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

FILE: B-216708 **DATE:** March 29, 1985

MATTER OF: Department of Energy Consultants

DIGEST:

1. The Controller, Department of Energy, asks whether five consultants designated as intermittent should be identified as temporary, and thus lose their entitlements to transportation and per diem. The Controller's doubt arises because consultants worked most available workdays and moved between ostensibly different positions in different organizational offices, both of which were headed by the same person. The determination of each consultant's status must be based on the facts of the particular situation. Here, the Office of Personnel Management conducted an investigation and determined that each of the consultants was properly designated as intermittent. The record provides no basis for a contrary view of the facts. Therefore, we conclude that the consultants may be regarded as intermittent and may be paid transportation and per diem.

2. Intermittent employment may not exceed a total of 130 days in a service year. Each of five Department of Energy consultants occupied several different intermittent positions within the Department and the total number of days worked by each consultant exceeded the 130-day limit. The Office of Personnel Management states that the service year limitation relates to the number of days worked in a specific position. Its view that a new service year is started when an intermittent appointee receives a new appointment to a different position is upheld.

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This action is in response to a request for an advance decision from the Department of Energy, regarding the status of five individuals whom it has employed as consultants.[1/] Although several questions are presented, the basic question is whether the consultants were correctly treated as intermittent employees, or whether they are in fact temporary employees. On the basis of the record before us, we would accept a Department of Energy determination that the consultants were intermittent employees.

BACKGROUND

The Department of Energy employed each of the five consultants to provide services in their respective areas of expertise within two separate offices, both of which were headed by the same person.

The Controller asked us to determine:

> (1) whether any of the consultants should have been identified as full-time temporary employees on the basis of having worked nearly all available workdays;
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> (2) whether the proscription, that an intermittent employee may not work more than 130 days in a service year, becomes effective in situations where an appointment is terminated and renegotiated when similar functions are still being performed in a subordinate organization under the same principal official;
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> (3) whether the application of that rule is affected if the consultant works for the same Government official who serves in different organizational capacities; and
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> (4) whether collection action should be taken in situations where the status of the

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1/ The request was presented in an October 2, 1984 letter from Gail T. Young, Controller, Department of Energy. The same questions were also presented by the consultants in a separate letter.

consultant was incorrect and the consultant was erroneously paid for transportation, per diem and other costs?

The answer to the first three questions depends on a determination of the status of each of the consultants as either intermittent or temporary employees. Intermittent employment is defined as occasional or irregular employment on programs, projects or problems. It is limited to 130 days in a service year. An intermittent employee's status is automatically changed to temporary when the employee works in excess of 130 days within the service year. See Federal Personnel Manual, ch. 304, paragraph 1-2(5) (Inst. 275, January 22, 1982).

The basis for the Controller's concern is that the consultants worked all or most of the available workdays in each position and that during the service year some of the consultants received numerous intermittent appointments to work on similar projects requiring them to report to the same official. Since the consultants would only be eligible for transportation between their homes and their official duty stations and to per diem while at their official duty stations if they were intermittent rather than temporary employees, the Controller requested our determination of the status of each individual before she certifies payment of these expenses.

At the time of the Controller's submission to us, the Office of the Under Secretary had by letter dated September 17, 1984, requested a review of the same issues by the Office of Personnel Management (OPM). We withheld action on this matter pending the completion of OPM's investigation and receipt of its report. That investigation is now complete, and we have received Energy's report on its action implementing the OPM findings.

FACTS

Briefly, the employment history of each of the consultants is as follows:

Harry E. Brown - Mr. Brown was employed by the Office of Conservation and Renewable Energy on a full time basis from September 18, 1983, to March 19, 1984. He was then

appointed on an intermittent basis to a position in the same office on July 3, 1984. He worked 58 of 61 possible workdays in this position.

Sydney J. Chiswell - Mr. Chiswell was appointed on an intermittent basis to a position in the Office of Conservation and Renewable Energy on January 16, 1984. Of the 142 possible workdays, he worked 129 days. He was appointed to another intermittent position in the same office, on August 6, 1984. In this position he worked 27 of 29 available workdays.

George D. Holling - Mr. Holling was appointed on an intermittent basis to a position in the Office of Conservation and Renewable Energy on January 24, 1984, for a maximum of 89 workdays. He worked 89 days in this position. He was then appointed to a second intermittent position in the same office, on June 27, 1984. He worked 42 of 42 available workdays in this position. He was appointed to a third intermittent position in the Office of Conservation and Renewable Energy on August 26, 1984, and worked 20 of 24 available workdays.

Robert H. Gardner - Mr. Gardner was given an intermittent appointment in the Office of the Under Secretary on August 3, 1983. He worked 43 of 43 possible workdays. The appointment was extended on October 1, 1983, and he worked 31 of 42 workdays. He was appointed to another intermittent position in the Office of Conservation and Renewable Energy on December 1, 1983. On June 9, 1984, his December 1983 appointment was changed to a full-time temporary appointment. On June 25, 1984, he was appointed to another intermittent position, in the Office of the Under Secretary where he worked 63 of 69 available workdays.

Joel B. Stronberg - Mr. Stronberg was originally appointed to an intermittent position in the Office of the Under Secretary on August 3, 1983. He worked 43 of 43 available workdays in that position. The appointment was extended on October 10, 1983, and he worked 31 of 42 available workdays. On December 9, 1983, he received an intermittent appointment in the Office of Conservation and Renewable Energy, where he worked 130 of 133 available workdays. This appointment was changed to a full-time position on June 23, 1984. Mr. Stronberg was then appointed to another intermittent position in the Office of the Under

Secretary on July 22, 1984, where he worked 63 of 69 available workdays.

We have been informally advised that all of the above consultants' intermittent appointments were terminated effective November 14, 1984.

As mentioned above, the questions presented to us regarding the correctness of the intermittent status of each of the consultants were also presented to OPM for consideration. Pursuant to its review authority, the OPM conducted an on-site investigation including a review of pertinent records and interviews.

After its on-site investigation, OPM presented tentative findings to Energy by letter of October 26, 1984. It found that neither the identity of the supervisor nor an organizational change, alone, was determinative in deciding whether or not a position was in fact a new position or merely a continuation of the original appointment. Instead, it looked at the type of position and the area of work in which the consultant was involved. The report noted that there was no evidence that any of the appointments carried with them the understanding that a consultant was to work on a regularly scheduled basis.

At the same time, the OPM report indicated that four of the five consultants had at least one period of service which may have been improperly designated as intermittent. This finding was based primarily on the similarity in work descriptions of the various positions. Noting that these descriptions were very brief, the Office of Personnel Management stated that "it is likely that more extensive and detailed descriptions would have noted significant distinctions among the various projects." OPM instructed Energy to review both the consultant certifications and the actual work performed and to correct any certificates that were not accurate.

Energy then provided additional written information regarding the work done by each of the consultants. This included detailed and specific information concerning each new position to which the consultants had been appointed and assurances that none of the consultants had ever had a regularly scheduled tour of duty with respect to these positions. In addition, Energy provided information showing

that in all situations, whether the individual consultant made an organizational change or remained within the same organization, new positions having different areas of work were involved.

After considering the additional information supplied by Energy, OPM presented its final conclusions in a letter dated November 19, 1984. It recognized that each of the appointments could have been in a different area of work and each appointment could have been to a new position for purposes of an intermittent appointment. It further stated that when differences in the type of work did exist, and the agency certified that the consultants were appointed to new positions, OPM would not substitute its own judgment for that of Energy in determining the status of the positions held by the consultants.

ANALYSIS

Statutory authority for the employment of experts and consultants on a temporary or intermittent basis is found at 5 U.S.C. § 3109 (1982). The OPM provides additional guidance in Chapter 304 of the Federal Personnel Manual (Inst. 275, January 22, 1982).

Consultants may be employed either as temporary or intermittent employees. The Office of Personnel Management has defined intermittent employment as occasional or irregular employment on programs, projects or problems. An intermittent employee may work up to 130 days in a service year. Intermittent employees may also be reappointed to the same position in the following service year.

Temporary employment is defined by OPM as employment for less than one year, and may include regularly scheduled employment on a full- or part-time basis. An intermittent employee who is paid for all or any part of a day more than 130 days in a service year ceases to be an intermittent employee and automatically becomes a temporary employee. Employees who work under temporary appointments may not be reappointed to their positions. Generally, the status of an employee depends upon the facts of his particular situation, including the type of schedule worked and the intent of the agency when the individual was appointed. All of the above rules are set out in FPM Chapter 304.

Whether the status of the consultants here is intermittent or temporary depends on the answer to three questions, two of which are essentially factual. They are (1) whether OPM's definition of "service year" is correct, (2) whether the successive appointments received by each consultant were to essentially the same position, and (3) whether the parties intended that the consultants work on a regularly scheduled basis.

We do not conduct investigations or hearings into the facts of a particular case, but instead rely upon the written record. See 53 Comp. Gen. 824 (1974); 4 C.F.R. § 31.7. The record in this case includes a most useful tool, the investigative report of OPM, an independent organization which both regulates and reviews employment of consultants and experts in an oversight capacity. Because of its expertise in personnel matters, including the appointment of experts and consultants, its interpretation and application of the rules discussed above to a fact situation is particularly relevant and entitled to great weight. Udall v. Tallman, 380 U.S. 1 (1965).

Issue 1: OPM's Definition of "Service Year"

As noted above, an intermittent employee may work up to 130 days in a "service year." The OPM has informally advised us that in preparing its report to Energy, it defined a service year as beginning at the time of the appointment and consisting of up to 130 workdays in that position. Thus, if a consultant serving in an intermittent appointment is then appointed to a new intermittent position, a new service year begins at the time of the new appointment. That is, the concept of a service year as it applies to intermittent employees counts the number of days the appointee works in a specific position; it does not embrace intermittent service performed in several different positions during either a calendar or a fiscal year.

We find this definition reasonable since it accords consistent treatment between temporary and intermittent employees. A temporary consultant may not be reappointed to the same position after he has served one year in that position. However, we have held that a temporary expert or consultant may be employed under a series of contracts in one position totaling less than one year, and then immediately be employed in a different expert position for which

he is qualified. See 28 Comp. Gen. 670 (1949). See also, FPM Chapter 304. Although that decision dealt with temporary employees, intermittent employees are appointed under the same statutory authority and we find no reason why they should be treated dissimilarly. Therefore, we conclude that a service year for each distinct appointment or position relates to that position or appointment.

Issue 2: Were Appointments to the Same Position?

As previously mentioned, OPM's report to the Under Secretary indicated that OPM would accept his determination that each appointment was correctly identified as an intermittent appointment to a new position. Given the above concepts and facts, we find nothing in the record which compels us to take exception to either Energy's initial determinations or to OPM's concurrence that each of the questioned appointments was to a new position with recognizably different duties and responsibilities, thereby starting a new service year. Therefore, on the basis of the record before us, those appointments may be considered intermittent.2/

However, the movement of these experts and consultants within the agency as described while retaining their intermittent status raises legitimate concerns. Situations such as those presented may give the appearance of improper use of experts and consultants as prescribed in FPM Chapter 304. For this reason, we also agree with OPM's comments that at some point, the process for ensuring that the appointments of the consultants were correct, failed in this case. Appendix A of FPM Chapter 304 presents the requirements for internal agency controls for the hiring of consultants and experts. See also, Lynn Francis Jones, B-214432, July 25, 1984, 63 Comp. Gen. ___. They include different levels of approval and complete and accurate descriptions of the services required. Apparently Energy has such a process in place, but failed to submit these appointments to that process. The continued failure to

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2/ We note that regarding the appointment of Mr. Brown to an intermittent position on July 3, 1983, the file lacks certification by the agency that the appointment was in fact to a new, intermittent position in a different area of work. However, if the agency can certify that it was a new position, we have no objection to such a determination.

submit such appointments to agency controls will contribute to continuing questions concerning the status, and hence entitlement to transportation and per diem, of consultants and experts hired in the future.

Issue 3: Did the Consultants Work On a Regularly Scheduled Basis?

The remaining issue is whether each of the consultants was in fact an intermittent employee in view of their having worked on most available workdays. The question is important because transportation from their homes to their duty station and per diem while there may be paid to the consultants if they were intermittent, but may not be paid if they were temporary employees. See 55 Comp. Gen. 199 (1975).

We have held that employment must be occasional or irregular to be regarded as intermittent. However, we recognize that in certain cases although an expert or consultant works full time, he may still be regarded as intermittent if the record shows that intermittent employment was actually intended and there was an inability to reasonably anticipate the need for services on a full-time basis. Hector Avila Morales, Jr., B-193170, May 16, 1979. In addition, in determining whether employment is intermittent, we have long held that the establishment of a regular tour of duty prescribed in advance should be considered. 35 Comp. Gen. 90 (1955); 35 Comp. Gen. 638 (1965). An established tour of duty has been defined as "a definite and certain time of day and/or hour of any day during the work week when the employee regularly will be required to perform duty." Copp Collins, 58 Comp. Gen. 167 (1978).

The question of whether these consultants had regular tours of duty was addressed directly in the OPM investigation. The record shows that Energy assured OPM that none of the consultants had a regularly scheduled tour of duty.

Specifically, OPM reported:

> "However, we were unable to identify evidence that any of the appointments reviewed carried with them the understanding, in advance, that the consultant was to work

on a regularly scheduled basis (e.g., every workday for several consecutive pay periods). We are reluctant to infer a regularly scheduled tour of duty retroactively, solely on the basis of a pattern of days worked. Further, for most of the periods reviewed, the consultant did not work every single workday."

Since none of the appointments involved work in excess of 130 days, if Energy certifies that the employees did not have regularly scheduled tours of duty and that, when the appointments were made, they were intended to be intermittent, we would not object to payment of transportation and per diem expenses to which they are otherwise entitled.

Harry R. Van Cleve
for Comptroller General
of the United States