

**DOCUMENT RESUME**

08010 - [C3348442]

[Appeal of Disallowance of Claim for Retroactive Promotion with Backpay and Moving Expenses]. B-192916. November 24, 1978. 4 pp.

Decision re: Charles B. Simone; by Robert P. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: Personnel Law Matters I.  
Organization Concerned: National Institutes of Health; Public Health Service.

Authority: 37 U.S.C. 404. 37 U.S.C. 406. 35 Comp. Gen. 584. 30 Comp. Gen. 228. 31 Comp. Gen. 335. 52 Comp. Gen. 700. 55 Comp. Gen. 109. 1 J.T.R., para. H3000. 1 J.T.R., para. H3001. 1 J.T.R., para. H8250. 1 J.T.R., para. H8251.

The claimant appealed disallowance of his claim for a retroactive promotion with backpay and moving expenses incident to his appointment as a commissioned officer in the Public Health Service. He may be paid as a "de facto" officer for the period he served prior to being found fully qualified, as he performed his duties in good faith under color of authority. He may not be paid at a higher grade than that to which he was appointed, and he is not entitled to allowances for travel and shipment of household goods performed without order. (Author/SC)

**DECISION**

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

H. B. Simone  
Part L. I  
9442

FILE: N-192916

DATE: November 24, 1978

MATTER OF: Dr. Charles B. Simone, USPHS

**DIGEST:**

An applicant for a commission in the Public Health Service (PHS), began performing the duties of a commissioned officer on July 1, 1977, prior to his being found fully qualified, and appointed as an officer effective July 12, 1977, by official personnel order. He may be paid as a de facto officer for the period July 1-11, 1977, at the rate of pay for the grade to which he was subsequently appointed since he performed duties in good faith under color of authority. He is not entitled to pay at a higher grade than that to which he was appointed nor to allowances for travel and shipment of household goods performed without orders.

This action is in response to a letter dated August 23, 1978, from Dr. Charles B. Simone, Clinical Associate, National Institutes of Health, appealing the disallowance by the Claims Division of this Office of his claim for a retroactive promotion with backpay, travel expenses and shipment of his household goods incident to his appointment as a commissioned officer in the Public Health Service (PHS).

The record shows that in September 1976, Dr. Simone submitted an application for appointment as a commissioned officer of the PHS, indicating that he would be available for active duty in July 1977. Before an applicant can be appointed and called to duty, he must meet all appointment qualifications which include physical requirements. After an initial review of his application, on November 4, 1976, Dr. Simone was requested to arrange for a physical examination. Dr. Simone alleges that in anticipation of the PHS request he completed a physical examination, including audiogram, in October 1976 and contemporaneously forwarded the documentation to the PHS. Various communications ensued between the Commissioned Personnel Operations Division (CPOD), PHS, and Dr. Simone over the fact that the PHS had never received the results of the required completed physical exam. Finally, Dr. Simone completed a second physical examination on June 11, 1977, and the report was received by CPOD.

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on June 15, 1977. However, the results were incomplete, and Dr. Simone was immediately sent a request for the missing information. The additional physical information requested on June 15, 1977, was received on July 5, 1977, thus actuating the remainder of the appointment process. An acceptance from Dr. Simone was received on July 11, 1977, and the official personnel order appointing him to the permanent grade of O-3, senior assistant surgeon, and calling him to active duty effective July 12, 1977, was issued.

Dr. Simone began moving his household goods to Bethesda, Maryland, the site of his anticipated permanent duty station, from Euclid, Ohio, on June 18, 1977, arriving on June 30, 1977, and reported for duty at the National Institutes of Health on July 1, 1977. However, all of these actions were taken by Dr. Simone prior to his being found fully qualified and being appointed to the service.

It is reported that had Dr. Simone been placed on personnel orders and appointed before July 1, 1977, he would have been eligible for a temporary promotion to the "full grade" O-4. However, a new promotion policy went into effect on July 1, 1977, making him ineligible for temporary promotion to the O-4 grade until he completed at least 6 months of active service.

Dr. Simone claims pay for the period July 1-11, 1977, for which he has not been paid; retroactive promotion to grade O-4 with backpay from July 1; and the expenses of his travel and transportation of household goods from his home in Euclid, Ohio, to Bethesda, Maryland, performed in June 1977.

By settlement dated August 7, 1978, the claim was disallowed by our Claims Division. The portion of the claim relating to travel and household goods was disallowed on the basis that under paragraph M3000, 1 Joint Travel Regulations (1 JTR), no reimbursement for travel is authorized unless competent orders have been issued therefor, and reimbursement may not be made for travel performed in anticipation of or prior to receipt of orders. The claim for pay was disallowed on the basis that he was not appointed in the PHS until July 12, and then he was appointed at the O-3 grade.

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The statutory authority for payment of travel and transportation allowances, and transportation of household goods, generally, is contained in 37 U.S.C. 404 (1976), which provide that under regulations prescribed by the secretaries concerned, members of the uniformed services shall be entitled to receive certain allowances for travel performed or to be performed "under orders." Transportation of household goods is authorized under 37 U.S.C. 406 (1976). Paragraph M3000, 1 JTR, provides that no reimbursement for travel is authorized unless orders by competent authority have been issued therefor, while paragraph M3001 of the same regulations defines a "competent travel order" as a written instrument issued or approved by proper authority directing a member to travel between designated points. Under paragraphs M8250 and M8251, 1 JTR, members "ordered" to make a permanent change of station, including initial reporting to the first duty station for officers newly commissioned, are entitled to transportation of household goods.

It is well established that legal rights and liabilities with regard to travel allowances vest as and when travel is performed under orders and that such orders may not be modified retroactively so as to increase or decrease the rights which have accrued or become fixed under those orders, after the travel has already been performed.

The right of uniform service personnel to reimbursement of travel expenses and the extent of such reimbursement is dependent upon the performance of official travel directed by competent orders. There being no record that competent written travel orders or verbal orders confirmed by written orders acceptable under the requirements of the Joint Travel Regulations were issued prior to the travel performed or movement of household goods. Further, there is no legal basis for reimbursement of the expenses of travel or movement of household goods as claimed when travel was performed before the individual gained status as a PHS commissioned officer. Accordingly, as to that portion of the August 7, 1973, settlement, the settlement is sustained.

Concerning Dr. Simone's entitlement to active duty pay and allowances, under the terms of the appointment he received, he was appointed to and called to active duty in the C-3 grade effective July 12, 1977. Prior to that date he had no de jure status as a commissioned officer. Compare 35 Comp. Gen. 564 (1956). Beginning July 12, 1977, he was entitled to the pay and allowances

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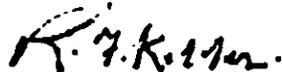
of the grade to which he was appointed, O-3, and we have no authority to authorize payment to him at a higher grade.

However, we must further consider whether Dr. Simone may be considered as a de facto officer in order that, under our recent decisions in similar cases, he might be paid the reasonable value of his services for the period he was on duty prior to his official appointment. 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 (1950), 31 id. 335 (1952), 52 id. 700 (1973), and 55 id. 109 (1975).

Persons who serve in good faith as de facto officers or employees may be paid compensation equal to the reasonable value of services rendered during such period of service. 52 Comp. Gen. 700; 55 Comp. Gen. 109, supra.

In view of the circumstances as reported to us we conclude that Dr. Simone was in a de facto status in the PHS during the period July 1-11, 1977. Accordingly, we conclude that the PHS may properly compensate Dr. Simone for the reasonable value of his service rendered while he was in such de facto status. The reasonable value of services he rendered should be established at the rates of basic pay and allowances for the O-3 grade, the position to which he was appointed on July 12, 1977.

A settlement in accordance with this decision will issue in due course.

  
Deputy Comptroller General  
of the United States