



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of Energy--Claim for Expert
Witness Expenses

File: B-231208

Date: August 18, 1988

DIGEST

An employee of the Department of Energy (DOE) requested payment for expert witness fees incurred due to a cancellation by the agency of the original hearing date. The payment of the witness fees by DOE may not be allowed in the absence of specific statutory authority.

DECISION

This decision is in response to a request by an authorized certifying officer of the Department of Energy (DOE) for an advance decision on the legality of certifying for payment an employee's claim for reimbursement of witness expenses caused by the postponement of a hearing, through no fault of the employee's, which had been scheduled under title 10 of the Code of Federal Regulations, Part 710. We hold that the claim must be denied because of the absence of specific statutory authority to pay such expenses.

BACKGROUND

The report from DOE indicates that the employee requested an administrative hearing under title 10 of the Code of Federal Regulations (CFR), Part 710 to consider evidence concerning the eligibility of the employee for continued DOE "access authorization" (security clearance).

The hearing was scheduled to take place on February 26, 1988. Due to the sudden unavailability of DOE's expert witness because of a serious family illness, the hearing was canceled at DOE's request 24 hours before the hearing date and rescheduled for a later time.

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Because of the short notice to the employee, the employee's witness, a clinical psychologist, was unable to reschedule other patients to fill the 3-hour time slot that he had set aside for testifying. Consequently, the witness charged the employee for the entire 3 hours even though he did not testify on February 26. The employee requests reimbursement for this fee of \$225.

Under section 710.25(d) of title 10 CFR, an individual requesting a hearing is responsible for producing and paying his or her own witnesses. It is understood by DOE, and by the employee, that he is responsible for the cost of his witness's time during the actual hearing. However, the Chief Counsel of the Pittsburgh Naval Reactors Office suggests the possibility of reimbursement to the employee for the extra fee caused by the DOE-requested cancellation on very short notice, based on equitable considerations. The Chief Counsel regards it "as a necessary expense to the agency, incurred in connection with DOE maintaining its personnel security program."

DISCUSSION

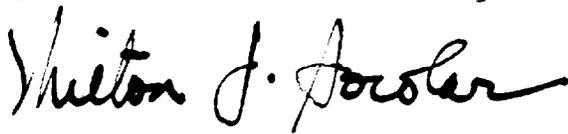
Generally we have held that under the "American Rule," the hiring of an outside attorney to represent an employee is a private matter between the attorney and the client and that reimbursement of attorney fees may not be allowed in the absence of express statutory authority. Nuclear Regulatory Commission, B-194507, Aug. 20, 1979, and decisions cited therein. This principle also applies to expert witness fees and expenses. Id. We know of no statute that specifically authorizes reimbursement of such witness fees. There is no provision for payment of witness fees or attorney fees in DOE's organic legislation. 42 U.S.C. §§ 7101-7375. Therefore, there is no contractual obligation for DOE to pay an employee's witness expenses in this type of proceeding.

Moreover, an employee must take the risk that from time to time, it may be necessary for the government to postpone or otherwise delay a hearing for a reasonable cause. However, the government cannot be held responsible for any added costs such delay or postponement may occasion. Cf. 9 Comp. Gen. 79 (1929) (subpoenaed witness whose place of residence was in the same city as canceled hearing not entitled to fees, notwithstanding the fact that she may have received the subpoena while on a visit to another city and returned home earlier than intended).

As mentioned above, the Chief Counsel suggests that financial relief can be made on equitable grounds, since the hearing was canceled for the benefit of DOE. We noted in 57 Comp. Gen. 856, 861 (1978) that principles of fairness are

not sufficient to overcome the general rule that the employment and compensation of an attorney is a matter between the client and the attorney, absent some statutory provision or agreement based upon a statutory provision. The same reasoning applies to expert witness fees. Even though in this instance the hearing was canceled for the convenience of the Department, the actions of DOE do not appear to have been arbitrary and capricious nor do they appear to have been an effort to circumvent the hearing process for the employee.

In conclusion, we find no basis upon which DOE may allow reimbursement for the expert's fees and expenses resulting from the canceled hearing.

for 
Comptroller General
of the United States