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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

September 10, 1990

The Honorable John Glenn
United States Senate
Washington, D. C. 20510

Dear Senator Glenn:

This is in response to the letter of August 22, 1990, signed by you and several other members of Congress, requesting the Nuclear Regulatory Commission (NRC) to "reimburse Mr. [Roger] Fortuna for all appropriate legal fees which he has incurred (pursuant to the Civil Service Act of 1978, Section 5596(b)(1)(A)(ii) of the United States Code, and the Federal Tort Claims Act, Title 28, Section 2671 et seq. of the United States Code)." Our Office of General Counsel and the Department of Justice have studied this matter and are continuing to do so. Up to this point, we have been unable to identify legal authority for reimbursing Mr. Fortuna for his attorney's fees.

The provision of the Civil Service Act noted in your August 22 letter, 5 U.S.C. 5596(b)(1)(A)(ii), is part of what is popularly known as the "Back Pay Act" and allows payment of attorney's fees only in connection with a back pay award. Mr. Fortuna has not suffered any loss of pay and has not sought back pay under the Back Pay Act or otherwise. The Comptroller General has made clear that the Back Pay Act does not authorize a payment of attorney's fees to an employee who prevails in a grievance against a Federal agency unless the grievance involves a loss of pay or allowances. See Matter of Stanley D. Welli, 68 Comp. Gen. 366 (1989) (copy attached).

Your August 22 letter also refers to the Federal Tort Claims Act. On June 28, 1990, Mr. Fortuna filed an administrative claim with the Commission seeking \$3,000,000 in damages under that Act. Mr. Fortuna's administrative claim points to a variety of alleged torts: intentional infliction of emotional distress, negligent supervision, violations of the Fourth Amendment and the RICO statute, and possibly others. Our Office of General Counsel is researching the tort issues but thus far has located no precedent holding the United States liable in tort to one of its employees on theories comparable to Mr. Fortuna's.

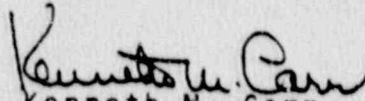
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The Office of General Counsel is also consulting with the Torts Branch (Civil Division) at the Department of Justice with respect to Mr. Fortuna's tort claim. Those consultations are not yet complete. By statute, the Department of Justice must approve any Federal Tort Claims Act award, compromise, or settlement for more than \$25,000. See 28 U.S.C. 2672.

The NRC is endeavoring to reach a conclusion on the tort claim matter as expeditiously as possible. We will advise you of our final decision. In the absence of a legitimate basis for paying legal fees as part of a tort settlement, we would have no authority to reimburse Mr. Fortuna for his attorney's fees.

Sincerely,


Kenneth M. Carr

Enclosure:
Copy of Case



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

September 10, 1990

The Honorable Morris K. Udall
United States House of Representatives
Washington, D. C. 20515

Dear Congressman Udall:

This is in response to the letter of August 22, 1990, signed by you and several other members of Congress, requesting the Nuclear Regulatory Commission (NRC) to "reimburse Mr. [Roger] Fortuna for all appropriate legal fees which he has incurred (pursuant to the Civil Service Act of 1978, Section 5596(b)(1)(A)(ii) of the United States Code, and the Federal Tort Claims Act, Title 28, Section 2671 et seq. of the United States Code)." Our Office of General Counsel and the Department of Justice have studied this matter and are continuing to do so. Up to this point, we have been unable to identify legal authority for reimbursing Mr. Fortuna for his attorney's fees.

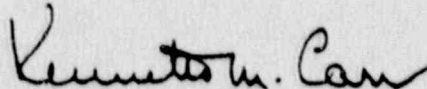
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Kenneth M. Carr

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CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

September 10, 1990

The Honorable Edward J. Markey
United States House of Representatives
Washington, D. C. 20515

Dear Congressman Markey:

This is in response to the letter of August 22, 1990, signed by you and several other members of Congress, requesting the Nuclear Regulatory Commission (NRC) to "reimburse Mr. [Roger] Fortuna for all appropriate legal fees which he has incurred (pursuant to the Civil Service Act of 1978, Section 5596(b)(1)(A)(ii) of the United States Code, and the Federal Tort Claims Act, Title 28, Section 2671 et seq. of the United States Code)." Our Office of General Counsel and the Department of Justice have studied this matter and are continuing to do so. Up to this point, we have been unable to identify legal authority for reimbursing Mr. Fortuna for his attorney's fees.

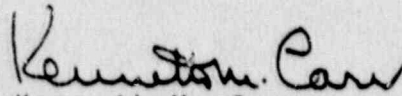
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CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

September 10, 1990

The Honorable Philip R. Sharp
United States House of Representatives
Washington, D. C. 20515

Dear Congressman Sharp:

This is in response to the letter of August 22, 1990, signed by you and several other members of Congress, requesting the Nuclear Regulatory Commission (NRC) to "reimburse Mr. [Roger] Fortuna for all appropriate legal fees which he has incurred (pursuant to the Civil Service Act of 1978, Section 5596(b)(1)(A)(ii) of the United States Code, and the Federal Tort Claims Act, Title 28, Section 2671 et seq. of the United States Code)." Our Office of General Counsel and the Department of Justice have studied this matter and are continuing to do so. Up to this point, we have been unable to identify legal authority for reimbursing Mr. Fortuna for his attorney's fees.

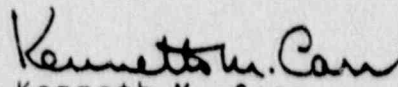
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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

September 10, 1990

The Honorable Peter H. Kostmayer
United States House of Representatives
Washington, D. C. 20515

Dear Congressman Kostmayer:

This is in response to the letter of August 22, 1990, signed by you and several other members of Congress, requesting the Nuclear Regulatory Commission (NRC) to "reimburse Mr. [Roger] Fortuna for all appropriate legal fees which he has incurred (pursuant to the Civil Service Act of 1978, Section 5596(b)(1)(A)(ii) of the United States Code, and the Federal Tort Claims Act, Title 28, Section 2671 et seq. of the United States Code)." Our Office of General Counsel and the Department of Justice have studied this matter and are continuing to do so. Up to this point, we have been unable to identify legal authority for reimbursing Mr. Fortuna for his attorney's fees.

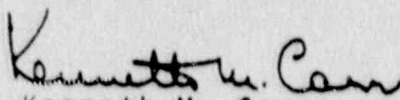
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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

September 10, 1990

The Honorable John D. Dingell
United States House of Representatives
Washington, D. C. 20515

Dear Congressman Dingell:

This is in response to the letter of August 22, 1990, signed by you and several other members of Congress, requesting the Nuclear Regulatory Commission (NRC) to "reimburse Mr. [Roger] Fortuna for all appropriate legal fees which he has incurred (pursuant to the Civil Service Act of 1978, Section 5596(b)(1)(A)(ii) of the United States Code, and the Federal Tort Claims Act, Title 28, Section 2671 et seq. of the United States Code)." Our Office of General Counsel and the Department of Justice have studied this matter and are continuing to do so. Up to this point, we have been unable to identify legal authority for reimbursing Mr. Fortuna for his attorney's fees.

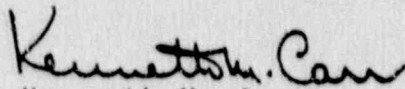
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58 Comp. Gen. 366 B-231938	R 2 OF 34	P 1 OF 5	CG	T

Matter of: Stanley D. Welli--Attorney Fees

April 4, 1989

DIGEST

1. An employee who filed an agency grievance alleging that his reassignment was in retaliation for his whistleblowing, received a favorable settlement but no backpay or other monetary award. Since the grievance did not involve a reduction or denial of pay or allowances, it was not subject to the Back Pay Act, as amended, 5 U.S.C. s 5596 (1982). He may not be reimbursed his **attorney fees** since there is no statutory or other authority for the payment of **attorney fees** in connection with an administrative grievance proceeding where there is no backpay or other monetary award.

2. An employee who settled an agency grievance may not be reimbursed his **attorney fees** under the Equal Access to Justice Act. The Act only applies to "adversary adjudications" and the agency grievance is not within the statutory

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definition of an adversary adjudication.

DECISION

The Internal Revenue Service (IRS) requests our decision regarding whether payment may be made from agency appropriations to reimburse Stanley D. Welli, an IRS employee, for **attorney fees** in connection with settlement of an agency grievance brought by Mr. Welli. Because there is no legal authority for payment of **attorney fees** in such a case, reimbursement may not be made.

BACKGROUND

Mr. Welli's GM-14 operations manager position was abolished as a result of a reorganization. He was reassigned to a GS-14 staff assistant position and subsequently was denied a transfer to a GM-14 audit manager position. Mr. Welli then retained legal counsel and filed an agency grievance alleging, in part, that the reorganization under which he was reassigned was in retaliation for whistleblowing allegations that he had made. He also filed a complaint with the Office of the Special Counsel, Merit Systems Protection Board, apparently involving the same matters as the grievance, that is still ongoing.

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The grievance was settled to the employee's satisfaction. Mr. Welli was given a GM-14 audit manager position and some other incidental and collateral relief but no backpay or other monetary award.

Mr. Welli seeks to be reimbursed for his **attorney fees**. The IRS recognizes the general rule that unless there is express statutory authority, reimbursement of **attorney fees** may not be allowed. E.g., Norman E. Guidaboni, 57 Comp.Gen. 444 (1978). The IRS asks whether the Equal Access to Justice Act 5 U.S.C. § 504 (1982), supplies this necessary authority. If not, the IRS asks whether such authority could be found in two of our cases, 61 Comp.Gen. 515 (1982) and Jeannette E. Nichols, 67 Comp.Gen. 37 (1987).

OPINION

Initially, we point out that we have held that an employee who prevails in a grievance handled under agency grievance procedures but receives no monetary award cannot be reimbursed his **attorney fees**. See Julian C. Patterson, 61 Comp.Gen. 411 (1982). Our holding reflects the general rule that in the absence of express statutory authority an employee may not be reimbursed his **attorney fees**. Specifically, we held that, since the grievance did not involve any reduction or denial of pay or allowances, it was not subject to the Back Pay Act, as amended, 5 U.S.C. § 5596 (1982), and **attorney fees** could not be

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awarded under that authority. See *id.* at 413-414.

The Equal Access to Justice Act does not provide an alternate source of the necessary statutory authority. The Act enables an agency that conducts an "adversary adjudication" to award fees and expenses incurred by a prevailing party. 5 U.S.C. § 504(a)(1). The Act defines adversary adjudication as a proceeding under the Administrative Procedure Act (APA), 5 U.S.C. § 554, in which the position of the United States is represented by counsel or otherwise, 5 U.S.C. § 504(b)(1)(c). Although not clearly reflected in the original case record, we were able to verify from the IRS that their grievance proceedings are not governed by or under the APA. Therefore, this grievance is not an adversary adjudication under the Equal Access to Justice Act and that authority is not available to pay the **attorney fees** in question. See *Cherokee Leathergoods, Inc.*, B-205960, Dec. 27, 1982.

Nor do 61 Comp.Gen. 515, *supra*, and Jeannette E. Nichols, 67 Comp.Gen. 37, *supra*, provide the necessary authority. In these cases we held that supervisors or employees charged with prohibited personnel practices by the Merit Systems Protection Board could have their **attorney fees** paid for by the agency out of appropriated funds.

Clearly, the facts of the present case do not come under the rule of law set out immediately above. Mr. Welli is not "an employee who [was] forced to defend himself against charges arising out of conduct which was within the

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scope of his Federal employment." 61 Comp.Gen. at 516. This is not a case in which the government's interest is aligned with the interest of the employee against charges pressed by a third party. See generally B-212487, Apr. 17, 1984; 58 Comp.Gen. 613, 618-619 (1979). Rather, this is a case in which the employee is complaining of the agency having taken action against him.

Accordingly, the IRS may not reimburse Mr. Welli for his attorney fees.

Milton J. Socolar

Comptroller General of the United
States

Comptroller_General
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