

Appropriations/Financial Management

Appropriation Availability

■ **Purpose availability**

■ ■ **Attorney fees**

The Forest Service may not use appropriated funds to reimburse a federal employee for attorney's fees and other expenses incurred as a defendant in a criminal proceeding that was prosecuted by the Department of Justice. The reimbursement of attorney's fees is not predicated on the outcome of judicial proceedings and is not available where the fees incurred do not advance the interests of the United States.

Matter of: Leo D. Thiels—Request for Reimbursement of Attorney Fees

An authorized certifying officer, U.S. Department of Agriculture (Agriculture), Forest Service (FS), Region 8 Regional Office, Atlanta, Georgia, has requested an advance decision on the propriety of using appropriated funds to reimburse Leo D. Thiels, a retired FS employee, for attorney's fees and other expenses incurred as a defendant in a criminal proceeding that was prosecuted by the Department of Justice (Justice). We conclude that the agency's appropriations are not available for that purpose.

Background

From July 1, 1982, through October 8, 1985, Thiels was the District Ranger in the Daniel Boone National Forest, Kentucky. As District Ranger, he was responsible for timber management activities in the district, including timber sales, as delegated by the Forest Supervisor. Forest Service Manual § 2404.13 (May 1981).

¹ DCA explains that the photograph of Teletronics's system was provided to STS only to indicate the position of the low amplifier; Teletronics's actual proposal offered a detachable pedestal assembly that is transportable and can be set up quickly, and specified a system weight of less than 200 pounds, in accordance with the RFP requirements.

A FS investigative report on Thiels' management of activities in the district alleged numerous instances of financial and other irregularities in the sale of timber and violations of FS policy. Based on this report, Justice brought criminal charges against Thiels. On November 28, 1987, after a trial in the U.S. District Court for the Eastern District of Kentucky, London, Kentucky, Thiels was acquitted of all charges.¹

At the conclusion of the trial, FS began administrative proceedings against Thiels based on four specifications: (1) that Thiels took little or no corrective measures to improve his District's small timber sales program, and specifically, that he failed to properly supervise and monitor the activities of his Timber Management Assistant; (2) that he directed a subordinate to not comply with timber sales regulations in order to avoid the administrative requirements applicable to sales exceeding \$2,000; (3) that, after being notified of delinquent payments for harvested timber, he failed to take prompt and appropriate action to ensure that moneys were collected; and (4) that he continued to knowingly allow a FS employee who was the father of a purchaser of timber, to inspect FS timber sales to his son, despite being advised of the "conflict of interest" situation by the Forest Supervisor's Office. All four specifications were sustained and Thiels was suspended from duty for 14 calendar days, from October 9-22, 1988. Thiels filed, but later withdrew, a grievance concerning the disciplinary action.

On December 9, 1987, after the District Court trial, Thiels submitted to FS a request for reimbursement of attorney's fees and other expenses which he incurred as a defendant in the criminal proceeding. The agency referred Thiels' reimbursement request to the U.S. Attorney for the Eastern District of Kentucky who declined to deny or grant the requested relief, stating that it was a matter governed by Agriculture's rules and regulations and for consideration by the department's attorneys.

Agriculture's Office of the General Counsel considered the matter and determined on November 2, 1988, that the agency had no authority to use appropriated funds to reimburse Thiels for attorney's fees and other expenses associated with his criminal trial.

Thereafter, on September 13, 1989, Thiels filed with FS a claim for reimbursement of \$11,630 in attorney's fees and incidental expenses. He contended that Agriculture should pay his legal expenses because Justice would not have indicted him had it not been for the allegedly erroneous investigative report prepared by the FS, and that once the alleged errors in the report were corrected, the jury found him "not guilty" of all charges. This claim has been submitted to our Office for consideration.

¹ The FS submission indicates that Thiels' subordinate, a Timber Management Assistant, was convicted by the court.

The hiring of an attorney is a matter between the attorney and the client, and absent express statutory authority, an agency may not use its appropriations to reimburse the attorney's fees. 55 Comp. Gen. 1418, 1419 (1976). However, in those instances where an officer or employee of the United States is sued in his individual capacity for something he did (or failed to do) while performing his official duties, and the interest of the United States in advocating the legality of its employee's actions or inaction coincides with the employee's interest, the United States may bear the expense of defending that suit. See 58 Comp. Gen. 613, 615 (1979); 6 Comp. Gen. 214, 215 (1926).

Except as otherwise authorized, federal law reserves the conduct of litigation to Justice where the United States, an agency, or an officer or employee of an agency is either a party or has an interest in the litigation. 28 U.S.C. § 516 (1988). Agencies, other than Justice, are therefore generally precluded from using appropriations to hire attorneys to represent employees. 5 U.S.C. § 3106. When a present or former employee is sued for actions performed as part of his official duties, Justice provides for the defense of the employee when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's duties and Justice determines that providing representation would be in the government's interest. 28 C.F.R. § 50.15(a) (1990). Representation, however, generally is not available in federal criminal proceedings. 28 C.F.R. § 50.15(a)(4).

In limited circumstances, where Justice determines that representation is appropriate but is unable to provide representation, the employee's agency's appropriations may be available to pay private attorney's fees to defend the employee. 55 Comp. Gen. 408, 412-413 (1975). In these circumstances, reimbursement for private attorney's fees is limited to fees incurred for legal work that is determined to be in the interest of the United States. 28 C.F.R. § 50.16(d)(1).

Thiels contends that Agriculture should pay his legal expenses because Justice would not have criminally prosecuted him had it not been for the errors in the investigative report and also because the jury found him "not guilty" of all charges. The determination to pay an employee's private attorney's fees, however, is not predicated upon the ultimate outcome of a proceeding. 58 Comp. Gen. 613, 619 (1979). Rather, that determination must be made at the outset of proceedings initiated against the employee based upon a determination that the conduct in question was within the scope of his official responsibilities and that it is in the government's interest to provide representation. *Id.*

It appears that no determination was made by either Justice or Agriculture to provide Thiels with representation at the outset of the proceedings. In any event, based on the FS submission, we conclude that neither agency could properly have determined that representation of Thiels was in the government's interest. Here, once FS decided to conduct an investigation in order to determine whether there were any irregularities in Thiels' management of timber sales, the interest of the government was no longer aligned with Thiels' interest. Also,

since Thiels was being tried in a federal criminal proceeding, it was not in the government's interest to provide representation. 28 C.F.R. § 50.15(a)(4), *supra*. Because the attorney's fees for which Thiels seeks reimbursement merely advanced his personal interest rather than that of the government, Agriculture's appropriations are not available for payment of his legal expenses. *See* 28 C.F.R. § 50.16(d)(1) *supra*.