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DECISION



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

[Propriety of Recoupment of Payments to DOL Employee]

FILE: B-195279

DATE: September 26, 1979

MATTER OF: Department of Labor

DIGEST:

Employee of Department of Labor was found to have misrepresented himself as a city employee in order to receive assignment under the Intergovernmental Personnel Act (IPA) of 1970. Because his misrepresentations related to material qualifications required by the IPA, his appointment was subsequently voided by the Department. His status is that of a de facto employee. He may keep payments already made to him for the IPA period since there is no statute either expressly prohibiting payments or requiring a refund of such payments.

Mr. Frank A. Yeager, Director of Personnel Management, U.S. Department of Labor, by letter of June 15, 1979, requests a decision whether payments made to a Department of Labor employee are subject to recoupment. The individual in question misrepresented himself to be an employee of the City of Waterloo, Iowa, in order to be appointed to a Federal position under the Intergovernmental Personnel Act of 1970 (IPA), Pub. L. No. 91-648, 84 Stat. 1909, January 5, 1971 (5 U.S.C. 3371 et seq.). Although the Department of Labor has determined that the misrepresentation voids his IPA appointment, the employee may retain all compensation that he has received.

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The facts are as follows. On June 7, 1973, the Department of Labor entered into an IPA agreement with the employee who was identified as an administrative assistant to the Mayor of Waterloo, Iowa. The purpose of the IPA assignment was to allow him to continue work that he began on a previous IPA assignment with the Department when he was an employee of the State of Iowa. He was no longer employed by the State at the time of the agreement in question.

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The agreement was subsequently renewed on June 10, 1974, December 6, 1974, and March 14, 1975, extending his total period of employment under the IPA agreement from June 10, 1973 to June 21, 1975. His IPA appointment was then terminated and, on June 22, 1975, he received a career-conditional appointment with the Department's Manpower Administration. An investigation later revealed

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that the employee had never served as an administrative assistant to the Mayor and never been employed by the City of Waterloo.

Although the employee apparently adequately performed his IPA duties, the material falsification of the IPA application has prompted the Department to void his IPA assignment and to propose his removal from his current position. In addition the Department asks whether it should seek repayment of the salary paid under the IPA assignment.

A condition precedent to employment under the IPA is that the applicant be an employee of a State or local government, or an institution of higher education. 5 U.S.C. 3372(a).

Where the falsification in an application involves an absolute bar to employment, we have held that the employee has no legal rights under the appointment, but he is to be regarded as a de facto employee and he is allowed to retain those payments already made to him. 38 Comp. Gen. 175 (1958).

Furthermore, we have permitted the employee to retain the salaries he has already received even where the disqualification is the result of a deliberate misrepresentation on his part. In 15 Comp. Gen. 587 (1936); we held:

"It appears that but for the fraudulent misrepresentation and deceit practiced by the employee referred to in your letter, he could not have obtained the employment, and that, upon discovery of the fraudulent nature of the entry into service, the employee was immediately discharged. Under such circumstances, the contract of employment cannot be made the basis of a legal claim for services rendered thereunder. At most, he could be regarded as only a de facto employee and as such entitled to retain such payments as may have been made to him, but having no enforceable right to compensation that had not been paid." * * *
(Emphasis added.)

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We believe the rule stated in 15 Comp. Gen. 587 is controlling in the instant case and entitles the employee to retain the payments made to him under the IPA assignment.

Recoupment of payments is only necessitated where there exists an absolute statutory bar which either expressly prohibits the payment of appropriated funds to the employee or requires a refund by the employee. 18 Comp. Gen. 815 (1939). Such a statutory prohibition precludes the retention by the employee of funds already paid. See 35 Comp. Gen. 216 (1955).

Since the Intergovernmental Personnel Act of 1970 does not contain an express provision prohibiting the payments or requiring the recovery of payments already made to the employee, his status as a de facto employee for the period of the IPA assignments entitles him to keep the salary payments received.



Deputy Comptroller General
of the United States