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**DECISION**



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

**FILE: B-139703**

**DATE: December 3, 1976**

**MATTER OF: Costs of Intervention - Food and Drug Administration**

- DIGEST:**
1. Food and Drug Administration may reimburse costs of otherwise eligible persons or groups who participate in its proceedings where agency determines that such participation "can reasonably be expected to contribute substantially to a fair determination of" issues before it. Participation need not be "essential" in the sense that issues cannot be decided without such participation. B-92288, February 19, 1976, clarified.
  2. Food and Drug Administration may reimburse costs of persons or groups who participate in proceedings before it only where person or group lacks financial resources to participate adequately. Absent specific statutory authority, agency may not adopt more liberal standard of eligibility based on factors other than person's or group's actual financial resources which could be applied to participation in agency proceeding.
  3. Food and Drug Administration may not make advance payments for costs of otherwise eligible persons or groups for participation in proceedings before it, absent specific statutory authority which overcomes prohibition against advance payments in 31 U.S.C. § 529.
  4. Food and Drug Administration's authority to reimburse costs of otherwise eligible persons or groups who participate in proceedings before it extends to all types of agency proceedings.

The Acting Commissioner of the Food and Drug Administration (FDA) has requested our decision on certain questions raised by a petition filed by Consumers Union which has been published as an Advance Notice of Proposed Rulemaking in 41 Fed. Reg. 35855 (August 25, 1976).

In general terms the questions presented to us involve the extent of FDA's legal authority to provide financial assistance, in the form of attorneys fees and other expenses of administrative litigation to certain participants in its adjudicatory and rulemaking proceedings. Specific

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questions are raised concerning the criteria to be applied in determining eligibility for financing the expenses of participants under the terms proposed by Consumers Union in the light of prior statements by this Office on the subject in B-139703, July 24, 1972; B-92288, February 19, 1976; and a letter to the Chairman of the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce, B-180224, May 10, 1976. See also, our opinion to several members of the Congressional Black Caucus in B-139703, September 22, 1976.

Our decisions in this area, referred to above, address the extent to which payments to parties and other participants in agency proceedings may be considered "necessary expenses" within the discretion accorded the Federal agency in carrying out its statutory functions. Thus we observed in B-92288, supra, with respect to the Nuclear Regulatory Commission (NRC):

"While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Gen. 621 (1927); 17 id., 636 (1938); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973).

"The question, of course, is whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe only the administering agency can make that determination.

\* \* \* \* \*

"In view of the above, if NRC in the exercise of its administrative discretion, determines that it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose. \* \* \*"

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The basic criteria to be applied were stated in B-180224, supra, as follows:

"\* \* \* appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that (1) it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation. \* \* \*"

"We would like to emphasize, however, that it is within the discretion of each individual agency to determine whether the participation of the particular party involved is necessary in order for it to properly carry out its functions and whether the party is indigent or otherwise unable to finance its participation. No party has a right to intervene at Federal expense unless the agency so determines."

Our opinion in B-139703, September 22, 1976, concerning the Federal Communications Commission (FCC), elaborated upon these criteria:

"\* \* \* FCC appropriations are available to make payments to persons (and organizations) representing an interest in a matter before it where the Commission determines that such payments are necessary to achieve a fair resolution of the matter. This conclusion follows from our prior decisions, discussed supra \* \* \*."

"As indicated in our decisions, the prerequisite to such payments is a determination by the agency that the payments are 'necessary' to the accomplishment of its functions. Certainly this would include obtaining presentations or other forms of participation which enable the full and fair resolution of matters before the Commission. However, we would emphasize that our decisions are limited to situations in which the payment, as well as the participation, is necessary; that is, lack of financial resources on the part of the person

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involved would preclude participation without reimbursement. Accordingly, the Commission must determine that both the participation itself and payment therefor are necessary. In the absence of relevant statutory standards, we believe that the Commission must be accorded considerable discretion in making these determinations. Compare H.R. 13901 [94th Congress] (page 3, line 15-page 4, line 12), and S. 2715 [94th Congress] (page 9, line 7-page 10, line 3), supra, with respect to proposed statutory standards in this regard."

The Consumers Union petition advocates the adoption of standards which would define eligibility for receipt of compensation for costs of participants as follows:

"(a)(1) The Commissioner may provide compensation for reasonable attorneys' fees, expert witness fees, and other reasonable costs of participation incurred by eligible participants in any rule making or adjudicatory proceeding conducted pursuant to Subparts B,C,D, and E of these regulations, whenever public participation in such a proceeding promotes or can reasonably be expected to promote a full and fair determination of the issues involved in the proceeding.

"(2) Any person is eligible to receive an award under this section \* \* \* for \* \* \* participation (whether or not as a party) in a rule making or adjudicatory proceeding if

"(1) The person represents an interest the representation of which contributes or can reasonably be expected to contribute substantially to a fair determination of the proceeding, taking into account the number and complexity of the issues presented, the importance of public participation, and the need for representation of a fair balance of interests; and

"(ii)(a) The economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding by that person or in the case of a group or organization, the economic interest of the individual members of such group or organization is small in comparison to the costs of effective participation in the proceedings; or

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"(b) The person demonstrates to the satisfaction of the Commissioner that such person does not have sufficient resources available to adequately participate in the proceeding in the absence of an award under this section." (Emphasis added.)

FDA's specific questions concerning the proposal, and our responses, are as follows:

1. "Your decision concerning the Nuclear Regulatory Commission indicates that payments can be made if the agency determines that participation is 'essential' to dispose of the matter. We request your views on whether FDA may pay the costs of participants if FDA finds that the participation would be useful in disposing of a matter but cannot conscientiously find that the participation is 'essential.'"

While our decision to NRC did refer to participation being "essential," we did not intend to imply that participation must be absolutely indispensable. We would agree with Consumers Union that it would be sufficient if an agency determines that a particular expenditure for participation "can reasonably be expected to contribute substantially to a full and fair determination of" the issues before it, even though the expenditure may not be "essential" in the sense that the issues cannot be decided at all without such participation. Our previous decisions may be considered modified to this extent.

2. "Under the Consumers Union petition, assistance could be provided when public participation can 'reasonably be expected to promote a full and fair determination of the issues' and when the participant 'represents an interest the representation of which \* \* \* can reasonably be expected to contribute substantially to fair determination \* \* \*'. This standard seems to give special weight, in assistance determinations, to the role of the participant in representing consumers and other interests potentially affected by FDA decisions. We would appreciate your views on whether FDA may make awards solely to ensure that a potentially affected interest is represented, or may give the representational role of the participant special weight in deciding whether to provide financial assistance."

As noted in our answer to question 1, we perceive no legal objection to the proposed standard. Of course, it is the agency that must determine whether the standard has been met in particular cases, and the agency has considerable discretion in this regard.

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With respect to the second part of the question, the agency also has discretion in determining the value of a participant's representational role. We do not read the standard as requiring participation of all those representing consumers or other parties affected by FDA determinations unless the FDA also finds that such participation will substantially contribute to the full and fair disposition of the particular matters before it.

3. "Under the financial eligibility criteria in the petition, payment could be made to persons or organizations who have (or have members with) an economic interest in the outcome which is small in comparison with the costs of effective participation or who demonstrate they do not have sufficient resources to participate adequately. In a May 10, 1976 letter to Congressman Moss, your office indicated that payments may be made to a party who is 'indigent or otherwise unable to finance its participation.' We would like your views on whether payments under the financial criterion in the Consumers Union petition would be authorized."

As stated in our opinion in B-139703, September 22, 1976, supra:

"\* \* \* our decisions are limited to situations in which the payment, as well as the participation, is necessary; that is, lack of financial resources on the part of the person involved would preclude participation without reimbursement. Accordingly, the \* \* \* [agency] must determine that both the participation itself and payment therefor are necessary. \* \* \*"

We are still of the view set forth in our prior opinions that a regulatory agency may not pay costs of a party requesting to participate in a regulatory agency proceeding unless the agency first determines that the party is indigent or otherwise unable to finance its participation. Accordingly, it is our view that FDA may not extend financial assistance to a party requesting to participate which has the financial resources to participate but does not, for whatever reason, wish to use its resources for this purpose.

Section 2.151(a)(2)(ii) of the proposed Consumers Union regulation would permit reimbursement for costs of participation either where lack of sufficient resources can be demonstrated or where:

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"\* \* \* the economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding by that person or, in the case of a group or organization, the economic interest of the individual members of such group or organization is small in comparison to the costs of effective participation in the proceedings \* \* \*."

Since the latter standard, as quoted, is based on factors other than financial ability to participate in a strict sense, we must conclude that it is not acceptable under our prior decisions and in the absence of specific statutory authority.

4. "\* \* \* the Consumers Union petition asks that awards be available for hearings in connection with rulemaking and adjudicatory proceedings, including public hearings before a public advisory committee pursuant to Subpart D of the proposed regulations on administrative practices and procedures published in the September 3, 1975 Federal Register (40 FR 40682). The NRC decision dealt only with costs of participation in an adjudicatory licensing hearing."

We see no basis for distinction in terms of the nature of agency proceedings for the purposes here relevant.


5. "Like the Nuclear Regulatory Commission, the Food and Drug Administration generally receives a lump sum appropriation for salaries and expenses. The Agency does not have any express statutory authority to use its appropriated funds specifically to assist participants.

"Any expenditure made by FDA to provide assistance to participants will also come within the scrutiny of the Congressional subcommittees responsible for our appropriations, i.e., the Subcommittees for Agriculture and Related Agencies of the House and Senate Appropriation Committees. We would appreciate your comments on whether we need to obtain the views of these subcommittees on this issue, or whether these subcommittees have expressed agreement with your position on this matter."

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Our opinions in this area are concerned only with the availability of appropriations as a matter of law. Strictly speaking, notice to, or approval by, the appropriations subcommittees is not required for the use of appropriations sanctioned by our opinions, assuming that there are no applicable statutory requirements for prior congressional approval. Thus the question raised here is one of policy and the relationships between the agency and the subcommittees which we cannot resolve. Our Office does, of course, favor the greatest possible disclosure of spending activities to interested congressional committees and subcommittees.

In response to the final question, we are not aware that the subcommittees referred to have expressed any views on our opinions in this area.

  
Deputy Comptroller General  
of the United States