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

FILE: B-219140 **DATE:** August 13, 1986

MATTER OF: Request for Advance Decision Concerning Loss Or Damage to Personally-Owned Tooling

DIGEST: 1. Watervliet Arsenal, Department of the Army, may not under 31 U.S.C. § 3721 assume risk of loss or damage to employee-owned tools or tool boxes used on the Arsenal's premises in the performance of Government work by charging losses to the Arsenal's industrial fund overhead account since claims made pursuant to 31 U.S.C. § 3721 are properly chargeable to the appropriation for "Claims, Defense" and may not be charged to some other fund or appropriation. Charging them to industrial fund's overhead account would result in their payment from another appropriation.

2. Watervliet Arsenal, Department of the Army, may not under 31 U.S.C. § 3721 purchase insurance to pay claims for loss or damage to employee-owned tools or tool boxes used on the Arsenal's premises in the performance of Government work and charge the cost of premiums to the industrial fund as an operating expense since claims for loss of employee-owned property incident to service in the absence of any other law is for consideration under 31 U.S.C. § 3721 and any payment warranted must be charged to the "Claims, Defense" appropriation.

3. We recommend Watervliet Arsenal, Department of the Army, seek a reconsideration of the determination by the U.S. Army Claims Service that losses of employee-owned tools may not be paid under authority of 31 U.S.C. § 3721 since it involves the refusal of the Army to hear an entire class of claims based upon a policy determination that has as far as we can determine never been officially adopted or endorsed by the Department of the Army.

This advance decision is in response to a request from Earl T. Hilts, Counsel, Watervliet Arsenal, Department of the Army (submitted on behalf of the Comptroller) asking:

--Whether the Army may assume the risk of loss or damage to employee-owned tools or tool boxes used on the Arsenal's premises in the performance of Government work, by charging losses to the Arsenal's industrial fund overhead account.

--Whether the Arsenal may purchase private insurance and charge the cost as an operating expense to the Arsenal's industrial fund.

For the reasons given below, we answer both questions in the negative. However, we also recommend that the Arsenal seek a review of the position of the U.S. Army Claims Service on the compensability of this class of claims.

BACKGROUND

The submission indicates that the Watervliet Arsenal has for decades required some production shop employees to provide a small complement of employee-owned hand tools to perform their required duties.[1/] In the past, claims for lost, stolen, or damaged employee-owned property were processed under 31 U.S.C. § 3721 (1982), popularly referred to as the Military Personnel and Civilian Employees Claims Act of 1964. However, by letter of February 27, 1985, Colonel James McCune, Command Staff Judge Advocate/Deputy Command Counsel, U.S. Army Materiel Command, Department of the Army, notified all Army Materiel Command Legal Offices that payments of claims for lost or stolen employee-owned tools and equipment used in the performance of official duties and stored in Army facilities would be improper, based on a decision rendered by the U.S. Army Claims Service. The Colonel's letter points out that the basis of the Army Claims Service's opinion is:

> "'The Government is responsible to provide its employees with the tools necessary to perform their duties. Employees should not be required or encouraged to bring their personal tools to work. The payment of claims for lost personal tools would constitute improper use of the DOD Claims Appropriation to fund operational requirements.'"

1/ The Arsenal produces large artillery and tank cannon components and maintains a vast inventory of special tooling, gauges and measuring instruments. The employees are required to provide basic items such as rulers, wrenches, pliers, measuring tools and tool boxes.

The Colonel's letter then goes on to advise claims officers to ensure that these claims not be adjudicated as proper for payment and also advises that:

> "Just as important is the necessity to ensure that the tool owner is apprised of the fact that a potential claim for loss or damage to his privately owned tools used in the course of official duties may be denied. It is suggested that a notice be published periodically in the installation, unit, or command bulletin or other locally generated information media."

We have been informally advised by two officials of the Arsenal that its agreement with the employee's union contains a "past practice" provision to the effect that nothing in the agreement should be considered as superseding existing management-employee practices and relationships at the Arsenal except as specifically provided in the agreement. These officials also advised us that nothing in the agreement addresses the matter of whether employees are required to furnish their own tools or, if they do, whether the Army would hear employee claims for losses submitted under 31 U.S.C. § 3721. However, it was indicated that this has been the practice for quite some time on both these matters. We have also been informally advised that the Arsenal has not provided the employees the tools in question and employees continue to use their own tools.

The Arsenal's Counsel points out that the estimated cost to the Arsenal to purchase the tools and tool boxes now provided by the employees would be in excess of $315,000 and that this figure does not include any costs for the development of the administrative system to issue, record and control the tool sets, or the costs of the personnel dedicated to managing this responsibility.[2/] On the other hand, the Arsenal's Counsel points out that claims for lost, stolen or damaged employee-owned tooling processed under 31 U.S.C. § 3721 totaled only $4,100 in the previous 5-1/2 years. Thus the Arsenal would like to find some way to continue to permit employees to use their own tools and to pay claims for theft or damage to employee-owned tools when appropriate.

2/ Such costs would be absorbed in the overhead account and passed on to its customers. See 10 U.S.C. § 2208.

DISCUSSION

The submission indicates that claims for employee-owned tools and tool boxes previously have been processed under 31 U.S.C. § 3721, which provides that:

> "(b) The head of an agency may settle and pay not more than $25,000 for a claim against the Government made by a member of the uniformed services under the jurisdiction of the agency or by an officer or employee of the agency for damage to, or loss of, personal property incident to service. A claim allowed under this subsection may be paid in money or the personal property replaced in kind."

Usually claims presented under authority of 31 U.S.C. § 3721 are paid from the operating appropriations available to the agency whose activities gave rise to the claim since, as a general rule, the Congress does not establish a specific fund for payment of these types of claims by agencies. See B-174762, January 24, 1972. However, in the present case, all noncontractual claims against the Department of Defense, as authorized by law (other than claims relating to civil functions), are to be paid out of annual appropriations to the Department of Defense for "Claims, Defense." This account represents the consolidated requirements of the Secretary of Defense and the Departments of the Army, the Navy, and the Air Force. See S. Rep. No. 99-176, 99th Cong., 1st Sess. 83 (1985), accompanying H.R. 3629, the Department of Defense Appropriation Bill, 1986, which was enacted into Public Law No. 99-190, December 19, 1985, 99 Stat. 1185.

As a general rule of appropriation construction, when an appropriation has been made for a specific purpose (among others), no other appropriation which might otherwise be considered available for the same purpose may be used instead, even if the proper appropriation is exhausted or unavailable in a particular case for some other reason. See, for example, 31 Comp. Gen. 491 (1952).

Although the Arsenal's industrial fund is charged with paying most of the costs incurred in operating the Arsenal, which are then reimbursed pursuant to an agreement by industrial fund customers from their own appropriations,[3]/

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[3]/ See Department of Defense Regulation entitled "Industrial Fund Operations", DOD 7410.4-R., chapter 4, Section H (April 1982).

claims by employees for lost or damaged tooling presented pursuant to 31 U.S.C. § 3721 are noncontractual in nature. Payment, if authorized, is properly chargeable only to the appropriation for "Claims, Defense". Consequently, the Arsenal is not authorized to make payment of these claims from the industrial fund and charge them as overhead. Thus the first question is answered in the negative.4/

Regarding the purchase of insurance, we note that the Government generally assumes the risk of loss for actions of its employees resulting in damage or loss of property. This is known as the rule on self-insurance, a rule founded on the policy:

> "* * * that it does not make economic sense to expend appropriated funds for the purchase of insurance to cover loss or damage to Government-owned property or for the liability of Government employees for damage to someone else's property. The extent of the Government's resources is generally sufficient to absorb such a loss or liability should the contingency actually occur. See B-158766, February 3, 1977; 19 Comp. Gen. 798, 800 (1940) * * *." 63 Comp. Gen. 110, 113 (1983).

Under the self-insurance concept, claims settled under 31 U.S.C. § 3721 are to be paid from the appropriation available for that purpose and the agency is precluded from purchasing insurance to cover such claims. Where the agency has decided not to hear the claim or that the claim does not merit payment under 31 U.S.C. § 3721, then it has decided that either there should be no risk to the Government or even where there is a risk, the claim is meritless. In either case, the

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4/ We note that the Arsenal has not suggested that it may settle the claims in question under 31 U.S.C. § 3721 and charge the payment against the "Claims, Defense" appropriation account itself. Whether the Arsenal has this authority is doubtful. Army Regulation (AR) 27-20, chapter 11 sets forth criteria for settling claims under 31 U.S.C. § 3721 and delegates authority to various specific officials of the Department of the Army to settle these claims. We do not think that an official of the Arsenal is included. See for example, AR 27-20 paragraphs 11-4 and 11-45. See also AR 27-20 paragraph 1-3. For these reasons we are not advancing this as an option for resolving the Arsenal's dilemma.

agency cannot purchase insurance to cover these types of claims since it would be doing indirectly through insurance what it has determined it would not do directly through settling the claim under 31 U.S.C. § 3721.

Therefore, the Arsenal may not purchase insurance to cover risks of loss to employee-owned property occurring incident to service and charge it to the industrial fund operating expense account since any payments under 31 U.S.C. § 3721 must be paid out of the appropriation available for this purpose, in this case "Claims, Defense". The second question is therefore answered in the negative.

RECOMMENDATION

We recommend that the Arsenal seek a reconsideration of the position expressed by the U.S. Army Claims Service as to the compensability of this class of claims. Generally, whether a particular claim is payable under this provision of law is within the administrative discretion of the agency concerned and not reviewable by this Office. However, we have also held that the concept of administrative discretion does not permit an agency to refuse to hear all claims filed by its employees under the act. While we will not tell an agency how to exercise its discretion, in our opinion, it does have a duty to exercise its discretion. See 62 Comp. Gen. 641 (1983). While the present situation does not involve the Army's refusal to hear all claims under the law, it does involve the refusal of the Army to hear an entire class of claims based on a policy determination that has as far as we can determine from the submission, never been officially adopted or endorsed by the Department of the Army.

While employees could not be required to provide their own tools for Army's work, there is no question that the Army could, if it chooses, either permit or prohibit the voluntary use of personally-owned tools by employees. Similarly, Army could have prohibited its component organizations from agreeing to the use of employee-owned tools pursuant to a union agreement or otherwise. To permit such use is tantamount to agreeing that the Army considers the tools to be used for the Army's benefit ("incident to service") and that, especially in view of the apparent past practices, it will consider any losses incurred for payment under 31 U.S.C. § 3721. Consequently, any change in Army policy on this issue should be prospectively applied from the date that the Army notifies its employees by regulation or other written document, that they are prohibited from further use of their own tools in performing Government work.

As indicated earlier, it is our understanding that at Watervliet employees have for many years been required or permitted to use their hand tools, and claims for loss or damage to these tools have been considered and paid under 31 U.S.C. § 3721 at least for the past 5-1/2 years. This raises another question about the application of the Claims Service opinion to currently pending claims. If this is in fact the "past practice" at Watervliet, there is a question as to whether the "past practice" provision in the applicable labor-management agreement has effectively limited the discretion that Army might otherwise have had.5/

Should the Claims Service affirm its prior position, the Army must determine (a) precisely what the "past practice" at Watervliet was, and (b) whether a refusal to consider claims during the life of the current labor-management agreement would violate that agreement. If it is determined that the "past practice" provision applies, then the Claims Service's decision with respect to Watervliet (and similarly situated installations) should be deferred until expiration of the present union agreement, and an appropriate provision disavowing the past practice should be included in future agreements.

for Shelton J. Jordan
Comptroller General
of the United States

5/ It is settled that an agency can limit its discretion by regulation. Service v. Dulles, 354 U.S. 363 (1957); Accardi v. Shaughnessy, 347 U.S. 209(1954); California Human Development Corp. v. Brock, 762 F.2d 1044, 1049 (D.C. Cir. 1985); Griffin v. United States, 215 Ct. Cl. 710 (1978); B-202039, May 7, 1982. It should follow that it can do the same by contract.