

DOCUMENT RESUME

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[Salary Payment to Alien]. B-188852. July 19, 1977. 4 pp.

Decision re: Clarence D. Swanson; by Paul G. Dembling (for Elmer B. Staats, Comptroller General).

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel Management (805).

Organization Concerned: Bureau of Reclamation; Immigration and Naturalization Service.

Authority: Public Works Appropriation Act of 1975 (P.L. 94-160; 89 Stat. 1035). Public Works Appropriation Act of 1976 (P.L. 94-355; 90 Stat. 889). Treasury, Postal Services, and General Government Appropriation Act, 1976 (P.L. 94-91; 89 Stat. 458; 31 U.S.C. 699b (Supp. V)). Treasury, Postal Services, and General Government Appropriation Act, 1977 (P.L. 94-363; 90 Stat. 977). 37 Comp. Gen. 483. B-178882 (1974). Executive Order 11935. 5 C.F.R. 338.101(b). Hampton v. How Sun Wong et al., 462 U.S. 88.

Donald D. Anderson, Assistant Commissioner, Bureau of Reclamation, Department of the Interior, requested a decision concerning the propriety of salary payments made to an alien from date of appointment to date of naturalization. Claimant who, in good faith, thought he was a U.S. citizen but was in fact a Canadian national may retain payments. Statutes prohibiting payments to aliens do not apply to nationals of U.S. allies in defense effort. (Author/DJM)

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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-188852

DATE: July 19, 1977

MATTER OF: Clarence D. Swanson - Salary Payment to Alien

DIGEST: Although Public Laws 94-91 and 94-353 prohibit use of appropriated funds to pay compensation of noncitizens, employee who in good faith believed himself to be U.S. citizen but who was in fact Canadian national may retain salary payments. Civil Service Commission has allowed appointment to stand and statutory prohibition does not apply to nationals of countries allied with United States in defense effort.

By a letter dated April 12, 1977, Mr. Donald D. Anderson, Assistant Commissioner of the Bureau of Reclamation, Department of the Interior, requests our decision concerning the propriety of salary payments made to Mr. Clarence D. Swanson from the date of his appointment to the date of his naturalization as a United States citizen. Since Mr. Swanson was an alien prior to his naturalization, the propriety of the salary payments is administratively questioned in view of 31 U.S.C. § 693b (Supp. V, 1975) which generally imposes a citizenship or allegiance requirement on Federal employees compensated from appropriated funds.

The record indicates that Mr. Swanson, an employee of the Department of the Interior, was selected for, and given a career-conditional appointment as a Construction Inspector, GS-809-6, on September 4, 1975, from a certificate issued by the Des Moines Area Office of the Civil Service Commission. On both his SF-171 and his SF-61B he had indicated that he was a citizen of the United States born in Canada and it appears that Mr. Swanson did believe all his life that he was a U.S. citizen.

During a routine post-employment National Agency Check and Inquiry conducted by the Civil Service Commission, a question arose about Mr. Swanson's citizenship. Inquiry was made of the Registrar of Canadian Citizenship who advised that his office did not have a record of Mr. Swanson's parents and that they were not naturalized British subjects. Upon receipt of this information Mr. Swanson

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applied to the U.S. Immigration and Naturalization Service for a Certificate of Citizenship by reason of his being born abroad to American citizens. The Immigration and Naturalization Service investigated his allegations and a further search of the records of the Registrar of Canadian Citizenship disclosed that Mr. Swanson's father was granted naturalization as a British subject on August 13, 1913, at Swift Current, Saskatchewan, Canada, and that his wife was deemed to be a naturalized British subject by virtue of their marriage on January 6, 1917. When the family returned to the United States in 1926, they inquired as to what action was necessary to retain their U.S. citizenship, and were told that none was required.

Based upon the above information, the Immigration and Naturalization Service determined that Mr. Swanson had no valid claim to United States citizenship either by acquisition or derivation, but that he was eligible to file a petition for naturalization by reason of his honorable U.S. military service. Accordingly, Mr. Swanson withdrew his application for a Certificate of Citizenship and petitioned for naturalization. On December 16, 1976, he was granted Certificate of Naturalization No. 10288149 by the U.S. District Court in South Dakota.

At the time of Mr. Swanson's appointment in the Department of Interior, Civil Service Commission regulations, section 338.101(b) of title 5, Code of Federal Regulations (1975), provided in pertinent part as follows:

"(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. * * *"

In Hampton v. Mow Sun Wong et al., 426 U.S. 80 (1976), however, the Supreme Court held that regulation to be unconstitutional. Subsequently, by Executive Order No. 11935, September 2, 1976, the President amended the Civil Service Rules by adding a new section 7.4 which provides that no person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States. In a letter dated March 29, 1977, to the Bureau of Reclamation, the General Counsel of the Civil Service Commission concluded that in view of the above facts Mr. Swanson's appointment of September 14, 1975, should be allowed to stand. However, the issue concerning the propriety of salary payments made to Mr. Swanson from

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that date until his naturalization on December 16, 1976, has been referred to this Office for a decision.

To determine whether authority existed for the lawful payment of a salary to Mr. Swanson, we have reviewed the relevant appropriations acts for the period of his employment as an alien. The Public Works Appropriation Acts for fiscal years 1976 and 1977, which generally appropriate funds for the Bureau of Reclamation, do not contain prohibitions against paying such funds as salary to noncitizens. See act of December 26, 1975, Public Law 94-190, 89 Stat. 1035; act of July 12, 1976, Public Law 94-355, 90 Stat. 889. However, the Treasury, Postal Service, and General Government Appropriation Act, 1976, act of August 9, 1975, Public Law 94-91, 89 Stat. 458, 31 U.S.C. § 699b (Supp. V, 1975), contains the following provisions:

"Unless otherwise specified and during the current fiscal year, and the period July 1, 1976, through September 30, 1976, no part of any appropriation shall be used to pay the compensation of any officer or employee of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States) whose post of duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of enactment of this section, who, being eligible for citizenship, has filed a declaration of intention to become a citizen of the United States prior to such date and is actually residing in the United States, (3) is a person who owes allegiance to the United States, or (4) is an alien from Cuba, Poland, South Viet Nam, or the Baltic countries lawfully admitted to the United States for permanent residence * * *. This section shall not apply to citizens of the Republic of the Philippines or to nationals of those countries allied with the United States in the current defense effort, or to temporary employment of translator, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies."

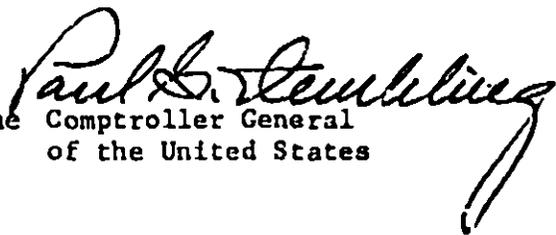
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The Treasury, Postal Services, and General Government Appropriation Act, 1977, section 602, act of July 14, 1976, Public Law 94-363, 90 Stat. 977, contains similar provisions.

With respect to fiscal years 1976 and 1977, a determination that Canada is allied with the United States in the current defense effort is a political judgment not subject to the decision of this Office. However, we believe it to be a commonly accepted fact that Canada is so allied, and we would not question an affirmative administrative determination to that effect. See B-178882, May 7, 1974. Upon such a determination, it would appear that the prohibition contained in the appropriation acts, supra, would not be applicable to Mr. Swanson since, while employed as an alien, he was a national of Canada.

In 37 Comp. Gen. 483 (1958) we held that the appointment of a noncitizen to a position contrary to provisions identical to 5 C.F.R. § 338.101(b), which has been declared unconstitutional by the Supreme Court, did not make the appointment void ab initio, but merely voidable. We thus concluded that an employee who, in good faith believed she was a citizen of the United States but who was not in fact a citizen, was entitled, upon separation, to a lump-sum payment for accrued annual leave, and to retain all payments of compensation made to her.

Accordingly, upon an administrative determination made in accordance with the above, Mr. Swanson may retain all payments made to him from appropriated funds as compensation for the period during which he was not a citizen of the United States.


For the Comptroller General
of the United States