D88798

P/M-1

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

10,212

OFFICE OF GENERAL COUNSEL

IN REPLY REFER TO: B-192968 (JB)

MAY 17 1979

Do not make available to public reading

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

DLG00925

Dear Ms. Waxman:

This is in response to a letter dated September 20, 1978, from Mr. H. Patrick Swygert, then General Counsel of the Civil Service Commission, concerning service credit for erroneously appointed employees. Mr. Swygert reported that he had proposed to affected bureaus of the Commission that service credit be allowed for such employees where there is no absolute statutory bar to the appointment and where the employee has not deliberately misrepresented or falsified the facts. He asked whether the Comptroller General would reconsider his position that de facto employees are not entitled to lump-sum payments for annual leave in light of the Commission's proposal since it would be inconsistent to allow service credit for retirement and other purposes while disallowing it for annual leave.

In his letter Mr. Swygert cites James K. Saufley, B-189000, June 16, 1978, published at 57 Comp. Gen. 583 (1978). We there held that because a de facto employee is not an "employee" within the meaning of 5 U.S.C. 2105, he does not accrue annual leave during the de facto period so as to be entitled to a lump-sum payment.

If the Office of Personnel Management decides to allow an individual service credit for retirement purposes, we would no longer follow Saufley, supra, but would allow a lump-sum payment for any accrued annual leave. We note that 5 U.S.C. 8331 provides that for Civil Service retirement purposes an "employee" means an employee as defined by 5 U.S.C. 2105. Similarly, 5 U.S.C. 6301 provides that for leave purposes an "employee" is also defined by 5 U.S.C. 2105. Therefore, we agree that it would be inconsistent to consider an individual as an employee for one purpose but not the other. Furthermore, the statute concerning accrual of annual

dyb

Letter
505338

leave, 5 U.S.C. 6303, provides that in determining years of service an employee is entitled to credit for all service creditable under section 5 U.S.C. 8332.

With respect to Mr. Swygert's proposal, we assume that it applies only to individuals who have been erroneously appointed and not to those who have never been appointed. In 55 Comp. Gen. 109 (1975) we allowed payment to a claimant for the reasonable value of his services even though he had not been appointed. We stated that he was a de facto employee who served in good faith and without fraud and therefore, if he had been compensated, he could have retained that compensation under the de facto rule or recovery could have been waived under 5 U.S.C. 5584. Without appointment we do not feel that an individual meets the requirement of 5 U.S.C. 2105(a)(1) that to be an employee, an individual must be appointed. As a result, individuals without appointments cannot be considered employees for accrual of leave.

Mr. Swygert stated that the proposal to allow service credit except where falsification had occurred or a statutory bar existed, would obviate the need to determine whether the erroneous appointment was void or voidable. As he pointed out in a memo attached to his letter, where an appointment is void but the invalidity does not result from an absolute statutory bar and there is a legally authorized and existing position, the employee is considered to be a de facto employee and entitled to retain compensation already received. In 52 Comp. Gen. 700 (1973) we extended the de facto rule to permit payment for the reasonable value of services rendered by persons who served in good faith. When an employee serves under a voidable appointment, the de facto rule is not involved and he is entitled to earned compensation and to all employee benefits including service credit.

Mr. Swygert apparently wished to do away with the void or voidable test because he felt that it was difficult to determine whether an appointment was void or voidable. To point out the inconsistency in our decisions on the subject he cited 38 Comp. Gen. 175 (1958) and 37 Comp. Gen. 483 (1958). In the former case we stated:

> "As a general rule our view has been that falsification in an employee's application which does not involve an absolute bar to

> his employment does not render his employment void ab initio but voidable only. That is, if the true facts had been known at time of appointment, and if the appointment, nevertheless, within the discretion of the agency or the Civil Service could have been made, such appointment is to be treated as voidable. * * * In cases where the falsification in an employee's application involves an absolute bar to his employment we have held that the employment cannot be made the basis of a legal claim for services rendered thereunder. The employee is to be regarded as a de facto employee - not applicable in case of statutory prohibition - and as such is entitled to retain such payments as may have been made to him. He has no enforceable right to compensation that has not been paid * * * In the case of a statutory prohibition, however, the sum paid for the entire period of employment is for recovery."

In the latter case we held that the employment of a non-citizen in contravention of a Civil Service regulation precluding employment unless a person was a citizen or owed allegiance to the United States, made the appointment voidable rather than void. We cited 37 Comp. Gen. 483 in Matter of George D. Midgett, Jr. B-183328, April 16, 1976, where we held that an employee's Temporary Veterans Readjustment Appointment which violated Civil Service Commission regulation 5 C.F.R. 211.402(b)(7) was voidable. We then went on to state that the employee was in a de facto status. We now recognize that the latter determination was incorrect for as Mr. Swygert pointed out, the de facto status applies only to persons whose appointments are void.

We would like to point out that under the void or voidable test an employee who falsified facts relating to his desirability rather than his qualifications was entitled to all benefits since his appointment would be considered voidable. Under your proposal it seems no distinction would be made according to the degree of falsification. We believe your proposal is too restrictive. We

would be inclined to permit service credit where the falsification relates only to his desirability.

We also believe it would be helpful to define what is meant by a statutory bar. In 38 Comp. Gen. 175 when we stated that a de facto employee could retain payments already made to him except in the case of a statutory prohibition, we were referring to prohibitions in appropriations acts against the use of funds to pay employees who did not have certain qualifications. We have denied de facto status to an employee who held two offices contrary to 5 U.S.C. 62 (36 Comp. Gen. 803 (1957)). In our earlier cases employees denied a de facto status due to a statutory bar were required to refund the compensation they had received. Now, however, we waive such payments under 5 U.S.C. 5584. The Office of Personnel Management and the General Accounting Office should be using the same definition of statutory bar so that the situation would not arise where the Office of Personnel Management considered there to be a statutory bar rendering an employee ineligible for service credit while we considered the employee to be in a de facto status and entitled even to his unpaid compensation.

We support Mr. Swygert's proposal in principle but we think that it needs modification. We would like to work with you in resolution of this problem.

Sincerely yours,

MILTON SOCOLAR

Milton J. Socolar
General Counsel