

DECISION

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

118904

FILE: B-196506

DATE: July 8, 1982

MATTER OF: International Trade Commission—Legal representation

DIGEST: Chairman, International Trade Commission requests decision on whether Commission may use appropriated funds to furnish legal representation to employees brought before Merit Systems Protection Board on complaint of the Board's Special Counsel. Commission funds are available to provide counsel in cases in which supervisor performed the conduct which is the subject of the Special Counsel's complaint within the scope of employment and the agency determines that it is in its interest to provide representation. Conduct is within the scope of a supervisor's employment if it is in furtherance of, or incident to the carrying out of official duties. Because such conduct is in furtherance of an agency function, the cost of counsel may be considered a necessary expense incurred in performing that function. 53 Comp. Gen. 301 (1973) cited.

The Chairman of the International Trade Commission has requested our opinion on whether the Commission may use appropriated funds to provide legal representation for employees brought before the Merit Systems Protection Board by the Special Counsel. We hold that it may.

The Merit Systems Protection Board, created by the Civil Service Reform Act of 1978 (Pub. L. No. 95-454, 92 Stat. 1111 (1978)), is charged with insuring adherence to the merit systems principles enunciated by the Act. Among its duties, the Board (or an administrative law judge designated by the Board) conducts hearings to determine whether Federal employees have committed so-called prohibited personnel practices. The practices include discriminating for or against an employee on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation; granting any unauthorized preference or advantage to any employee for the purpose of improving or injuring the prospect of any particular person for employment; taking or failing to take a personnel action with respect to any employee as a reprisal for "whistleblowing" disclosures, and taking or failing to take such actions which violate any law, rule or regulation implementing, or directly concerning the merit systems principles of the act. 5 U.S.C. § 2302(b) (Supp. III. 1979).

The Board prepares a written decision at the conclusion of a hearing and may issue a final order imposing disciplinary action. 5 U.S.C. § 1207(a)(5), (b) (Supp. III, 1979). The Board may order an employee's

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removal, reduction-in-grade, debarment from Federal employment for up to 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000. 5 U.S.C. § 1207(b) (Supp. III, 1979).

The statute expressly allows any employee against whom a complaint has been presented to the Board to have a reasonable amount of time to answer the charges, to have a transcript kept of his hearing, and to have an attorney represent him. 5 U.S.C. § 1207(a)(1),(2),(4) (Supp. III 1979).

Generally, the hiring of an attorney is a private matter between the attorney and the client, and absent express statutory authority, reimbursement of attorney's fees may not be allowed. 55 Comp. Gen. 1418 (1976). However, appropriated funds are available to provide legal counsel when representation of the employee is in the Government's interest. B-130441, April 12, 1978. The Department of Justice provides representation in actions brought against an employee under the authority of 28 U.S.C. §§ 516, 517, 518, and 547(b) (1976), when it believes that the outcome of the litigation could ultimately affect the rights and duties of the United States. These sections charge the Department with the responsibility for representing the United States in all litigation in which it has an interest.

The Department provides representation in accordance with its Statement of Policy set forth at 28 C.F.R. §§ 50.15, 50.16 (1980). The Statement provides for Department representation in state criminal proceedings and in civil and Congressional proceedings. The Department does not provide representation in administrative hearings under the policy.

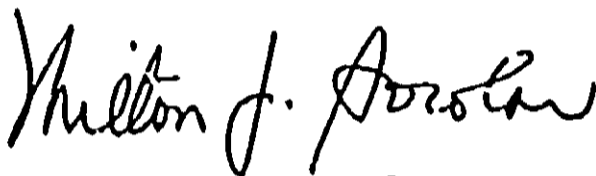
However, an agency's appropriated funds are available to provide a supervisor with representation in an administrative hearing if he performed the conduct in issue within the scope of his employment. Conduct is within the scope of a supervisor's employment if it is in furtherance of, or incident to his carrying out his official duties. In such cases, because the performance of the conduct was in furtherance of an agency function, the cost of counsel may be considered a necessary expense incurred in performing that function. 53 Comp. Gen. 301, 306 (1973).

For example, we held that Nuclear Regulatory Commission appropriated funds were available to reimburse Commission employees who retained counsel to represent them in a disciplinary action before a special board designated by the Chairman of the Atomic Safety and Licensing Board. The employees were charged by a private attorney who represented intervenors with misconduct in connection with their actions during a licensing proceeding. The Commission Executive Legal Director had determined that the employees were acting within the scope of their employment, and we concluded that agency funds were available to provide legal counsel. B-127945, April 5, 1979.

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Moreover, an agency can also have an administrative interest in providing legal representation to its employees. It serves the agency to supply counsel to an employee who is forced to defend himself against charges arising out of conduct which was within the scope of his Federal employment. If agency employees know that they would have to bear their own representation expenses in actions against them resulting from performance of their jobs, they might discharge their duties and exercise their discretionary functions less rigorously.

Accordingly, the Commission may provide representation to supervisors brought before the Merit Systems Protection Board if it believes that the conduct which is the subject of the Special Counsel's complaint was performed within the scope of the supervisor's employment. For example, if the Special Counsel brings a complaint before the Board because he thinks a supervisor has discriminated against an employee in a hiring or promotion, but the Commission believes that the supervisor has acted properly, the Commission may provide counsel.

for 
Comptroller General
of the United States