

DECISION



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

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FILE: D-185443

DATE: AUG 4 1976

MATTER OF: Humberto Aguirre - Lump-sum annual leave  
payment

**DIGEST:** Employee of Community Services Administration made numerous significant misrepresentations in his application for employment and in several personal qualifications forms filed with agency in connection with salaries received in prior positions, educational background, and time periods reported at prior job assignments. Where incorrect information supplied agency affected grade and salary, claimant is de facto employee and, therefore, not entitled to unpaid compensation or lump-sum annual leave. Because misrepresentation is involved, good faith is lacking, and claimant does not fall within exception of 52 Comp. Gen. 700 (1973) that permits payment of compensation to de facto employees after termination.

This matter involves a request dated November 25, 1975, from Roy B. Hogg, an authorized certifying officer of the Community Services Administration (CSA), formerly the Office of Economic Opportunity (OEO), for an advance decision as to whether a claim submitted by Humberto Aguirre for a lump-sum annual leave payment in the amount of \$3,434.76, representing 252 hours of accrued annual leave, may be certified for payment.

The record shows that Mr. Aguirre was first employed as a consultant for the OEO on May 3, 1965. In applying for the position he executed a Standard Form 60, "Application for Federal Employment (Short Form)," which was signed by him on April 14, 1965. On September 15, 1968, Mr. Aguirre was assigned as the OEO Coordinator to the U.S. Mexican Border Commission. In applying for that position he submitted a "Personal Qualifications Statement" (Standard Form 171) which he signed on June 9, 1968. Mr. Aguirre resigned the coordinator position effective December 13, 1968, to accept employment in the private business sector. On February 12, 1973, Mr. Aguirre was reemployed by the OEO as an expert, and on that date he completed and signed a Standard Form 171. On April 19, 1973, Mr. Aguirre completed and signed yet another Standard Form 171 enlarging upon the

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representations he had made on the Standard Form 171 signed on February 12, 1973. Shortly thereafter a dispute arose between the CSA and union officials as to whether the position to which Mr. Aguirre was appointed (Special Assistant, May 1973) should have been posted according to provisions of the contract between CSA and Local 2677 of the National Council of CSA locals. The matter was arbitrated, and on June 8, 1975, the arbitrator ruled that the position should have been posted, that Mr. Aguirre was improperly appointed, and that the position held by Mr. Aguirre should be vacated. The arbitrator also agreed with the union's charges that Mr. Aguirre had made certain misrepresentations on the several application forms he had completed and signed during his tenure with CEO/CSA. Arbitrator Block stated, "Significant disparities appear on both Mr. Aguirre's application form with respect to prior employment and on the Employer's documents with respect to his placement." Subsequently, Mr. Aguirre resigned his position with CSA effective July 31, 1975.

CSA's Inspection Division conducted an investigation into allegations submitted by officials of Local 2677 that Mr. Aguirre had furnished the agency with personal qualifications forms containing inaccurate and misleading information. As a result of this investigation, it was determined that the forms contained major conflicts when compared with CSA's personnel files and the information obtained as the result of the investigation. These conflicts appeared in items pertaining to educational background, in time periods reported for various job assignments, and in salaries reportedly paid by previous employers.

It appears that Mr. Aguirre generally reported his salaries earned at prior jobs to be significantly above the salaries actually received at those positions. He also represented that he had earned a Master's Degree in Education in 1963, when in reality he had neither completed the courses required nor had he been awarded such a degree. Numerous other significant misrepresentations were discovered by the investigation. The case was referred to the United States Department of Justice but because of the delay between the making of the misrepresentations and their discovery, prosecution was declined.

In view of the above-stated facts, the authorized certifying officer questions whether Mr. Aguirre is entitled to unpaid

salary and lump-sum annual leave payments when incorrect information which affected his grade and salary had been furnished to CSA in the various employment forms.

The question to be determined is whether Mr. Aguirre is to be considered a de facto employee during the period of his employment or whether the falsifications in his application for employment and personal qualifications forms makes his employment contract voidable at the option of the Government.

In 38 Comp. Gen. 175<sup>V</sup>(1958), we distinguished between misrepresentations made by applicants on the basis of whether the appointment could have been made "but for" the misrepresentations. Where the appointment would not have been influenced by knowledge of the true facts, such an appointment is not void ab initio but rather is voidable at the discretion of the reviewing authority. However, misrepresentation of crucial facts essential for the position would have an influence on the appointment and would render the appointment void ab initio. B-184611, October 2, 1975. In such cases the employee may be regarded as a de facto employee and, in the absence of a statutory prohibition, may retain that pay which has already been received by him, but a de facto employee has no enforceable right to compensation that has not yet been paid to him. B-184611, supra.

In the present case the misrepresentations are significant in that they might very well have precluded employment had the truth been known to CSA officials. This is especially likely in view of the fact that the case was referred to the Justice Department for possible prosecution even though the case was not found to be attractive for prosecution due to the long delay between the making of the false statements and their discovery. Moreover, misstatements as to educational degrees and prior salaries received certainly had an influence upon the appointment and the salary received by Mr. Aguirre.

In a recent decision we extended the de facto rule and allowed compensation to be paid even after termination to a de facto employee. See 52 Comp. Gen. 700<sup>V</sup>(1973). In allowing payment we referred to recent statutes, such as 5 U.S.C. 5584<sup>V</sup> (1970), permitting administrative adjustment where administrative error results in overpayments to employees. That statute,

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however, specifically provides that relief may not be granted if, in connection with the claim, there is an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee concerned. In the instant case Mr. Aguirre misrepresented himself numerous times on significant matters, and, therefore, he cannot be said to have acted in good faith. Consequently, the rule of 52 Comp. Gen. 700 is not applicable to the present claim.

Accordingly, the claim presented by Mr. Aguirre for \$3,434.76 in accrued annual leave, and unpaid salary if any, may not properly be certified for payment.

R. F. Keller  
Deputy, Comptroller General  
of the United States

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