings, preparing transcripts for judges,

and filing copies of transcripts with the clerk of the court. However, unlike other Federal employees, the official court reporter is allowed by statute also to be an independent entrepreneur, deriving income in addition to salary from the sale of transcripts to litigants. It is because of this latter status that the Act also requires that the reporter must furnish all of his own supplies. See, e.g., Computer-Aided Transcription Program in the Federal Courts, B-185484, May 25, 1977.

All concerned parties agree that the court reporters are officers of the United States for purposes of the penalty mail provisions. The court reporters contend that, as Government officers, they are entitled to use the penalty mail privilege under 39 U.S.C. § 3202 at the expense of the Administrative Office. They assert that the term "supplies" in 28 U.S.C. § 753 does not include penalty mail and that the legislative history of that section shows an intent to grant them the use of the penalty mail privilege. They rely on the fact that, shortly after the enactment of 28 U.S.C. § 753, the Administrative Office determined that the reporters were entitled to use penalty mail.

The Administrative Office contends that court reporters may not use penalty mail but must provide for their own envelopes and printing costs, and pay the postage for the delivery of their correspondence, because of the requirement that court reporters furnish all supplies at their own expense. The Administrative Office further contends that court reporters, although officers of the United States under 39 U.S.C. § 3202(a), supra, are not entitled to the penalty mail privilege by virtue of the exception set forth in 39 U.S.C. § 3202(c), which says that the use of penalty mail is not available to officers who receive "a fixed allowance as compensation for their services including expenses of postages". The Administrative Office asserts in this regard that because court reporters receive both a salary for their official duties and a fixed per-page fee for the transcripts they produce and sell, the Congress intended that this income would compensate court reporters for all expenses, including postage.

The Postal Service disagrees that 39 U.S.C. § 3202(c) prevents the court reporters from using penalty mail. It concludes that the subsection 3202(c) exception to the use of penalty mail applies only to those officers who receive compensation specifically earmarked for postage expenses. Since the Court Reporters Act does not specifically provide an allowance for postal expenses, the Postal Service believes that the subsection 3202(c) exception does not apply to the court reporters. The Postal Service goes on to say that --

"There is a provision in the Court Reporter's Act, 28 U.S.C. Sec. 753, which might be considered as a similar exception to the penalty mail provisions. That provision, section 753(e), requires court reporters to furnish all of their supplies at their own expense. We defer to the judgment of the General Accounting Office on the interpretation of that provision." [Footnote omitted.]

At the outset, it seems clear that preprinted envelopes are "supplies" within the meaning of 28 U.S.C. § 753(e). Moreover, we agree with the Administrative Office's General Counsel that postage fees are also "supplies." We have always interpreted the term, "supplies," broadly. In Computer-Aided Transcription Program in the Federal Courts, supra, we held that court reporters must fully reimburse the Administrative Office for the use of a computer system to aid in preparation of transcripts. Moreover, telephone service -- an analogous kind of expense -- has been regarded since 1945, apparently without dispute by the reporters, as a "supply" within 28 U.S.C. § 753(e). See Report of the Judicial Conference of Senior Circuit Judges, 9 (1945).

Hence, under the requirement that they provide supplies at their own expense, the reporters must pay for mailings unless 39 U.S.C. § 3202 in effect creates an exception from that requirement. Both the reporters and the Administrative Office ask, in this regard, whether the reporters are authorized to use the penalty mail privilege, apparently assuming that if they are, the cost would be borne by the Administrative Office. However, in our view, the essential question raised by the requirement of 28 U.S.C. § 753(e) that the reporters pay for their own supplies is not whether they may use penalty mail -- the Postal Service, as discussed below, concludes that they may, for official non-fee-generating activities -- but rather whether 39 U.S.C. § 3202 or any other law allows them to do so without reimbursing the United States. We believe that the language of the Court Reporters Act prevents the court reporters from mailing at Government expense.

The authority of agencies to allow their officers to use the mails for official Government business at no expense to themselves is not created by section 3202. Appropriations of Federal agencies are generally available, without specific statutory authority, for the expense of the use of the mails by their officers and employees for official purposes. Section 3202 establishes, not who may use the mails, but what conditions must be met for Federal agencies to use

the penalty mail privilege, i. e., to allow officers to use the mails for official business without the agency having to pay in advance for postage. (The relevant condition is that the mail be official mail of officers of the Government.)

Repeal of 39 U.S.C. § 3202, for example, would not prevent Government officers otherwise authorized to do so by their agencies from using the mails for official business, nor would it prevent the agencies from paying the associated postage. It would merely prevent the use of penalty mail, i. e., official mail for which the postage has not been prepaid.

By requiring that they provide supplies at their own expense, 28 U.S.C. § 753(e), in effect, prevents court reporters from mailing at Government expense whereas, as discussed above, nothing in 39 U.S.C. § 3202 gives reporters (or any other officers of the Government) an independent right to use the mails for official business at Government expense. Consequently the reporters' contention that 39 U.S.C. § 3202 creates an exception to 28 U.S.C. § 753(e) is misplaced, and they must provide postage at their own expense.

For purposes of determining who must bear the costs of postage and mailing supplies, we see no basis for making a distinction, either between fee-generating and non-fee-generating activities of the reporters, or between different types of non-fee-generating activities. In Computer-Aided Transcription Program (B-185484), supra, we held that court reporters must reimburse the Administrative Office for use of a computer system to prepare the transcripts which they are required to provide to the courts free of charge. We said that the Court Reporters Act contemplates that --

"* * * such duties as preparing transcripts for judges and filing copies of transcripts with the clerk represent the reporters' statutory duties for which they are duly compensated by their yearly salary."

Thus, it is not only their fee-generating activities for which the reporters are required by 28 U.S.C. § 753(e) to provide all supplies at their own expense. Even as to their non-fee-generating activities, such as providing transcripts to judges, they must provide their own supplies.

The Director of the Administrative Office also asks, however (assuming we determine that use of penalty mail is "supplies") whether a distinction should be made between the use of penalty mail by court reporters for Government correspondence on the one hand and fee-generating correspondence on the other. The Director

is not now raising the question of who should bear the expense of mailings but rather whether penalty mail may be used at all for non-official purposes.

We think this distinction is very valid. As the Postal Service points out, 39 U.S.C. § 3202, supra, permits use of penalty mail only for "official business," as opposed to the private business of officers and employees of the Government. In fact, the "penalty" is imposed precisely for such private use. It is, of course, up to each agency to determine which of its outgoing mailings are official although, as indicated above, the Postal Service views mailings in connection with fee-generating activities as not official. Assuming that the Administrative Office determines that mailings in connection with reporters' fee-generating activities are not official business, we see no basis to allow the use of the penalty mail privilege for that purpose even though the reporters later reimburse the Administrative Office.

Conversely, the Postal Service has said that the non-fee-generating mail of the reporters concerning their official duties is official mail under 39 U.S.C. § 3202(a)(1)(A). The reporters may be allowed by the Administrative Office in its discretion to use penalty mail for purposes which the Administrative Office agrees are official and non-fee-generating on a reimbursable basis, assuming that the Administrative Office can account adequately for the amounts to be reimbursed.

In view of the uncertainty over this issue and of the longstanding administrative interpretation allowing the use of penalty mail, this decision will have prospective application only.

Henry R. Jan Cleva

For the Comptroller General
of the United States