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DECISION



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

[Claim for Reimbursement of Unauthorized Expenses]

FILE: B-199951

DATE: April 16, 1981

MATTER OF: Richard A. Du Bey

DIGEST: Claimant, former Environmental Protection Agency (EPA) Assistant Regional Counsel, had notices published in newspapers without prior written authorization as required by 44 U.S.C. § 3702 and EPA directives. Claimant paid newspapers from his own personal funds and sought reimbursement from EPA. Since EPA could not have paid claim by newspapers directly, and since employee may not create claim in his favor by voluntarily making payment from personal funds, claim must be denied.

Mr. Richard A. Du Bey has requested reconsideration of the action of our Claims Group disallowing his claim in the amount of \$89.93 arising in the circumstances set forth below. For the reasons that follow, we conclude that the disallowance was correct.

On January 5 and February 2, 1980, Mr. Du Bey, then the Assistant Regional Counsel, Region X, Environmental Protection Agency (EPA), requested that a notice of a public hearing be advertised in two Boise, Idaho newspapers. The notice had been provided for in a stipulation by the parties in a lawsuit brought against EPA by a homeowners' association. Upon discovering that he had failed to comply with a requirement, imposed by statute and EPA directive, that he obtain written authorization before placing the notices, Mr. Du Bey paid the newspapers from his own personal funds and sought reimbursement from EPA. EPA referred the matter to our Claims Group which disallowed the claim by Settlement Certificate dated June 10, 1980 (claim no. Z-2822295).

The primary reason Mr. Du Bey's claim cannot be allowed is 44 U.S.C. § 3702, which provides:

"Advertisements, notices, or proposals for an executive department of the Government, or for a bureau or office connected with it, may not be published in a newspaper except under written authority from the head of the department; and a bill for advertising or publication may not be paid unless there is presented with the bill a copy of the written authority."

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An EPA directive, EPA Procurement Information Notice No. 79-25, dated May 21, 1979, implements this statute and prescribes the procedures to be followed in placing orders for paid notices or advertisements.

An initial question is whether the statute applies to EPA. This question arises because the statute uses the language "for any executive department of the Government, or for a bureau or office connected with it," and, strictly speaking, EPA is not an "executive department" nor is it a bureau or office connected with an executive department. The question is thus whether Congress could have intended to make the statute applicable only to cabinet-level departments and not to executive branch agencies like EPA. Research discloses that 44 U.S.C. § 3702 was originally enacted in 1870 (16 Stat. 308). The practice of creating executive agencies outside of the departmental structure is essentially a 20th century phenomenon. Thus, when the statute was originally enacted, Congress could not have intended to exclude executive branch agencies outside of the departmental structure because such agencies did not exist at that time. On the contrary, it appears that Congress was taking extra caution to ensure that the entire executive branch (as it then existed) was included. Accordingly, we think 44 U.S.C. § 3702 was intended, and must be construed, to apply to the entire executive branch.

A long and consistent line of decisions of the Comptroller General and of his predecessor, the Comptroller of the Treasury, has held that, under the plain terms of the statute, [a voucher cannot be paid nor can a claim by a newspaper be allowed unless the prior written authority] required by section 3702 [has been obtained.] Also, in view of the mandatory language of the statute, [after-the-fact approval or attempted ratification is not sufficient to remove the statutory bar against payment.] 5 Comp. Dec. 166 (1898); 3 Comp. Gen. 737 (1924); 4 Comp. Gen. 841 (1925); 17 Comp. Gen. 693 (1938); 35 Comp. Gen. 235 (1955); B-181337, November 25, 1974; B-196440, April 3, 1980; B-199453, October 2, 1980. As an early Comptroller of the Treasury noted, "If any statute is mandatory this is" 5 Comp. Dec., supra, at 168.

[Since EPA could not have paid the claim under the existing statutory language if filed directly by the newspapers, we see no legal basis to reimburse Mr. Du Bey.] As stated in 3 Comp. Gen. 681, 682 (1924), "the voluntary intervention of claimant in the matter cannot operate to authorize the making indirectly of a payment that could not legally be made directly."

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There is an additional principle involved here--the well-established rule that no officer or employee of the Government can create a valid claim in his favor by paying obligations of the United States from his own funds. E.g., 33 Comp. Gen. 20 (1953); B-184982, October 13, 1976. Exceptions have been recognized where the necessity for an expenditure arose in urgent and unforeseen circumstances, which is not the case here. A recent decision, B-186474, June 15, 1976, stated:

"Voluntary payments of Government obligations from personal funds must be very strongly discouraged, and the general rule remains that reimbursement will not be authorized."

For the reasons stated above, the settlement action of our Claims Group must be affirmed.)

Milton J. Fowler

Acting Comptroller General
of the United States