

TUCOM/ASD
PM-I

DECISION



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

FILE: B-219565 **DATE:** February 11, 1986

MATTER OF: Marie L. Vaughn - Erroneous Promotion -
De Facto Employment

DIGEST:

A temporary employee was promoted to a competitive position at GS-4, step 1. It was later discovered that the promotion was erroneous since she did not have competitive status. However, she was retained in the position pending a request for a variation. The request was denied and she was returned to her prior position. Since she performed the duties of the GS-4 position, she is entitled to retain the pay of the GS-4 position as a de facto employee and is not indebted for the additional compensation received in that position.

This action is in response to a request for reconsideration of our Claims Group's March 4, 1985, denial of a waiver of overpayments made to Ms. Marie L. Vaughn. Ms. Vaughn requests waiver of \$679.02 in overpayments of pay she received between September 19, 1982, and May 28, 1983, based on an erroneous promotion. The Department of the Navy recommended approval of the waiver since Ms. Vaughn did, in fact, perform the higher level duties during the time she was erroneously promoted. Our Claims Group denied waiver on the ground that Ms. Vaughn was on notice since at least October 1982 that her promotion was erroneous and in violation of regulatory requirements for competitive promotion. We find that the issue of waiver need not be reached since Ms. Vaughn was entitled to retain the compensation received for the services performed as a de facto employee.

BACKGROUND

The record shows that in August 1982, Ms. Vaughn, a civilian employee of the Navy, applied under a Merit Promotion Announcement for promotion to the position of Budget Clerk, GS-4, step 1. She was selected for the vacancy and promoted to the position effective September 19, 1982. In October 1982, the Civilian Personnel Office (CPO) reviewed her official personnel folder and discovered that her

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promotion to the Budget Clerk position was erroneous and in violation of regulatory requirements for competitive promotions. Ms. Vaughn was not eligible to compete for promotion through merit promotion procedures since she was employed on September 8, 1980, on a temporary appointment pending establishment of a register in a Worker-Trainee position which did not confer either competitive status or eligibility for noncompetitive movement to other positions. According to the Navy, a meeting was held with Ms. Vaughn in October 1982 to inform her that she did not meet the regulatory requirements for competitive promotion. However, Ms. Vaughn was retained in the position of Budget Clerk, GS-4, step 1, pending the outcome of a request to the Naval Civilian Personnel Command (NCPC) by the CPO for a variation from the regulations to correct the erroneous action. On April 27, 1983, NCPC denied the variation request and directed that Ms. Vaughn be returned to her former position and tenure group. This action was taken on May 25, 1983. On June 17, 1983, a notification of indebtedness was sent to Ms. Vaughn stating that she was indebted to the United States for \$679.02 based on the overpayments she received due to her erroneous promotion. Ms. Vaughn subsequently sought waiver of the debt.

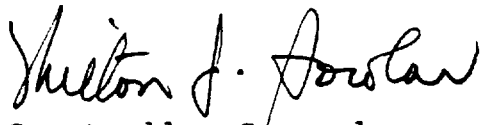
ANALYSIS

Where an appointment is invalid but the invalidity does not result from an absolute statutory bar, an individual who performs the duties of the position with apparent right and claim of title to the position is considered a de facto employee and is entitled to retain compensation already received. See 30 Comp. Gen. 228 (1950). Recoupment of such payments is only necessitated where there exists an absolute statutory bar which either expressly prohibits the payment of appropriated funds to the individual or requires refund by the individual. See Department of Labor, B-195279, September 26, 1979, and decisions cited. Under the de facto rule, the individual involved, generally, may retain only the salary payments he has received and is not entitled to be paid any balance of salary remaining due at the time the deficiencies in his employment were discovered and his employment terminated. However, we have extended the de facto rule to permit individuals to be paid accrued, unpaid compensation where they can establish that their services were rendered in good faith. See 52 Comp. Gen. 700 (1973); 55 Comp. Gen. 109 (1975); Victor M. Valdez, Jr., 58 Comp. Gen. 734 (1979).

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A promotion is a new appointment to a position of higher rank and pay. See B-168953, April 10, 1970. Ms. Vaughn's competitive promotion, therefore, was a new appointment to the Budget Clerk, GS-4, step 1, position. Her appointment was later found to be invalid because she did not meet the regulatory requirements for competitive promotion. However, Ms. Vaughn was retained in the position by the Navy pending a request for a variation from the regulations. Therefore, she performed the duties of the position under color of an appointment, with apparent right and claim of title to the position. Since the invalidity of her appointment did not result from an absolute statutory bar expressly prohibiting the payment of appropriated funds to her or requiring a refund from her, Ms. Vaughn is entitled to retain the pay of Budget Clerk, GS-4, step 1, as a de facto employee.

Therefore, the notice of indebtedness sent to Ms. Vaughn on June 17, 1983, was incorrect. Ms. Vaughn is, thus, entitled to retain the additional compensation of \$679.02 she received between September 19, 1982, and May 28, 1983.

for 
Comptroller General
of the United States