

GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-251061.3

September 29, 1993

Ms. Jean Noonan
General Counsel
Farm Credit Administration
1501 Farm Credit Drive
McLean, Va. 22102-5090

Dear Ms. Noonan:

This responds to your request for reconsideration of our opinion, B-251061.2, Feb. 10, 1993. For the reasons stated below, we see no reason to modify our conclusion therein.

The February 1993 opinion addressed the payment of two claims, one of which arose under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2672 (1988), and the other under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E) (1988). In that opinion, we confirmed our Claims Group's conclusion that it could not legally certify payment of litigative awards against the Farm Credit Administration (FCA) from the permanent, indefinite appropriation known as the Judgment Fund because those awards are "otherwise provided for." 31 U.S.C. § 1304(a) (1988). Our opinion was based essentially on two propositions. First, FCA's funds are statutorily available to pay all expenses of the agency. Second, since the funds used to operate FCA may not be construed to be "Federal Government funds" or "appropriated monies" for any purposes, 12 U.S.C. § 2250(b) (1988), they are not subject to the general prohibition on the use of appropriated funds to pay litigative awards.

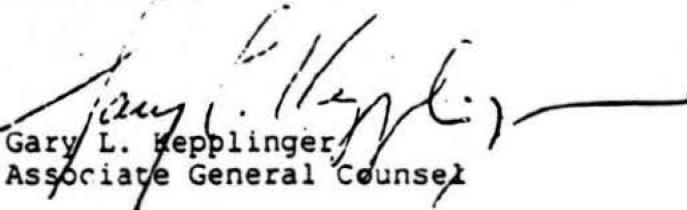
In your request for reconsideration, you argue that awards under the FTCA and FOIA, such as those at issue in our February opinion, are payable only by the United States from the Judgment Fund, which is the source commonly used to pay such awards against the federal government. You point out that the FTCA and FOIA specify that lawsuits are to be brought against "the United States" rather than against particular agencies. Cf. 28 U.S.C. § 2679(a); 5 U.S.C. § 552(a)(4)(F). You conclude from these provisions that these acts "waived sovereign immunity only as to the United States . . . not against individual agencies."

We find your argument unpersuasive. It has long been the view of this Office that the provisions of the FTCA (and

analogy here, those of FOIA, as well) which require suit to be brought against the United States do not eliminate the need to satisfy, on a case-by-case basis, the criteria established in 31 U.S.C. § 1304 for certification and payment of litigative awards from the Judgment Fund. See, e.g., 67 Comp. Gen. 142, 144-45 (1987). The Justice Department is of a similar view in this regard. 13 Op. Off. Legal Counsel 436, 442-44 (1989) (prelim. print). As Justice points out, such requirements (for suit to be brought against the United States) establish nothing more than a "litigating convention." Id. at 444. It is the nature and substance of the claims and parties, and the extent to which the criteria of section 1304 have been satisfied, not the "style" of the case, which determines the availability of the Judgment Fund to pay litigative awards. E.g., 58 Comp. Gen. 311, 315-16 (1979).

For these reasons, we deny your request for reconsideration. Should you have any further questions in this regard, please feel free to contact Mr. [redacted]
of my staff.

Sincerely yours,


Gary L. Kepplinger
Associate General Counsel

cc: Mr. Jeffrey Axelrad, Department of Justice

'We see no inconsistency between our conclusion here and our holding in , B-236399, B-238303, May 29, 1991. At issue here is the availability of the Judgment Fund to pay judgments and awards. addressed another issue, i.e., OCC's status as a nonappropriated fund instrumentality for purposes of the Dual Compensation Act, 5 U.S.C. § 5532.