

DECISION



22302
Archibald
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-206236

DATE: June 1, 1983

MATTER OF: Grover L. Miller

DIGEST:

Government employee who uses personal funds to procure goods or services for official use may be reimbursed if underlying expenditure itself is authorized, failure to act would have resulted in disruption of relevant program or activity, and transaction satisfies criteria for either ratification or quantum meruit, applied as if contractor had not yet been paid. While GAO emphasizes that use of personal funds should be discouraged and retains general prohibition against reimbursing "voluntary creditors," these guidelines will be followed in future. Applying this approach, National Guard officer who used personal funds to buy food for subordinates during weekend training exercise when requisite paperwork was not completed in time to follow normal purchasing procedures, may be reimbursed.

The Administrative Officer, Headquarters First Battalion, 152nd Infantry, Indiana Army National Guard, has requested our reconsideration of the claim of Captain Grover L. Miller for reimbursement of personal funds he expended to purchase food supplies. Captain Miller's claim was disallowed by our Claims Group on October 28, 1981 (Settlement Certificate Z-2828580). In disallowing the claim, the Claims Group cited the proposition, embodied in numerous decisions of this Office, that a Government employee cannot create a valid claim in his favor by paying an obligation of the United States from his own funds. E.g., 33 Comp. Gen. 20 (1953). At the outset, we note that the request for reconsideration was not submitted either by the claimant or the appropriate agency head as required by 4 C.F.R. § 32.1 (1983). Nevertheless, because we think there is adequate basis to allow the claim, we will exercise our discretionary authority to reconsider the settlement action on our own motion.

025743

Facts

The facts of this case may be stated briefly. During the times pertinent to this claim, Captain Miller was the Commanding Officer of Company C, First Battalion, 152nd Infantry, Indiana National Guard. In July 1980, he used his own funds to purchase rations for use by his unit on a weekend training mission. The food was purchased from two separate markets (\$241.37 to Kroger Company and \$91.61 to Gruelich's Market) for a total of \$332.98.

In his written explanation of why normal purchasing procedures were not followed in this instance, Captain Miller cited several contributing factors. The principal reason, however, appears to have been that during the period in question, a single Supply Technician, with limited experience in the position, was burdened by an extremely heavy workload. Routine paperwork which was required to obtain the necessary purchasing authority was not completed in time. As a result, Captain Miller purchased the food supplies with his own funds.

The "voluntary creditor" rule

As a general proposition, as noted above, one who uses personal funds to pay what he perceives to be an obligation of the Government does not thereby create a valid claim in his favor and may not be reimbursed. This has come to be known as the "voluntary creditor" rule--the individual has voluntarily (i.e., without being authorized or required by law to do so) attempted to make himself a creditor of the Government. The rule has been around for a long time. To illustrate, the Comptroller of the Treasury, in 4 Comp. Dec. 409, 410 (1898), quoted the following passage from an 1855 Treasury Department decision:

"It has been so often decided by the accounting officers that no person could acquire a legal [emphasis in original] claim against the United States by such advances, that it must now be considered as the settled adjudication of the question, at least, by that branch of the Government.***"

Ancient as the principle may be, it is nevertheless not an absolute. There are, and always have been, exceptions. In

many cases, it is clear that the individual (the "voluntary creditor") exercised commendable initiative and acted in the Government's best interests. For example, we have permitted reimbursement for the purchase of food where the expenditure was incidental to the protection of life or Government property during an urgent and unforeseen emergency. 53 Comp. Gen. 71- (1973) (General Services Administration special police required to spend entire night in building which had been unlawfully occupied by demonstrators); B-189003, July 5, 1977 (FBI agents stranded in Government building during severe blizzard). Compare 42 Comp. Gen. 149 (1962); B-185159, December 10, 1975.

A 1980 decision broadened the exception somewhat to recognize that "urgent and unforeseen emergency" could, in appropriate circumstances, include mission completion short of life-threatening situations. We authorized reimbursement to an Air Force sergeant in Italy who had purchased communications equipment which could not have been obtained quickly enough to avoid mission impairment had normal procurement procedures been followed. We noted that "it would be shortsighted indeed not to recognize that this kind of initiative by the employee in an emergency is very valuable and, when it results in preserving a Government property interest, the employee should not be penalized through denial of reimbursement." B-195002, May 27, 1980.

Most recently, in B-204073, September 7, 1982, we authorized reimbursement to a military officer who used personal funds to purchase microcomputer software items for use in an ongoing research project at the Naval War College. While our decision attempted to distinguish the case on its facts from the general prohibition, the essence of the decision was that, on the facts presented, denial of reimbursement would have produced an unduly harsh result without any compensating benefit to a legitimate Government interest.

In each case, we continually stress that payments from personal funds should be strongly discouraged. Nevertheless, the cases continue to arise. Therefore, we have chosen this case as an opportunity to re-examine the foundations of the voluntary creditor rule and to establish reasonable guidelines for the future.

The early decisions

The voluntary creditor rule, as we have indicated, is not new and was the subject of several early decisions. Perhaps the best discussion of the foundations of the rule is contained in 8 Comp. Dec. 582 (1902). There, the superintendent of an Indian school had contracted with a mechanic to oversee the installation of an electric plant at the school. After receiving the agreed-upon contract price of \$400, the contractor claimed an additional \$270 for an alleged breach by the Government, which the superintendent paid from personal funds. In denying the superintendent's claim for reimbursement, the Comptroller of the Treasury cited several factors reflecting considerations of both law and policy:

- The superintendent's voluntary payment was beyond the scope of his authority and could not operate to bind the Government.
- The superintendent was not entitled to reimbursement under a theory of subrogation nor, by virtue of the Assignment of Claims Act, could the claim be viewed as having been assigned or transferred to him.
- The claims settlement jurisdiction of the "accounting officers" extends only to claims based on legal liability and not to claims based on equity or moral obligations.

In addition, the Comptroller noted that established systems exist for adjudicating claims and disbursing public funds, and an individual should not be permitted to pre-empt these procedures. To do so would "produce endless confusion and lead to double payment and serious embarrassments." 8 Comp. Dec., at 585.

While cases like 8 Comp. Dec. 582 and 4 Comp. Dec. 409 thus reflected a general prohibition, the rule was not applied blindly or arbitrarily. The early decisions recognized a significant exception for cases of "public necessity." Thus, in 8 Comp. Dec. 43 (1901), an Army medical officer was reimbursed for hiring laundresses to wash bed and table linen in an Army hospital. Conceding that the question was not entirely free from doubt, the Comptroller of the Treasury stated the following proposition:

"Wherever an officer in the performance of his duty has found it necessary, in order to properly perform his duty, to advance his private funds, such an advance has been regarded by this Office, not as a voluntary and unauthorized advancement of funds creating no liability on the part of the Government, but as an advancement rendered necessary by the exigencies of a situation for the existence of which the Government was responsible, and for which the officer was entitled to reimbursement of the amount advanced." 8 Comp. Dec., at 46.

One of the cases cited in 8 Comp. Dec. 43 was an unpublished decision of April 24, 1901, Appeal No. 5805, 17 MS Comp. Dec. 559. In that case, a soldier was reimbursed for food purchased for a group of recruits en route to their new duty station when Government-furnished rations were erroneously sent to the wrong place. ^{1/} See also 2 Comp. Dec. 347 (1896).

This line of decisions was continued in 18 Comp. Dec. 297 (1911). A Justice Department employee had used personal funds to pay the fees of witnesses summoned to testify in a court action where there was insufficient time to follow normal authorization and payment procedures. The Comptroller allowed the claim for reimbursement, noting the voluntary creditor rule but stating:

"But this is a rule of accounting and should not be permitted to hinder the public business or prevent the payment of just and lawful claims against the Government." Id., at 299.

^{1/} Strictly speaking, it would be sufficient merely to cite this unpublished decision as precedent for allowing Captain Miller's claim. However, the frequency of these cases in recent years makes it desirable to address the issue more generally.

Analysis and conclusions

Based on our review of the body of case law on voluntary creditors, we are convinced, first, that there are sound reasons for retaining a general prohibition on reimbursement. There are well-established procedures for making purchases, submitting and adjudicating claims, and making disbursements. Keeping in mind that we are spending the taxpayers' money, the interests of the Government are best served when these procedures are followed. It is, we think, clearly undesirable for individual employees to presume to make these decisions on their own and beyond their authority based on what they believe should happen.

At the same time, however, we are equally convinced that some voluntary creditors should be reimbursed. The difficulty, of course, lies in drawing an appropriate line. The decisions of the Comptroller of the Treasury made considerable progress in this direction, and early GAO decisions reflected this. Thus, a 1927 decision stated the rule as follows:

"[N]o 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 except when conditions or circumstances are shown to exist making such procedure necessary in the interest of the Government." A-15833, March 10, 1927 (emphasis added).

In an apparent attempt to control potential abuse, that decision also stated that reimbursement should be permitted only in cases involving "urgent and unforeseen public necessity."

The test of "urgent and unforeseen public necessity" might have been adequate had it been properly defined in later decisions. Unfortunately, however, the phrase was used instead to tighten the rule. What had once been recognized as a "rule of accounting" (18 Comp. Dec. 297, supra) became treated, in

effect, as a rule of law and acquired a rigidity it was never intended to have. Decisions of the past decade, previously discussed, evidence an attempt to escape this rigidity.

It becomes our task now, therefore, to establish reasonable guidelines for these cases in the future. The first step is to emphasize that there are certain categories of cases in which we will continue to apply the prohibition in essentially its traditional form. These are:

(1) Cases in which the underlying expenditure itself is improper, for example, where a given object is prohibited by statute or Comptroller General decision. If the agency would not be authorized to make a given expenditure directly, then the intervention of an employee as a voluntary creditor can have no effect. E.g., ~~60 Comp. Gen. 379 (1981)~~; 3 Comp. Gen. 681 (1924); 2 Comp. Gen. 581 (1923). The only exception will be expenditures necessary for the protection of life or Government property during an extreme emergency. E.g., 53 Comp. Gen. 71, supra. While even this exception is not free from doubt, we will not disturb the decisions that recognize it.

(2) Cases in which an employee purchases an item primarily for his own personal use even though also in the performance of official duties, where the item is authorized, but not required, to be furnished at Government expense. Examples are 46 Comp. Gen. 170 (1966) (purchase of uniforms by Air Force hospital employees) and B-162606, November 22, 1967 (purchase of safety orthopedic shoes by automotive mechanic). If an item is required to be furnished but the Government fails to furnish it, we would not object to reimbursement of an amount administratively determined to be reasonable.

(3) Cases in which an employee uses personal funds to pay certain types of claims, not involving the procurement of goods or services, which have been filed or should have been filed against the Government. Examples are claims by Federal employees relating to compensation or tort claims. These areas are generally governed by specific statutory and/or regulatory requirements. For a variety of reasons, the normal adjudication and settlement process should be allowed to work its course. This decision does not deal with this category. For the most part, reimbursement will be prohibited. E.g., 33 Comp. Gen. 20 (1953); 11 Comp. Dec. 486 (1905). Again, however, there may be rare exceptions based on unusual circumstances. See B-177331, December 14, 1972; B-186474, June 15, 1976.

The largest remaining category of cases--and the one we think warrants some redefinition--is illustrated by Captain Miller's claim: the unauthorized procurement of goods or services, where reimbursement is not prohibited under any of the three categories specified above. It is here that the most "meritorious" cases generally occur.

As with voluntary creditor cases in general, payment from personal funds is undesirable and should be discouraged. Adequate procedures exist to ensure payment to the contractor in appropriate cases. The agency may be able to "ratify" the unauthorized procurement. See in this connection section 1-1.405 of the Federal Procurement Regulations (FPR) and sections 17-204.4 and 17-205.1(d) of the Defense Acquisition Regulations (DAR). If ratification is not appropriate, the contractor's claim may be considered under a quantum meruit/quantum valebat theory. In general, this is the approach we think should be followed.

Occasionally, however, as this case illustrates, an individual will make payment from personal funds. An absolute prohibition on reimbursement is not mandated by precedent nor is it necessary to protect the Government's interests. Of course, the ratification and quantum meruit theories are, strictly speaking, not applicable because the contractor has already been paid. The Government is now dealing directly with its employee who is not a contractor. Nevertheless, we believe these theories, by analogy, offer a rational basis on which to evaluate these cases.

First, however, an important threshold test must be met--the test of "public necessity" suggested in the early decisions. The measure is the extent to which the program or activity involved would have been disrupted had the voluntary creditor not taken prompt action. The purpose of this test is to limit reimbursement to cases where there is a real need to act without delay to protect a legitimate Government interest. Reimbursement should not be allowed where an individual purchases something mainly because he thinks it is desirable, and is then able somehow to induce or pressure his agency into "ratifying" the transaction. In this latter situation, there is no reason not to follow regular procedures.

Another factor to consider is the extent to which the voluntary creditor acted on his own or was induced or "directed" to act by a superior. To the extent the voluntary creditor acted by direction, a somewhat lesser standard of "public necessity" may be applied. Even though the superior official may have been wrong, the burden should not fall on the employee who may well have felt that he had little choice but to comply.

If the "public necessity" test is favorably satisfied, the agency should next ask whether it could have ratified the transaction under whatever authority it may have (e.g., FPR § 1-1.405 where applicable) if the voluntary creditor had not made payment. If the agency could have ratified the transaction to pay the contractor, it may reimburse the voluntary creditor.

If ratification is not appropriate, the claim may be considered under a quantum meruit approach, again applied as if the contractor had not yet been paid. The elements are (1) benefit to the Government, (2) good faith, and (3) reasonable price. The "benefit to the Government" test will already have been satisfied by virtue of the "public necessity" determination. In determining reasonable price, the Government should, to the extent feasible, compare the price it would have paid in a regular procurement, taking into consideration such factors as tax exemptions and the availability of Government discounts. Claims under this theory, as with direct quantum meruit claims, should be forwarded to GAO for settlement. Of course, as we have indicated, this theory is available only where the underlying expenditure itself is authorized.

Applying the approach outlined above to Captain Miller's claim, we find the following:

(1) The National Guard personnel under Captain Miller's command were entitled to be fed at Government expense during the weekend training exercise.

(2) Captain Miller acted in the Government's best interests. The alternatives would have been either for each individual to pay for his/her food and submit separate claims for reimbursement, or presumably, disrupt the training schedule. While there was certainly no "emergency," failure to act would have impaired the mission.

(3) Captain Miller's headquarters told him, in a July 23, 1980 letter, to advise the vendor "of your actions and plans for payment to the firm." The clear inference is that Captain Miller was to pay from personal funds rather than risk adverse public relations by subjecting the vendor to lengthy claims settlement procedures.

(4) The National Guard Bureau considered "formalization" under ~~DAR § 17-205.1(d)~~ and concluded that it could not formalize the commitment under the DAR.

(5) The Government clearly received a benefit from Captain Miller's actions. The training mission was able to proceed without interruption and, as far as we can tell, the troops ate the food.

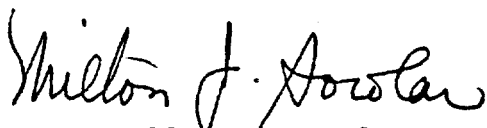
(6) There is no indication of lack of good faith on anyone's part.

(7) We have no reason to question the reasonableness of the price. The total cost was small and the food consisted of standard supermarket items.

In view of the foregoing, we conclude that Captain Miller should be reimbursed in the amount of \$332.98.

In sum, it must be emphasized that a voluntary creditor always acts at his own risk. As pointed out since the earliest days, the voluntary creditor does not acquire a "legal claim" against the Government. In other words, he is not entitled as a matter of law to be reimbursed. Reimbursement, where permitted, is essentially an equitable measure, as is the quantum meruit theory itself.

In the future, we will apply the guidelines set forth in this decision in the settlement of voluntary creditor claims. While we do not find it necessary to overrule any prior decisions, they should be viewed as modified to the extent they are inconsistent with what we have said here.

for 
Comptroller General
of the United States