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DECISION



21597
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-204266

DATE: April 22, 1982

MATTER OF: Appointments - Nepotism

DIGEST: Individual appointed in violation of anti-nepotism provisions of title 5, United States Code, is not entitled to retain salary received or to the payment of unpaid salary since 5 U.S.C. § 3110 (Supp. III, 1979) expressly prohibits the payment of pay from the Treasury where an appointment violates that provision of law. However, waiver of erroneous salary payments received is granted under 5 U.S.C. § 5584 (1976) since there is no indication that the individual was at fault in the matter. In addition, the individual is entitled to retain payment of travel expenses received and to payment of unpaid travel expenses since the prohibition contained in 5 U.S.C. § 3110 only applies to pay or compensation.

This action concerns a request for an advance decision from the Acting Director, Personnel Division, of the Farmers Home Administration (Administration) as to whether an individual who was separated from her position as a result of a violation of the "anti-nepotism" provisions of title 5, United States Code, is entitled to the payment of unpaid compensation as well as compensation already received. In addition, the Administration asks whether the individual concerned is entitled to payment on a travel voucher and to retain reimbursement for travel expenses already received. While we hold that the employee is not entitled to salary received or to the payment of unpaid salary, she may retain the salary paid since those erroneous payments are waived under 5 U.S.C. § 5584. The employee may retain travel funds previously received and, if otherwise proper, may receive reimbursement of the unpaid voucher for expenses of official travel.

The record shows that the Office of the Special Counsel, Merit Systems Protection Board, conducted an investigation into allegations of nepotism, a prohibited personnel practice, involving the appointment of the individual concerned to a temporary position with the Administration. The Special Counsel's

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investigation showed that the employee's father, an employee with the Administration, violated the anti-nepotism provision set forth at 5 U.S.C. § 2302(b)(7) as added by section 101(a) of the Civil Service Reform Act of 1978, October 13, 1978, 92 Stat. 1111, 1113, by recommending her for appointment to the position of Construction Inspector. At the direction of the Special Counsel the Administration on May 21, 1981, terminated her appointment as an intermittent employee, grade GS-6.

We are advised by the Administration that it is withholding payment of the final salary in the gross amount of \$105.12 for her final pay period and it is also withholding payment of her final travel voucher in the amount of \$623.50. We are asked whether the employee is entitled to receive the unpaid salary and the unpaid claim for reimbursement of travel expenses. If not, the Administration asks whether it should take action to recover the monies which the individual has already received for salary and travel expenses. The Administration notes that due to her temporary status, she did not accrue leave.

The agency points out that the individual showed on her application that her father was employed by the United States Government and that she served the agency in good faith having had no reason to believe that her appointment was improper.

Subsection 2302(b)(7) of title 5, United States Code, which the individual's father was found to have violated, provides that "any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not with respect to such authority * * * appoint, employ, promote, advance or advocate for appointment, employment, promotion or advancement, in or to a civilian position, any individual who is a relative* * * of such employee, if such position is in the agency in which such employee is serving as a public official or * * * over which such employee exercises jurisdiction or control as such an official." The legislative history shows that this provision is a restatement of the "anti-nepotism" provision set forth at 5 U.S.C. § 3110 (Supp. III, 1979). See S. Rept. No. 95-969, 95th Cong. 2d Sess. 21 (1978).

Section 3110 of title 5 of the United States Code is similar to subsection 2302(b)(7) in terms of defining nepotism. It goes on to provide:

"An individual appointed, employed, promoted, or advanced in violation of this section is not entitled to pay, and money may not be paid from the Treasury as pay to an individual so appointed, employed, promoted, or advanced."

We have held that in view of the clear language of 5 U.S.C. § 3110 prohibiting the receipt of pay from Government funds by an individual "appointed" in violation of its provisions, such individual is not entitled to retain salary already received or salary yet unpaid. Matter of Grantham, B-186453, May 2, 1977. See Matter of Valdez, Jr., 58 Comp. Gen. 734 (1979) in which we held that an individual whose appointment is invalid because it is made in violation of an absolute statutory prohibition, unlike a de facto employee, is not entitled to receive unpaid compensation.

Accordingly, in view of the express statutory prohibition against payment of pay set forth at 5 U.S.C. § 3110, the employee is neither entitled to receipt of unpaid salary nor to payment of salary already received. The agency has advised that the employee has received payment of salary in excess of \$12,000.

Although the individual's appointment was contrary to law she may be considered an employee of the United States for purposes of the waiver authority set forth at 5 U.S.C. § 5584 (1976). B-174154, April 3, 1972. Section 5584 of title 5, United States Code, provides that erroneous payments of pay may be waived where collection of the erroneous payments of pay would be against equity and good conscience and not in the best interests of the United States. However, subsection (b) of that section prohibits the exercise of waiver authority by either the head of the agency or the Comptroller General, for claims of more than \$500:

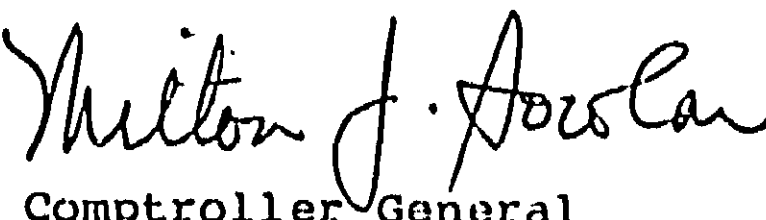
"(1) if in his opinion there exists, in connection with the claim, an indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim."

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As stated above, the agency has determined that the employee was unaware of the impropriety of her appointment and served the agency in good faith. Furthermore, the agency has advised that the employee did not reside with her father during the period of her employment and that it is not aware of any pecuniary dependency between the individual and her father. Since there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee, the erroneous payments of compensation she received are hereby waived.

Concerning the matter of the individual's entitlement to receive payment of travel expenses, there is nothing in either the language or legislative history of the "anti-nepotism" provision at 5 U.S.C. § 3310 which states or suggests that the word "pay" should be given a meaning beyond its ordinary and accepted sense. Generally, the word "pay" is defined as being remuneration or compensation for service rendered. See 53 Comp. Gen. 355 (1973) and 54 *id.* 210 (1974) regarding the use of the word "pay" in legislation relating to civil service employment. Thus, there is no statutory bar to the payment of expenses other than pay which may be made without regard to whether the individual has been properly appointed.

The authority to pay travel expenses is not limited to individuals appointed to Federal employment. Under 5 U.S.C. § 5701, an agency may pay the travel expenses of an individual serving without pay. We believe that an agency properly may find that an individual appointed in violation of 5 U.S.C. § 3310 falls within the purview of that authority. If the agency so determines, we would have no objection to the individual's retaining reimbursement for travel expenses already received and being paid the unpaid voucher for travel expenses, provided that such reimbursement is otherwise proper.

for 
Comptroller General
of the United States