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DECISION

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

10,808

FILE: B-194508 DATE: July 19, 1979

MATTER OF: Civil Penalties Imposed on Federal Agencies for Violations of Local Air Quality Standards - Source of Funds for Payment

DIGEST:

1. Fine or penalty assessed administratively by State or local authority against Federal agency for violation of local air pollution law, although it is claim against United States which local authority could sue to enforce, may not be referred to Attorney General for defense of imminent litigation if agency does not dispute basis for or amount of fine. Funds appropriated by 31 U.S.C. § 724a for payment of compromise settlements, negotiated by Attorney General in connection with imminent litigation (28 U.S.C. § 2414), are therefore not available to pay fine.

2. Civil penalties imposed administratively on Federal facilities by State or local agencies for violations of local air pollution regulations must be paid from Federal agency's appropriation if incurred in the course of activities necessary and proper or incidental to fulfilling the purposes for which the appropriation was made. B-191747, June 6, 1978.

3. Civil penalties imposed on Federal agencies by court after suit is brought against them for violation of local air pollution law, either in accordance with terms of consent decree or stipulated settlement, or as result of judgment on the merits, may be paid, upon proper certification by Attorney General (28 U.S.C. § 2414), from permanent indefinite appropriation for judgments and compromise settlements established by 31 U.S.C. § 724a.

The Assistant Attorney General, Land and Natural Resources Division, Department of Justice (Justice), requested our opinion on the available source of payment, in various circumstances, of civil penalties assessed against Federal facilities for violation of State or local air pollution regulations. (The United States was made subject to these penalties by section 118 of the Clean Air Act, as amended, 42 U.S.C. § 7418.)

The specific occurrences which precipitated Justice's request are the imposition of administrative penalties against the Department of the Navy (Navy) by two local air pollution control agencies, the

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Bay Area Air Pollution Control District in California and the Puget Sound Air Pollution Control Agency in Washington. The penalties were assessed for violations by several Navy vessels of the respective local air pollution regulations. Additionally, South Carolina has indicated that Navy's operation of steam-generating boilers in Charleston, South Carolina, has violated the State's air pollution regulations. South Carolina plans to file a civil action against Navy for such violations. In discussions of a negotiated settlement with Navy, the State apparently has said that it intends to require that Navy pay civil penalties as a condition of any settlement.

Navy has asked Justice to certify the penalties assessed in these three instances as compromise settlements to avoid imminent litigation, pursuant to 28 U.S.C. § 2414 (1976). Justice seeks our advice on whether administratively or judicially imposed penalties are payable under the procedures set forth in 28 U.S.C. § 2414.

Section 2414 of title 23 provides that compromise settlements by the Attorney General (or his designee) either of claims referred to him by Federal agencies for defense of imminent litigation, or of suits against the Government, shall be settled and paid in a manner similar to judgments, i.e., from the permanent indefinite appropriation made by 31 U.S.C. § 724a. Also, the Attorney General (or his designee) may certify that it is in the interest of the United States to pay "final judgments" by a State court or tribunal against the United States, upon which these also may be paid under the terms of 31 U.S.C. § 724a.

With a view to appropriate treatment of these and possible future situations, Justice has described four categories in which civil penalties for violation of State and local air pollution regulations may be assessed against Federal agencies and has asked which, if any, can be certified by the Attorney General under 28 U.S.C. § 2414. The first category consists of cases where the local administrative agency has the authority to impose a penalty by issuing a notice or an administrative order. Generally, payment is then due unless a request for a hearing is made. If the violator does not pay the penalty, the State usually has the right to go to court to collect the penalty. However, in the situation described by Justice, the Federal agency does not dispute its liability and agrees to pay the penalty. Thus, the question, as stated by Justice, is whether the payment of this kind of "purely administrative" fine can be accomplished as a compromise of imminent litigation within the meaning of 28 U.S.C. § 2414.

In the second category, the enforcement procedure is initiated by issuance of a notice of violation. Then a letter is sent to the

violator notifying the violator that it is subject to a penalty under State law and that the State (or locality) may commence a civil action to assess penalties. The violator is advised that settlement may be made by payment of a penalty prior to filing of the civil suit. Again, the premise is that the Federal agency does not dispute its liability. Thus, the question is whether a fine assessed against a Federal agency (where the liability is undisputed) in order to avoid a threatened legal action to collect the fine is payable under 28 U.S.C. § 2414 as a compromise settlement.

The third category involves the payment of a fine in accordance with the terms of a consent decree or stipulated settlement filed in a State or Federal court. Justice has separated this category into three subcategories: (a) cases in which the civil suit seeks to collect an administratively-assessed penalty which the violator has refused to pay; (b) cases in which there has been an attempt to settle on the part of the violator by payment of an agreed amount to the administrative agency prior to filing of the action; and (c) cases in which no attempt was made either to collect previously-assessed fines or to settle the matter before the filing of an action seeking the imposition of a civil penalty for the violation. For each of these subcategories, the question is whether penalties paid in accordance with the terms of a consent decree or stipulated settlement are payable under 28 U.S.C. § 2414 as "final judgments" from the permanent indefinite "judgment fund" appropriation established by 31 U.S.C. § 724a.

Finally, the fourth category consists of cases in which a civil penalty is imposed against a Federal agency by a court after a trial or hearing on the merits of the case. This category is also subdivided into the three subcategories described above. As in category three, the question is whether penalties assessed against a Federal agency pursuant to a court order entered after a trial or hearing on the merits are "final judgments" within the meaning of 28 U.S.C. § 2414 and 31 U.S.C. § 724a.

Originally, judgments rendered against the United States were payable only upon enactment of specific appropriations for that purpose. Then, in 1956, section 1302 of the Supplemental Appropriation Act, 1957 (Pub. L. No. 84-814, 70 Stat. 694; 31 U.S.C. § 724a) was enacted, which established a permanent indefinite appropriation out of which judgments rendered against the United States not in excess of $100,000 were to be paid. In 1961, 31 U.S.C. § 724a and 28 U.S.C. § 2414 were amended to provide for the expeditious payment of compromise settlements made by the Attorney General or his designee in connection with imminent litigation in

the same manner used to pay judgments. Pub. L. No. 87-187, August 30, 1961. (The $100,000 limit has since been removed.)

Justice asks whether what it describes as a "purely administrative" fine, in the first category, may be viewed as a compromise of imminent litigation within the meaning of 28 U.S.C. § 2414, and is therefore payable under the terms of that section. Section 2414 requires that there must be a compromise settlement of a claim, by the Attorney General (or his designee), by mutual concession. See generally Newson v. Miller, 42 Wash. 2d 727, 258 P.2d 812, 814 (1953). The compromise settlement must be made because resolution of the dispute otherwise seems possible only in court. That is, there must be a genuine disagreement or impasse. The claim must have been referred to the Attorney General "for defense of imminent litigation." See S. Rep. No. 733, 87th Cong., 1st Sess., reprinted in [1961] U.S. Code Cong. & Ad. News 2439, 2441. In the first category of cases described by Justice, there is no dispute as to liability, no reason to refuse to pay the fine, and therefore no reason for the agency to refer the matter to the Attorney General for defense of expected litigation. Agreement by the agency to pay the fine administratively assessed therefore is not a compromise settlement as contemplated by 28 U.S.C. § 2414, and funds from the permanent indefinite appropriation, 31 U.S.C. § 724a, are not available to pay it.

In the second category, Justice asks whether a State or locally-assessed fine is payable under 28 U.S.C. § 2414 as a compromise settlement, where the State or locality serves notice on the Federal agency of the imposition of a penalty for a violation and of the State or locality's right to institute court proceedings to collect the penalty, assuming that the Federal agency does not dispute its liability. Only the Attorney General (or his designee) can enter into compromise settlements payable pursuant to 28 U.S.C. § 2414. In the circumstances which Justice describes as the second category, there are no issues to be resolved between the Federal and local agencies and therefore there is nothing to refer to the Attorney General. Hence the fine could not be paid pursuant to the procedure in 28 U.S.C. § 2414 in these circumstances.

In the first two categories, we find no significance, for present purposes, in the distinction between whether the fines are, as Justice characterizes the first category, "purely administrative," or whether, as in the second category, the State or locality assessing the fine advises that unless the penalty is paid, it may file suit. The important distinction, in terms of availability of funds under 31 U.S.C. § 724a, is not whether suit is expressly threatened as a collection procedure but whether the Federal agency contests its

liability (or the amount of the assessment). If the agency concedes liability, then there is no controversy to be referred to the Attorney General for defense, as provided in 28 U.S.C. § 2414, and hence no basis for a compromise settlement by him.

In the first two categories, a penalty would be payable from the appropriate agency appropriation, assuming that the penalty was incurred in the course of activities necessary and proper or incidental to fulfilling the purposes for which the appropriation was made. National Oceanic and Atmospheric Agency Payment of Civil Penalty for Violation of Local Air Quality Standards, B-191747, June 6, 1978. If the agency requested an administrative hearing and after that hearing agreed to pay the penalty, that too would be payable from agency appropriations. However, if the agency disputed its liability for the levy, or if the agency and the State or local authority were unable to agree upon the amount to be paid, so that the matter was referred to the Attorney General for defense of an imminent law suit, and the Attorney General compromised the claim, the compromise settlement would be payable in accordance with 28 U.S.C. § 2414 and 31 U.S.C. § 724a. Payment of a compromise settlement under those circumstances, upon the Attorney General's submission to this Office, would be made from the permanent indefinite appropriation established by 31 U.S.C. § 724a.

Third, Justice asks whether a fine which is assessed against a Federal agency for air pollution violations in accordance with the terms of a consent decree or a stipulated settlement is payable under 28 U.S.C. § 2414 as a final judgment. As long as Justice (acting as the legal representative of the Federal agency in violation) and the State or local authority agree that the consent decree or stipulated settlement terminates the litigation, then payment of a consent decree or stipulated settlement may be made in the manner prescribed in 28 U.S.C. § 2414 from the appropriation established by 31 U.S.C. § 724a.

Justice asks if the answer to this question is changed by varying circumstances existing before suit is brought. These circumstances--whether the violator has either refused to pay or has unsuccessfully sought to settle, or whether there has been no previous attempt to collect or to settle (described above as subcategories (a), (b), and (c))--do not affect our answer.

Finally Justice asks whether civil penalties imposed against a Federal agency by a court after a trial or a hearing on the merits are payable as final judgments under 28 U.S.C. § 2414. The answer

is yes, provided the Attorney General makes the required certification. As with the third question, this result is unaffected by circumstances existing before suit is brought. It is immaterial whether the court adopted the administratively determined fine in its disposition of the case or determined the amount of the fine de novo. A money judgment, when it is deemed final, is payable under 28 U.S.C. § 2414.

Deputy Comptroller General
of the United States