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DECISION



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

**Wm. Haubert
Civ. Pers.**

FILE: B-186512

DATE: JAN 17 1977

**MATTER OF: Reimbursement for State-imposed pesticide
applicator license fee**

**DIGEST: Pursuant to Federal statute and implementing regulations,
Oregon has plan for certification of pesticide applicators.
State plan includes assessment of \$7.50 fee for certifica-
tion and licensing. Appropriations of U.S. Forest Service
are not available for reimbursement of employee who pays
this fee because it represents a personal expense incident
to qualifying for his position.**

**This decision is in response to a request from an authorized
certifying officer of the Forest Service, United States Department of
Agriculture, for our decision as to whether he may properly certify
for payment a voucher for reimbursement of a \$7.50 fee paid to the
State of Oregon by David A. Graham, a Forest Service employee, for an
Oregon Pesticide Applicator License.**

**The Federal Insecticide, Fungicide, and Rodenticide Act, as
amended by the Federal Environmental Pesticide Control Act of 1972
(7 U.S.C. §§ 136 et seq. (Supp. V, 1975), hereinafter "the Act")
established statutory requirements governing the distribution, sale,
and use of pesticides. The Administrator of the Environmental Pro-
tection Agency (EPA), who is charged with administering the Act, has
issued regulations at 40 C.F.R. § 171 (1975), providing for the
certification by States of users or applicators of restricted use
pesticides under plans to be approved by EPA.**

**Pursuant to these regulations, the State of Oregon has submitted
a plan for the certification of pesticide applicators. EPA regulations
authorize States with an approved plan to act as the certifying agency
for all pesticide applicators, including those employed by the United
States. 40 C.F.R. § 171.7. Under the Oregon plan, Oregon certifies
Federal applicators of pesticides, and assesses a fee of \$7.50 for the
licensing of pesticide applicators.**

**Mr. Graham has paid the fee and seeks reimbursement. The
certifying officer indicates that Mr. Graham performs his duties as
a pesticide applicator at the direction of the Forest Service during
official working hours and entirely on Federal lands.**

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The certifying officer states that there is no indication in either the Act or its implementing regulations that a license fee may be assessed against a Federal agency. Further, he cannot find " * * * any indication that Federal agencies must require employees to pay a State license fee as a condition of employment." Moreover, the certifying officer notes that U.S. Government pesticide applicators performing work on Federal lands are bound by substantive State law, but not by administrative rules, by virtue of Executive Order No. 11,752, 3 C.F.R. § 380 (1974). It is his opinion that the licensing requirement is an administrative rather than substantive provision.

The Act contemplates that all applicators of restricted use pesticides, including Federal employees, will be subject to certification. 7 U.S.C. § 136(c)(1), § 136b(a)(Supp. V, 1975). Although standards for certification are to be prescribed by the Administrator of EPA, the authority to certify may in effect be delegated to States having programs for certification which meet the standards for certification which the Administrator prescribes and which are approved by him. 7 U.S.C. § 136b(a).

As noted above, the Administrator, in implementing these provisions, has allowed States with approved plans to certify Federal pesticide applicators. It is under such a State plan in Oregon that Mr. Graham was licensed as a pesticide applicator upon payment of the required fee. The Oregon Plan provides, with respect to certification of United States employees, that " * * * [o]btaining of a commercial applicator's license and paying the associated public applicator's fee will still be required."

Decisions of this Office, holding that Federal employees may not be reimbursed for a license fee imposed by a State or locality, have been based on the rationale that these expenses are " * * * personal to the employee as an incident to qualifying for the position for which engaged * * *." 6 Comp. Gen. 432, 433 (1926); 31 *id.* 81 (1951). The same rationale precludes reimbursement in this case.

We do not here question, as we did in the cited decisions, the authority of the States to require licensing of a Federal employee. In those cases, we pointed out that the States have no power by taxation or otherwise to control in any manner the operation of constitutional laws enacted by the Congress to carry into effect the powers vested in the Federal Government, citing such cases as Johnson v. Maryland, 254 U.S. 51 (1920). As a corollary, we said, in 31 Comp. Gen. 81, supra, that it is for the Federal Government to determine the competency of its employees for the performance of the services for which they are employed.

In this instance, however, the State, in certifying and licensing a pesticide applicator who is an employee of the Federal Government, is acting under authority granted by EPA. It is only because the Administrator has allowed States to include Federal employees within the scope of their approved plans that the State is empowered to prescribe qualifications for Federally-employed pesticide applicators performing their duties on Federal facilities. This is acknowledged in effect by EPA in its General Comments on the regulations:

"* * * Federal agency employees who satisfy GAP [Government Agency Plan--minimal Government-wide certification criteria] requirements have demonstrated their competence and are eligible for certification. They are not, however, certified, and hence are not authorized to use or supervise the use of restricted use pesticides until a State with an approved State plan accepts them, either on the basis of GAP acceptance alone, or GAP acceptance plus other State-imposed requirements. Thus, in requiring compliance with its State plan, the State, as the entity authorized to certify applicators pursuant to [7 U.S.C. § 136b (Supp. V, 1975)], is implementing the Federal law. * * *" 40 Fed. Reg. 11699 (1975), emphasis in original.

Moreover, the Act, at least indirectly, recognizes licensing as an appropriate procedure in implementing its provisions. See 7 U.S.C. § 1361(b), providing that

"When establishing or approving standards for licensing or certification, the Administrator shall establish separate standards for commercial and private applicators."

Accordingly, we conclude that the Oregon requirement for pesticide applicators to be licensed is lawfully imposed on the Forest Service employee. If qualification as a pesticide applicator is a condition of his employment, as appears to be the case, he must meet the Oregon requirements, but any associated expense is personal, and may not be reimbursed with appropriated funds. The voucher, which is returned herewith, may not be certified for payment.

The certifying officer cites the provision of Executive Order No. 11,752 that U.S. Government applicators performing their work on Federal lands are bound by substantive State law but not by State

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administrative rules. He states that the Oregon licensing procedure " * * * could appear to be an administrative rule in that it parallels many other licensing requirements of the State * * *," suggesting that a Forest Service employee performing his duties on Federal land should therefore not be subject to the State requirement. However, the Executive Order, in our view, does not apply here since, as discussed above, the licensing procedure, although implemented by the State, is imposed by virtue of Federal law.

The certifying officer asks, in addition, if the voucher may not be certified, whether Federal employees with pesticide applicator duties can be required by an employing agency to obtain and pay for a license as a personal matter. Since none may apply restricted pesticides without a license in Oregon, if the employee's duties necessarily involve the application of such pesticides, he could not qualify for his position unless he holds the license in question. Such special employment requirements are not unique in or out of the Federal Government. Thus, positions requiring an employee to be a lawyer are not available to persons who have not obtained a State license to practice law; positions requiring certified public accountants are not open to persons who have not obtained the necessary certification; etc. In each instance, the possession of a license is a prerequisite for acceptance of the employee as being qualified for a position that requires such a license.

Therefore, fees incident to obtaining permits or licenses necessary to qualify a Federal employee to perform the duties of a position are personal expenses, to be paid by the employee. 51 Comp. Gen. 701 (1972) and cases cited therein.

H.F. KELLER

Deputy Comptroller General
of the United States