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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Albert J. Beaudreault

File: B-245712.3

Date: May 20, 1992

DIGEST

Employee, subject to an Inspector General investigation, caused by a third party, may not be reimbursed for the attorney's fees he incurred since the agency, having decided to investigate the employee, did not have a common interest with him.

DECISION

Mr. Albert J. Beaudreault, a former employee of the United States Department of Agriculture, seeks reimbursement for legal fees.

While employed at the Department of Agriculture (USDA), Mr. Beaudreault became the subject of an investigation by the agency's Office of Inspector General on the basis of allegations of impropriety by a USDA employee. Mr. Beaudreault retained an attorney and agreed to pay him a \$5,000 nonrefundable retainer, plus miscellaneous out-of-pocket expenses. The subject of the retainer agreement is shown as "Criminal Investigation by the Office of Inspector General and by U.S. Attorney's Office in Boston." The investigation resulted in no action being taken against Mr. Beaudreault.

The USDA denied Mr. Beaudreault's request for reimbursement on the basis that there is no authority for expenditure of an agency's appropriated funds unless representation is in the government's interest, citing to decisions of this Office. Mr. Beaudreault, in support of his request for reimbursement, states that he was advised by the Office of the Inspector General to retain legal counsel since this was a grand jury investigation, and that his supervisor, the Market Administrator, agreed to authorize the payment. Mr. Beaudreault has furnished an affidavit from the former Assistant Market Administrator to the effect that an office conference was held in which he was advised by the Market Administrator that his legal expenses would be paid if Mr. Beaudreault was acting within the scope of his official duties, but would not if he were acting outside the scope of his duties.

The hiring of an attorney is a matter between the attorney and the client, and absent express statutory authority, an agency may not use its appropriations to reimburse the attorney's fees. Leo D. Thiels, B-237601, July 22, 1991, 70 Comp. Gen. 628. However, in those instances where an officer or employee of the United States is sued in his individual capacity for something he did (or failed to do) while performing his official duties, and the interest of the United States in advocating the legality of its employee's actions or inaction coincides with the employee's interest, the United States may bear the expense of defending that suit. 58 Comp. Gen. 613 (1979).

An agency, however, may not reimburse attorney's fees incurred by an employee as a cost of providing legal representation in cases where charges of misconduct, while initially raised by an outside party, are pursued not by the private party but by the agency on the basis of its independent determination to investigate the conduct of its employee. Upon the agency's determination that the matter should be further investigated, the situation is no longer one in which the government's interest is aligned with the interest of the employee against charges pressed by a third party. It is no longer in the government's interest to provide the employee with legal counsel. Reimbursement for Banking Charges and Attorney's Fees - Inspector General Investigation, B-212487, Apr. 17, 1984.

Mr. Beaudreault's case exactly parallels our decision B-212487, Apr. 17, 1984, supra. In both, allegations concerning the employee's conduct were initially raised by a third party, and the agency's Inspector General believed that the matter should be further investigated. Therefore, the government's interest was no longer aligned with the interest of the employee. Leo D. Thiels, 70 Comp. Gen. 628, supra.

We also disagree with Mr. Beaudreault's contention that the affidavit he has provided shows conclusively that he was promised reimbursement by the government. The Market Administrator was merely stating the general rule as to when an agency may expend its appropriated funds and reimburse an employee for his attorney fees. See International Trade Commission - Legal Representation, 61 Comp. Gen. 515 (1982).

Accordingly, Mr. Beaudreault's claim for reimbursement of attorney's fees is denied.

for *Seymour Spoo*
James F. Hinchman
General Counsel