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DECISION



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

FILE: B-192875

DATE: January 15, 1980

MATTER OF: [Reimbursement by Federal agencies for services of Civil Service Commission complaints examiners]

DIGEST: Reimbursement to Civil Service Commission for services of complaints examiners assigned to conduct discrimination complaint hearings for other Federal agencies was a proper transfer of those agencies' funds pursuant to the Economy Act, 31 U.S.C. § 686, since it was a necessary expense of agency where the complaint arose to provide an impartial agency-level hearing on all formal discrimination complaints. CSC had no statutory duty to provide examiners and did not receive appropriations for the purpose of doing so. Assuming that circumstances are essentially unchanged, same conclusion applies to providing of examiners to agencies on reimbursable basis by Equal Employment Opportunity Commission, successor to these CSC functions.

DLC 03208

The Assistant Secretary (Administration), Department of the Treasury (Treasury) has requested the opinion of this Office on whether payment by the requesting agency for the services of complaints examiners employed by the Federal Employee Appeals Authority (FEAA), an arm of the Civil Service Commission (CSC), was an illegal augmentation of CSC's appropriations. We requested and have now received a report from CSC (now the Office of Personnel Management (OPM)). Based on this information and our review of the matter, it is our conclusion that reimbursement to CSC for the services of complaints examiners was a legal transfer of agency funds. By statute, Executive Order, and CSC regulations, each agency of the Federal government was required to hold an impartial hearing on all formal discrimination complaints. Therefore, it is our view that the cost of providing a qualified hearing examiner was a necessary expense of the agency conducting the hearing, for which its appropriations were available.

DLC 03210

Before continuing, it is important to note that the Equal Employment Opportunity Commission (EEOC) now oversees the equal employment opportunity functions which had been the responsibility of the CSC under the Civil Rights Act of 1964, as amended, and Executive Order 11478. When the CSC ceased existence on January 1, 1979, many of its functions were transferred to OPM and the Merit Systems Protection Board (MSPB). However, the equal employment enforcement functions within the Federal government, which had been assigned to the CSC (42 U.S.C. §§ 2000e-16(b) and (c)), were transferred to the Equal

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Employment Opportunity Commission. We have been informally advised by EEOC that it has adopted CSC regulations on the assignment of complaints examiners to conduct discrimination hearings at other Federal agencies, and that it requests reimbursement for the services of such examiners. EEOC has declined the opportunity to submit formal comments concerning this matter.

Before January 1, 1979, a formal discrimination complaint was first heard within the agency where it arose. CSC regulations (5 C.F.R. § 713.201 et seq.) required the agency to provide a prompt and impartial hearing, conducted by a complaints examiner who was an employee of another agency. It was the role of the complaints examiners to control and direct the proceedings and to make recommendations to the agency or department head. The final decision on the complaint, however, rested solely with the agency head. Following a final determination by the agency, the complainant had the right of appeal to the Civil Service Commission.

Section 713.218(a) of title 5, C.F.R., specifically required agencies to request the name of a qualified complaints examiner from the CSC. However, there was no requirement that a complaints examiner be a CSC employee in order to qualify. (According to OPM's report to our Office, other agencies have, in fact, furnished complaints examiners to hear EEO cases.) In those cases where the complaints examiner assigned to conduct an agency hearing was a CSC employee, the CSC sought reimbursement for the services of that employee from the requesting agency. In contrast, the CSC's appellate review of discrimination complaints was funded entirely through CSC appropriations.

It is Treasury's position that the reimbursements CSC received for the services of its employees, assigned to conduct discrimination complaint hearings for other agencies, constituted an illegal transfer of funds. Treasury contends that under the Civil Rights Act of 1964 and Executive Order 11478, the provision of complaints examiners was a normal agency function of the CSC and, as such, should have been funded out of CSC appropriations. In support of this position, Treasury cites, among other decisions, 32 Comp. Gen. 534 (1953), in which we determined that agencies furnishing Security Hearing Board members to other agencies, as required by statute and executive order, could not request reimbursement from the agencies for which the hearings were held. In that decision we stated in pertinent part:

"* * * Since the [statute] . . . requires all departments and agencies to furnish employees to serve as members of security hearing boards of other departments and agencies, the cost of furnishing

the employees is a necessary expense of the agencies furnishing the employees* * *."

The significant difference between that case and the instant case is that in 32 Comp. Gen. 534, all agencies were required by law to furnish hearing board members to serve at other agencies. In this case, there was no requirement that all agencies provide discrimination complaints examiners to conduct EEO hearings for other agencies, although under the so-called "Economy Act," 31 U.S.C. § 686 they would be authorized to do so on a reimbursable basis if they wished. However, the Economy Act, as Treasury points out, is applicable only when there is no other statute specifically requiring the provider agency to render the service in question as part of its own mission. The question then, is whether anything in the law required CSC to use its own appropriations to provide complaints examiners for other agencies.

Section 2000e-16(b) of title 42, United States Code, gave the Civil Service Commission broad authority to enforce the requirement that all personnel actions affecting Federal employees be made free of discrimination based on race, color, religion, sex, or national origin. Specifically, CSC was given the authority to issue whatever regulations it deemed necessary to carry out its enforcement functions. While the equal employment responsibilities of the CSC were described in very general terms, the statute more specifically delineated the responsibilities of the individual departments and agencies of the Federal government. In that regard, 42 U.S.C. § 2000e-16(b) provided in pertinent part:

"* * * The head of each such department, agency or unit shall comply with such [CSC] rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include but not be limited to--

* * * * *

(2) a description * * * of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program."

The governing statute, then, did not specifically direct either the CSC or the individual agencies to pay for the services of complaints examiners for agency level hearings. However, the law clearly

contemplated the active participation of each individual agency, including the use of "personnel and resources" to meet the cost of complying with CSC equal employment directives.

Finally, 42 U.S.C. § 2000e-16(e) stated that nothing in the statute relieved Federal agencies or officials from responsibilities under Executive Order 11478. That Order supports the conclusion that each department or agency was generally responsible for providing, and consequently funding, an agency-level hearing. Executive Order 11478, Sec. 4, stated in part:

"* * * Agency systems shall provide access to counseling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency, and shall provide for appeal to the Civil Service Commission."

The legislative history of the sections referred to above provides a further indication of congressional intent regarding the appropriate "division of labor" between CSC and the individual agencies as they worked toward their common goal of equal employment opportunity within the Federal government. In describing the functions of CSC and those of the individual agencies under the legislation which was subsequently enacted, the Senate Committee on Labor and Public Welfare stated:

"* * * The Civil Service Commission is . . . given authority to issue rules and regulations necessary to carry out its responsibilities under this section. The Civil Service Commission also shall annually review national and regional equal employment opportunity plans and be responsible for review and evaluation of all agency equal employment opportunity programs. Finally, agency and executive department heads and officers of the District of Columbia shall comply with such rules and regulations, submit an annual equal employment opportunity plan and notify any employee or applicant of any final action taken on any complaint of discrimination filed by him." (S. Rep. No. 92-416, 45.)

In summary, prior to January 1, 1979, the CSC had responsibility for supervising the Federal equal employment opportunity program, including extensive authority to monitor EEO programs within each agency.

However, the fact that the Commission was given authority to implement and enforce EEO directives in no way obviated the need for each individual agency to develop its own equal employment program and to allocate funds for that program. Moreover, the CSC was not required by law to provide its own complaints examiners to the various agencies.

As a part of its internal EEO program, each agency of the Federal government was required by statute and executive order to have an impartial agency-level hearing by a non-agency examiner on all formal discrimination complaints. CSC implemented that requirement by providing a core of qualified complaints examiners through the FEAA. When the services of an examiner were required by an individual agency, it is our view that bearing the cost of such service was a necessary expense of the requesting agency. Clearly, if CSC examiners were not available, the agency would have to bear the cost of providing an examiner from another source, such as another agency or from outside the Government.

Treasury { The cases cited by Treasury are not applicable. They stand generally for the proposition that payment for services provided by one agency for another is not authorized when the performing agency is required by law to render the services and when appropriations are provided to carry out these activities. E.g., 40 Comp. Gen. 369 (1960). Here, there is no requirement that CSC provide the examiners.

With regard to whether appropriations were provided to CSC for this purpose, Treasury suggests that CSC requested additional funds for new positions to cover anticipated increases in the number of agency-level discrimination complaints. However, OPM pointed out in its report to our Office that the requests for additional appropriations did not include funding for the services of complaints examiners to other agencies, but were "limited to the expenses involved in processing and adjudicating appeals to the Commission after the impartial agency review." (The CSC received appropriations for hiring personnel who served as complaints examiners but these were apparently associated with the normal duties for CSC of these personnel, reviewing adverse action and reduction-in-force appeals to the Commission.)

Further, it is clear that Congress was on notice that CSC received reimbursements for the services of complaints examiners assigned to conduct agency-level EEO hearings. For example, the following testimony is from the CSC appropriation hearings for fiscal year 1977:

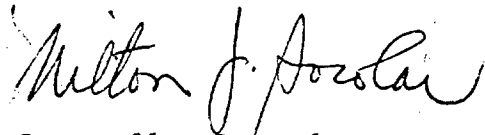
"Senator MONTOYA. I have some additional questions which I should like you to answer for the record.
[The questions and answers follow:]

"PERSONNEL ADMINISTERING EEO PROGRAMS

"Question. How many people do you now employ at the Commission to administer the Equal Employment Opportunity Program, and what is the current annual expenditure for these positions?

"Answer. Seventy-four people are employed nationwide in our equal employment opportunity program staff, with a total expenditure of \$1.7 million. * * * This total Commission effort involves some 373 staff years and more than eight and a quarter million dollars in expenditures from appropriated funds. In addition, some 150 Commission staff years are involved in EEO activities for which we are reimbursed by agencies. These activities include conducting investigations and hearings in discrimination complaint cases, and providing EEO training for agency staffs." Emphasis added. (Hearings Before the Senate Committee on Appropriations, 94th Cong. 2nd Sess. 1412.)

Therefore, under the Economy Act (31 U.S.C. § 686), the CSC properly requested reimbursement for the services of FEAA complaints examiners when they were assigned to conduct hearings for other agencies. Assuming the circumstances to be essentially unchanged, the same conclusion applies to the present practice whereby EEOC, the successor to these CSC functions, provides complaints examiners to agencies, on a reimbursable basis.



For The Comptroller General
of the United States