

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

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FILE: B-181934

DATE: JUL 23 1975

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MATTER OF: Lieutenant Colonel Robert G. M. Storey,
USA (Retired) - Compensation for services
rendered pending appointment

DIGEST: Army officer, assigned as Executive Assistant to Ambassador-at-Large, retired from Army in anticipation of civilian appointment to that position. After retirement he continued to serve as Executive Assistant for 7 months before Department of State determined he could not be appointed. Claimant is a de facto officer who served in good faith and without fraud. He may be paid reasonable value of services despite lack of appointment in view of fact that had compensation been paid, claimant could retain it under de facto rule or recovery could be waived under 5 U.S.C. § 5584. Although he was not paid, administrative error arose when claimant in good faith entered on duty with understanding of Government obligation to pay for services. On reconsideration B-181934, October 7, 1974, is overruled.

This action is a reconsideration of decision B-181934, dated October 7, 1974, which disallowed the claim of Lieutenant Colonel Robert G. M. Storey, United States Army (Retired), for compensation during the period November 1, 1973, to June 11, 1974, when he served as Executive Assistant to Ambassador-at-Large Ellsworth P. Bunker, at the Department of State, Washington, D.C. The Ambassador, the claimant, and the Department of State have submitted additional information that now provides a basis for favorable reconsideration of the claim. The record before us shows the following facts.

Colonel Storey served as Military Assistant to Ambassador William Sullivan in the East Asian Bureau of the Department of State from June 1970 to September 1973. On September 20, 1973, Ambassador Bunker requested the Director General of the Foreign Service at the Department of State to assign Colonel Storey as his Executive Assistant and to arrange for his outside hire and appointment as a Foreign Service Reserve Officer with the grade FSR-2. Colonel Storey was immediately transferred into Ambassador Bunker's office and began performing the duties of his new position. At the same time, steps were initiated for his appointment as a civilian.

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According to additional information supplied by Ambassador Bunker in support of reconsideration, it became apparent that the Department of Defense could not assign a replacement in the East Asian Bureau as long as Colonel Storey remained on active military detail to the Department of State. Accordingly, Colonel Storey felt an obligation to resign from the Army, even though he had not wished to do so until his appointment in the Foreign Service Reserve was confirmed. He submitted his resignation on October 29, 1973, and his retirement from the Army was made effective on October 31, 1973.

Ambassador Bunker, in a letter dated October 25, 1974, states the following:

"* * * From that time until June 1974 both LTC Storey and I continued to expect that he would be appointed. Indeed, I was assured periodically by Department officials concerned that LTC Storey's application was well in process and that a successful decision could be expected.

"Under these circumstances, from November 1, 1973, until June 11, 1974, LTC Storey worked for me in the position of 'Executive Assistant to the Ambassador at Large.' With the exception of handling classified documents, he performed all the tasks required by this position and was fully accepted in this job by officials within the Department of State as well as other government departments. Throughout this period, my expectation was that verification of his appointment was imminent. Certainly there was never any doubt but that LTC Storey was operating in this position under color of authority and with the approval of the Department of State, nor was there any doubt that he was occupying and satisfactorily carrying out a job required for the operation of this office of the Department of State and was occupying a position which otherwise would have been filled by a Department officer."

However, Colonel Storey was not immediately appointed into the Foreign Service, apparently because the routine security investigation had not been completed. Colonel Storey continued to serve

as Executive Assistant to Ambassador Bunker with the expectation that he would shortly receive an appointment which would be made retroactive to November 1, 1973. The retroactive appointment was specifically requested by Ambassador Bunker in a November 13, 1973 memorandum to the Director General of the Foreign Service, and all parties appeared to be unaware of the prohibition against such appointments.

Inasmuch as Colonel Storey's Department of Defense security clearance was revoked at his retirement, he lost access to classified material. Then a problem arose in the Department of State's security clearance investigation that required the development of additional information. However, the lack of security clearance apparently had little impact on his job performance. Ambassador Bunker wrote several memoranda to the Director General of the Foreign Service and other high officials in the Department of State during the ensuing months explicitly setting forth Colonel Storey's unpaid status and complaining of the delay in his appointment. Apparently all these officials were of the opinion that the problem in the investigation could be quickly resolved and Colonel Storey would be appointed. Unfortunately, the problem could not be satisfactorily resolved and in fact became a permanent obstacle to his appointment. Finally, on June 11, 1974, the Deputy Director General/Director of Personnel informed Colonel Storey that he would not be appointed as a Foreign Service Officer and on that date he ceased serving as Executive Assistant to Ambassador Bunker.

On reconsideration, we are of the opinion that Colonel Storey was a de facto officer of the Government. We have defined a de facto officer as follows:

"An officer 'de facto' is one who performs the duties of an office with apparent right and under color of an appointment and claim of title to such office. That is, where there is an office to be filled, and one acting under color of authority fills said office and discharges its duties, his actions are those of an officer 'de facto' * * *." 30 Comp. Gen. 228, 229 (1950).

Colonel Storey satisfies the criteria of the above-quoted definition. As an Army officer, he was assigned to the authorized position of Executive Assistant to the Ambassador-at-Large with the knowledge

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and concurrence of the Director General of the Foreign Service. After retirement, he continued to fill the office and discharge its duties for more than 7 months. He acted with the authority of Ambassador Bunker and the Department of State and had the apparent right and title to the office. He served in good faith and with no indication of fraud. The lack of appointment is no obstacle to de facto status in view of the services rendered in good faith and under color of authority.

Notwithstanding Colonel Storey's de facto status, previous rulings have denied any payment of compensation not already received by the officer. 15 Comp. Gen. 587 (1936); 23 id. 606 (1944); 38 id. 175 (1958); B-90406, December 1, 1949; B-122347, March 30, 1955; B-174848, February 24, 1972; B-163720, April 2, 1968; and B-154308, June 12, 1964. The above-cited cases involved fault on the part of the employee. However, the de facto rule was also applied in cases involving employees who, in good faith, performed services under color of authority. 28 Comp. Gen. 514 (1949), and B-148827, May 23, 1962.

However, the latter rulings were modified in 52 Comp. Gen. 700 (1973) where we allowed compensation to be paid after termination to a de facto employee. There, prior to any payment of compensation, it was discovered that an administrative error had been made in appointing an active-duty military member to a civilian position. In allowing payment, we referred to recent statutes permitting administrative adjustment where administrative error results in overpayments or underpayments to employees and other persons. See 5 U.S.C. §§ 5584, 5596. We stated that a primary reason for those statutes was to relieve the Congress of the need to consider private bills for the relief of individuals whose claims, though equitable, could not be paid because no legal basis for payment existed.

Under 5 U.S.C. § 5584, we pointed out that recovery could be waived of overpayments caused by administrative error through no fault on the part of employees involved. Moreover, any repayments made to the Government prior to the waiver determination are refunded to the overpaid employee. Therefore, even though the claimant there, Mr. Wilner, had not received any payment for his civilian services, we applied the waiver statute by analogy and stated the following rationale for changing the prior rule (52 Comp. Gen. 700, at 702):

"However, the instant situation does contain a unique element setting it apart from the usual case of error discovered prior to payment. Mr. Wilmer has not been paid anything for the services he rendered the Government. Moreover, he would not only have been entitled to consideration for waiver if he had been paid, but, indeed, under the de facto rule referred to he would have been entitled to retain the amount involved as a matter of right. It, therefore, seems appropriate, where no payment at all is provided for services rendered, to consider for purposes of the waiver statute, that the administrative error and 'overpayment' arose at the point in time when Mr. Wilmer entered on duty with the understanding of a Government obligation to pay for his services. Particularly does this seem so when it is recognized that refunded overpayments ultimately waived are redispensed to the employees involved.

"In the circumstances, bearing in mind the intent of the Congress as expressed in the legislation cited—that individuals should not be penalized as a result of Government errors—we would not object to payment for services rendered by Mr. Wilmer." (Emphasis added.)

That decision, in effect, extended the de facto rule to permit payment, even after termination, of the reasonable value of services rendered by persons who served in good faith. Accordingly, the prior decisions listed above will no longer be followed to the extent that they are inconsistent with 52 Comp. Gen. 700, supra, and this decision.

Hence, we conclude that the Government should compensate Colonel Storey for the reasonable value of the services he rendered from November 1, 1973, to June 11, 1974, while serving as Executive Assistant to Ambassador Bunker. The Department of State has advised us that the reasonable value of Colonel Storey's services would equate to grade FSR-3, step 7 level, or an annual rate of \$32,663. The payment should be reduced by normal deductions, including the deduction from his military retirement

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pay under 5 U.S.C. § 5532 (1970). Our decision B-181934, October 7, 1974, is hereby overruled.

(SIGNED) ~~FRANK R. STALLER~~
Comptroller General
of the United States