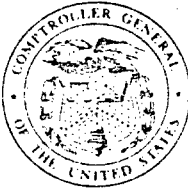


DECISION

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

60763

FILE: B-183328

DATE: APR 16 1976

MATTER OF: George D. Midgett Jr. - Compensation for
employment in violation of appointment
authority

DIGEST:

Small Business Administration employee was removed from his position pursuant to a direction by Civil Service Commission that his Temporary Veterans Readjustment Appointment violated 5 CFR 316.402(b)(7). Employee is, nevertheless, to be considered as a de facto employee and, as such, is entitled to retain salary and lump-sum payment for annual leave accrued during period of his employment. Questions concerning Federal Group Life Insurance and Civil Service Retirement Law should be addressed to the Civil Service Commission.

99058

This action involves a request by the Acting Regional Director, Region VIII of the Small Business Administration (SBA) concerning whether compensation paid to an employee must be recovered where the Civil Service Commission determines that the appointment of the employee was in violation of appointment authority. Specifically, the Acting Regional Director requests a decision regarding the employee's legal entitlement to (1) retain the salary he has been paid during his appointment in the Small Business Administration (SBA) which was in violation of a Civil Service regulation; (2) retain his life insurance and Civil Service Retirement coverage for that period; and (3) receive credit for that period of service for leave and retirement purposes.

Mr. George D. Midgett Jr. was hired by the SBA under a Temporary Veterans Readjustment Appointment (VRA). He assumed this position without a break in service from a permanent VRA at the Department of Transportation. At the time, he was told by Mr. Barr, an area Veterans Readjustment Coordinator of the Civil Service Commission, that he could convert back to permanent VRA at any time and he was referred for consideration to other agencies recruiting for permanent VRA's. Subsequently, however, when SBA attempted to convert Mr. Midgett to a permanent position, it was told that this could not be done. Furthermore, SBA was told that since

Mr. Midgett's appointment was in violation of SBA's appointment authority he had to be removed from his temporary VRA position.

Civil Service Commission regulations provide that an agency must select temporary limited appointees from an appropriate register. 5 CFR 316.402(b)(7). The exception to this rule for certain veterans applies only if the appointee has "completed not more than 14 years of education." 5 CFR 316.402(b)(ii). Since Mr. Midgett had more than 14 years education at the time he received his temporary VRA, the Civil Service Commission determined that his appointment was in violation of appointment authority, even though he was transferring from a permanent position.

The failure of SBA to conform with the Civil Service Commission regulation concerning temporary appointments, as interpreted by the Civil Service Commission, did not render the appointment void ab initio, but voidable only. See 37 Comp. Gen. 483, 485 (1958). Thus we are of the opinion that Mr. Midgett was a de facto officer of the Government. We have defined a de facto officer as follows:

"An officer 'de facto' is one who performs the duties of an office with apparent right and under color of an appointment and claim of title to such office. That is, where there is an office to be filled, and one acting under color of authority fills said office and discharges its duties, his actions are those of an officer 'de facto' * * *." 30 Comp. Gen. 228, 229 (1950). See also 55 Comp. Gen. 109 (1975)

The employee in the present case satisfies the above-quoted definition of a de facto employee. The record shows that the employee, Mr. Midgett, was paid due to a good faith belief by the disbursing officer that Mr. Midgett qualified for a temporary VRA. Furthermore, the record shows that the employee served in the good faith belief that he was entitled to hold the position to which he had been appointed, and there is no indication of fraud on his part.

Since Mr. Midgett was a de facto employee during the period from his appointment on June 2, 1974, with SBA until his removal on February 18, 1975, he was entitled to that compensation which he would have received had he been a duly-appointed employee. See 37 Comp. Gen. 483, 485 (1958). Since these payments have already been made by SBA to Mr. Midgett, no further action is necessary on SBA's part.

B-183328

Under the Federal Group Life Insurance Law, 5 U.S.C. §§ 8701-8716, the Civil Service Commission may issue regulations which prescribe the time at which and the conditions under which an employee is eligible for coverage. 5 U.S.C. § 8716(b). Regarding creditable service for accrual of annual leave, 5 U.S.C. § 6303a provides that in determining years of service, an employee is entitled to credit for all service creditable under section 8332 of title 5 of the United States Code, for the purposes of annuity under subchapter III of chapter 83 of title 5. Claims for Civil Service Retirement benefits are within the jurisdiction of the Civil Service Commission. The authority of the Commission in that regard extends to determinations of the amount of service credit an employee may receive under 5 U.S.C. § 8332.

We suggest that the questions concerning the application of the Federal Group Life Insurance Law and the Civil Service Retirement Law be addressed to the Civil Service Commission at the following address:

Bureau of Retirement, Insurance, and
Occupational Health
United States Civil Service Commission
1900 E Street, N.W.
Washington, D.C. 20415

R.F. KELLER

Deputy Comptroller General
of the United States