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DECISION



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

FILE: B-187389

DATE: July 19, 1978

MATTER OF: Harvey J. Nozick - Claim of Consultant
for Travel Expenses and Additional Pay

- DIGEST:
1. Consultant of Environmental Protection Agency is not entitled to payment of travel expenses from residence in Reading, Massachusetts, to duty station in Arlington, Virginia, after 130 days of service since appointment then ceased to be intermittent and became temporary. Under temporary appointment, consultant must bear cost of transportation from place of residence to official duty station. Erroneous travel payments cannot be waived under 5 U.S.C. § 5584. However, consultant is entitled to travel expenses under 5 U.S.C. § 5703 during intermittent appointment in subsequent service year.
 2. Claims of intermittent consultant for overtime compensation and increased daily rate of compensation are denied. Experts and consultants temporarily and intermittently employed are generally not entitled to overtime compensation but are only entitled to established daily rate of compensation regardless of hours worked. Record shows no agreement to pay for additional hours of work and there is no administrative error in agency determination of compensation rate.

By letter dated October 26, 1977, Mr. Harvey J. Nozick appealed the action of our Claims Division by letter dated August 4, 1977, which denied his request for waiver of erroneous payments of travel expenses but granted waiver of overpayments of pay incident to his employment as a consultant with the Environmental Protection Agency (EPA). The letter also disallowed Mr. Nozick's claims for additional pay.

The record shows that effective March 19, 1973, Mr. Nozick was appointed as an intermittent consultant with

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the EPA, Office of Noise Abatement and Control. During the period March 19, 1973, to September 15, 1973, Mr. Nozick worked a total of 134 days. The Federal Personnel Manual, ch. 304, § 1-2a(5) (July 16, 1971), provides that when an intermittent expert or consultant is paid for all or any part of a day for more than 130 days in a service year, his employment automatically ceases to be intermittent and becomes temporary. Thus, Mr. Nozick became a temporary employee as of September 11, 1973. Effective September 16, 1973, the EPA officially converted his appointment to that of a temporary consultant. Mr. Nozick served as a temporary consultant through March 18, 1974. Effective March 19, 1974, Mr. Nozick was reappointed on an intermittent basis with the Office of Noise Abatement and Control and he served under this appointment to July 19, 1974.

During the period of his status as a temporary employee, Mr. Nozick received a total amount of \$2,262.46 incident to commuting between his residence in Reading, Massachusetts, and his duty station in Arlington, Virginia. An expert or consultant employed on a temporary rather than an intermittent basis is in the same position as a regular Government employee with regard to travel expenses and is subject to the well-settled rule that a regular employee must bear the cost of transportation from his place of residence to his place of duty at his official station. B-180698, August 19, 1974, and cases cited therein. Accordingly, Mr. Nozick was not entitled to the payment of travel expenses from his residence to his duty station during the period of his temporary employment, September 11, 1973, through March 18, 1974, and he is indebted for such payment in the amount of \$2,262.46.

Mr. Nozick has requested waiver of these overpayments on the basis that travel expenses were authorized in advance and that the EPA approved the payment of his travel vouchers. In addition, Mr. Nozick states that the agency never informed him that he was ineligible to receive reimbursement for the travel expenses in question. Concerning the actions of the EPA in authorizing and approving these travel expenses, it is a well-settled rule of law that the Government cannot be bound beyond the actual authority conferred upon its agents by statute or regulation. See Matter of M. Reza Fassihi,

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54 Comp. Gen. 747 (1975) and cases cited therein. Also, these erroneous payments may not be waived because the waiver statute, 5 U.S.C. § 5584 (Supp. IV, 1974), expressly excludes waiver of erroneous payments of travel and transportation expenses. See Fassihi, supra.

Mr. Nozick states that in B-166506, July 15, 1975, we permitted unauthorized payments without requiring collection action and believes we may do so in his case. The cited decision concerned the propriety of the use of EPA appropriated funds to pay transportation and lodging expenses of 27 state officials at the 1974 National Solid Waste Management Association Convention which was sponsored by the EPA pursuant to 42 U.S.C. § 3253 (1970). We held that the EPA was prohibited by 31 U.S.C. § 551 (1970) from using its funds to make such payments. But the provisions of 42 U.S.C. § 3253, in broad terms, authorize the EPA to render financial and other assistance to appropriate public authorities in the conduct of research relating to solid waste disposal and the payments were not inconsistent with the purpose of the broad language of the statute. Considering all the facts and circumstances of the case and since it was not clear that the payments in question were improper until the rendition of our decision, we did not require collection of the unauthorized payments. However, the limited entitlement of an expert employed on a temporary basis to travel expenses, which is involved in this case, has long been established. See B-180698, August 19, 1974, and 27 Comp. Gen. 695, 697 (1948). Accordingly, B-166506, supra, is inapplicable to this case.

If collection of these erroneous payments of travel expenses is required, Mr. Nozick suggests that restitution should be made from EPA's Financial Management Division budget or the EPA Personnel Division budget. Since the expenses of those divisions are payable from EPA appropriated funds, the same source of funds from which the erroneous payments were made, the action suggested by Mr. Nozick would not result in repayments to the Government. Accordingly, such action may not be taken.

In the event that we cannot grant his request for waiver, Mr. Nozick also requests that we refer it to Congress under the Meritorious Claims Act, 31 U.S.C. § 236 (1970).

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This is an extraordinary remedy and its use is limited to extraordinary situations. Also, it is not used in a situation which is likely to recur since such use would constitute preferential treatment for the claimant over others who are similarly situated. As other Government employees have been erroneously advised by their agency as to entitlement to reimbursement for travel expenses, we cannot hold that Mr. Nozick's situation is so unusual or extraordinary as to entitle him to equitable relief under the Meritorious Claims Act. See B-189900, -January 3, 1978. Cf. B-188058, January 31, 1978.

In view of the above the erroneous payments of travel expenses incident to Mr. Nozick's service while employed as an expert on a temporary basis should be collected. In this connection Mr. Nozick advises that the overpayments total \$2,252.46, not \$2,262.46. The EPA should recompute the overpayments before taking collection action.

Incident to his employment with the EPA as an intermittent consultant for the period March 19, 1974, to July 19, 1974, Mr. Nozick received reimbursement of travel expenses in the amount of \$930.36 incident to his travel between his residence in Reading, Massachusetts, and his duty station in Arlington, Virginia. Our Claims Division determined that this was an erroneous payment in view of the EPA Travel Manual, chapter 11, paragraph 3d(3) which provides that a consultant or expert who serves on an intermittent basis for 130 days, then is converted to a full-time basis, completes that appointment, and then is reappointed on an intermittent basis again in the same position, will not be eligible for travel expenses as an intermittent employee. Our Office has subsequently been advised by the EPA that the effective date of the above-cited restriction on travel expenses of intermittent employees was August 8, 1974. Accordingly, Mr. Nozick was entitled to travel expenses as an intermittent consultant pursuant to 5 U.S.C. § 5703 (1970) for the period March 19, 1974, to July 19, 1974. Thus, the payments he received for travel from his residence to his duty station were proper and Mr. Nozick is not indebted in the amount of \$930.36 for travel expenses. In addition, any suspended travel vouchers for the period March 19, 1974, to July 19, 1974, should be certified for payment if otherwise proper.

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Incident to his employment as a temporary consultant during the period September 17, 1973, to March 18, 1974, Mr. Nozick was paid \$2,203.61 for 233 hours of overtime worked. Our Claims Division determined that Mr. Nozick was not entitled to compensation for overtime, but waived the indebtedness resulting from the erroneous payment pursuant to the waiver authority of 5 U.S.C. § 5584 (Supp. II, 1972). The Claims Division also disallowed his claim for an additional amount of \$899.39 incident to the same hours of overtime. That amount represents the difference between the hourly rate of \$13.375 based on his established daily compensation of \$107 and \$9.65 per hour, the then maximum rate for overtime under 5 U.S.C. § 5542, (Supp. II, 1972), less adjustments applying the limitation in 5 U.S.C. § 5547 (1970), which the EPA paid him for this overtime work. Mr. Nozick contends that the additional amount claimed should be paid since the overtime was approved and worked. In support of his claim he cited Rapp v. United States, 167 Ct. Cl. 852 (1964). He also believes the waiver of partial payment of \$2,203.61 is indicative of the fact that he was entitled to compensation for overtime. Finally, he asserts that he was verbally informed that he was eligible for overtime and the fact that this was not indicated on his SF-50, Notification of Personnel Action, was probably an oversight.

The statutory provision for overtime compensation, section 201 of the Federal Employees Pay Act of 1945, as amended, 5 U.S.C. § 5542, does not apply to experts and consultants whose services are procured on a temporary or intermittent basis in accordance with the provisions of 5 U.S.C. § 3109 (1970). See 46 Comp. Gen. 657 (1967). Experts and consultants are generally entitled to the per diem rate prescribed for their employment regardless of the total number of hours worked. 46 Comp. Gen. 667 (1967); 28 id. 328 (1948). Accordingly, Mr. Nozick was only entitled to his established rate of compensation for each day he performed work regardless of the number of hours worked in a day and the payments for overtime work constituted erroneous payments. The Court of Claims case, Rapp, cited by Mr. Nozick is not applicable since it dealt with regular Government employees, not experts or consultants. The waiver of the overpayments does not indicate entitlement. Rather it represents erroneous payments

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of pay to Mr. Nozick whose collection is waived since there was no lack of good faith on his part. Also, with regard to the compensation of experts and consultants for additional work, EPA Order 3110.4A, September 28, 1973, paragraph 8, provides as follows:

"f. Pay for Overtime. Experts and consultants are not entitled to pay at overtime rates under the Federal Employees Pay Act of 1945, as amended. Experts and consultants may be paid at regular (straight-time) rates for service in excess of the regularly scheduled tour of duty if specifically authorized in the 'Remarks' section of the SF 50, Notification of Personnel Action."

The record shows that Mr. Nozick was not authorized payment for overtime in accordance with para. 8f of EPA Order 3110.4A, as there was no notation on Mr. Nozick's SF-50 that he was authorized to work in excess of his regularly scheduled tour of duty. In this connection Mr. Nozick states that he was credited with both sick and annual leave as well as holiday pay despite the fact that eligibility for those benefits were also to be authorized on the SF-50 and were not. The copies of time and attendance reports do not show that any leave was credited to Mr. Nozick. The file in our Office does not show whether payment for holidays was made. However, if payment was made for holidays not worked, it would appear that such payment would be erroneous since it was not authorized on the SF-50. In any event an erroneous payment in one area would not justify an entitlement in another area which was not authorized. Accordingly, since Mr. Nozick's payment for overtime work was erroneous, there is no legal basis to allow Mr. Nozick's claim for an additional payment of compensation in the amount of \$899.39 for hours of overtime worked.

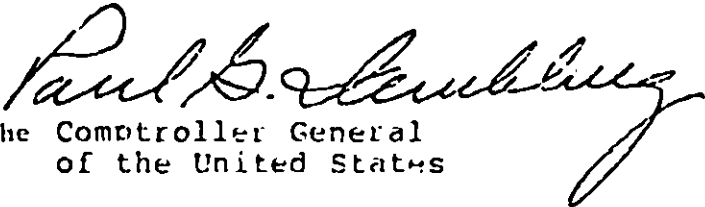
Mr. Nozick's final claim arises out of his employment as a consultant on an intermittent basis for the period March 19, 1974, to July 19, 1974. Mr. Nozick claims that his proper rate of compensation should have been \$113 per day rather than the \$107 per day which he actually received and he claims the amount of \$558 representing the difference

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in the rate of pay for the period involved. Mr. Nozick's claim is based on submission by the Deputy Assistant Administrator for Noise Abatement of an SF-52, Request for Personnel Action, incident to Mr. Nozick's March 1974 appointment on which the stated salary was \$113 per day. However, the EPA established Mr. Nozick's compensation at the daily rate of \$107. The EPA's criteria for determining the rate of compensation for experts and consultants are set forth in section 8, EPA Order 3110.4A, supra, which in part provides that determinations regarding the specific rate to be paid will be made on an individual case basis by the Servicing Personnel Officer after various specified factors have been received. By letter dated October 16, 1975, the Office of Planning and Management, EPA, informed our Claims Division that upon a review of Mr. Nozick's previous salary, it was determined that his correct rate of compensation should be \$107 per day rather than \$113 per day salary recommended by the Office of Noise Abatement and Control.

There is nothing in the record to indicate that the EPA failed to follow the general criteria established in section 8 of EPA Order 3110.4A, supra, with regard to setting the rate of pay of experts and consultants. Accordingly, since under section 8 of the EPA Order, the Servicing Personnel Officer had the authority to determine the specific rate of compensation of an expert or consultant, the EPA's decision not to implement the \$113 per day salary recommended by the Deputy Assistant Administrator for Noise Abatement does not constitute an administrative error. See 55 Comp. Gen. 42 (1975); B-180046, April 11, 1974. Accordingly, there is no authority for the retroactive adjustment of Mr. Nozick's rate of compensation for the period March 19, 1974, to June 19, 1974.

The agency should take action on this matter in accordance with the above.


For The Comptroller General
of the United States