



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

B-133972

April 16, 1973

30802

The Honorable Arthur F. Sampson
Acting Administrator
General Services Administration

Dear Mr. Sampson:

We refer to the letter of September 27, 1972, signed by you as Acting Administrator of General Services and Mr. Russell E. Train, Chairman of the Council on Environmental Quality, concerning the allowance of \$420,862 as compensation to Mr. John W. Wilmer, Jr., during the period of his temporary intermittent employment by the Council on Environmental Quality. Prior to the payment of any compensation for services rendered it was discovered that an administrative error had been made in making the appointment to the civilian position inasmuch as Mr. Wilmer was at that time on active duty as an enlisted member of the United States Navy.

You recognize the well established rule that a person on active duty in the military forces of the United States may not be employed to perform services as a civilian employee of the Government and that any member who by mistake or otherwise is so employed may not receive the compensation of the civilian position. See 49 Comp. Gen. 444 (1970). However, you have submitted the question of paying Mr. Wilmer for the civilian services he performed for our consideration in view of the fact that waiver of collection action under 5 U.S.C. 5584 would have been possible had the compensation in question been paid. You indicate that GSA would have authorized a waiver in this case since the total amount involved was less than \$500, since Mr. Wilmer did not make a secret of the fact that he was on active military duty at the time of his employment, and since you consider that collection of an amount paid would have been against equity and good conscience and not in the interest of the United States. You feel that the discovery of Mr. Wilmer's erroneous appointment before any compensation had been paid to him for the services rendered should not justify placing him in a worse position than would have been the case had compensation been paid to him for such services.

It is the position of this Office that without regard to the provisions of 5 U.S.C. 5584, a member of the armed forces on active duty who is mistakenly employed for service in a civilian capacity is entitled to retain any payments he has received for services performed under the rule applicable to de facto employment. Compare 38 Comp. Gen. 175 (1958), 40 id. 51 (1960). However, under the de facto rule the individual involved

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may retain only the salary payments he has received and is not entitled to be paid any balance of salary remaining due at the time the deficiencies in his employment were discovered and his employment terminated.

There are many situations not covered by the de facto rule in which erroneous actions by Government personnel result in payments to employees in excess of their entitlement. Also there are situations in which Government error results in the improper reduction or withdrawal of an employee's pay. In recent years the Congress has provided a specific statutory remedy permitting administrative adjustment of employee claims arising out of such situations. See 5 U.S.C., 5504, 5596. One of the primary reasons for enactment of such legislation was to relieve the Congress of the need to consider private legislation for the relief of individuals whose claims, though equitable, could not be paid because no legal basis for payment existed.

The case presented by you involves a situation in which an individual has an equitable claim for compensation for services rendered which, in law, cannot be paid because an error was made by the Government.

Under the statute providing for adjustment of claims based upon overpayments caused by administrative error through no fault on the part of employees involved, recovery may be waived. Such waivers apply to the full employee indebtedness. Any repayments to the Government which might have been made prior to a waiver determination having been reached are refunded to the overpaid employee.

Ordinarily, where an administrative error has been discovered in sufficient time to avoid the making of an erroneous payment, there is not involved a situation calling for waiver as no overpayment has occurred and the employee involved is paid precisely what is due him for the services rendered. Under the general rule, there is no basis for relief in the instant case.

However, the instant situation does contain a unique element setting it apart from the usual case of error discovered prior to payment. Mr. Wilner has not been paid anything for the services he rendered the Government! Moreover, he would not only have been entitled to consideration for waiver if he had been paid, but, indeed, under the de facto rule referred to he would have been entitled to retain the amount involved as a matter of right. It, therefore, seems appropriate, where no

payment at all is provided for services rendered, to consider for purposes of the waiver statute, that the administrative error and "overpayment" arose at the point in time when Mr. Wilner entered on duty with the understanding of a Government obligation to pay for his services. Particularly does this apply so when it is recognized that refunded overpayments ultimately waived are reimbursed to the employees involved.

In the circumstances, bearing in mind the intent of the Congress as expressed in the legislation cited--that individuals should not be penalized as a result of Government errors--we would not object to payment for services rendered by Mr. Wilner.

Sincerely yours,

PAUL G. DEMBLING
For the Comptroller General
of the United States

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