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**DECISION**

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

*[Entitlement to Compensation for Work Period]*

FILE: B-196620

DATE: March 19, 1980

MATTER OF: Richard M. Wair

*personal name*

**DIGEST:** Summer employee of HEW returned to work during midyear school break after being told he might be allowed to do so but without official appointment. Agency realizes individual lacks appointment during his work period and allows individual to continue working while retroactive appointment is processed. Employee is never appointed due to administrative problems and agency questions whether employee can retain compensation he received in form of salary advance. Employee was de facto employee and may retain compensation.

An authorized official of the Department of Health, Education, and Welfare (HEW) ~~requested an advance decision~~ on whether Richard M. Wair was a de facto employee and is entitled to retain the compensation he received. We find that Mr. Wair performed services in good faith under color of authority, he was a de facto employee and may retain the compensation he received.

During the summer of 1977, Mr. Wair worked in HEW's Office of the General Counsel (OGC) as a Clerk-Typist, GS-2, under a valid appointment. He and other OGC summer employees were told that they might be allowed to work during the midyear school break, and were told to notify the OGC Administrative Office in November if they were interested in doing so. On or about December 18, 1977, Mr. Wair returned to OGC, without authorization from the Office of the Secretary Personnel Office, and worked until January 14, 1978. The OGC Administrative Office disclaims knowing that he wanted to return or instructing him to do so. Whether his supervisor advised him to report for duty cannot be verified because she is now deceased. Nevertheless, when the Administrative Office learned that Mr. Wair had returned, he was allowed to continue to work. A late request for appointment was prepared and he was paid for the work he performed during December 1977 and January 1978 through an emergency salary advance. He was to repay the full amount of the advance upon receipt of a supplemental check issued through the normal payroll system once the Personnel Office had completed all necessary documentation.

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Although after Mr. Wair ceased working a request for appointment was submitted to the Personnel Office, this request has never been processed. The Personnel Office has been unable to obtain certain documentation from Mr. Wair which is required for processing the request for appointment.

Because Mr. Wair has never been fully appointed, he has never been issued the supplemental check from which he was to repay the salary advance. The Personnel Office indicates that the question has arisen whether Mr. Wair is liable to repay the salary advance or whether he is entitled to retain the funds as a de facto employee.

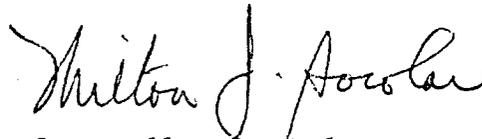
If the required documentation could effect Mr. Wair's appointment, we would return this case to the Personnel Office and request them to take additional steps to obtain the data. However, Mr. Wair could not receive a retroactive appointment as contemplated by the agency. In B-188424, March 22, 1977, we pointed out that personnel actions, including appointments, cannot be made retroactively effective unless denial or administrative errors occurred that (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. Thus, Mr. Wair cannot be retroactively appointed as the facts of this case do not satisfy any of the three criteria.

A de facto officer or employee is one who performs the duties of a position with apparent right and under color of an appointment and claim of title to such office. 30 Comp. Gen. 228, 229 (1950). Lack of an official appointment does not preclude de facto status if the service is rendered in good faith and under color of authority. 55 Comp. Gen. 109, 111 (1975). While the record does not directly establish that Mr. Wair initially assumed the duties under color of authority, we believe that the circumstances of this case warrant this conclusion. Moreover, the actions by the OGC Administrative Office and the Personnel Office, when they became aware of Mr. Wair's status, buttress this conclusion.

Since Mr. Wair was a de facto employee he is entitled to retain the amount he received for his services. 38 Comp.

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Gen. 175 (1958); 55 Comp. Gen. 109, supra; and B-192264, April 3, 1979.

A handwritten signature in cursive script that reads "Milton J. Fowler".

For The Comptroller General  
of the United States