

DOCUMENT RESUME

00693 - (A0100023)

Reimbursement by United States of Government Attorney for Fine Imposed by Court. B-186680. October 4, 1976. 5 pp.

Decision by Robert P. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: General Government Matters.

Budget Function: General Government: Central Personnel Management (805).

Organization Concerned: Department of Justice.

Authority: 28 U.S.C. 2412. 44 Comp. Gen. 312; 31 Comp. Gen. 246, 247.

An employee of the Department of Justice requested reimbursement for a fine imposed on him for failing to meet a court deadline. Since the employee failed to reply or request an additional extension, there is no authority to use appropriated funds for reimbursement. (HTW)

DECISION



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

00693

FILE: H-186600

DATE: OCT 1 1976

MATTER OF: Reimbursement by United States of Government
attorney for fine imposed by Court

DIGEST: Appropriated funds are not available to reimburse an attorney representing the United States for a fine imposed on him by the Court unless the facts support an administrative determination that the fine was necessarily incurred in the performance of official duties for which the appropriation was made, and without fault or negligence by the attorney.

The Assistant Attorney General for Administration, Department of Justice, has requested our decision whether the Department of Justice, using funds appropriated to it, may reimburse an employee of the Department who was ordered by a Federal District judge to pay a \$500 fine. Mr. W.S. Gwatkin, who made the payment, is an attorney in charge of the admiralty litigation on behalf of the plaintiff United States, captioned in the title of the Complaint of the United States of America as Owner of the United States Naval Ship Private Joseph P. Marrell for Expropriation from or in Ligation of Liability, Civil Action No. 74-1979 (C.D. Cal. 1976) (hereinafter cited as the Marrell case).

The Assistant Attorney General sets forth the facts and the question presented as follows:

"* * * During the course of discovery proceedings, Mr. Gwatkin failed to meet a deadline set by the court (January 30, 1976) for submission of answers to certain interrogatories submitted by the defendant to the Government. On January 30, 1976, the day of the deadline, he filed a motion with a supporting affidavit to extend the time limit until February 9, 1976, and a hearing was set for March 1, 1976. Defendant's counsel did not oppose the request for an extension. However, because of the press of other duties of the office, Mr. Gwatkin was unable to meet the February 9 deadline and placed the interrogatories in the mail to all counsel involved in the Marrell case, on February 29, 1976.

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"At the ensuing hearing on March 1, 1976, the court expressed displeasure with Mr. Gwatkin's conduct in answering the interrogatories. The court was particularly displeased with Mr. Gwatkin's assertion, in his affidavit, that many matters were pending in his office, all of which required that various deadlines be met in various court proceedings; he stated that since he found it impossible to meet all the deadlines which had been imposed on his office, he found it necessary, in the performance of his duties, to exercise value judgments as to which cases could be delayed with the least prejudice to the position of the United States. Mr. Gwatkin explained that a brief further extension of time in which to answer the interrogatories in the Merrill case would be less prejudicial to the overall progress of that case than to other pending matters in his office, some of which had been on the dockets of the courts concerned longer than had the Merrill case. The court described Mr. Gwatkin's conduct as arrogant and inexcusable, and as demonstrating an attitude on his part that his views superseded the directions of the court as to when papers were to be filed.

"The court stated that it intended to impose sanctions and asked for reasons why the complaint should not be dismissed. When the court realized that the complaint was addressed to larger claims than the one affected by the interrogatories, it regarded dismissal as too harsh a sanction and instead directed Mr. Gwatkin to pay the sum of \$500 to opposing counsel. The opposing counsel had not requested the sanction and had in fact advised the court that there had been no bad faith on the part of the Government. The court indicated, however, that the sanction could not be waived by opposing counsel; that the sanction was imposed on Mr. Gwatkin personally; and that Mr. Gwatkin had five days (later extended to ten days) in which to pay the sanction unless he appealed the order to the United States Court of Appeals for the Ninth Circuit and obtained a stay; and that if he did not do so, an order would be issued to show cause why he should not be held in contempt.

"Before the expiration of the ten-day period for payment set by the court, Mr. Gwatkin sent the Clerk of the court his personal check for \$500, and asked that

it be deposited in the registry of the court to await the final outcome of any appeal, or as otherwise directed by the judge.

"The Civil Division of the Justice Department intends to request that the Solicitor General authorize an appeal of this case, on behalf of Mr. Gwatkin and the United States. Processing of the request cannot be completed until receipt of the transcript of the hearing. The Civil Division contends that the court's order of payment to opposing counsel is contrary to the provisions of Rule 37(f), Federal Rules of Civil Procedure, which provides that expenses and fees may not be imposed against the United States as discovery sanctions under Rule 37, and is contrary to 28 U.S.C. § 2412, which provides that a judgment of costs against the United States may not include fees and expenses of attorneys. In addition, the Civil Division contends that the court's order is not an adjudication of contempt personally against Mr. Gwatkin, but rather is a sanction which indirectly falls upon the United States, and hence constitutes an unauthorized evasion of the provisions preventing an award of attorney's fees.

"We are aware of many decisions of the Comptroller General which state the principle that, 'no officer or employee can create a valid claim in his favor by paying obligations of the United States from his own funds.' 33 Comp. Gen. 20(1953). See also, 18 Comp. Gen. 424, 425(1938); 7 Comp. Gen. 104(1927); 2 Comp. Gen. 581 (1923); and 24 Comp. Dec. 155 (1917). However, in this case Mr. Gwatkin did not act voluntarily to create an obligation of the United States; he was ordered by a Federal district court to pay a sum of money to defense counsel under threat of a contempt citation. In addition, Mr. Gwatkin was acting on behalf of the Government; his duties as Chief of the San Francisco Office of the Admiralty and Shipping Section include the exercise of discretion in a situation where there are many demands on the resources of his office and all demands cannot be adequately met. It was the exercise of such discretion, in the performance of his assigned duties, and under the heavy work load of his office, which prompted the court to assess the \$500 fine at issue."

While the Assistant Attorney General asks only whether the employee, having paid the fine, may be reimbursed, the threshold question which must first be addressed is whether appropriated funds are available to pay a fine imposed on an employee by a court. Whether a fine to punish a contempt by a Federal employee could be paid by his agency was the subject of inquiry in 44 Comp. Gen. 312 (1964). The Agent in Charge, Chicago office of the Federal Bureau of Investigation (FBI), declined to answer questions, despite the court's order to do so, based upon specific instructions received from the Attorney General of the United States and upon certain regulations of his Department. An administrative determination was made that the fine was necessarily incurred in the accomplishment of official business for which the appropriation for salaries and expenses of the FBI was made. Payment from that appropriation was held to be authorized.

Compare, however, 31 Comp. Gen. 246 (1958), in which a Federal agency asked whether it might reimburse an employee for a fine imposed and paid by him for a traffic violation. The violation--double-parking--involved a Government vehicle driven by the employee while on official business. We held that there is no authority to use appropriated moneys--

"* * * for the payment of a fine imposed by a court on a Government employee for an offense committed by him while in the performance of, but not as part of, his official duties." 31 Comp. Gen. at 247.

In distinguishing between 44 Comp. Gen. 312 and 31 Comp. Gen. 246, the significant factor is whether the action for which the fine is imposed is a necessary part of the employee's official duties. Thus, the employee in 31 Comp. Gen. 247 could presumably have made the delivery which was his task without violating the law by double-parking. In 44 Comp. Gen. 312, however, it was clear that the offense which was the occasion for the fine--

"* * * arose by reason of the performance of [the employee's] duties * * * and his compliance with Department regulations and instructions, and was without fault or negligence on his part * * *."
44 Comp. Gen. at 314.

We also said in 44 Comp. Gen. 312, at 314, that whether the fine--

"* * * was necessarily incurred in the accomplishment of official business for which the appropriation proposed to be charged was made is, of course, a factual

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rather primarily for administrative determination in the light of the circumstances of the particular case * * *."

The Assistant Attorney General has evidently made that administrative determination in this case. He states that Mr. Gwatkin was acting on behalf of the Government, and that because his official duties require the exercise of discretion in deciding how to allocate the scarce resources of his office, the fine was the result of the exercise of his discretion in the performance of his official duties. However, we are not bound to accept the administrative determination when the facts do not support it.

The failure of Mr. Gwatkin to respond to the interrogatories by February 9, the time set by the court, was the result of the press of other official matters. We do not question the exercise of his discretion in deciding that other matters took precedence over the Merrill case. However, the extension of time to February 9 to reply to the interrogatories was granted by the court at Mr. Gwatkin's request. When that deadline was reached, Mr. Gwatkin neither filed the answers nor did he request an additional extension of time or otherwise communicate with the court about his problem. There is nothing in the record to indicate why an additional extension of time was not requested or to show that Mr. Gwatkin's failure to make such request was in compliance with Department instructions and without fault or negligence on his part. On the basis of the present record it is our view that there is no authority to use appropriated funds to reimburse Mr. Gwatkin for the sanction imposed on him personally by the court.

R. F. KELLEY
Deputy Comptroller General
of the United States