

DECISION



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

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FILE: B-182816

DATE: OCT 29 1975

MATTER OF: J. N. Hadley, reimbursement of legal fees by SBA.

DIGEST: Where U.S. Attorney undertook defense of former SBA employee who was sued as result of actions committed while acting within the scope of his employment and during course of proceedings U.S. Attorney withdrew for administrative reasons, necessitating former employee's retaining the services of private counsel although Government's interest in defending employee continued throughout proceedings, we would not object to SBA's reimbursing former employee an amount for reasonable legal fees incurred. 28 U.S.C. §§ 516-519, 547, and 5 U.S.C. § 3106 are not a bar in such circumstances since to hold otherwise would be contrary to the rule that cost of defending such cases should be borne by the Government.

The Administrator of the Small Business Administration (SBA) requested our decision as to whether SBA has authority to reimburse a former employee (Mr. J. N. Hadley) for legal fees incurred as a result of his obtaining the services of private counsel to defend him in a suit arising out of actions committed while acting within the scope of his employment.

The record indicates that upon initiation of the action against Mr. Hadley by the service of process and complaint upon him, the SBA referred his case to the Department of Justice for legal representation. The Department referred the matter to the United States Attorney in Billings, Montana, with instructions that he represent Mr. Hadley's interest. The United States Attorney handling the matter made timely application to remove the cause from the State court in which it was filed to Federal court. Unfortunately, the removal application was ineffective since, through inadvertence, it had been filed in the name of the United States rather than in the name of the employee who was the party defendant.

Because of this oversight, the case was not effectively removed. Also, no answer was filed in the State proceeding on behalf of the defendant, and the statutory time for appearance expired. A judgment by default was summarily entered in the State proceeding and the plaintiff promptly took steps to execute the judgment against Mr. Hadley's property encumbering all of his real property and seizing his bank account. The United States Attorney did move to set aside the default judgment in the State proceeding, but no answer or

affidavit was filed with the motion as required by law to state a defense to the complaint, and no stay of execution was requested to stop a judicial sale or to stop delivery of Mr. Hadley's property to the plaintiff. The plaintiff's attempts to execute the judgment caused Mr. Hadley to retain private counsel, who thereupon secured a stay of execution until the default judgment could be set aside.

The United States Attorney informed Mr. Hadley's attorney that he did not desire to remain as counsel in the case, but he was encouraged to continue as such for the time being in the event developments made his participation an advantage to the defense. After extensive briefing and argument, the State District Court entered its order setting aside the default judgment and plaintiff appealed to the Montana Supreme Court. A motion to dismiss the appeal was filed on the ground that the District Court's order was not appealable and after more extensive briefing, the motion was granted.

The United States Attorney did not participate on the briefs or in the court appearances subsequent to Mr. Hadley's retaining the services of private counsel. Following the granting of the motion to dismiss the appeal, the United States Attorney requested and was granted an order permitting his withdrawal as an attorney for the defendant, although it was not then clear that the case would be dropped by the plaintiff.

Subsequently, Mr. Hadley's property was released from execution and all property under levy was returned to him. However, Mr. Hadley has incurred \$1,947.87 in legal fees in procuring the services of private counsel to protect his interests for which he has requested reimbursement.

Although officials within the SBA all agree that equity and good conscience dictate reimbursement of the legal expenses, the Administrator states that there is concern for the legality of such reimbursement by the Agency in view of 5 U.S.C. § 3106 (1970) which provides that:

"Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice. This section does not apply to the employment and payment of counsel under section 1037 of title 10."

Therefore, we have been asked to determine whether Mr. Hadley may be reimbursed by the SBA for the legal expenses he incurred as described above.

It is noted that the term "Executive department" as defined by 5 U.S.C. § 101 (Supp. III, 1973) does not include the SBA, since it is an "Independent

establishment" as defined by 5 U.S.C. § 104 (Supp. III, 1973). Since such definitions are applicable throughout title 5 of the United States Code, absent a specific provision to the contrary, the SBA does not fall within the language of the specific prohibition of 5 U.S.C. § 3106. However, there are other provisions of law which similarly evidence the intent of the Congress to assign to the Department of Justice, under the direction of the Attorney General, comprehensive authority to supervise and control the conduct of litigation in which the United States, an agency or officer thereof is a party. These other relevant provisions of law provide as follows:

"28 U.S.C. § 515. Authority for legal proceedings; commission, oath, and salary for special attorneys.

"(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

"(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than \$12,000."

"28 U.S.C. § 516. Conduct of litigation reserved to Department of Justice.

"Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

"28 U.S.C. § 517. Interests of United States in pending suits.

"The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests

of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

"28 U.S.C. § 518. Conduct and argument of cases.

"(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

"(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so."

"28 U.S.C. § 519. Supervision of litigation.

"Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties."

"28 U.S.C. § 547. Duties.

"Except as otherwise provided by law, each United States attorney, within his district, shall—

"(1) prosecute for all offenses against the United States;

"(2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned."

These provisions of law make it clear that unless otherwise authorized by law, only the Attorney General or the United States Attorney can represent the Government's interest in a court action. Cf. United States v. Daniel, Urbahn, Seelye and Fuller, 357 F. Supp. 853 (N.D. Ill. 1973); Richter v. United States, 190 F. Supp. 159 (E.D. Pa. 1960), affirmed, 296 F.2d 509 (3d Cir. 1961), cert. denied, 369 U.S. 828 (1962); Sutherland v. International Insurance Co. of New York, 43 F.2d 969 (2d Cir. 1930). Inasmuch as Mr. Hadley

was involved in the suit only as a result of his performance of official duties, the matter of his defense appears to be a valid concern of the United States. The Department of Justice in its letter of July 25, 1975, stated that the representation of Mr. Hadley was undertaken—

"* * * in spite of the absence of a direct financial impact upon the United States, in recognition of other fundamental interests to be served in defending suits brought against Government employees acting within the scope of their duties. The United States acts through its employees. Accordingly, upholding the authority and propriety of actions taken by employees in furtherance of their duties serves as well to protect the Federal Government as the employee. See, e.g., Johnson v. Maryland, 254 U.S. 51, 55-56 (1920). The Government would face obvious morale problems if it failed to defend employees carrying out official policy. Federal employees would be less vigorous in upholding Federal law and in discharging their duties if, when sued, they had to absorb their expenses of litigation. For these and other reasons it has long been the general policy of the Department of Justice to afford representation to employees sued for acts taken in the performance of their official duties. The Attorney General's authority to implement this policy is counted among his statutory powers. 28 U.S.C. 517 and 518. This authority was upheld in Booth v. Fletcher, 101 F.2d 676, 682 (C.A. D.C., 1938), cert. den., 307 U.S. 628; Swanson v. Willis, 114 F. Supp. 434, 435 (D.C. Alaska, 1953); Bradford v. Harding, 108 F. Supp. 338, 339 (E.D. N.Y., 1952)."

Although provisions of law cited, supra, preclude the Administrator from reimbursing the employee for expenses of hiring private counsel if representation from the United States Attorney was available, if such representation was sought, but was unavailable, we believe such provisions of law would not be a bar to reimbursement if otherwise appropriate. To hold otherwise would yield a result contrary to the general rule that such litigation expenses should be borne by the United States rather than the employee. See Konigsberg v. Hunter, 308 F. Supp. 1361, 1363 (W.D. Mo. 1970) and 6 Comp. Gen. 214 (1926).

Recently we considered the question of the propriety of the use of judiciary appropriations to pay litigation costs, including minimal fees to private attorneys, when a Federal judge, judicial officer, or judicial entity was sued as a result of actions taken in the discharge of their official duties. We held that, subject to certain qualifications not here applicable, 28 U.S.C. §§ 516-519, and 5 U.S.C. § 3106, would not—

"* * * preclude the use of judiciary appropriations to pay the costs of litigation including minimal fees to private

attorneys—if you determine the use of private attorneys is necessary—in those cases where it is determined that it is in the best interest of the United States and necessary to carry out the purposes of the Federal judiciary's appropriations for the judicial officer or body to be defended or represented in that litigation, and the Department of Justice has declined to provide representation." 53 Comp. Gen. 301, 305 (1973).

We see no basis for departing from that principle in the present circumstances. The Department of Justice initially decided that it was in the interest of the United States to defend Mr. Hadley, and it undertook to provide him with legal representation. However, as the proceedings progressed, representation by the United States Attorney became, in effect, unavailable, according to a letter dated July 25, 1975, which we have received from Assistant Attorney General Rex E. Lee. This necessitated Mr. Hadley's procuring the services of private counsel. The Department of Justice does not claim that the withdrawal of representation by the United States Attorney was due to a determination that the United States was no longer officially interested in the defense of Mr. Hadley. Thus the defense of Mr. Hadley, through the services of private counsel was still an obligation of the United States. The aforementioned letter from the Department of Justice interposes no objection to that conclusion.

Therefore, we would have no objection to SBA reimbursement of Mr. J. N. Hadley for legal fees incurred as a result of his obtaining the services of private counsel to defend him in this suit, arising out of actions committed while acting within the scope of his employment, in an amount it determines to be reasonable. Such reimbursement in this limited context may be considered a necessary expense incurred by the employee in the course of his official duties, and paid from appropriations otherwise available for such expenses.

R.F.KELLER

Deputy

Comptroller General
of the United States