

17267

Bolesford

GAO

United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-191977 (J)

March 9, 1981

Entitlement to Service Credit by Erroneously Appointed Employee

Margery Waxman, General Counsel
Office of Personnel Management
Washington, D.C. 20415

Dear Ms. Waxman:

This is in response to your request for clarification of Victor M. Valdez, 58 Comp. Gen. 734 (B-191977, August 17, 1979). In that decision we held that when it is discovered that an employee has been erroneously appointed, he is entitled to his unpaid compensation and to credit for good faith service for purposes of accrual of annual leave and payment of lump-sum annual leave upon separation, unless (1) the appointment was made in violation of an absolute statutory prohibition or (2) the employee was guilty of fraud or deliberately misrepresented or falsified a material matter.

In our prior cases, an employee's entitlements depended on whether his appointment was void or voidable. Where an appointment was "void" but the invalidity did not result from an absolute statutory bar and there was a legally authorized and existing position, we considered the employee to be a de facto employee, entitled to retain compensation already received. In 52 Comp. Gen. 700 (1973), we extended our de facto rule to permit payment for the reasonable value of services to persons who served in good faith so as to allow such persons reimbursement for unpaid compensation. On the other hand when an employee served under a "voidable" appointment, we held that the de facto rule was not involved and he was entitled to earned compensation and all employee benefits including service credit.



015879

B-191977

[Valdez differs from our prior decisions in that we discarded the void/voidable test and, for the first time, allowed service credit for leave accrual purposes and a lump-sum payment for accrued annual leave.]

This change was initiated by a letter dated September 20, 1978, from Mr. H. Patrick Swygert, then General Counsel of the Civil Service Commission, in which he outlined a proposal to allow service credit for retirement and other purposes for periods served under erroneous appointments. In light of this proposal Mr. Swygert asked whether the Comptroller General would reconsider his position that de facto employees are not entitled to lump-sum payments for annual leave because it would be inconsistent to allow service credit for retirement and other purposes while disallowing it for annual leave.

In preparing our response we conducted a thorough review of our cases which revealed inconsistencies in the application of the void/voidable test and led us to the decision to discard that test. We also concluded that we would allow a lump-sum payment for annual leave. Previously, payment of lump-sum annual leave had been denied on the basis that a de facto employee was not an "employee" within the meaning of 5 U.S.C. § 2105 and therefore did not accrue annual leave during the de facto period. We noted that 5 U.S.C. § 6301 provides that for leave purposes an "employee" means an employee as defined by 5 U.S.C. § 2105 which is the same definition of employee used for Civil Service retirement purposes as provided for by 5 U.S.C. § 8331. As a result, we agreed that it would be inconsistent to consider an individual as an employee for one purpose but not the other.

Your first question concerning Valdez is whether we intended to limit that decision to instances in which separation is required. In that connection, you noted that separation is necessary only in the event of a statutory bar to the initial appointment.

[We intended that Valdez would apply to all erroneous appointments except those prohibited by statute or those resulting from fraud or a material misrepresentation by the

B-191977

appointed individual. Thus, in those situations where, as we understand it, an agency has the option to regularize the appointment, we would expect Valdez to be applied.

When we referred to a statutory bar in Valdez we were contemplating specific statutes relating to appointments such as 5 U.S.C. § 3110 and appropriation acts prohibiting the use of funds to employees who lacked certain qualifications. When an individual's appointment is prohibited either by statute or an appropriation act, we do not believe he should receive unpaid compensation or service credit. In the past we required individuals appointed in violation of a statutory bar to refund compensation they had received but now such payments may be waived under 5 U.S.C. § 5584.

Your second question was whether we intended to limit the application of Valdez to initial appointments. In that decision, we were referring to initial appointments rather than any other personnel actions such as promotions. In the past, however, we have applied the de facto rule in connection with erroneous promotions as well as erroneous appointments. See 28 Comp. Gen. 514 (1949). That decision was issued before the enactment of the waiver statute. We are presently considering whether to continue to apply the de facto rule in cases of erroneous promotions and would appreciate your comments on the subject.

Your final question is whether, in connection with Valdez, we intended to limit our jurisdiction to pay matters, such as entitlement to unpaid compensation, lump-sum payment for unused leave upon separation, and credit for purposes of accrual of annual leave. We recognize that OPM has jurisdiction over retirement and other employee benefits mentioned in your letter and had no intention of ruling in those areas.

However, under Valdez we would allow unpaid compensation, including lump sum leave payments (thereby necessarily according the individual service credit for leave accrual purposes) regardless of whether an individual was separated so long as there was no statutory bar, fraud, or material misrepresentation involved. We are concerned with the inconsistency

B-191977

which will result if OPM does not allow service credit for other purposes for those same individuals.

We believe that it may be useful for representatives of our Offices to meet in order to further exchange views on this area.

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel