

Disposal

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**DECISION**



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

FILE: B-196940

DATE: December 29, 1980

MATTER OF: William Devine, Jr. - [Compensation for Services Prior to Appointment]

DIGEST: Intermittent consultant of Department of Energy (DOE) who worked beyond his appointment limitation, relying on past practices with Energy Research and Development Administration (ERDA) (before ERDA became part of DOE) and at request of Director of Uranium Resources and Enrichment Division, and who was subsequently notified that DOE could not make retroactive appointments, is not entitled to compensation beyond date of such notification.

This action is in response to the request of Jack E. Hobbs, Controller, Department of Energy (DOE), for an advance decision on whether William Devine, Jr. is entitled to compensation for consulting services performed prior to his appointment on January 16, 1978. For the following reasons Mr. Devine is entitled to compensation for the period of October 3 through October 21, 1977, but not for the period of October 22, 1977, to the time of his official appointment.

Mr. Devine's previous appointment as an intermittent consultant with the Energy Research and Development Administration (ERDA) expired September 30, 1977. When ERDA became a part of DOE on October 1, 1977, Mr. Devine, relying on past practices with ERDA and at the request of the Director of the Uranium Resources and Enrichment Division, continued to provide services to DOE. The Division of Personnel, on October 21, 1977, notified Mr. Devine and the Uranium Resources and Enrichment Division that DOE could not retroactively appoint consultants and, therefore, Mr. Devine should not be working. Mr. Devine apparently expected compensation at least through November 2, 1977, since a commitment had already been made to him up to that date prior to the time he was informed that he should not be working. Mr. Devine continued to work until January 12, 1978, with no expectation of reimbursement. His new appointment was effective January 16, 1978.

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The Director of Administration, DOE, sent a memo to the Director of the Uranium Resources and Enrichment Division on September 5, 1979, in which he acknowledged Mr. Devine's services for the entire period which were performed "at the request of Resource Applications (RA) officials, in spite of both oral and written communications from Personnel that he should not work without an appointment after October 21, 1977." The memo went on to say that the Director and his staff "feel that the services were performed in good faith and we see no element of fraud." Although a commitment was made only through November 2, 1977, the Director of Administration recommends payment for all services rendered since the law forbids accepting voluntary services of this nature.

If Mr. Devine was a de facto employee, under our previous decisions, he may be paid for the reasonable value of his services for the period of his service prior to his official appointment. A de facto officer or employee is one who performs the duties of an office or position with apparent right and under color of an appointment and claim of title to such office or position. Where there is an office or position to be filled, and one acting under color of authority fills the office or position, performs the duties, and has a reasonable expectation of payment, his actions are those of a de facto officer or employee. 55 Comp. Gen. 109 (1975); 52 id. 700 (1973); Dr. Frank von Hippel, B-196088, November 1, 1979; William A. Keel, Jr., et al., B-188424, March 22, 1977.

Mr. Devine continued to provide consulting services for DOE relying on past practices with ERDA and at the request of the Director of the Uranium Resources and Enrichment Division. It was reasonable, and in good faith, for Mr. Devine to do so. The record shows that previous appointments of Mr. Devine, as an intermittent consultant for ERDA, were officially made after the time he had already begun to provide his services. For example, the letter of appointment to Mr. Devine for January 20 to June 30, 1975, is dated February 10, 1975; a modification of appointment for the period April 22 to September 30, 1977, is dated August 2, 1977. Thus, until October 21, 1977, when he received notice that DOE could not retroactively appoint consultants, there was no reason for

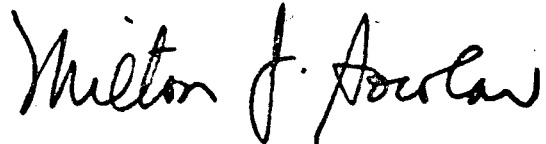
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Mr. Devine to believe otherwise. Therefore, Mr. Devine was a de facto employee from October 3 through October 21, 1977, and he may be paid for services rendered during that period.

Mr. Devine was not a de facto employee from October 22, 1977, through his official appointment on January 16, 1978. Both he and the Director with whom he worked knew on October 21, 1977, that he should not be working without an appointment. Notwithstanding this knowledge, and with no expectation of compensation (at least not after November 2, 1977), Mr. Devine continued to work until his official appointment. In addition, on October 21, 1977, DOE issued a memo providing interim instructions for requesting consultant appointments. However, other than the fact that Mr. Devine was officially appointed on January 16, 1978, there is no evidence in the record which reports any attempt to appoint Mr. Devine earlier than that date. We conclude that Mr. Devine does not qualify as a de facto employee from October 22, 1977, to the time of his official appointment.

Accordingly, payment may not be made to Mr. Devine for services after October 21, 1977, to the date of his appointment, January 16, 1978.

As noted above, the Director of Administration suggests that Mr. Devine should be paid for the entire period because the law forbids the acceptance of voluntary services. After careful consideration of the statute to which the Director apparently refers, 31 U.S.C. § 665(b), we conclude it does not provide authority for payment to Mr. Devine for his services rendered after October 21, 1977.



For the Comptroller General  
of the United States