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Office of the General Counsel

B-257893

June 1, 1995

Ms. Trudy Huskamp Peterson  
Acting Archivist of the United States  
National Archives

Dear Ms. Peterson:

By letter dated June 30, 1994, you asked that we relieve Mr. David Millane, certifying officer of the National Archives and Records Administration (NARA), of liability for certifying an unauthorized payment. For the reasons discussed below, we grant relief.

Background

In December 1992, NARA entered into a settlement agreement with Mr. Lawrence Oberg, its former Inspector General (IG). The agreement stemmed from a proposal by NARA to remove Mr. Oberg from his position as IG. NARA had concluded that he violated the Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, as amended by Pub. L. No. 100-504, 102 Stat. 2515 (1988). NARA settled this matter through negotiations with Mr. Oberg's attorney. Under the terms of the settlement agreement, Mr. Oberg agreed to accept a one-grade reduction in salary and removal from the IG position, and NARA agreed to pay his attorney fees in the amount of \$10,833. On March 2, 1993, Mr. Millane certified the \$10,833 payment in attorney fees. We subsequently held that NARA does not have authority to pay an employee's attorney fees for negotiating such a settlement with the agency. B-253507, Jan. 11, 1994.

A certifying officer is responsible for repaying improper, incorrect, or illegal payments that he or she certified. 31 U.S.C. § 3528(a)(4). The certifying officer is jointly and severally liable, along with the person or persons who benefited from the payment, to the United States for the amount of the loss incurred as a result of the illegal, improper, or incorrect payment. 67 Comp. Gen. 457, 464 (1988); B-239592, Aug. 23, 1991. As required, NARA examined the possibility of collecting this claim from Mr. Oberg. 4 C.F.R. § 102.1(a). NARA decided to terminate

collection action because "the cost of further collection will exceed the amount recoverable thereby." 4 C.F.R. § 104.3(c). The certifying officer, nonetheless, remains liable for the unauthorized payment. 67 Comp. Gen. at 464.

### Analysis

This Office is authorized to relieve a certifying officer from liability when we find that (1) the obligation was incurred in good faith; (2) no law specifically prohibited the payment; and (3) the United States received value for the payment. 31 U.S.C. § 3528(b)(1)(B). A finding of good faith is premised, in large part, on our finding that the certifying officer did not have, nor should reasonably have had, doubt regarding the propriety of the payment. B-250884, Mar. 18, 1993. Whether the certifying officer should have been in doubt requires weighing all surrounding facts and circumstances and cannot be resolved by any "hard and fast rule." 70 Comp. Gen. 723, 726 (1994).

In this regard, our review of the record indicates that Mr. Millane neither had, nor under the circumstances reasonably would or should have had, any doubts concerning the payment in question. When asked to certify payment here, Mr. Millane was provided with a copy of the settlement agreement and was "informed" that the then Archivist of the United States had authorized the settlement and that NARA's Office of General Counsel had approved the terms of the agreement. Although a certifying officer may not be relieved from liability for an unauthorized payment by claiming reliance on the advice of agency counsel, we recognize that advice from agency counsel is a relevant factor in demonstrating good faith under section 3528(b)(1)(B). B-191900, July 21, 1978; B-127160, Apr. 3, 1961. Acknowledging the circumstances confronting a certifying officer daily, we have not insisted that a certifying officer affirmatively solicit advice from agency counsel if it is readily apparent to the certifying officer from the documents supporting the request for certification that agency counsel has, otherwise, affirmatively approved the payment for which certification is requested. In a 1993 decision, for example, we held that good faith could be demonstrated, in part, in circumstances where a certifying officer had relied on agency guidelines; the guidelines had been promulgated by the agency's Chief Financial Officer with the assistance of the General Counsel and approved by the agency's Administrator. B-250884, Mar. 18, 1993. In many cases, good faith is found simply by the absence of any evidence to the contrary. *Id.* Your letter states that Mr. Millane, on

numerous occasions, had certified payments of attorney fees arising from the administrative settlement of personnel disputes. You cite as examples Equal Employment Opportunity actions and actions before the Merit Systems Protection Board (MSPB) where attorney fees are specifically authorized by law. See 62 Comp. Gen. 464 (1993); B-231813, Aug. 22, 1989; B-199291, June 19, 1981. Indeed, in our 1994 decision, we noted that NARA could have properly paid Mr. Oberg's attorney fees had the MSPB been involved and awarded him his attorney fees. B-253507, Jan. 11, 1994. In this circumstance, considered in light of the fact that Mr. Millane was advised that NARA's General Counsel had approved the payment of the attorney fees, we find that Mr. Millane acted in good faith.

The second criterion is that no law specifically prohibited payment to the former IG for attorney fees. We have interpreted this criterion as referring to statutes which expressly prohibit payments for specific items or services, and not to improper certifications resulting from violations of general fiscal laws.<sup>1</sup> 70 Comp. Gen. at 726; B-191900, July 21, 1978. There is no express statutory prohibition on the payment of attorney fees. The prohibition is a result of decisions by the accounting officers of the government that appropriated funds are not generally available to pay for an employee's attorney fees. In this case, we specifically held in B-253507, Jan. 11, 1994, that an agency is authorized to pay an employee's attorney fees only where there is specific statutory authority to do so, and we found no such authority here.

The third criterion is met because the government received value for the payment of Mr. Oberg's attorney fees. In this regard, we have recognized that the requirement of "value received" is met if the agency receives an intangible benefit, such as achieving the desired result of the payment. B-250884, Mar. 18, 1993; B-127160, Apr. 3, 1961. Through the settlement process, NARA achieved its aim of removing Mr. Oberg from his position as Inspector General and imposing a one-grade reduction on him for action the agency deemed inappropriate. NARA also received the benefits associated with avoiding litigation and related costs.

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<sup>1</sup>Of course, in the latter class of cases, the "good faith" criterion may pose an obstacle to relief where the certifying officer knew or should have known that the payment was not consistent with generally applicable appropriations law.

In conclusion, since all three criteria found in 31 U.S.C. § 3528(b)(1)(B) have been met, we relieve Mr. Millane, the certifying officer, in this case.

Sincerely yours,

Gary L. Kepplinger  
Associate General Counsel

**DIGEST**

Relief is granted to certifying officer under 31 U.S.C. § 3528(b)(1)(B) who improperly certified attorney fees provided for in a settlement agreement for payment. The payment was not specifically prohibited by statute and the government received value for the payment. Certifying officer's good faith was demonstrated, in part, by reliance on the Office of General Counsel's approval of the settlement agreement.