

**DECISION**

*J. H. [unclear]*  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES *PLM I*  
WASHINGTON, D. C. 20548

8342

FILE: B-189935

DATE: November 16, 1978

MATTER OF: John R. Hanson - Claim for Backpay and Request  
for Reconsideration of Denial of Waiver

- DIGEST:
1. Employee appeals GAO Claims Division's denial of waiver of an overpayment of salary resulting from premature within-grade increase. Denial of waiver is sustained. Employee should have been aware of Federal pay structure, including the statutory waiting periods between within-grade increases. Since he made no inquiry concerning increase, he is not without fault.
  2. Employee, whose temporary promotion was terminated by supervisor who was serving on improper detail, is not entitled to backpay since supervisor was de facto employee and as such his acts were valid as to third parties.

This decision is in response to an appeal by Mr. John R. Hanson, an employee of the Community Services Administration, from our Claims Division's action of April 25, 1977, Z-2622080-121, which denied his application for waiver of an overpayment of salary resulting from a premature step increase. In addition to appealing that denial, Mr. Hanson has made a claim for backpay. He argues that he is entitled to backpay because his temporary promotion to a higher grade was terminated by a supervisor serving on an improper detail who was without authority to take such action.

The record shows that Mr. Hanson, Program Analyst (Program Development Officer), GS-14, step 3, received a within-grade step increase to GS-14, step 4, effective May 27, 1973. He received a temporary promotion to Chief, Management and Budget Division, GS-15, step 2, effective September 2, 1973, not to exceed 60 days. The temporary promotion was later extended not to exceed June 30, 1974, and then terminated effective December 23, 1973. He received a quality step increase from GS-14, step 4, to GS-14, step 5, effective May 14, 1974.

The statutory provision governing the timing of step increases, 5 U.S.C. 5335(a) (1970), provides, in pertinent part, as follows:

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"(a) An employee paid on an annual basis, and occupying a permanent position within the scope of the General Schedule, who has not reached the maximum rate of pay for the grade in which his position is placed, shall be advanced in pay successively to the next higher rate within the grade at the beginning of the next pay period following the completion of--

"(1) each 52 calendar weeks of service in pay rates 1, 2, and 3;

"(2) each 104 calendar weeks of service in pay rates 4, 5, and 6; or

"(3) each 156 calendar weeks of service in pay rates 7, 8, and 9; subject to the following conditions:

"(A) the employee did not receive an equivalent increase in pay from any cause during that period\* \* \* "

Payments incident to temporary promotions are not to be included in determining whether there has been an equivalent increase in pay. Federal Personnel Manual Supplement 990-2, Book 531, subchapter S4, 87(3)(e) (April 7, 1972); 30 Comp. Gen. 82 (1950). Section 5336(b) of title 5, United States Code, provides that a quality step increase is not an equivalent increase in pay within the meaning of 5 U.S.C. 5335(a). Therefore, Mr. Hanson was entitled to a within-grade increase to step 6 on May 25, 1975, 104 weeks after he received his increase to step 4. However, due to an administrative error, Mr. Hanson erroneously received a step increase to GS-14, step 6, effective September 1, 1974, approximately 66 weeks after his increase to step 4. As a result, Mr. Hanson was overpaid \$618.40 during the period from September 1, 1974, to May 24, 1975.

The authority to waive overpayments of pay and allowances is contained in 5 U.S.C. 5584 (1970) and the regulations implementing that section, which are found at 4 C.F.R. 91.5 (1976). Section 91.5 provides for waiver of an erroneous payment whenever:

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"(c) Collection action under the claim would be against equity and good conscience and not in the best interests of the United States. Generally these criteria will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and that there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or member or any other person having an interest in obtaining a waiver of the claim. Any significant unexplained increase in pay or allowances which would require a reasonable person to make inquiry concerning the correctness of his pay or allowances, ordinarily would preclude a waiver when the employee or member fails to bring the matter to the attention of appropriate officials. \* \* \*"

We stated in B-165663, June 11, 1969, in regard to the requirement that there be no indication of fault on the part of the employee, that:

"Whether an employee who receives an erroneous payment is free from fault in the matter can only be determined by a careful analysis of all pertinent facts, not only those giving rise to the overpayment but those indicating whether the employee reasonably could have been expected to have been aware that an error had been made. If it is administratively determined that a reasonable man, under the circumstances involved, would have made inquiry as to the correctness of the payment and the employee involved did not, then, in our opinion, the employee could not be said to be free from fault in the matter and the claim against him should not be waived."

In determining whether an employee's actions are reasonable with regard to an overpayment we examine such matters as his

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position, experience, knowledge, or service history.  
B-174301, October 22, 1971. Our Claims Division denied  
Mr. Hanson's claim on the basis that he should have been aware of  
the Federal pay structure, including the statutory waiting periods  
between within-grade increases. Charts providing such information  
were apparently available to all personnel at the Denver office  
of the Community Services Administration (CSA).

Mr. Hanson served as Program Analyst, GS-14, and as Chief,  
Management and Budget Division, GS-15. It would appear that the  
incumbent of those positions, especially the latter one, would  
necessarily have to have a thorough knowledge of the Federal pay  
system. In view of this and since the erroneous increase was  
allowed 28 weeks prior to its proper date and the availability of  
the pay charts referred to above, we believe that he should have  
known that he was not eligible for a step increase at the time he  
received it. Since Mr. Hanson made no inquiry concerning the  
step increase, he is not without fault and, therefore, his debt  
may not be waived.

Regarding Mr. Hanson's claim for backpay, the record shows,  
as indicated above, that he was given a temporary promotion to  
GS-15, step 2, effective September 2, 1973, which was extended  
on November 3, 1973, not to exceed June 30, 1974. The temporary  
promotion was terminated on December 23, 1973, when another employee  
was selected for permanent assignment to the position which  
Mr. Hanson had been filling. All actions in connection with  
Mr. Hanson's temporary promotion were taken by the Denver Regional  
Director of the CSA who was serving on a detail. Later the Civil  
Service Commission determined that the part of that detail in ex-  
cess of 120 days was improper since the agency had not obtained  
Commission approval for the excess period. In view of the Com-  
mission's action Mr. Hanson claims that the Regional Director  
had no authority to terminate his temporary promotion.  
Mr. Hanson feels that he is, therefore, entitled to GS-15 pay  
for the maximum period of a temporary promotion and the date of  
eligibility for an in-step increase should have remained unchanged.

In general, we have held that acts performed while a person  
is serving in a de facto status are as valid and effectual in-  
sofar as they concern the public and the rights of third persons  
as though he was an officer de jure. Matter of Acting Federal  
Insurance Administrator's Status and Authority, 56 Comp. Gen.  
761, 765 (1977); 42 Comp. Gen. 495 (1963).

The Regional Director falls within our definition of a de  
facto officer or employee as one who performs the duties of an

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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 its duties, his actions are those of a de facto officer or employee. See Matter of William A. Keel, Jr., and Richard Hernandez, B-188424, March 22, 1977, and decisions cited therein.

The rule concerning the effectiveness of the acts of de facto officers was enunciated in a letter from the General Counsel of the Civil Service Commission to Mr. Hanson's attorney as follows:

" \* \* \* it is nonetheless, well-settled that 'a/ person actually performing the duties of an office under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned.' United States v. Lindsley, 148 F.2d 22 (C.A. 7, 1945), cert. denied 324 U.S. 863 (1945)."

In this connection, Mr. Hanson was one of several plaintiffs who brought a suit before the United States District Court for the District of Colorado in which one of the claims was for damages for wages lost as a result of personnel actions taken by the Regional Director. The Court granted summary judgment for the defendants on the grounds that a collateral attack on a public official's authority is generally not permitted.

This Office has consistently adhered to the position that the doctrine of res judicata, which is to the effect that a valid judgment rendered on the merits constitutes an absolute bar to a subsequent action on the claim, applies when a party raises the same issue before this Office that he raised in the court. 47 Comp. Gen. 573 (1968). Although the Court's action in Mr. Hanson's case was an order granting summary judgment, it has the same effect as a judgment for these purposes. As set forth in 60 C.J.S. Motions and Orders 65:

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" \* \* \* final orders, or orders affecting substantial rights, fully litigated, and from which an appeal lies, are conclusive of the matter adjudged, and, under the doctrine of res judicata, binding on the parties in all subsequent proceedings unless reversed or modified by an appellate court."

In view of the above Mr. Hanson's claim for backpay is disallowed and the action of our Claims Division denying waiver of his overpayment is hereby sustained.

  
Deputy Comptroller General  
of the United States