Goddard C.P.

DECISION

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

04630

FILE: B-188574 DATE: December 29, 1977

MATTER OF: Jackie R. Smarts - De Facto Employee

DIGEST: Employee who worked with Army 40 hours prior to the Army's discovery that she had not been processed by Personnel Office may not be retroactively appointed. In view of the fact that the Army intended that the employee be appointed the day she started work and since employee acted in good faith in filling the office and performing the duties of the office to which the Army intended to appoint her and to which it did subsequently appoint her, she may be compensated for the services rendered as a de facto employee.

This decision is at the request of Lieutenant Colonel C. G. Nieman, United States Air Force, Chief, Accounting and Finance Branch, Headquarters Warner Robins Air Logistics Center, Robins Air Force Base, Georgia 31098, and concerns the propriety of making the appointment of Ms. Jackie R. Smarts, an employee of the Air Force, retroactive.

The facts in the case are stated by Colonel Nieman as follows:

"Ms. Jackie R. Smarts is a general schedule employee recently hired along with several other part-time students on excepted service appointments under Schedule A. Ms. Smarts was the only one of the group who had not worked before and was the only one whose employing organization did not desire her to start work soon. On 7 October 1976, it was agreed among the employment technician, the employing organization, and Ms. Smarts that she would begin work after the current school quarter ended (the last day of school was Friday, 19 November 1976). The file shows that in lieu of the specific instructions that the other students were given to report to the Employment Office for taking an oath of office and other processing, Ms. Smarts was instructed to telephone the employment technician on the following Wednesday, 13 October 1976,

presumably to receive instructions. She telephoned on 13, 14 and 12 October, but he was not in. She reported to the employing organization for duty at 0800 hours on 23 November 1976, and worked forty hours before it was discovered that she had not been properly processed in. The oath of office was thereupon administered and the appointment affidavit made on 6 December 1976. The appointment purports to be effective 6 December 1976. Ms. Smarts now claims pay at the lowest GS-01 rate, with appropriate deductions, for the forty hours worked from 21 November to 4 December 1976, plus 3 1/4 hours holiday leave for 25 November 1976.

* * * * *

"* * * In the instant case, the Employment Office is not able to state with any certainty what specific instructions were given to Ms. Smarts with regard to processing. She attempted to comply with the instructions that she acknowledges receiving but stopped short of a successful conclusion, although she apparently did not know what that should be. She reported for her first day of duty at 0800 hours, earlier than the start of the Employment Office's duty day at 0810, and she did not have the 'employment package' of documents without which the employing organization could not properly begin to administer an employee, which should have strongly suggested to the employing organization that Ms. Smarts was under a misapprehension as to having been processed in.* * *"

Colonel Nieman asks whether our decision 55 Comp. Gen. 109 (1975) is applicable here, therefore allowing Ms. Smarts to be paid compensation for the week she worked prior to her official appointment and prior to her having taken the oath. In this regard he states:

"In 55 C. G. 109, it is not clear whether the contemplated appointment, if ultimately issued, would have been dated retroactive to the beginning date of the services rendered, nor is it shown

whether an oath of office was taken or required to be taken before payment was made. Consequently, your decision is requested on the following questions.

"a. May an appointment be dated retroactive to the commencement date of services where all interested parties intended that the appointment be effective on that date so as to entitle the employee to compensation from that date?

"b. Is the ruling in 21 C. G. 817 (1942) to the effect that the oath, when executed, will relate back to the date of entrance on duty applicable to the instant case?

"c. If the answer to a or b above is negative, may the ruling in 55 C. G. 109 be applied to this case so as to entitle the employee to the compensation claimed."

Decision 55 Comp. Gen. 109 (1975) involved a situation in which an individual, who was never appointed to the position in which he worked, was found to be a de facto officer and was thus entitled to compensation for his services. However, the finding that an individual is a de facto officer or employee should not be misunderstood as meaning he has been retroactively appointed to the position in which he worked. Rather, the rule is that even though an employee may not be retroactively appointed, he may yet receive compensation for his services if he is found to be a de facto employee. In Matter of Keel, B-188424, March 22, 1977, the distinction between de facto officers from those retroactively appointed, was made clear.

In Keel, we pointed out that personnel actions, including appointments, cannot be made retroactively effective unless clerical or administrative errors occurred that (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation, or policy if not adjusted retroactively. See 54 Comp. Gen. 888 (1975) and decisions cited therein. In Ms. Smarts' case, as in Keel, we do not find that the facts satisfy any of the three criterion set forth above

so that an exception to our rule generally precluding retroactive appointments may be allowed. Hence, there is no legal basis for allowing Ms. Smarts' appointment to be made retroactively effective to the date she entered on duty with the Army. 20 Comp. Gen. 267 (1940). Keel, supra.

As in Keel, however, for further consideration is whether Ms. Smarts, even though she may not be retroactively appointed, may be considered a de facto employee so that she may be paid the reasonable value of her services for the time she was on duty prior to her official appointment. A de facto officer is defined as "* * * 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).

There is no question that Ms. Smarts filled the office, discharged its duties, and did so with the approval of her supervisors. That Ms. Smarts did so in good faith and under color of authority is also unquestioned as both the Department of the Army and Ms. Smarts agreed that she fill the office after her current school quarter ended and she did appear for duty, as was contemplated, on the week following the last day of the school quarter. Therefore, although she was expected for work the day she arrived, she failed to first go through the administrative processing which would have properly appointed her to the position in which she worked. That she did not first go to the Personnel Office for processing does not imply any fault on Ms. Smarts' part given the fact that as a student and new employee she would hardly be familiar with Federal employment procedures, especially in view of the Army's confusing instructions to her.

In 55 Comp. Gen. 109 (1975) we acknowledged that the de facto rule had been extended by 52 Comp. Gen. 700 (1973) to permit payment, even after termination, of the reasonable value of services rendered by persons who served in good faith. Accordingly, Ms. Smarts may be compensated for the reasonable value of the services she rendered while in a de facto status. The reasonable value of the service rendered by Ms. Smarts may be established at the rate of compensation set for the position to which she was appointed on December 6, 1976. See Keel, supra.

That Ms. Smarts did not take the oath of office until 1 week after entering on duty is no bar to her being paid as the oath, when taken, may relate back to the date of the acceptance of the appointment in the absence of any restriction in the appointment itself. 4 Comp. Gen. 845 (1925); 21 Comp. Gen. 817 (1942); and United States v. Flanders, 112 U.S. 88 (1884).

With respect to the 3-1/4 hours of holiday leave which Ms. Smarts is claiming, it appears that Ms. Smarts was scheduled to work, but did not work the 3-1/4 hours on November 25, 1976, the Thanksgiving holiday.

We do not consider that the rule that a de facto employee is entitled to the reasonable value of services rendered limits the employee to his basic compensation only. Rather, the reasonable value of his services would include premium pay including holiday pay which he would normally receive as part of his basic compensation package. Accordingly, Ms. Smarts may also be paid for the 3-1/4 hours of holiday pay which she claims.

Acting Comptroller General
of the United States