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Abel Lopez
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DECISION

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

FILE: B-186857 DATE: February 9, 1978

MATTER OF: Attorney's fees in traffic offense cases

DIGEST: Funds appropriated to the Bureau of Alcohol, Tobacco and Firearms may not be used to pay attorney's fees of one of its inspectors charged with reckless driving. Attorney's fees and other expenses incurred by the employee in defending himself against traffic offenses committed by him (as well as fines, driving points and other penalties which the court might impose) while in the performance of, but not as part of, his official duties, are personal to the employee and payment thereof is his personal responsibility. See 31 Comp. Gen. 246 (1952).

This is in response to a request for an advance decision by the Fiscal Officer, Bureau of Alcohol, Tobacco and Firearms (ATF) of the Department of the Treasury as to whether ATF has the authority to reimburse an employee for legal fees incurred for representation by private counsel in Ponce, Puerto Rico.

On February 3, 1976, Mr. Luiz A. Irizarry, an ATF employee, was involved in an automobile accident while on official business. He was driving a Government vehicle for the purpose of investigating an application for a permit as a wholesale liquor dealer. Both he and the other driver were cited for a violation of the local traffic code. He appeared before a judge who signed the charges prepared by the police officer and was told to appear at the District Court of Ponce on March 11, 1976, for trial. He was advised that he was required to have counsel present at the trial.

As an ATF employee, Mr. Irizarry was governed by paragraph 46j of ATF Order 2002.1 (May 21, 1975), which provides in part:

> "As a plea of guilty in traffic court may be introduced in evidence in a civil action it is imperative that all ATF employees obtain legal counsel if they are cited for a traffic violation while in the performance of official business resulting in an accident, before entering such a plea in court. * * * In no case should an ATF employee plead guilty

> to a traffic violation charge resulting in an accident without advice and counsel of a representative of the Chief Counsel's or Regional Counsel's office."

Complying with that order, Mr. Irizarry did consult ATF Regional Counsel who felt it would be in the best interest of the Government for him to be represented by Government attorneys.

ATF requested the Department of Justice to provide its employee with legal representation. On February 25, 1976, the Acting Chief, Torts Section, of Justice's Civil Division, sent a telegram to the United States Attorney in San Juan, Puerto Rico, asking whether his office could provide representation. By telephone the U.S. Attorney told ATF that his heavy case load would not permit the detail of an attorney for the purpose of representing Mr. Irizarry. Subsequently, by letter of March 23, 1976, the U.S. Attorney advised ATF's Regional Counsel that his office "will give legal assistance to your agents in Puerto Rico, case load permitting it, in all criminal action against them that may arise from their activities and within the scope of their employment that could" make the United States liable in a civil action.

Having been told that no legal representation could be provided Mr. Irizarry by the Department of Justice, ATF Regional Counsel requested permission from the Supreme Court of Puerto Rico to allow a member of his legal staff to provide the representation. In reply, he was advised that lawyers who are not members of the Puerto Rican bar must be able to speak Spanish fluently or be associated with an attorney who speaks Spanish fluently. No one in the Regional Counsel's office was able to meet this requirement and as a result, Mr. Irizarry had to retain private counsel. Mr. Irizarry acknowledges that at that time he was advised that it was unlikely that the Government would pay his attorney's fee.

The traffic violation charges against Mr. Irizarry were dismissed at the trial. His attorney has presented him with a bill for $300 and he asks that the Government pay it on his behalf.

We are not aware of any authority by which ATF may use its appropriations to pay for any fine imposed by a court on a Government employee for a traffic offense committed by him while in the performance of, but not as a part of, his official duties. Such fine (or a forfeiture of collateral) is imposed on the employee personally and payment thereof is his personal responsibility. See 31 Comp. Gen. 246 (1952). While

the Department of Justice may authorize and pay for the employment of a private attorney to defend an employee in a criminal action if if determines that the employee was acting within the scope of his employment, such authorization was not granted in the instant case. Further, if such authorization had been granted, only Justice Department appropriations, and not ATF appropriations, would be available for the payment of the attorney's fees.

Accordingly, it is our view that the ATF may not use its appropriations to pay Mr. Irizarry's attorney's fees.

Deputy Comptroller General
of the United States