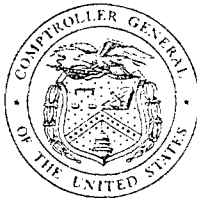


DECISION



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

10,013

FILE: B-193862

DATE: APR 30 1979

MATTER OF: Reimbursement to National Park Service Employees for California Water Treatment Operator Certificates

DIGEST: State of California requires water suppliers to use only State-certified water treatment operators to run water treatment plants. Under sec. 8(a) of the Safe Drinking Water Amendments of 1977, and sec. 61(a) of the Clean Water Act of 1977, the National Park Service is subject to all State and local substantive and procedural requirements. Therefore, personnel operating National Park Service water treatment facilities in California must obtain State certificates. However, certification is a personal qualification which is the employee's responsibility. United States may not reimburse employee for the certificate cost. [REQUEST FOR]

An authorized certifying officer, Western Region, National Park Service, has requested an advance decision as to payment of claims for reimbursement of fees paid by 16 National Park Service employees to the State of California for certification as water treatment operators. He states that he received vouchers for reimbursement of the employees based on an opinion of the Field Solicitor, San Francisco Field Office, Department of the Interior, on the effect of section 8(a) of Pub. L. No. 95-190. However, the Certifying Officer believes that, although the immunity of Federal agencies from complying with certain State and local requirements has been waived by recent legislation, there is no authority for the United States to pay the fees in question.

Subsequently, the Assistant Secretary for Policy, Budget, and Administration, Department of the Interior, wrote to us on the same subject. The Assistant Secretary refers to our decisions, 47 Comp. Gen. 577 (1968) and Reimbursement for State-imposed pesticide applicator license fee (B-186512, January 17, 1977), and to section 313(a) of Pub. L. No. 95-217 and wishes to know the effects of these decisions on the question of whether the Federal Government may pay for employee licensing by States, where a State license becomes a qualification for a position after an individual is hired, or where the license is a condition of employment. He also poses the following related questions:

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"1. Under the new laws, are Federal agencies now permitted to reimburse the employee the costs incurred to become licensed by a State in order for the employee to lawfully operate a water, wastewater, or solid waste treatment/processing facility? (Reference 1968 Comptroller General Decision B-163826.)

"2. Is a Federal agency permitted to pay directly to a State those fees associated with licensing an employee?

"3. If these fees are a recurring fee (e.g., yearly) may the agency continue to pay them each year?

"4. In situations where the Environmental Protection Agency has not delegated primary enforcement responsibility to a State, would payment of State licensing fees for Federal employees be authorized?

"5. May these fees associated with licensing of employees or those imposed by a State for operating permits for an individual treatment or processing system, be paid even though the systems were operating prior to enactment of the above mentioned Public Laws?"

With regard to the certifying officer's specific question, section 8(a) of Pub. L. No. 95-190, the Safe Drinking Water Amendments of 1977 (91 Stat. 1393, 1396, November 16, 1977), amended section 1447(a) of the Public Health Service Act, 42 U.S.C. § 300j-6, to read as follows:

"Sec. 1447. (a) Each Federal agency (1) having jurisdiction over any federally owned or maintained public water system or (2) engaged in any activity resulting, or which may result in, underground injection which endangers drinking water (within the meaning of section 1421(d)(2)) shall be subject to, and comply with, all Federal, State, and local requirements, administrative authorities, and process and sanctions respecting the provision of safe drinking water and respecting any underground injection program in the same manner, and to the same extent, as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits, and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and

(C) to any process or sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply, notwithstanding any immunity of such agencies, under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty under this title with respect to any act or omission within the scope of his official duties."

Regarding this amendment, House Report No. 95-338 (1977) on H.R. 6827, a derivative source of the 1977 Act, states that:

"This section subjects Federal agencies which have jurisdiction over a federally owned or maintained public water system or which are engaged in underground injection activities which endanger drinking water, to all Federal, State, and local requirements, substantive and procedural, and to administrative authorities and process and sanctions which pertain to the provision of safe drinking water. Thus, Federal facilities would have to comply with State and local requirements including recordkeeping or reporting requirements, permit requirements, and any other type of Federal, State, or local requirement. The section waives sovereign immunity of Federal agencies and subjects those agencies to Federal, State, and local judicial process.

* * * * *

"In Hancock v. Train, 426 U.S. 167 (1976), the Supreme Court dealt with the issue of whether a State which has a federally approved implementation plan under the Clean Air Act which forbids an air contaminant source to operate without a State permit may require existing federally owned or operated installations to obtain such permit. The Court held that although section 118 of the Clean Air Act mandated compliance by federally owned or operated sources with air pollution control and abatement measures, the language of the section did not require Federal sources to comply with procedural requirements, such as the State permit requirement at issue. * * *

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"In enacting section 8 of the Amendments, the committee wishes to avoid the pitfall encountered in the Clean Air Act.

Thus the committee makes manifest its intention that federally owned or operated facilities comply with all Federal, State, and local requirements, of a substantive and procedural nature, which pertain to the provision of safe drinking water. By subjecting Federal facilities to State and local safe drinking water requirements, the committee explicitly waives the applicability of the doctrine of sovereign immunity to those sources. * * *
At 12, 13.

Section 61(a) of Pub. L. No. 95-217, 91 Stat. 1566, 1598, the Clean Water Act of 1977, amended section 313 of the Federal Water Pollution Control Act, 33 U.S.C. 1323, to include a provision comparable to section 8(a) of the Safe Drinking Water Amendments of 1977. Similar provisions subjecting Federal activities to State or local substantive and procedural requirements are included in other recent legislation-- such as section 116(a) of Pub. L. No. 95-95, 91 Stat. 685, 711, the Clean Air Amendments of 1977, which amended section 118 of the Clean Air Act, 42 U.S.C. 7418.

In order to assure the delivery of pure, wholesome, and potable water, the California Administrative Code requires the utilization of qualified persons for the operation of water treatment facilities. No water supplier is to employ or utilize a person to operate a water treatment plant unless the person possesses an appropriate valid operator certificate. No person is to operate a water treatment plant unless he has an appropriate certificate, which is awarded (with certain exceptions) only to applicants possessing the necessary education and experience who pass an examination specified by the State Department of Health. (Sections 7100, 7103, 7106, 7109, 7113).

The certification program is to be entirely self-supporting and fees are to be set to recover all administrative costs (Sec. 4083, California Health and Safety Code). The application fee for certification or change in grade of certification is \$15. The same amount is charged for each 2-year certificate renewal. (Sections 7130, 7131 of the Administrative Code.)

In 47 Comp. Gen. 577 (1968) (B-163826), we concluded that the United States could not pay fees for certification by the State of Montana of U. S. Bureau of Reclamation employees as water and waste water operators. After examination of the Federal Water Pollution Control Act, we found that it contained no authority "specifically or by necessary implication" for payment of the fees. In the absence of payment authority, we held that our prior decisions, commencing with

3 Comp. Gen. 663 (1924), were controlling on the basis that, under the constitutional principle of Federal supremacy, the State lacked authority to require Federal employees to obtain the State certification in question.

We had before us in B-186512, supra, a claim for reimbursement by a U.S. Forest Service employee for a fee paid to obtain a State pesticide applicator license. We found that the State requirement for pesticide operator licensing was lawfully imposed on the Federal employee, under authority in effect delegated to the State by the Environmental Protection Agency (pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, as amended by the Federal Environmental Pesticide Control Act of 1972 (7 U.S.C. Sec. 136, et seq.)). Federal supremacy was therefore not an issue.

However, reimbursement was precluded, citing past decisions of this Office, on the basis that the license fee imposed by the State was personal to the employee, as an incident to qualifying for his position.

We believe that similar considerations are controlling in the case at hand. It appears clear that the relevant provisions of law, section 8(a) of the Safe Drinking Water Amendments of 1977, and section 61(a) of the Clean Water Act of 1977, subject the National Park Service to California's procedural as well as substantive requirements for the operation of Federal water treatment facilities located in that State. This includes, in wording common to both provisions, "any requirement respecting permits and any other requirement, whatsoever." Under the California Administrative Code, sec. 7103, the National Park Service, as a water supplier, is required to use only personnel possessing the appropriate certificate to operate a water treatment facility. Accordingly, an employee who has such duties must obtain a certificate issued by the State of California attesting to his competence to operate a water treatment plant, "in order to assure the delivery of pure, wholesome and potable water."

While the relevant Federal statutes have the effect of subjecting the National Park Service and its employees to California's requirements for water treatment operators, there is no authority therein to pay, or to reimburse Federal employees for, the cost of obtaining and maintaining in force the required State certificate. (This is in contrast to a specific statutory provision exempting employees acting in the scope of their employment from personal liability for civil penalties imposed by the State.) The possession of a valid certificate is a condition of employment for each operator. It is a personal qualification, in the absence of which he may not operate a water treatment

facility located in the State of California. Accordingly, it is the employee's responsibility to secure and maintain the certification in question.

This principle is applicable whether a license or certificate is an initial condition of employment or becomes a qualification afterwards, or is necessary because of a change of duty or location. See 51 Comp. Gen. 701 (1972) and cases cited therein.

Under the previously cited laws, permit fees which may be required of the National Park Service itself, as a water supplier, are payable by the Federal Government if otherwise proper. See 58 Comp. Gen. ___, B-192805, January 4, 1979. However, as indicated above, in the absence of statutory authority, payment may not include certificates required by individual employees in order to qualify them for their positions.

Consequently, reimbursement for fees paid by National Park Service employees for State water treatment operator certificates (or direct payment to the State of such fees) may not properly be made from appropriated funds. This is so regardless of whether the Environmental Protection Agency has delegated enforcement responsibility to the State, as in B-186512, supra. Of course, a State cannot impose the fees on Federal employees without Federal statutory authority of some kind. Also, the fact that a treatment system may have been in operation before enactment of the law conferring such authority on the State does not affect our answer. The questions submitted by the Assistant Secretary of the Interior are answered accordingly.

R.F.KELLER

Deputy Comptroller General
of the United States