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DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20540

John Hancock  
Co

FILE: B-189000

DATE: June 16, 1973

MATTER OF: James K. Saufley - De facto employee

- DIGEST:
1. Civil Service Commission (CSC) directed cancellation of employee's improper appointment. Since employee served in good faith, he is de facto employee and may retain salary earned. As a de facto employee, he is not entitled to lump-sum payment or to retain credit for unused leave attributable to period of de facto employment. Denial of service credit for that period and denial of refund of health and life insurance premiums was within jurisdiction of CSC.
  2. Retirement contributions previously deducted from compensation paid to a de facto employee may be refunded to him, less any necessary social security contributions since reasonable value of a de facto employee's services includes amounts deducted for retirement. 38 Comp. Gen. 175 (1958) should no longer be followed.

Mr. John D. R. Cole, Director of the Bureau of Personnel Management Evaluation, United States Civil Service Commission, requested our decision concerning the propriety of certain actions taken by the Commission incident to the cancellation of the improper appointment of Mr. James K. Saufley to a position in the civil service.

The record indicates that Mr. Saufley was appointed by the U.S. Geological Survey to a position in Reston, Virginia, on October 21, 1974. Ninety days later he was reassigned to a position in Metairie, Louisiana. Pursuant to civil service regulations, the Commission investigated the appointment to assess compliance with competitive principles. Although finding that Mr. Saufley acted in good faith, the Commission determined that the Geological Survey had improperly appointed him from a Washington, D.C. register in order to circumvent established certification procedures. Because of the improper procedure, the Commission directed that Mr. Saufley's appointment be cancelled.

The Geological Survey subsequently asked the Commission's opinion regarding Mr. Saufley's entitlement to retain the salary

B-189000

and leave he had earned. In addition, the Commission was queried as to the disposition of the employee's contributions toward the civil service retirement and health benefits and life insurance. By a letter dated April 25, 1977, the Commission rendered its opinion to the agency concerning the above matters. The Commission advised that none of Mr. Saufley's service under the cancelled appointment may be credited as Federal service for purposes of retirement, leave category, career tenure, reduction in force, or completion of probationary period. In addition, the Commission stated that under recent decisions of this Office, the employee may retain the salary and leave earned and that his retirement deductions would be returned, less any necessary social security contributions. The agency was also advised that Mr. Saufley would not be entitled to refund of premiums paid for health and life insurance because he had been covered and would have been eligible for payment under those programs. Finally, the Commission indicated that the Comptroller General is the final authority concerning issues of pay, and the matter was referred to this Office for a decision regarding the propriety of the above actions.

A de facto officer or employee is one who performs the duties of an office or position with apparent right and under color of an appointment and claim of title to such office or position. Where there is an office or position to be filled, and one acting under color of authority fills the office or position and performs the duties, his actions are those of a de facto officer or employee. 30 Comp. Gen. 228 (1958). We have recently extended the de facto rule to permit payment for the reasonable value of services rendered by persons who served in good faith. 52 Comp. Gen. 700 (1973); 55 id. 109 (1975); and Matter of William A. Keel, Jr., and Richard Hernandez, B-188424, March 22, 1977. However, because he is not an employee within the meaning of 5 U.S.C. 2105, a de facto employee does not accrue any annual leave during the de facto period so as to be entitled to a lump-sum payment. See 31 Comp. Gen. 262 (1952); James C. Howard III, B-189741, April 4, 1978 (57 Comp. Gen. \_\_\_).

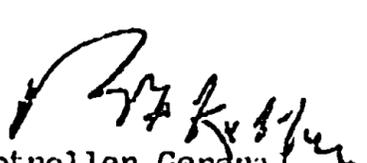
In the present case there is no evidence that Mr. Saufley had actual or constructive notice that he was improperly appointed to his position. In view thereof and since the Commission has specifically found that Mr. Saufley served in good faith, he may retain the salary which he earned during the improper appointment.

B-189000

George D. Midgett, Jr., B-183328, April 16, 1976. Further, Mr. Saufley may retain payments for leave used during his de facto employment. Mr. Saufley may not, however, be paid for or retain credit for the amounts of unused leave attributable to the period of his de facto status. Howard, supra.

With respect to reimbursement of retirement contributions made while a de facto employee, we have previously held in 38 Comp. Gen. 175 (1958) that such refunds may not be made. At the time that decision was rendered, we had held that a de facto employee could retain payments of compensation already made, but denied payment of any compensation not already received. Since the refund of retirement contributions would involve a further payment to the individual, we held that such refunds may not be made. 38 Comp. Gen. 175, supra. As noted above, however, we have recently extended the de facto rule to permit payment for the reasonable value of services rendered by persons who served in good faith. Since such persons receive no retirement service credit during a period of de facto employment, the reasonable value of their services would include the amount deducted for retirement purposes, less any necessary social security contributions. Thus, we have no objection to the Commission's conclusion that the retirement deductions previously made, less any necessary social security contributions should be refunded to the individual. Accordingly, our decision in 38 Comp. Gen. 175, supra, should no longer be followed with respect to refunding retirement deductions to de facto employees.

Concerning the issues of service credits and refunds of health and life insurance premiums, we have held that such matters are within the jurisdiction of the Civil Service Commission. Midgett, supra; B-154570, May 8, 1973. We therefore have no objection to the actions taken by the Commission regarding those matters.

  
Acting Comptroller General  
of the United States