



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Correct Payment Source for Agency Expenses
Related to Litigation

File: B-251466

Date: February 25, 1994

DIGEST

The U.S. Information Agency must bear from its own appropriations the costs (including the costs of temporary legal staff) it has incurred in assisting the Justice Department defend sex discrimination lawsuit because those costs reflect the proper provision of federal agency support to Justice Department litigators.

DECISION

The United States Information Agency (USIA) asks whether its appropriations or those available to the Attorney General of the United States should be used to cover certain expenses incurred and to be incurred by USIA in connection with the government's defense of Hartman v. Catto, Civ. Action No. 77-2019 (D.D.C.). As detailed in its submission, USIA and the Justice Department disagree on the extent to which USIA's appropriation is available to cover expenses incurred assisting Justice with this litigation. Based on our review, we conclude that the expenses identified by USIA are properly chargeable to USIA's appropriations. As explained below, agency appropriations are generally available to provide Justice with factual support, policy perspectives, and general assistance in trial preparation.

BACKGROUND

According to USIA's submission, Hartman is the largest sex discrimination class action ever brought against the United States government, with potential claimants and claims in excess of 1,000 and 2,500, respectively. The court has already found liability in the government and has appointed a special master to make findings concerning appropriate remedies and relief. This suit has been and continues to be defended by the Justice Department and the United States Attorney's Office (USAO) for the District of Columbia, with substantial support from USIA. In the course of consultations, Justice, USAO, and USIA agreed to establish a special task force, under the supervision of USAO, to manage the government's defense during the special master phase.

Justice and USAO asked USIA to provide the task force with a secure suite of offices capable of accommodating two to four attorneys, four to eight paralegals, and 3,000 independent files. USIA also was asked to provide all necessary and appropriate office supplies and equipment, including, among other things, telephones, FAX machines, voice mail services, computers, modems, and photocopiers. Finally, USIA was asked to dedicate to the task force, on a full-time basis, four to six attorneys and the same number of paralegal/document specialists, along with other support staff, including typists, computer software specialists, and keypunch/data-entry specialists. With respect to the legal professionals, Justice advised USIA that "USAO and USIA GC [will] review all claims and make final determinations of which claims to contest and which defenses to assert." For their part, Justice and USAO informed USIA that, together, they would dedicate to the task force a total of two full-time attorneys and one full-time paralegal.

USIA protested that it could not provide the requested number of attorneys and paralegals from the current staff of its Office of General Counsel. USIA explained that its General Counsel staff numbers only eight attorneys, whose services were needed to handle the agency's normal legal needs. Justice and USAO, however, stressed to USIA the need to bring additional staff on board quickly in order to meet the tight deadlines imposed by the court. After Justice and USAO rejected a USIA proposal to contract with a private law firm to obtain the additional legal staff, USIA advertised, recruited, and hired five additional attorneys to serve on the task force under temporary personnel appointments.

USIA presently estimates that it will incur expenses of about \$4.6 million over fiscal years 1992, 1993, and 1994 in connection with this litigation. According to the submission, USIA has already incurred substantial costs in gathering, compiling, and providing information possessed by USIA, the Office of Personnel Management (OPM) and the Federal Records Centers (FRC). These costs include such things as the special master's fees, contract services for computer data entry, duplication, office rental, travel expenses, telephone services, automated data processing and telecommunications equipment, general office supplies and support staff. These costs also include the salaries of the temporary attorneys hired by USIA at Justice's request. According to USIA, those attorneys were placed "under the direct, substantive control of [USAO]" and have been assigned tasks that "ranged from collecting facts to legal analysis of claims to preparation of affidavits." USIA adds that "[i]t is expected that the attorneys will soon be required to respond to various motions (summary judgment, discovery, etc.), conduct depositions, and prepare for and participate in hearings."

USIA thinks Justice and USAO should absorb a greater share of the expenses incurred by USIA in connection with this litigation, and reimburse USIA accordingly. Citing 39 Comp. Gen. 643 (1960) and other decisions of this Office, USIA concedes that it must bear the expenses of providing Justice with factual information to support the litigation effort. In USIA's view, however, the expenses at issue represent the provision of litigative services, not factual support. Among other things, USIA emphasizes that much of the factual information gathered by USIA came from other agencies, and that Justice insisted that USIA hire the temporary legal staff as government employees who were then placed under the direct supervision of USAO. USIA proposes that, with respect to "contract services," "duplicating," and "other services," USIA and Justice should share these costs equally. USIA also has asked Justice and USAO to reimburse it for the salaries of the temporary legal staff hired for the task force, and for the special master's fees. USIA believes that Justice's failure to bear a more "proportionate" ratio of these costs has improperly augmented Justice's appropriations and diverted USIA appropriations to purposes for which they were not intended.

With one exception,¹ Justice has not acquiesced in USIA's request to absorb a greater share of the other costs identified by USIA. In its letters to USIA, Justice has maintained that each agency is legally responsible for whatever costs it has or will incur in connection with this litigation, without reimbursement from the other. In this regard, Justice maintains that under our decisions, USIA is responsible for the expenses in question. To resolve this matter, USIA requests our opinion pursuant to our general authority to resolve disputed interagency claims under 4 C.F.R. § 101.3(c), and the GAO Policy and Procedures Manual for Guidance of Federal Agencies, tit. 7, § 2.4C.3 (TS No. 7-43, May 18, 1993).

DISCUSSION

As stated in 39 Comp. Gen. 643, 646 (1960), in the absence of specific statutory directions to the contrary, "it is the duty of the Attorney General . . . to defray the necessary expenses incident [to litigation] from appropriations of the Department of Justice rather than from appropriations of the administrative office which may be involved in the proceedings." At the same time:

¹Justice recently agreed to cover the fees of the special master assigned to this case. Cf., e.g., 39 Comp. Gen. at 646 (citing 15 Comp. Gen. 81 (1935)) and 19 Comp. Gen. 551 (1939) (special master fees are payable from Justice appropriations).

"an administrative agency whose activities result in a suit against the United States, and which, because of the knowledge and information pertaining to the subject matter of the suit possessed by it or its personnel alone, is in a position to review reports and furnish material required by the Department of Justice to defend the action against the Government, has a duty to review or furnish such material to the Department of Justice without reimbursement."

Id. at 647. USIA interprets this decision to mean that agency appropriations are available only for the provision of "factual support" to the litigators, not for "litigative services." Rather than distinguishing between factual support and litigative services, our cases stand for the proposition that, under the relevant statutory provisions, agency appropriations are available to defray litigative expenses where such expenditures are in furtherance of the litigative policies set by the Justice Department and are otherwise authorized by law. See, e.g., 70 Comp. Gen. 647, 650-51 (1991).

The decision in 39 Comp. Gen. 643 involved a dispute between the Justice Department and the Army Corps of Engineers over the allocation of costs incurred in connection with a lawsuit arising from flood damages caused by breaks in Corps constructed levies. The costs at issue derived from the preparation by the Corps of certain "digests and studies" requested by Justice in connection with its representation of the Corps. 39 Comp. Gen. at 644. These digests and studies were characterized by Justice and the Corps as "'assemblies of data' [that were] factual in nature and would not include opinions or conclusions." Id. In our characterization of that same work, we described it as "review[ing] State-prepared reports in the light of, and furnish[ing] material based on, knowledge, information, data, and experience possessed by [the Corps] (in its files) or its personnel." Id. at 647. Once the Corps realized the full scope and cost of the work requested by Justice, it protested that "the services in question are not in the nature of services customarily rendered by an administrative office where the United States is sued because of the activities of that administrative office." Id. at 645. Instead, the Corps argued that those services could and should be performed by private engineers retained by the Justice Department.

We agreed with the Corps that private engineers might be able to perform the review and make the special studies requested by Justice. At the same time, however, we doubted that private engineers could do so without substantial assistance from the Corps. The engineers would have had to

become familiar with basic data prepared by the Corps, be briefed on it by the Corps, and receive continuing assistance from the Corps in order to complete those tasks. We found that resort to private engineers would "take as much time and effort and be as expensive to the Corps as if the Corps completed the reviews and made the special studies itself." Id. at 647.

It was in this context that we held, as quoted above, that the Corps should defray the cost of the services at issue there. That conclusion did not follow from a characterization of the work as "factual". Rather, we concluded that it was appropriate for the Corps to provide those services because "outside engineers could not perform the services in question independently of the Corps of Engineers and . . . only the Corps possess[ed] (either in its files or through its personnel) the data and information necessary to make the special studies and review the State-prepared data." Id. Thus, provision of the services at issue directly served the purposes of the Corps' appropriation, cf. 31 U.S.C. § 1301(a), and there was no reason to allow the Corps to pass the costs of the services on to Justice pursuant to the Economy Act, 31 U.S.C. §§ 1535-36.

Nevertheless, USIA argues that compelling it to perform the services at issue here without reimbursement would improperly "augment" the Justice Department's appropriation. USIA reasons that, if Justice does not reimburse USIA, Justice will have accomplished its statutory duty to provide and pay for the defense of the lawsuit by the use of funds other than those appropriated to it for this express purpose, and that this would violate the statutory limitation on the use of agency funds to perform litigative services. Cf., e.g., 31 U.S.C. § 1301(a), 3302(b), and 5 U.S.C. § 3106. The record here does not support USIA's argument. While Justice is actively managing USIA's temporary legal staff, Justice and USIA are using those resources to develop and analyze the record and to articulate USIA perspectives for use by the Justice litigators.

The limitations on the use of agency appropriations to provide litigative services originated as part of the provisions that created the Justice Department and invested it with general responsibility to act as the government's litigator. See Act of June 22, 1870, 41st Cong., 2d Sess. §§ 5, 14-17, 16 Stat. 162, codified at 28 U.S.C. §§ 515-519, 543, 547; 5 U.S.C. § 3106 (1988). These provisions were intended to reinforce Justice's control of the conduct of litigation involving the United States, 70 Comp. Gen. 647, 650-51 (1991), not to bar agencies from using their appropriations to assist in the defense of

litigation. Our cases "recognize the availability of agency appropriations, where otherwise proper and necessary, for uses consistent with the litigative policies established for the United States by the Attorney General." Id. at 650 (citing 39 Comp. Gen. at 646-47). Consistent with this, for example, we have allowed agencies other than Justice, in certain situations, to use their appropriations to provide litigative services with respect to their own employees and operations. Id.

USIA also argues that, as a matter of equity, and because of the sheer magnitude of these expenses, it and Justice should split equally some of these costs, especially those for "contract services," "duplicating" and "other services." However, there is no legal or equitable requirement that litigation support costs be shared equally, or even "proportionately," between Justice and its client agencies. Based on the record before us, USIA should pay for the expenses in question. These represent no more than the cost to USIA of gathering and presenting to Justice the facts and agency perspectives necessary to allow Justice to represent USIA in court, a typical example of agency support for Justice litigators. There is nothing in USIA's submission to suggest that these expenses do not clearly fall within the scope of 39 Comp. Gen. at 647.

Finally, we note USIA's argument that it should not be responsible for the costs of litigative support activities which require it to obtain information from other agencies. This argument was based on the statement in 39 Comp. Gen. at 647 that client agencies must bear the costs where,

"because of the knowledge and information pertaining to the subject matter of the suit possessed by it or its personnel alone, [only the client agency was] in a position to review reports and furnish material required by the Justice Department to defend the action against the Government."

Generally speaking, except as otherwise required by law, the cost of providing information in the possession of another agency would typically be an operational charge to the other agency's operating appropriation. However, where a request for information imposes an extraordinary burden on an agency, for example, where the effort necessary to provide that information extends beyond the simple production of data, documents, or perspectives already in its possession or easily generated by the agency, reimbursement under the Economy Act may be appropriate. This is consistent with the decision in 39 Comp. Gen. 643, as explained above.

The record in this case indicates that, in order to defend the lawsuit, Justice and USIA required information and copies of relevant documents concerning former USIA employees and job applicants, and OPM's past practices in certifying job applicants for consideration by USIA. Apparently, some of this was obtained from OPM and the FRC in St. Louis, Missouri and Suitland, Maryland. The record does not clearly describe the services actually performed by those agencies in this regard. With respect to any photoduplication performed by the FRC, 44 U.S.C. § 2116(c) dictates that the costs of that service must be borne by USIA, not the FRC. Cf. B-217851, July 31, 1985; B-211953, Dec. 7, 1984. Insofar as the acquisition of information and records from OPM is concerned, the record before us suggests that OPM should bear those costs since that information relates specifically to OPM's performance of its duties under law. Thus, those expenses are appropriately charged to OPM's appropriations. Cf. 39 Comp. Gen. 643.



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