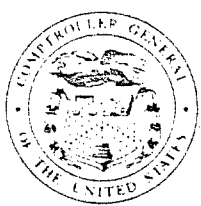


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DECISION



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

FILE: B-194433

DATE: July 13, 1979

MATTER OF: Nuclear Regulatory Commission - Live Entertainment
for National Black History Month

DIGEST: Nuclear Regulatory Commission requested advance decision on payment for jazz ensemble that performed at EEO special emphasis program. Our decision B-191737, January 5, 1979, 58 Comp. Gen. 202, established rule that certain live artistic presentations associated with EEO programs would be considered as employee entertainment and not allowed, regardless of characterization by sponsoring agency. However, that decision exempted expenditures prior to the decision from the rule. Because NRC had issued its purchase order prior to actual knowledge of cited decision payment may be made in this case.

The Director, Division of Accounting, Office of the Controller, Nuclear Regulatory Commission (NRC), requested an advance decision on whether he may use appropriated funds to pay a voucher representing costs incurred by the NRC Office of Equal Employment Opportunity (EEO) for the services of a jazz ensemble that performed in an agency EEO program on February 15, 1979.

During the second half of 1978, the NRC EEO Office began planning a program in observance of Black History Month. Representatives of that office discussed its plans with the legal staff of the NRC to determine whether it could use appropriated funds to hire a band to perform in the proposed program. The legal staff verbally advised the NRC EEO office in late November or December 1978 and in a written memorandum dated January 3, 1979, that it was of the opinion the anticipated expenditure was legally justified.

Relying on the legal advice it received, NRC's EEO staff proceeded to organize a Black History Month program. On February 1, 1979, pursuant to that Office's request, the NRC's Division of Contracts issued a purchase order to procure the services of the jazz ensemble for the program. According to the Director of the Division of Accounts:

"On February 14, 1979, shortly after this purchase order was presented to the NRC's Division of Accounting for recording as an obligation of NRC's appropriated funds, the Division of Accounting received from GAO, pursuant to our request, copies of C. G. Decisions B-191737 dated January 5, 1979, (Attachment C) and B-193661 dated January 19, 1979, (Attachment D). These opinions viewed the

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musical activities contracted for in connection with similar EEO programs conducted by the Bureau of Mines and the Equal Employment Opportunity Commission as the procurement of entertainment for Federal employees and, as such, were determined not to be proper expenditures of appropriated funds. "

The band performed on February 15, 1979. Our decision was issued two days after the NRC legal opinion of January 3. As noted, NRC's Division of Accounting knew of our decision by February 14. The NRC legal staff states that it did not become aware of the decision until February 15, 1979, the day of the program. On February 27, 1979, the legal staff advised the EEO office that live performances incident to EEO programs could no longer be legally justified and the earlier contrary opinion had been superseded. The EEO office was cautioned to coordinate any proposed appropriated fund expenditures for special emphasis programs with the NRC legal staff.

Nevertheless, in a March 2, 1979, memorandum the NRC legal staff advised the NRC Controller's office that payment for the jazz ensemble could be made. In arriving at this conclusion, the legal staff pointed out that in an earlier decision, 51 Comp. Gen. 797 (1972), we had permitted the Bureau of Public Debt, Department of the Treasury, to expend appropriated funds for a monthly subscription for MUZAK Company incentive music services in the central work area of that organization's Washington, D. C. office. The inference drawn by the legal staff was that certain kinds of entertainment are permissible, despite our holding in the Bureau of Mines decision. On this basis, the legal staff rationalized that payment for the jazz ensemble was justified and could be made. Because of an apparent conflict of opinion, the Controller's office sought an advance decision from this Office.

The NRC legal staff misinterpreted the holding of our Bureau of Mines decision and the holding in 51 Comp. Gen. 797, supra, concerning incentive music services. These decisions concern entirely different subject matters, although they both involve music. On the one hand, the Bureau of Mines decision dealt with a one-time live performance of short duration by musicians as part of a special program for Federal employees who were away from the work site. Public performances of this type are generally defined as entertainment. People v. Klaw, 106 N.Y.S. 341, 351 (1907). On the other hand, the incentive music service is recorded music provided on a continuous basis at the work site to increase employee productivity.

Our Bureau of Mines decision is applicable to the instant case. We restated there the long established rule that in the absence of specific authority, an agency may not use its funds to procure entertainment. We affirmed in that decision that this rule applies, as in all other situations, to the procurement of entertainment such as live music and artistic presentations incident to special emphasis EEO programs even when characterized by the agency as training activities.

In our decision, 58 Comp. Gen. 202 (January 5, 1979) we considered a variety of activities put on by the Bureau of Mines for National Hispanic Heritage Week. Included, for example, were a 1-hour lecture-demonstration of South American folk music by two musicians from Argentina and a 2-hour lunch time concert on the following day by 12 musicians and a guest singer from Puerto Rico which was held in the Plaza outside the Bureau's offices. Those and other activities were defended by the Bureau as employee training." We stated:

"When we analyze within the context of our decisions the artistic presentations which were components of the Bureau of Mines Hispanic Week, they seem very similar to the kinds of activities which we have consistently characterized in the past as 'entertainment.' We recognize that there may be some confusion regarding the kinds of activities which are authorized to commemorate Hispanic Week and similar occasions, or which could be carried out under any agency's EEO program, and that some agencies in the past have expended appropriated funds to provide entertainment characterized as training in connection with EEO programs. While we accept without question past agency characterizations that this entertainment type activity was EEO training or, at least, an authorized part of its EEO program and we will not take exception to any such past expenditures by the Bureau of Mines or other agencies, we feel that no similar expenditures in the future should be incurred unless made in strict conformance with statute or applicable Civil Service Commission regulations."

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In our decision of January 3, 1979, we recognized that in the past agencies had expended funds for entertainment that was characterized as EEO training and provided an exemption for such expenditures. Because of the question, prior to our decision of January 3, 1979, as to whether this type of expenditure was payable from appropriated funds and the fact that NRC, on advice of its legal staff, had issued its purchase order prior to actual knowledge of our decision we will not object to payment in this particular case.

Deputy


Comptroller General
of the United States