

**DECISION**

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

FILE: B-180708

DATE: JAN 30 1976

MATTER OF: Chairman of FCC - Inquiry as to Applicability  
of "special counsel fees" to Retired Annuitant  
for Preparation of Primers

DIGEST: In view of the funds provided in its current appropriation for special counsel fees, the Federal Communications Commission may procure the services of a retired Government attorney in order to prepare up-to-date primers on political broadcasting rulings, and the amount payable to him is not subject under 5 U. S. C. § 8344(a) to setoff by the amount of the retirement annuity since the retiree's expertise and thorough knowledge in the matter will enable him to perform the functions described in the statements of work contained in the proposed contract independently rather than under an employer-employee relationship.

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The Chairman of the Federal Communications Commission (FCC) requests our opinion as to the propriety of a proposed contractual arrangement with the former Associate General Counsel of that agency. Specifically, our advice is sought in regard to the following three questions:

1. Whether, under the circumstances, the FCC is authorized to enter into a contract with the annuitant former Associate General Counsel to prepare up-to-date primers on political broadcasting and the "fairness doctrine;"

2. Whether the highest rate specified by the Classification Act is the maximum amount that may be paid for such services under the authorization of the Communications Act of 1934, as amended, 47 U. S. Code § 154(g), as implemented by the current appropriation act, Public Law 94-121, October 21, 1975, 89 Stat. 611 and 634; and

3. Whether, in view of the fact that the proposed contractor is a Government annuitant, the amount awarded under the contract is subject to reduction by the amount of his retirement annuity.

The Chairman explains that the Commission believes that it would be in the public interest for the Commission to issue revised primers on political broadcasting and the "fairness doctrine" in the near future so as to be available prior to the national and local campaigns in 1976.

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As is explained by the Chairman, Mr. Slosberg, who recently retired as the Associate General Counsel, is particularly qualified in the circumstances for which his services are sought. Among his extensive qualifications, the Chairman reports that:

"\* \* \* Mr. Slosberg has had 16 years of experience in telecommunications area. For the past 7 years he has been the Associate General Counsel of this agency. In addition to extensive experience in the many areas of the Commission's jurisdiction, he has a long and intimate knowledge of the political broadcasting and fairness doctrine subject matter and has played a major role in the preparation and issuance of the previous primers that the Commission has adopted (Political Broadcasting - 1970 and Fairness Doctrine - 1964). The Commission believes that it would be in the public interest for the Commission to issue revised primers in the near future and certainly prior to the national and local political campaigns in 1976. Most important to the Commission, by reason of his experience with the prior primers in these areas; Mr. Slosberg would need no time to familiarize himself with this proceeding. He is available to start work on the contract immediately and in view of his recognized expertise there is no question but that he would be able to work independently without any guidance or supervision by anyone on the Commission staff."

The Chairman has forwarded statements of work to be included in the proposed contract. They call for the contractor's performance as follows:

"The contractor is to prepare an up-to-date primer on Political Broadcasting rulings, including:

"1. The collection of all interpretive rulings and decisions (including staff rulings under delegated authorities and Commission decisions) issued since the Commission's Public Notice of August 7, 1970, Vol. 35, Fed. Reg. No. 159 'Use of Broadcast Facilities by Candidate for Public Office,' and relating thereto.

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"2. The analysis and summarization of such rulings.

"3. The preparation of a comprehensive new public notice 'Use of Broadcast Facilities by Candidate for Public Office,' including any material in the 1970 Public Notice which should be included and any new material in the same general form as that of the 1970 Public Notice, together with such format revisions as the Commission may propose and such contractor shall be available to the Commission or the Commission staff for such explanation and discussions of the draft primer prepared by the contractor as may be desired."

and;

"The contractor is to prepare an up-to-date primer on Fairness Doctrine Rulings, including:

"1. The collection of all interpretive rulings and decisions (including staff rulings under delegated authorities and Commission decisions) issued since the Commission's Fairness Doctrine Primer, 40 FCC 598 (1964) and relating thereto.

"2. The analysis and summarization of such rulings.

"3. The preparation of a comprehensive new Public Notice 'Use of Broadcast Facilities by Candidate for Public Office' including any material in the 1964 primer which should be included and any new material in the same general form as that of the 1964 primer, together with such format revisions as the Commission may propose and such contractor shall be available to the Commission or the Commission staff for such explanation and discussions of the draft primer prepared by the contractor as may be desired."

In 53 Comp. Gen. 702 (1974), pursuant to a request by the Chairman, FCC, we considered essentially the same questions in regard to Mr. Asher H. Ende of Asher Ende Associates as are now being raised concerning Mr. Slosberg. Mr. Ende was the recently retired FCC managing counsel for the task force engaged in an investigation of Western Electric and its relationship to the operations of the Bell System Operating Companies and their parent corporation. The FCC proposed to employ Mr. Ende on a fee basis to perform certain legal services without supervision by Government officials in connection with the ongoing investigation. In that decision we responded, in pertinent part, as follows:

"With regard to his first question concerning the authority of the FCC to enter into a contract for the above-described legal services, the Chairman explains that title II of the Department of Housing and Urban Development, Space, Science, Veterans, and Certain Other Independent Agencies Appropriation Act, 1974, Public Law 93-137, 87 Stat. 491, 494, provides for necessary expenses of the FCC including 'special counsel fees.' The Chairman states that he is unaware of any opinion of this Office dealing with the use of appropriated funds for payment of special counsel fees to procure legal services such as are here involved.

"In our opinion the language contained in title II of the Appropriation Act, 1974, supra, appropriating funds for the payment of special counsel fees constitutes authority to enter into the proposed contract.

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"The Chairman's second question concerns the maximum amount which may be paid under the proposed contract. Inasmuch as we have found authority for the FCC's procurement of legal services on an independent contract basis under its specific appropriation for the payment of special counsel fees and since as concluded hereafter the services were in fact procured on such

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basis neither the salary limitation in 5 U. S. C. 3109 nor any other statutory provision of which we are aware would limit the amount payable under the contract as proposed.

"The Chairman's third question concerns possible setoff of Mr. Ende's retirement annuity against amounts due him under the proposed contract. Section 8344(a) of title 5 of the United States Code restricts the pay an annuitant may receive if reemployed by the Government as follows:

"If an annuitant receiving annuity from the Fund \* \* \* becomes employed after September 30, 1956, or on July 31, 1956 was serving, in an appointive or elective position, his service on and after the date he was or is so employed is covered by this subchapter. \* \* \* An amount equal to the annuity allocable to the period of actual employment shall be deducted from his pay \* \* \*."

We have held that payments under a contract which, as between the Government and the contractor, creates a relationship tantamount to that of employer and employee, is within the purview of the above provision requiring setoff of annuity payments against amounts received under the contract. On the other hand, where, under a contract, the retired annuitant functions on a truly independent basis, contractual payments are not subject to setoff based upon the amount of his annuity. 39 Comp. Gen. 681 (1960), B-154204, September 4, 1964, B-176681, October 27, 1972, 53 Comp. Gen. \_\_\_ (B-180303, February 1, 1974).

"Thus, whether the contract price to be negotiated is subject to setoff by the amount of Mr. Ende's annuity turns upon whether

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the contractual arrangement as proposed and as in fact executed evidences a true contractual relationship or whether thereunder Mr. Ende will function essentially as would an employee of the Government."

We have reviewed the proposed contractual arrangement with a view to determining whether the relationship contemplated thereby and the relationship it will elicit as between the contractor, Hilburt Slosberg, and the FCC is likely to have those aspects of an employer-employee relationship as will necessitate setoff of Mr. Slosberg's annuity payments under the provisions of 5 U. S. C. § 8344(a) quoted above in 53 Comp. Gen. 702 (1974). In doing so we have taken into account the entire proposed contractual arrangement contemplated by the parties and Mr. Slosberg's very thorough knowledge of the subject matter to be covered by the primers by virtue of the fact that the original editions were prepared by him.

The services which Mr. Slosberg would be required to provide under the contract as proposed are described in the statement of work quoted above. The Chairman states that the contract would also contain a provision stating that the contractor is expected to work on his own without any supervision from the Commission or its staff and that it will remain the prerogative of the contract supervisor to decide whether to use the contractor's reports and recommendations. The contractor is to be paid a fixed lump-sum based upon his overhead expenses as well as his compensation for expert legal services. In this connection, the contract is to contain a provision stating that the Government will not be obligated to provide office space, supplies, or any secretarial or other assistance to the contractor. Estimated times are to be mentioned in the contract for completion of the primers. However, payment is not to be made on a time basis nor is the contractor to be compensated for extra time required to complete the work should the actual performance require more time than estimated for completion of the primers.

We do not believe it is unreasonable that an attorney having such experience as Mr. Slosberg, who has previously prepared the original editions of the primers to be updated now, would be capable of performing all tasks and services specified in the contract without the close and continuous supervision or direction that would tend to nullify his independence as a contractor. However, it is essential that the proposed contract be administered in

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accordance with the statement of work and as otherwise indicated above.

On that basis, question 1 is answered in the affirmative and questions 2 and 3, in the negative.

R.F. KELLER

Deputy Comptroller General  
of the United States