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OGC 60-1513

23 NOV 1960

MEMORANDUM FOR: WE/4

ATTENTION: []

SUBJECT: Possible Claim of Former Agent for Alleged
Inadequate Settlement on Termination

1. According to your memorandum requesting an opinion on the Agency's legal position regarding the possible claim of one Desdemona, a former agent, who is dissatisfied with his termination settlement, you stated the following facts. Desdemona, an Italian newspaper correspondent, was recruited in 1946 and compensated, first 25,000 lire (\$40.30) and later 55,000 lire (\$88.70) per month to furnish information obtained through his many highly placed contacts in the Eastern Mediterranean countries. The compensation was considered to have been nothing more than a supplement to his income as a newspaperman, and no demands were ever made upon him which would have interfered with his professional career. Desdemona was terminated in 1957 and rehired in 1958.
2. In March 1959, he was sent to Libya on an operational assignment and given travel and per diem. He was injured in an automobile accident while in Libya and laid up for two weeks. He did not return to the Rome office until July. It was decided to request his termination on the basis of negative evaluations by both [] and [], and a settlement figure of 1,500,000 lire was approved by Headquarters. He was terminated on 12 December 1959 as per this plan at which time he signed a quitclaim and secrecy agreement. Prior to termination he had taken a mud bath cure recommended by his doctor to remedy a condition caused by the accident in Libya. During the treatment, he suffered a heart attack and spent three months in bed.
3. Shortly after his termination, he and a friend, Miss Virginia Reeves, requested a re-examination of the termination settlement. He was requested, thereafter, to submit the outline of a settlement which would be more satisfactory to him. He, therefore, requested a settlement totaling \$16,000, claiming that he had been grossly underpaid during his years of association with the Agency and suggesting that he be given \$200 per month, less what he actually received during this period.
4. Your memorandum has suggested the possibility that Desdemona will bring a claim, with perhaps Miss Reeves' assistance, against the

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SECRET

United States, either in an Italian or American court, and requested our opinion on the following questions:

- a. Does Desdemona have any legitimate basis for making a claim against us?
- b. If so, what would be suitable compensation for his injuries?
- c. If not, what legal steps, if any, could be taken to protect our position and avoid any further complications?

5. The first question is answered in the negative. His claim to have been underpaid during his thirteen-odd years' association with the Agency is entirely spurious. The monetary value of the information provided by an agent is measured by whatever the Agency agrees to pay. Having paid this amount the Agency would ordinarily have no further legal obligation to the agent. An exception might arise as a result of an Agency-connected injury. In such a case, however, it would be necessary to establish an employer-employee relationship before certifying the claim to the Bureau of Employees' Compensation (BEC) under the Federal Employees' Compensation Act.

6. This Office believes that BEC's acceptance of our certification of an individual as an employee of this Agency at face value makes it especially incumbent upon us to assure that our determination of employee status is in accordance with the legal standards followed by BEC itself in making such determinations. These standards and those applied to Federal social legislation generally are somewhat more liberal -- that is, an employer-employee relationship will be implied more often -- than those traditionally used at common law in determining authority, vicarious tort liability, etc., in the field of principal and agent.

7. According to 20 CFR 403.804, cited in U. S. v. Silk, 331 US 704 (Supreme Court, 1946), every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. Generally, such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. However, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and method for accomplishing the result, he is an independent contractor. An individual performing as an independent contractor is not as to such services an employee.

SECRET

SECRET

8. The Employees' Compensation Appeals Board stated in the Pearl Philips Parker case, decided 21 December 1956, "In ascertaining whether an individual is an employee of another, each case must be decided on its own facts and, ordinarily, no single feature of the relationship is determinative." The case before the Board involved a mail carrier who contracted with the Post Office Department to carry mail and parcel post back and forth between the local Post Office and the Pennsylvania Railway Station. In concluding that an employer-employee relationship existed, the Board stated:

"Here it is apparent that the Postmaster exercised complete control over the work activity; the Postmaster himself indicated that he considered that he had the prerogative to terminate Mr. Parker's services at any time; there is no evidence that Mr. Parker did not believe that the Postmaster had the right so to terminate his services. . . . Mr. Parker devoted all his working time to the Post Office Department and did not hold himself out to the public as an independent business service."

9. Examining the particular facts of Desdemona's activity for the Agency, it would be difficult to conclude that an employer-employee relationship existed. Certain indicia of such relationship did, in fact, exist, such as the right to terminate the relationship. The incidental nature of his activities in furnishing information of interest and value to the United States Government as compared with his primary profession as a newspaperman, the apparently modest compensation for such activity in comparison with that received in following his career, and the fact that no demands ever were made upon him which might have interfered with his professional career, leads us to the conclusion that Desdemona performed his services for the Agency as an independent contractor and not as an employee. The Agency was interested in the result to be accomplished by his activity, not in the details and means by which this result was to be accomplished. Therefore, this Office could not recommend the Agency's certifying Desdemona as an employee for compensation under FECA.

10. This Office believes that the Agency is in a strong legal position should Desdemona endeavor to bring a claim against the United States Government. Naturally, such an action should be avoided if possible. Desdemona would be ill-advised to bring suit in an Italian court since the nature of his activity could not help but reflect unfavorably upon him in Italy. This same consideration would probably also be controlling in a decision as to whether to sue in an American court. Therefore, the likelihood of his bringing a claim is remote, although, of course, such a possibility cannot be entirely discounted.

11. If the Agency should determine that it has some moral obligation to Desdemona, not compensated by the 1,500,000 lire provided in the termination agreement, or if it should determine that the outside possibility

SECRET

of Desdemona's bringing suit must be dealt with, additional compensation could be justified. Of course, the standard under which to measure this additional compensation is purely a matter of policy, determined by the exigencies of the situation. Nevertheless, FECA benefits might well be utilized as a guide.

12. Assuming the employer-employee relationship, BEC would require proof that Desdemona's disablement was work-connected for an award to be made under FECA. It would be possible to prove that the injury received in Libya was work-connected. However, it is doubtful that BEC would consider the heart attack to have been a natural concomitant of the original work-connected injury, therefore qualifying it for an award under FECA. Generally speaking, BEC will make awards to those persons suffering heart attacks only in situations where some extraordinary work-connected physical activity is the direct cause of the attack. Assuming, nevertheless, a favorable determination by BEC in a situation in which the employee has been permanently and totally disabled by a heart attack, the following recovery would be awarded. Under Section 3 of the FECA, if the disability is total "the United States shall pay to the disabled employee during such disability a monthly monetary compensation equal to $66 \frac{2}{3}$ percentum of his monthly pay which shall be known as his basic compensation for total disability." Desdemona apparently was totally disabled for a period of three months. During this time, however, he received his full monthly fee of 55,000 lire. Therefore, the FECA schedule would allow no additional compensation for this period of time.

13. Assuming that Desdemona's heart attack created a permanent partial disability, Section(4)(a)(1) of the Act would be applicable:

"Except as otherwise provided in this Act, if the disability is partial the United States shall pay to the disabled employee during such disability, a monthly monetary compensation equal to $66 \frac{2}{3}$ percentum of the difference between his monthly pay and his monthly earning capacity after the beginning of such partial disability which shall be known as his basic compensation for partial disability."

Since Desdemona's "employment" with the Agency was of a part-time nature and totally dependent upon his continuing as a newspaperman, the question, then, would be whether the heart attack had made continued employment in his primary profession impossible. If such was the case, his ability to perform other work outside the newspaper profession would be irrelevant to a determination of the extent of his disability. Desdemona, then, would be entitled to receive a monthly monetary compensation equal to $66 \frac{2}{3}$ percentum of \$88.70, adjusted to the scale as determined by BEC paid foreign nationals living on the Italian economy. A lump-sum payment might be made, in lieu of these monthly awards, calculated by means of actuarial tables.

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SECRET

14. In conclusion, this Office wishes to repeat that Desdemona has no legitimate basis for a claim against the Agency, and that no further legal steps need be taken to protect the Agency's position in the matter.

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