

**DECISION**

118494, GCM  
Archbald

THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20540

FILE: B-195347/B-195348

DATE: May 26, 1982

MATTER OF: Reconsideration of MSPB's authority to accept reimbursement for hearing officers travel expenses.

**DIGEST:**

In view of the Merit Systems Protection Board's statutory responsibility to provide appeals hearings, and absent any specific authority to the contrary, there is no authority for the MSPB to accept reimbursement for the travel expenses of its hearing officers, nor is there any authority for the employing agencies to use their appropriations for this purpose. 59 Comp. Gen. 415 (1980), which held that MSPB may not accept payments from other agencies or augment its appropriations by accepting donations from employees or unions, is affirmed.

We have been asked to reconsider our decision at 59 Comp. Gen. 415 (1980). In that decision, we held that the Merit Systems Protection Board (MSPB) is prohibited from accepting reimbursement from Federal agencies, employees, or employees' unions for the travel expenses of MSPB hearing officers. For the reasons discussed below, we conclude that 59 Comp. Gen. 415 must be upheld.

By statute, the Merit Systems Protection Board is responsible for the adjudication of Federal employees' appeals from agency personnel actions. The Civil Service Reform Act of 1978 authorizes MSPB, as successor to the Civil Service Commission, to hear, adjudicate, or provide for the hearing or adjudication of all matters within its jurisdiction (5 U.S.C. § 1205(a)(1)). Further, 5 U.S.C. § 7701 provides that a Federal employee or applicant for Federal employment may submit an appeal to MSPB from any action appealable to the Board under any law, rule, or regulation, and that such an appellant has a right to a hearing.

The location of these hearings is not specified by statute. In our 1980 decision, we noted that the Board, under its general authority to prescribe regulations necessary for the performance of its functions (5 U.S.C. § 1205(g)), appears to have inherent authority to determine where hearings are to be held. 59 Comp. Gen. at 416.

It has been MSPB's preferred practice to conduct appeals hearings in the appellant's home area. Because the employing agency and witnesses for both the appellant and the agency are typically located in the same general area, the entire appeals process is, quite logically, less time consuming and more cost-efficient if conducted in that area.

However, despite the obvious practical advantages to the Government as a whole, MSPB has not always been able to afford the expense of sending its hearing officers to the employee/appellant's home area. This was the case in 1979 when, due to a reduction in available funds, the Board first required that all appeals were to be heard at MSPB field offices. In an attempt to continue the practice of holding hearings in the appellant's home area, various employing agencies, employees and their unions offered to pay the travel expenses of MSPB hearing officers. The Board then requested our decision on the legality of accepting reimbursement from these sources.

In 59 Comp. Gen. 415, we ruled that MSPB could not legally accept reimbursement for hearing officers' travel expenses either from employing agencies, or from employees or their unions. The reasons for our decision were as follows:

- (1) Reimbursement by the employing agency may not be treated as a transaction authorized by the Economy Act, 31 U.S.C. § 686, because conducting the hearings is a statutory function of MSPB for which it receives appropriations.
- (2) Reimbursement by an employing agency would constitute an unauthorized transfer of appropriations in violation of 31 U.S.C. § 628-1.
- (3) Acceptance of funds from an employee or union, without specific statutory authority, would be an improper augmentation of MSPB's appropriations.

Late in 1979, the Board was again able to bear the cost of sending its hearing officers to appellants' home areas and, for a brief period, the question of accepting reimbursement was moot. However, in December 1981, Congress passed a continuing resolution which reduced MSPB's funding by 16 percent. Because of this budget cut the Board eliminated travel for its hearing officers, and again ordered that all appeals be heard at MSPB field offices.

As a result, we have received formal requests from MSPB, the Department of Agriculture, the Internal Revenue Service, and a Member of Congress, plus informal requests from several other agencies, that we reconsider our earlier decision. All of these parties have stressed that the cost to the Government as a whole is far less if a single hearing officer travels to an appellant's home area than if the employing agency sends its personnel and witnesses (usually several persons) to an MSPB field office. In addition, MSPB notes that because of the recent increase in reduction-in-force actions the number of appeals the Board now hears has and

will continue to increase, thereby multiplying the overall cost increase to the Government. MSPB also states that financial hardship caused by the increased travel costs for both employee/appellants and employing agencies has resulted in continuances and other delays. In the cases of appellants who ultimately prevail this will mean larger back-pay awards, further increasing the Government's cost. Finally, MSPB (and others) suggest that it is anomalous to construe the "Economy Act" to prohibit reimbursement, when to do so results in a substantial increase in the Government-wide cost of appeals hearings.

In addition, we have been advised that lawsuits have been filed challenging MSPB's action in restricting hearings to MSPB field offices. Two of the cases are National Treasury Employees Union v. MSPB, U.S. District Court for the District of Columbia, Civil Action No. 82-0588, and Gloria P. Sanchez Mariani v. Herbert E. Ellingwood et al., U.S. District Court for the District of Puerto Rico. While, as a matter of policy, we normally do not render decisions on matters in litigation, this policy is inapplicable here because the issue we are deciding is different from the issue before the courts. The courts are being asked to decide whether MSPB may properly restrict hearing sites to its own field offices. Our issue is merely the source of funds to pay the travel expenses of hearing officers if MSPB, by choice or otherwise, conducts hearings at some other location. Accordingly, we will proceed to consider the merits of the requests for reconsideration.

The statute popularly known as the "Economy Act" (31 U.S.C. § 686) authorizes the transfer of appropriated funds from one agency to another as reimbursement for provided services. The purpose of 31 U.S.C. § 686 is to allow Federal agencies to benefit from the expertise of other agencies. Where one agency is in a unique position to provide a service in a more effective or cost-efficient manner, other agencies in need of the service may take advantage of this ability by reimbursing the providing agency under a formal agreement. In this way, the Government uses the specialized talents and experience of its various departments to the best advantage. The economies which result are the source of the statute's popular name.

The Act does not, however, authorize a Federal agency to reimburse another agency for services which the latter is required by law to provide and for which, as part of the providing agency's mission, it receives appropriations. 16 Comp. Gen. 333 (1936); 17 Comp. Gen. 728 (1938); 33 Comp. Gen. 27 (1953); B-192875, January 15, 1980. A contrary interpretation would compromise the basic integrity of the appropriations process itself. Under the doctrine of separation of powers, Congress, and Congress alone, has the "power of the purse." When Congress makes an appropriation, it also establishes an authorized program level. To permit an agency to

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operate beyond the level that it can finance under its appropriation with funds derived from another source, would be a usurpation of the congressional prerogative.

In this instance, MSPB is required by law to provide appeals hearings in cases under its jurisdiction, and it receives appropriations for this purpose. The fact that the Board's legislation does not require that hearing officers travel to an appellant's home area does not make providing a hearing officer (wherever MSPB determines an appeal will be heard) any less a part of MSPB's statutory mission. Nor does the fact that there is a Government-wide savings when the hearing officer travels to the hearing, as opposed to when all necessary parties travel to the hearing officer, provide Economy Act authority for the transfer of funds from an employing agency to MSPB.

Further, the appeals hearing is not a "service" which MSPB provides to the employing agency as contemplated by the Economy Act. Thus, the expenses of the hearing officer (salary and any related travel expenses) are not expenses of providing a service to the employing agency and are not the proper subject of an Economy Act transaction. The expenses are nothing more than administrative expenses incurred by MSPB in carrying out its statutory function.

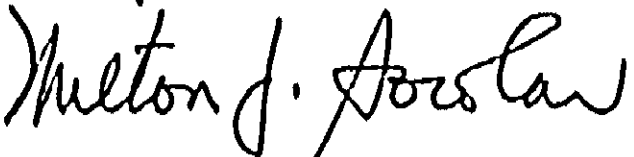
An additional factor, not mentioned in 59 Comp. Gen. 415, is 31 U.S.C. § 628, which restricts the use of appropriated funds to the purposes for which they were appropriated. Paying the expenses of MSPB hearing officers is not a purpose for which other agencies receive appropriations, nor can it be viewed as a "necessary expense" of carrying out the objects for which the employing agency's appropriations are made. Thus, not only is reimbursement by the employing agency unauthorized under the Economy Act, it would also violate 31 U.S.C. § 623. In other words, there is no authority for MSPB to receive the reimbursement, and there is equally no authority for the employing agency to make the expenditure. See in this connection B-143536, August 15, 1960, to the effect that 31 U.S.C. § 628 is not overcome merely because the proposed expenditure would result in substantial savings to the Government.

While we recognize that it is more efficient and economical for the Government as a whole if MSPB hearing officers travel to appellants' home areas, we are aware of no authority for the Board to accept reimbursement from other Federal agencies, or from employees or their unions. It is for Congress, through the appropriations process, to determine the amount of funds available to MSPB to carry out its mission, including travel, or to provide specific authority for the acceptance of funds from outside sources.

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MSPB could seek statutory authority to accept donations to supplement its appropriations. In this way, it could accept contributions from private sources for the travel expenses of its hearing officers or for other purposes. 49 Comp. Gen. 572 (1970); 46 Comp. Gen. 689 (1967); 36 Comp. Gen. 268 (1956). MSPB could also seek specific legislative authority to hold hearings at the employees' home sites on a reimbursable basis. On balance, however, we think it is preferable for the Congress to provide adequate funding to the Board. Not only would this be most economical for the Government, it would avoid potential inequities that might result from the facts that not all agencies can equally afford reimbursement, not all employees belong to labor unions, and reliance on donations would provide an undependable and possibly inadequate funding source.

In sum, while we are in full sympathy with the concerns of those who have sought reconsideration of 59 Comp. Gen. 415, what we are faced with here is essentially a funding problem. The inadequacy of MSPB's appropriations to enable it to carry out its function in a manner most economical to the Government as a whole does not change the law. Accordingly, we must affirm our 1980 decision.

*for*   
Comptroller General  
of the United States