Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cynthia S. Browning and Charlie L. Cranford—Expired Appointments—Status as De Facto Employees

File: B-260534

Date: November 29, 1995

DIGEST

A Federal Aviation Administration employee received an invalid 2-year appointment and another FAA employee received a valid 2-year appointment. Both employees continued to work after their appointments expired. Subsequently, both employees received valid competitive appointments. During the periods when they were not properly appointed, the individuals may be regarded as de facto employees and may retain the compensation paid to them. However, the periods following the expiration of their appointments may not be considered as creditable service for the purpose of leave accrual.

DECISION

Two employees of the Federal Aviation Administration (FAA), Ms. Cynthia S. Browning and Ms. Charlie L. Cranford, received time-limited appointments. For the reasons explained below, the first one was valid and the other one was not. Each of the employees continued to work for the agency after their appointments expired. Subsequently, each of them received valid competitive appointments. The FAA now asks whether, during the time between those appointments, the employees may be considered de facto employees so that they may retain the salary paid to them and receive service credit for leave accrual and other purposes.

We hold that the two individuals were de facto employees during the periods when they were not properly appointed and, therefore, that they are entitled to retain the compensation paid to them. However, the periods following the expiration of their appointments may not be considered as creditable service for leave accrual purposes.

BACKGROUND

Ms. Cynthia S. Browning. Ms. Browning works in the FAA's Alaskan Region as a Human Resource Assistant. The agency first appointed her on December 12, 1989, under the special authority that permits the noncompetitive employment of individuals who are at a severe disadvantage in obtaining employment because of certain disabilities, but who are certified able to function in the position to which they will be appointed. 5 C.F.R. § 213.3202(k). Appointments under this authority are limited to 2 years. Id.

Although the authority for Ms. Browning's appointment expired on December 11, 1991, Ms. Browning continued to serve in her position. The agency states that regional personnel had failed to put a "not to exceed" date on her appointment, and, consequently, the agency did not discover that her appointment had expired until it did a general review of appointments under special authorities. Subsequently, on August 9, 1992, the agency competitively appointed Ms. Browning to a permanent position.

Ms. Charlie L. Cranford. The FAA first appointed Ms. Cranford to a position in the Alaskan Region on May 21, 1989. Although the agency intended to appoint Ms. Cranford under the same authority used for Ms. Browning's first appointment, the agency erroneously appointed her under 5 C.F.R. § 213.3102(u), which permits noncompetitive appointments for a different category of disabled individuals. Appointments under this authority also have a 2-year limit.

Again, the agency failed to act on Ms. Cranford's appointment at the end of the 2-year period, and the employee continued to serve in her position. After discovering the error during its general review of special appointments, the agency competitively appointed Ms. Cranford to a permanent position on June 28, 1992.

The FAA submitted both cases to the Office of Personnel Management (OPM), requesting that OPM grant a variation from the regulatory time limits so that the employees' service between appointments would be creditable. See 5 C.F.R. § 5.1 (1995). OPM advised the FAA to first submit the matter to our Office and stated that, if we could not grant full relief, the FAA could resubmit its request for a variation to OPM.

OPINION

A de facto employee performs the duties of a position with apparent right and under color of appointment and claim of title to such position. J. Kenneth Blackwell, B-257669, Dec. 8, 1994, and cases cited therein. An individual may be considered a de facto employee and paid for the reasonable value of his services notwithstanding the lack of a valid appointment, provided the individual was acting

under color of authority and in good faith with the reasonable expectation of compensation. Id. Applying these rules, we have held that individuals who work beyond the expiration of their appointments because of administrative error and without fault may be considered de facto employees and paid for the reasonable value of their services. David J. McCullough, B-198238, June 5, 1980; Timothy P. Connolly, B-186229, June 8, 1977.

The determination whether an individual may receive service credit for leave purposes depends on whether the individual was serving under an appointment. A de facto employee serving under an appointment that is later found to be defective may receive leave credit, unless the appointment was made in violation of an absolute statutory bar or the employee was guilty of fraud. McCullough, supra; Victor M. Valdez, 58 Comp. Gen. 734 (1979). However, an individual who serves without an appointment or after the expiration of an appointment may not receive leave credit. While such individuals may be paid for the reasonable value of their services, they are not considered "employees" for leave purposes under 5 U.S.C. § 6301 (1994). McCullough and Valdez, supra.

The record shows that both Ms. Browning and Ms. Cranford met the requirements for de facto employee status. Ms. Cranford's initial appointment was executed improperly because of an administrative error, and the agency states that it was solely at fault in failing to take action at the end of the employees' 2-year appointments. Further, the record shows that both individuals continued to work in good faith until the agency discovered its errors and appointed them to permanent positions. Under these circumstances, both individuals may be paid for their services as de facto employees.

Ms. Browning's period of de facto service began upon the expiration of her 2-year appointment on December 11, 1991, and extended until she was appointed to a permanent position on August 9, 1992. For this period, Ms. Browning may retain the salary payments she received. However, as explained above, Ms. Browning was not an "employee" for purposes of the leave laws during this period and, therefore, she is not entitled to service credit for purposes of leave accrual.

Ms. Cranford had two periods of de facto service. The first period was when she served under the erroneous 2-year appointment from May 21, 1989, through May 20, 1991. For this period, Ms. Cranford may retain her salary and receive service credit for leave purposes. Ms. Cranford also may be paid as a de facto employee for the period between the expiration of her appointment and June 28, 1992, the date she was appointed to a permanent position. However, the time between Ms. Cranford's appointments is not creditable service for leave purposes.

Accordingly, both employees may retain compensation for the services they performed as de facto employees, but they may not be credited with leave for the periods between their appointments.[1]

/s/Seymour Efros
for Robert P. Murphy
General Counsel

[1]As noted previously, OPM advised FAA that it could renew its request for a variation in these circumstances.