

CCM

DECISION



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

13843

FILE: B-139703

DATE: May 28, 1980

*Request for*  
MATTER OF: Reimbursement of Attorney Fees  
Assessed Against (Individual Employees)

DIGEST: Federal Bureau of Investigation (FBI) Agents *AGC00002*  
and paid FBI informant may be reimbursed from  
FBI salaries and expenses appropriation for  
payment of attorneys fees assessed against  
them in their individual capacities in a  
civil action, providing it is administratively  
determined that the employees' obligation was  
incurred in the accomplishment of the official  
business for which the appropriation was made.

The Assistant Attorney General, Civil Division, Department  
of Justice, has requested our opinion on whether Government  
funds may be used to pay attorney fees assessed against three  
Federal Bureau of Investigation (FBI) agents and an FBI informant  
(Federal defendants) in their individual capacities in a suit  
for damages. We hold that Government funds may be used to reim-  
burse the employees for attorneys fees assessed against them,  
subject to the qualifications discussed below. *AGC000039*

The agents and the informant are defendants in the case  
of Hampton v. Hanrahan (Civil Action No. 70-C-1384, N.D. Ill.),  
an action for money damages brought against them and against  
State law enforcement officers arising from a raid on an apart-  
ment occupied by members of the Black Panther Party. The De-  
partment of Justice (DOJ) has been providing legal representa-  
tion to the Federal defendants based on its determination that  
the suit arose out of actions within the scope of their employ-  
ment.

The raid occurred on the morning of December 4, 1969, when  
police officers of the "Special Prosecution Unit" of the  
State's Attorney's Office, Cook County, Illinois, entered a  
Chicago apartment occupied by Party members. The officers were  
acting pursuant to a warrant issued by the Cook County Circuit  
Court, authorizing them to search for and seize illegal weapons.

~~010559~~  
112387  
DLG04717  
AGC03614  
AGC02037

Shortly after the officers entered the apartment, gun fire erupted, killing two occupants and wounding others. The police seized unregistered and other illegally held weapons, and arrested the surviving occupants on State criminal charges. Cook County grand jury indictments against the survivors were ultimately dismissed.

The surviving occupants of the apartment and the legal representatives of the two deceased occupants brought suit against the Federal defendants, basing their claims on the laws conferring a right of action for violation of civil rights (42 U.S.C. §§ 1983, 1985(3), and 1986), the Constitution, and the Illinois wrongful death statute. The exact nature of the Federal defendants' actions in connection with the raid is currently being litigated. However, the defendants' petition for a writ of certiorari and the Court of Appeals opinion indicate that the case against the Federal defendants is partly based upon the fact that the FBI had had since the 1950s, a program under which it had been conducting covert actions against various domestic organizations. In 1967, the program was expanded to include groups such as the Black Panther Party. The Federal defendants are the men who, on the day of the raid, were the Special Agent-in-Charge of the Chicago office of the FBI, the supervisor of the Racial Matters Squad of the FBI Chicago office, a Special Agent of the FBI assigned to the Racial Matters Squad, and a paid FBI informant.

The complaint charged some or all of the Federal defendants with intentionally or negligently depriving the occupants of the apartment of their civil rights by participating in the planning and execution of the raid; by conspiring to bring about the malicious prosecution of the plaintiffs' on the State criminal charges or failing to prevent it by conspiring to obstruct justice; by denying the plaintiffs their Constitutional right to counsel; and by impeding vindication of some plaintiffs on the State charges. In addition, the Federal defendants were charged under State law with the wrongful death of the two deceased occupants of the apartment. Hampton v. Hanrahan, 600 F. 2d. 600, 607 (7th Cir. 1979).

The action was tried in the United States District Court for the Northern District of Illinois before a jury in 1976 and 1977. The trial court directed verdicts in favor of the defendants, and an appeal was taken. The Court of Appeals reversed the District Court's decision, holding that the plaintiffs had established a prima facie case, and therefore that their evidence should have been allowed to be considered by the jury. The Court then remanded the case to the District Court for a new trial.

The Court also granted plaintiffs' request for an award of attorneys' fees for their appellate work, inviting plaintiffs to submit a statement of the fees requested. The Court said nothing then about whether payment was expected to come from the Federal defendants individually or from the Government. 600 F. 2d. 600, supra.

The award of attorneys' fees to the plaintiffs was made under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), which allows awards of costs, including reasonable attorneys' fees, to the prevailing party in an action for violation of civil rights. The Federal defendants then filed a petition for a writ of certiorari in the Supreme Court, one of the grounds of which is that the Court of Appeals erred in awarding attorneys' fees to the appellants because they are not "prevailing parties" within the meaning of 42 U.S.C. § 1988.

The DOJ also asked us at that time whether it could properly include the attorneys' fees assessed against the defendants when certifying for payment from the judgment appropriation the award of costs in favor of the plaintiffs under 28 U.S.C. §§ 2412 and 2414. (Letter dated June 25, 1979.) We responded that an opinion from us would be premature because the defendants were seeking certiorari; the question would be moot if the Supreme Court overturned the award of attorneys fees. B-139703, December 28, 1979.

Meanwhile, the Court of Appeals, having heard the parties on the issue of the amount of fees and the way they should be allocated among the defendants, awarded plaintiffs \$99,910. Apparently the Federal defendants argued that any award against them of attorneys' fees should be paid by the United States because in its Order, the Court said it agreed with them that any award against them was to be collected from the Federal defendants, "in their official capacity rather than in their personal capacities, in the absence of a finding of bad faith." Order, December 12, 1979, p. 13. The Order assessed the Federal defendants for one-third of the total award.

The DOJ, as a result has renewed its request to us. It intends to argue to the Court of Appeals that 42 U.S.C. § 1988 does not allow an award of attorneys' fees against the United States. This position, according to the Assistant Attorney General may conflict with the individual interests of the Federal defendants. If the Department's view that 42 U.S.C. §1988 does not waive the sovereign immunity of the United

States prevails, then the burden of paying the court's award of attorneys' fees may fall upon the defendants individually. Therefore, the defendants will have to obtain private counsel to represent their interests, unless we hold that the Government may reimburse the defendants for the attorney's fees awarded by the court.

The question the Department now poses is thus different from the initial one. The issue the Department now presents (at this point completely hypothetical) is whether Government funds could be used to reimburse the defendants in the event they personally have to pay the award of attorneys fees. This could happen if the Court of Appeals assesses the fees against them in their individual capacities because, as a matter of law, it agrees with DOJ that it could not assess the fees against the United States and that assessment of the defendants in their official capacities is, in effect, assessment against the United States. As the submission suggests, and as additionally indicated informally by a DOJ attorney representing the Federal defendants individually, the Department now needs an opinion before the related issue being appealed to the Supreme Court is decided, because if it cannot reimburse the defendants it represents they may wish to hire private counsel to assert their interests, in opposition to the Department's position.

It would appear that the action against the defendants arose by reason of the performance of their duties as employees of the FBI. (One defendant was a paid informant but for present purposes he may be regarded as having been an employee of the Bureau.) It has long been our view that the United States may bear expenses, including court-imposed sanctions, which a Government employee incurs because of an act done in the discharge of his official duties. 44 Comp. Gen. 312, 314; 31 id. 246; 15 Comp. Dec. 621.

This conclusion reflects the broader principle that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or incident to the accomplishment of the object or for which the appropriation was made, except as to expenditures in contravention of law, or for some purpose for which other appropriations have been made specifically available. See 44 Comp. Gen. 312, 314; 38 id. 782, 785; 32 id. 326. Hence, funds appropriated for the FBI's expenses could be used to pay an award of attorneys' fees made against the defendants individually, providing it is administratively determined that the defendants' obligation arose as a result of the performance of their duties

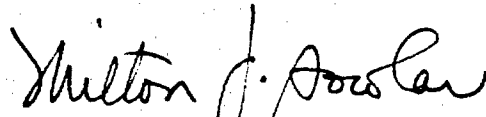
B-139703

as employees of the FBI.

Payment would be proper as long as the actions giving rise to the obligation constitute officially authorized conduct. The Government will not reimburse an employee for an obligation resulting from conduct which, though performed while the employee was carrying out his assigned duties, was not actually part of them. For example, we held that the Office of Price Stabilization could not pay the fine of an employee who double parked while he was performing his job--making deliveries--since double parking was not part of his official duties. 31 Comp. Gen. 246 (1952). On the other hand, in 44 Comp. Gen. 312 (1964), we held that FBI funds could be used to pay a contempt fine imposed upon an FBI agent when, in violation of a District Court order but in accordance with Justice Department regulations and specific instructions of the Attorney General, the agent refused to answer questions put to him during a judicial hearing.

The appropriation "Federal Bureau of Investigation, Salaries and Expenses," contained in the Departments of State, Justice, and Commerce, the Judiciary and Related Agencies Appropriation Act, 1980, Public Law 96-68, approved September 24, 1979, 93 Stat. 416, 420, provides funds for, among other things "\* \* \* expenses necessary for the detection, investigation, and prosecution of crimes against the United States \* \* \*."

FBI officials are in the best position to make the determination, in the first instance, of whether the attorneys' fees assessed against their employees were necessarily incurred incident to the accomplishment of FBI official business for which the appropriation referred to above was made and as part of the employees' authorized duties. This Office will not question such a determination if it is supported by substantial evidence.



For the Comptroller General  
of the United States