

*Legal Desk
Cig*

OGC Has Reviewed

17 June 1947

MEMORANDUM FOR THE DIRECTOR, SPECIAL FUNDS

Subject: Approvals Required for Disbursements which are not in accordance with special funds regulations

1. Reference is made to your memorandum to this office, dated 3 June 1947, in which you request clarification of the manner in which expenditures, which are beyond the scope of [redacted], must be approved. It appears that two questions are involved:

(a) Where a proposed expenditure is not in accordance with existing special funds regulations, must the Director, CIG, approve such disbursements?

(b) If the Director's approval is required, must it be in writing and signed personally by the Director, or may such approval be in the form of written memoranda from other individuals who state that the approval of the Director has been granted or who sign "For the Director"?

2. In order to present clearly the situation, it is deemed desirable to outline the manner in which special funds are made available to CIG for expenditure. By letter dated 30 July 1946, signed by the members of the National Intelligence Authority, the Secretary of the Treasury and the Comptroller General were requested to establish a Working Fund available to the Director of Central Intelligence. With approval of the Treasury Department and the Comptroller General, a Working Fund, US, General, 1947, was constituted and assigned symbol No. 2178900. On 2 September 1946, a letter was addressed to the Comptroller General, in which it was stated:

We now on behalf of the departments we represent, and in our capacity as members of the National Intelligence Authority, authorize the Director, subject to policies established by the National Intelligence Authority, to control, supervise and administer this

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working fund with full powers in respect thereto as would otherwise have been exercised by us over the funds contributed to the Working Fund by our respective departments, including the powers and authority granted by the Military Appropriation Act, 1967, and the Naval Appropriation Act, 1967, approved July 3, 1966 (Public Law 898 - 78th Congress), pertaining to certificates of expenditures and the determination of propriety of expenditures."

That letter, granting such powers to the Director of Central Intelligence, was signed by the members of the National Intelligence Authority, including Dean Rusk, Acting Secretary of State; Robert F. Patterson, Secretary of War; James Forrestal, Secretary of the Navy, and William E. Leahy, Personal Representative of the President on N.I.A. No question has been raised by the General Accounting Office, or any other Government Agency, concerning the authorities thus granted to the Director of Central Intelligence.

3. The unvouchered funds made available to CIA for the 1967 fiscal year were taken from the sum appropriated for the military establishment by the Military Appropriation Act of 1967, approved 10 July 1966. A portion of the unvouchered funds was taken from the section "Contingencies of the Army", the language of which provides:

"... payments from this Appropriation may, in the discretion of the Secretary of War, be made on his certificate that the expenditures were necessary for confidential military purposes."

The remainder of the unvouchered funds was taken from the Atomic Service Section, which provides in part:

"That the official in charge may expend sums from this Appropriation ... for objects of a confidential nature and in any such case his certificate as to the amount of the expenditure and that it is deemed indivisible to specify the nature thereof, shall be deemed a sufficient voucher for the sum therein expressed to have been expended."

4. In view of the authorizations granted to the Director of Central Intelligence by the three Secretaries and the acceptance

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of such grant of authority by the Comptroller General, it is the opinion of this office that the Director of Central Intelligence is in effect constituted a head of an independent agency or executive department, and, with respect to the funds granted under the section "Contingencies of the Army", may execute the certificate required of the Secretary of War. Further, it is the opinion of this office that with respect to the funds made available to CIG from the section "Atomic Service", the Director of Central Intelligence is authorized to expend same for objects of a confidential nature, and execute the certificate specified therein and required of "the official in charge".

5. In order to administer the funds granted to the Director of Central Intelligence by the actions of the three Secretaries and the Military Appropriation Act of 1947, the Director of Central Intelligence has prescribed regulations under which unvouchered funds may be expended. Expenditures which are not in accordance with the prescribed regulations may not be made, and the regulations state specifically in Section 2.0:

"Unvouchered funds may be expended only in accordance with CIG regulations for necessary official confidential purposes."

Therefore, any expenditure of unvouchered funds which is not in accordance with the regulations prescribed by the Director is illegal and improper.

6. To determine whether the Director of Central Intelligence, or an official acting for him, must approve expenditures which are not in accordance with the regulations, we have examined a number of decisions which are pertinent. The opinion of the Assistant Comptroller General, dated 21 May 1941, Comp. Dec. 757, concerns the authority of subordinate officials to approve claims by signing the document evidencing a determination "By Direction" or "By Order" of the Secretary of War. In this case a statute was involved which specifically conferred upon the Secretary of War the authority to examine into, ascertain, and determine the value of lost or damaged property

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and provides that the determination made by the Secretary of War shall be final and conclusive. The opinion goes on to state:

"The action of the Secretary of War is required by the statute to be taken on each claim and the assignment to some subordinate official of the duty of approving or disapproving claims of this character and of signing the Government evidencing his determination 'By Direction' of the Secretary of War, etc. is a delegation of a jurisdiction thus reposed in the Secretary of War by the act."

The mere recitation that such action was done by a subordinate official "By Direction" of the Secretary of War was not considered evidence that the Secretary of War personally exercised the judgment or action required under the statute, and the Assistant Comptroller General stated such a settlement of the claim could not be accepted. In 16 Comp. Gen. 696, 28 January 1937, the general principle was summarized as follows:

"Where, as in this case, the law requires in specific terms the certification by the head of the department, the authority to certify may not be delegated. The action may be only by the Secretary of the Treasury or an Under Secretary or Assistant Secretary authorized by law to perform any duty the Secretary may perform."

In 21 Comp. Gen. 221, 10 April 1942, the Comptroller General states he is not authorized to waive statutory provisions specifically requiring authorizations or approvals by heads of departments. Consequently, the approval by the Assistant General "By Direction of the Secretary of War" may not be accepted as meeting the statutory requirements, since it is understood that such signing would not be preceded by an actual determination by the Secretary of War in each instance.

V. The propriety of a purported approval and ratification by the head of a department of an action done by a sub-

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ordinate official, which by statute was required to be done in the discretion of the head of the department, is discussed in RE Comp. Gen. 1035, 10 June 1943. That decision quotes a previous decision 16 Comp. Gen. 596, 15 March 1938:

"* * when a statute vests in a board or other Federal agency discretion in the use of appropriated funds, such discretion properly may be exercised only in advance of the incurring of the obligation, as approval after an expenditure has been incurred does not constitute the exercise of discretion in the use but a condoning of what has already been done. This does not meet the requirements of the law * *."

It is pointed out in the opinion that the decisions have consistently held that, when a statute confers statutory authority upon a given person, the authority must be exercised by that person alone and in advance of the incurring of the obligation. The general rule is stated that ratification of a particular act may be made by anyone in whose behalf such act has been done only if he could have given authority to do the act in the first instance and if he still has power to do so at the time of ratification. In other words, one who lacks authority to delegate the performance of acts which he himself has power to perform cannot ratify such acts when done by another who has no such authority.

6. The authority of the deputy or assistant head of a department or independent establishment to serve as the alter ego and to perform functions which ordinarily require the discretion of the head of the department (and hence not delegable to subordinates) has been considered by the Comptroller General at various times 10 Comp. Gen. 27, 15 July 1940; 20 Comp. Gen. 779, 14 May 1947. Such a point was presented in Metolius vs U.S., 17 C. Cls. 92 (1961) in which it is stated:

"While I do not find any specific statutory authority for Assistant Secretaries of State to act in lieu of the head of the department in matters of discretion vested in such head, the title and nature of the position have generally been held to authorize assistant secretaries of the various departments to assist the head of the

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Department in all matters requiring his personal attention or discretion and to act in lieu of the Secretary of the Department when authorized by him so to do."

9. It is the opinion of this office that the manner in which unexpended funds shall be spent is a responsibility vested in the person of the Director of Central Intelligence. His discretion may not be delegated to a subordinate official. The approval of expenditures which are beyond the scope of the prescribed regulations is in effect the laying down of a new regulation. Consequently, such approval must come from the Director of Central Intelligence, and such expenditure must be authorized in advance. In other words, an expenditure which has been made, or an obligation incurred which is beyond the scope of the regulations, would be a proper disbursement only with the prior approval of the Director of Central Intelligence. The approval of the Director, in view of the above decisions, must be in writing and signed personally by the Director. Therefore, the answer to question (a) of paragraph 8 is yes. The answer to question (b) of paragraph 8 is that the authorization must be in writing and must be signed personally by the Director, or by his Deputy or Assistant Director authorized by the Director to act for him in his absence or incapacity. In the latter event the title "Acting Director" should be used.

10. This office is available at all times to render assistance to you and your staff in the administering of the special funds regulations. Specifically, we shall furnish, upon request, opinions concerning the propriety of particular expenditures, i.e., whether the item in question is a proper disbursement in accordance with the prescribed regulations.

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WILLIAM H. ROBERTS
General Counsel

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