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United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Availability of appropriations for counsel fees and other legal expenses incurred on behalf of a Department of Defense Dependents Schools employee

File: B-289288

Date: July 3, 2002

DIGEST

Under 10 U.S.C. § 1037, and the regulations and support agreements that implement it, the Navy, as the military department concerned, may expend its appropriations to provide legal services in defense of personal, nonofficial matters of Department of Defense Dependents Schools (DODDS) employees who are employed by and accompany American armed forces overseas. By virtue of 10 U.S.C. § 1037(c), the Navy's Operation and Maintenance appropriation was legally available to pay for legal services afforded the DODDS employee.

DECISION

The Financial Manager of the Department of Defense Dependents Schools (DODDS) Pacific Area Office requested an advance decision pursuant to 31 U.S.C. § 3529. The Navy's Staff Judge Advocate, COMFLEACT (Commander, Fleet Activities) Yokosuka, Japan, has asked DODDS to reimburse his office for court costs and attorney fees incurred in connection with employing counsel under 10 U.S.C. § 1037 to represent a DODDS employee charged and convicted in a Japanese court under Japanese law for the criminal possession of marijuana. The Financial Manager requests an advance decision on whether appropriated funds are available to pay legal fees in defense of personal, nonofficial matters, and if so, what appropriation is available for that purpose. As explained below, we find that, pursuant to 10 U.S.C. § 1037, appropriated funds are available to provide legal services of this nature, and the Navy, as the military department concerned, should use its Operation and Maintenance appropriation for these expenses.

BACKGROUND

The DODDS is the overseas component of the Department of Defense Education Activity (DODEA), which is a worldwide school system created to provide a quality education (prekindergarten to grade 12) for eligible minor dependents of DOD military and civilian personnel who are on official assignment.¹ The program was established under the authority of 20 U.S.C. § 921. Under 20 U.S.C. § 931, the Secretary of Defense is required to issue regulations which, among other things, provide for arrangements between DODDS and commanders of military installations for necessary logistics support of schools located in military installations.

In August 2001, a DODDS employee assigned to work at a DODDS school in Japan was arrested and charged with criminal violations of Japanese law involving the importation and possession of marijuana. It is undisputed that the actions leading to the arrest of the DODDS employee were unrelated to and wholly beyond the scope of her official duties. Citing 10 U.S.C. § 1037, the Navy's Staff Judge Advocate, COMFLEACT Yokosuka, retained private, local counsel to defend the employee before the Japanese courts. In September 2001, the DODDS employee was convicted. Later that month, again citing 10 U.S.C. § 1037, the Navy Staff Judge Advocate asked DODDS for \$2,100 as reimbursement for the fees charged by the local, private defense counsel, as well as the assessed court costs.

Under 31 U.S.C. § 3529, accountable officers are entitled to obtain advance decisions from this Office on questions involving payments to be made or vouchers presented for certification. The Financial Manager requests an advance decision on whether (1) appropriated funds are available to pay for personal legal fees of DODDS employees, and (2) if so, what appropriation is available for this purpose.

DISCUSSION

The first issue is whether appropriated funds are available to pay for personal legal fees of the DODDS employee. It is well established that, in the absence of express statutory authority to do so, agencies may not use appropriated funds to pay for legal fees and expenses incurred in connection with matters of personal, rather than official, interest. *E.g.*, 70 Comp. Gen. 647, 649 (1991). The Department of Defense, however, has express statutory authority in 10 U.S.C. § 1037 to provide such services for DOD employees outside of the United States. This statute provides that

“[u]nder regulations prescribed by him, the Secretary concerned may employ counsel and pay counsel fees, court costs, bail, and other expenses incident to the representation, before the judicial tribunals and administrative agencies of any foreign nation, of persons subject to the Uniform Code of Military Justice,

¹ See “DODEA PreK-12 Programs,” <http://www.Odedodea.edu/instruction/eddir.htm>.

and of persons not subject to the Uniform Code of Military Justice who are employed by or accompanying the armed forces in an area outside the United States.”

10 U.S.C. § 1037(a). In the case at hand, the DODDS employee meets the criteria. She was employed by the Department of Defense to provide services to military members and their dependants at a Navy installation in Japan, an area outside of the United States. Because of her arrest, she was being brought before a Japanese judicial tribunal. Thus, the Secretary is authorized to employ counsel and pay expenses incident to representation. This is an exception to the general rule that appropriated funds are not available to pay personal legal expenses of employees not related to their employment. 70 Comp. Gen. 647, 649 (1991). Section 1037(a) permits the employment of counsel and payment of fees for personal nonofficial matters of DODDS employees while overseas.

The second issue is what appropriation is available to pay for these legal expenses. The statute directs that “[a]ppropriations available to the military department concerned . . . for the pay of persons under its jurisdiction may be used to carry out this section.” 10 U.S.C. § 1037(c).² In order to prepare our reply, we sought comments from the Department of Defense, which shared our request with the Navy and the DODEA. In a memorandum dated March 13, 2002, the Associate Counsel of the Navy’s Office of the Assistant Secretary for Financial Management and Comptroller advised us that his office concluded that “there is no basis to require DODDS to reimburse the [Navy Staff Judge Advocate]” for the services rendered or the expense incurred in this matter.³

Navy reasoned that DOD’s implementing regulations are found in DOD Directive 5525.1 and are, in turn, implemented by the military services in their joint regulation, AR27-50/SECNAVINST 5820.4G (hereafter, Joint Regulation). The Joint Regulation provides for the provision of counsel fees and payment of expenses. The Navy memorandum quotes the Navy Financial Management Policy Manual, which states that installation commanders are required to provide “legal services/claims and personal affairs” to “dependents schools and DODDS personnel on a nonreimbursable basis.” Paragraph 075207 1.d(1). It also requires the services to enter into “support agreements” with DODDS. Paragraph 075207 1.d(4). The relevant support agreement states that the Navy Staff Judge Advocate will provide DODDS

² As a general proposition, the statute provides that “[t]he person on whose behalf a payment is made under this section is not liable to reimburse the United States for that payment.” 10 U.S.C. § 1037(b).

³ Memorandum entitled “DODDS Reimbursement of Expenses Incurred by the Navy Pursuant to 10 U.S.C. § 1037,” from the Associate Counsel, Office of the Assistant Secretary (Financial Management and Controller) to the Deputy General Counsel, Fiscal, Department of Defense (Mar. 13, 2002) (hereafter, Navy Memorandum).

“legal assistance, claims and other base services.” Nothing in the agreement indicates that these services are reimbursable. In Navy’s opinion, “under section 1037(c), it is the appropriation of the military department concerned—in this case, Operation and Maintenance, Navy—which is available to cover legal costs incurred on behalf of the DODDS employee,” and the Navy views the Joint Regulation and the Navy Financial Management Policy Manual as confirming that conclusion. Navy Memorandum at 3. The DOD Fiscal Deputy General Counsel’s staff advised us that they concur in the Navy’s findings.

We agree with Navy that it is authorized to provide for the legal fees and court costs incurred in defending the DODDS employee and that the Navy’s Operation and Maintenance appropriation is the appropriate funding source. Section 1037(a) speaks of the “Secretary concerned.” For the purposes of Title 10 of the U.S. Code, this term refers to the Secretaries of the Army, Navy, and Air Force.⁴ 10 U.S.C. § 101(a)(9).

Under section 1037(c), the funding to implement this authority is to come from “[a]ppropriations available to the military department concerned . . . for the pay of persons under its jurisdiction” For the purposes of title 10, the term “military departments” means “the Department of the Army, the Department of the Navy, and the Department of the Air Force.” 10 U.S.C. § 101(a)(8). Section 1037 (c) explicitly authorizes the legal expenses permitted under section 1037(a) to be paid from the appropriations used by the military department concerned to pay its members and employees. Section 1037(a) applies to persons, both subject to and not subject to the Uniform Code of Military Justice, who are employed by or accompany American armed forces while overseas, and it is applicable not only to members and employees of the military departments, but also to the DODDS employee in the present case.

The “military department concerned” here is the Navy. Under 20 U.S.C. § 931, the Secretary of Defense is required to issue regulations which, among other things, provide for arrangements between DODDS and commanders of military installations for necessary logistics support of schools located in military installations. As noted above, read together, the DOD Directives, the Joint Regulations, and the Navy Financial Management Policy Manual require each military installation to provide legal services to DODDS personnel assigned to the installation. This DODDS employee was stationed at and performed her assigned tasks at a Navy installation. Consistent with this, the support agreement between the Navy and the DODDS authorized the Navy to provide DODDS and its employee the legal services in this case. The Navy receives an annual appropriation for “Operation and Maintenance.” For example, Title II of the 2002 Department of Defense Appropriations Act contains a lump sum appropriation for “Operation and Maintenance, Navy.” Pub. L. No. 107-117, 115 Stat. 2230, 2233 (2002) (FY 2002). See also, e.g., Pub. Law No. 106-259, 114

⁴ This term also refers to the Secretary of Transportation with respect to the Coast Guard—when it is not operating as a service of the Navy. 10 U.S.C. § 101(a)(9)(D).

Stat. 656, 659 (2000) (FY 2001). These appropriations are available for “expenses, not otherwise provided for, necessary for the operation and maintenance of” the military department named therein. Id.

DODDS is not a military department and receives its funds from an appropriation separate and distinct from those available to the military departments. DODEA and DODDS have been civilian agencies of the Department of Defense for many years.⁵ Title II of the 2002 Department of Defense Appropriations Act includes a lump sum appropriation for “Operation and Maintenance, Defense-Wide.” 114 Stat. at 2233-34. This appropriation provides funding for “expenses, not otherwise provided for, necessary for the operation and maintenance of activities and agencies of the Department of Defense (other than the military departments).” Id. (emphasis added). See also, e.g., Pub. Law No. 106-259, 114 Stat. at 660 (FY 2001). In informal conversations with the office of the DODEA Comptroller, we have confirmed that DODDS obtains its funding from the “Defense-Wide” appropriation. Thus, while section 1037(c) makes the operation and maintenance appropriations of the Army, Navy and Air Force available to pay for the legal expenses authorized to be incurred under section 1037(a), it does not make the appropriations which fund DODDS available for that purpose. Since the statute is specific, DODDS lacks authority to use its funds to pay for legal expenses incurred in defending a DODDS employee under section 1037.

CONCLUSION

Under 10 U.S.C. § 1037 and the regulations and support agreements which implement it, the military departments may expend their appropriations to provide legal services in defense of the personal, nonofficial legal matters of DODDS employees employed by or accompanying American armed forces overseas. DODDS does not have such authority. For the purposes of this case, in accordance with regulations and the Navy Financial Management Policy Manual, the Navy, at whose installation this DODDS employee was stationed, and for whose members she performed her assigned tasks, is the “military department concerned.” Consequently, the Navy’s operation and maintenance appropriation was legally available to pay for the legal services afforded the DODDS employee. DODDS may not reimburse the Navy for the provision of such services to DODDS employees.

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General Counsel

⁵ “DODEA Facts 2002,” <http://www.odedodea.edu/communications/dodeafacts2002.htm>.