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DECISION



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

FILE: B-175031

DATE: April 28, 1978

MATTER OF: - Claim for
Attorney's Fees

DIGEST: Federal meat inspector was sued by supervisor for libel and malicious defamation for certain allegations contained in letters the inspector wrote to various public officials. Claim for reimbursement of inspector's legal fees may not be allowed in the absence of determinations that acts of inspector were within scope of official duties and that representation of inspector was in interest of United States. 55 Comp. Gen. 408 (1975) distinguished.

This action is in response to the claim filed by _____, a former employee of the Department of Agriculture, for reimbursement of legal fees in the amount of \$852.94 incurred in defending against a lawsuit filed by his supervisor.

_____ was employed as an assistant circuit supervisor in the Animal and Plant Health Inspection Service (APHIS), Department of Agriculture, in Providence, Rhode Island, when he wrote several letters during the summer of 1976 to the President of the United States, to a member of the staff of a United States Senator, and to several APHIS officials including the Administrator, Dr. F.J. Mulhern. The letters alleged improper activities with regard to the inspection of a meat packing plant in Rhode Island. In response to certain allegations contained in these letters, _____ supervisor filed suit in a state court in Rhode Island on November 30, 1976, alleging that the letters were libelous and constituted malicious defamation.

It appears that _____ immediately contacted Agriculture's Office of General Counsel to seek representation in this lawsuit, but he was initially advised that such representation would not be available since _____ actions did not appear to be within the scope of his employment. Shortly thereafter, APHIS realized that _____ letter to the Administrator

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of APHIS, Dr. Mulhern, constituted a grievance under the provisions of APHIS Directive 460.5 and that the filing of such a grievance was within the scope of employment.

, therefore, repeated his request for representation by mailgram dated December 13, 1976. We have been informally advised that APHIS then sought to have the plaintiff supervisor dismiss the lawsuit while at the same time the agency prepared a letter to the Department of Justice seeking representation for

. The letter from Agriculture's Office of General Counsel to Justice dated January 11, 1977, stated that some of the actions by were within the scope of his employment by being part of a grievance filed with the Administrator of APHIS, but the letter also stated as follows:

"The agency is not willing to say that all the acts of the defendant were done within the scope of his official duties since part of the allegations relate to the letters he wrote to Senator Kennedy and President Ford."

It further appears that while Agriculture was requesting representation for him, I obtained private counsel who transferred the suit to Federal court and attended to the dismissal of the suit in both state and Federal courts. The lawsuit was dismissed before the Department of Justice had reached a decision on whether to represent, and, in response to our request for a report, Assistant Attorney General Barbara A. Babcock states as follows:

"The difficulty in recommending payment for legal expenses, which we understand amounted to \$800.00, is that Department of Justice representation was never authorized, since as stated above, the case was dismissed soon after the request was forwarded by the Department of Agriculture's Office of General Counsel. More importantly, the fact that the Office of General Counsel stated in the letter of January 11, 1977, that "[t]he agency is not willing to say that all of the acts of the defendant were done within the scope of his official duties," makes it apparent

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that _____ would not have met one of the basic requirements for authorization of representation. The suit seems to have been based primarily on the defamatory implications of the letters written by the defendant--actions which are the ones pointed to by the agency as probably not within the line of his official duties.

"Accordingly, it is the recommendation of the Department of Justice that _____ is not entitled to payment for legal fees encountered in the above suit."

Our Office has long held that the hiring of an attorney is a matter between the attorney and the client, and that, absent express statutory authority, reimbursement of attorney's fees may not be allowed. See _____ 55 Comp. Gen. 1418 (1976) and decisions cited therein. However, it is the policy of the Department of Justice to represent Federal employees sued for acts taken in the performance of their official duties under the authority of 28 U.S.C. §§ 517, 518 (1970). In fact, the Department of Justice issued a policy statement in January 1977 setting forth the conditions under which Justice would represent an employee who is sued or subpoenaed in his individual capacity. 42 Fed. Reg. 5695 (1977).

The key question, as noted in the above letter from the Assistant Attorney General, is whether the acts of the defendant-employee were within the scope of his official duties. In the present case the Department of Agriculture could not state that all of the acts of _____ were within the scope of his employment, and, therefore, the Department of Justice could not conclude that providing representation was in the interest of the United States. Under these circumstances, we know of no basis upon which to allow reimbursement for _____ legal fees.

Our decision in _____ 55 Comp. Gen. 408 (1975), is distinguishable since in that case the acts of the employee were clearly within the scope of his employment and the United States had agreed to represent the employee. In _____ this representation by the United States was later withdrawn without a determination that the United States was no longer officially interested in _____ defense,

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and our Office held that reasonable legal fees were reimbursable under those circumstances.

Accordingly, the claim may not be allowed.


Deputy Comptroller General
of the United States