



United States  
General Accounting Office  
Washington, D.C. 20548

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Office of the General Counsel

B-261456

June 30, 1995

The Honorable John E. Baldacci  
House of Representatives

Dear Mr. Baldacci:

This is in response to your letter to the Comptroller General, dated May 9, 1995, concerning whether you may employ Ms. Mary M. Smith in view of the Dual Compensation Act provisions of 5 U.S.C. § 5533 (1994).

Your letter states that you wish to employ Ms. Smith of Bangor, Maine, who is a part-time inspector with the Immigration and Naturalization Service (INS), Department of Justice. You propose to hire Ms. Smith as a nonpermanent, temporary employee for the maximum term of 90 days, as provided by the Rules of the House of Representatives. Her total compensation for the 90-day appointment will be \$2,500, based on an annual rate of \$10,000.

Ms. Smith works on an intermittent ("when-actually-employed") basis for the INS, and is paid on an hourly basis, which is calculated from her annual rate of pay at the GS-7, step 2 level (\$24,838).<sup>1</sup> As of April 15, 1995, Ms. Smith had earned \$478.55 from the INS for calendar year 1995. She projects earning no more than \$12,000 in her work for INS during 1995, and believes the total will probably be much less.

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<sup>1</sup>See letter from Ms. Gail Sakker, Administrative Officer, INS, to Congressman John E. Baldacci, dated May 9, 1995. See also 25 Comp. Gen. 121 (1945) (employees subject to 5 U.S.C. § 5504 who work less than full time should be compensated at an hourly rate), and 5 U.S.C. § 5504(b) (1994).

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Title 5 U.S.C. § 5533(c)(1) (1994) imposes a limit on the aggregate pay of individuals occupying more than one "position"<sup>2</sup> if one of the positions is with the House of Representatives or with other specified legislative branch entities. It states:

"Unless otherwise authorized by law . . . appropriated funds are not available for payment to an individual of pay from more than one position if the pay of one of the positions is paid by the Secretary of the Senate, the Clerk of the House of Representatives . . . and if the aggregate gross pay from the positions exceeds [\$22,200] a year. . . ."<sup>3</sup>

Title 5 U.S.C. § 5533(c)(3) (1994) provides:

"For the purposes of this subsection, 'gross pay' means the annual rate of pay (or equivalent thereof in the case of an individual paid on other than an annual basis) received by an individual."

But for § 5533(c)(3), Ms. Smith's projected pay from her INS employment of \$12,000 or less this year would appear to make it possible for her to avoid the statutory limit. We have interpreted this provision to mean the annual pay rate to which the individual would be entitled working full time for the entire year, and not the amount of pay actually received or projected. B-176632, Oct. 12, 1972; B-195783, Oct. 2, 1980. As this rule applies to Ms. Smith, her full annual pay rate at INS of \$24,838 per annum is the relevant figure for purposes of applying this statute, and not the \$12,000 or less she estimates she will actually earn this year in her position with INS.

There is, however, an exception which can be invoked to permit receipt by Ms. Smith of pay from the two positions. The recognized exception applies when there is included in the appointment of the individual a restriction expressly limiting the amount of compensation received under the appointment to an amount which, when added to the basic pay of the other position, would not cause the statutory limitation to be exceeded. B-164397, May 24, 1968. See 27 Comp. Gen. 510 (1948).

We understand from your letter that Ms. Smith is prepared to state in writing that she will decline to accept daily employment with INS if it would cause her to exceed the maximum combined salary limitation. Since the annualized pay from

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<sup>2</sup>The two separate positions in the instant case are "positions," as defined for purposes of the dual employment statutes, respectively, in 5 U.S.C. § 5531(2) and § 5531(5) (1994). We note that the definition expressly includes "a temporary, part-time or intermittent position."

<sup>3</sup>This amount is the current limitation. See note under 2 U.S.C. § 60a-1 (1994).

your office would be \$10,000, the maximum annual amount that she could accept from INS would be \$12,200. If the INS is willing to expressly limit her appointment with that agency to a maximum annual amount of \$12,200 or less, there would be no violation of 5 U.S.C. § 5533(c)(1) (1994).

We trust this letter is responsive to your inquiry.

Sincerely yours,

Robert P. Murphy  
General Counsel