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DECISION



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

FILE: B-194021

DATE: February 11, 1980

MATTER OF: Dr. David Pass - [Entitlement of Consultant to
Leave and Travel Expenses]

- DIGEST:**
1. Individual, who worked 80 or more hours during most of 13-month period he served as a consultant, claims entitlement to leave benefits. Although consultant worked along side of regular full-time employees, he did not serve regular tour of duty and is therefore not entitled to leave benefits. See Copp Collins, 58 Comp. Gen. 167 (1978).
 2. Consultant, who was appointed on intermittent basis, automatically becomes employed on temporary basis after 130 days of service. As a temporarily employed consultant he must bear the cost of travel between his residence and place of employment, as well as his expenses while at his official station. Erroneous travel payments must be collected and may not be waived. Harvey J. Nozick, B-187389, July 19, 1978. In addition, claim for attorney fees incurred in connection with this matter may not be allowed.

This decision is in response to the request of Mr. Larry E. Byrne, Director, Personnel Systems and Payroll Division, Department of Housing and Urban Development (HUD), concerning the entitlement of Dr. David Pass, a HUD employee, to annual and sick leave while he was previously employed by HUD as a consultant. The agency has also questioned Dr. Pass' entitlement to travel expenses during the period he was employed as a consultant.

Dr. Pass was employed by the New Communities Administration of HUD as a consultant from July 2, 1973 until August 18, 1974, when he received a permanent appointment with HUD. While serving as a consultant, Dr. Pass worked a full schedule during many pay periods, but the agency states there is no documentation indicating that he had an established regular tour of duty. For this reason and because the Standard Form 50 issued

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in 1973 upon Dr. Pass' appointment clearly stated "NO ANNUAL OR SICK LEAVE BENEFITS," the agency questions whether Dr. Pass may be credited with annual and sick leave.

With regard to Dr. Pass' entitlement to annual and sick leave, we have held that an expert or consultant who is employed under the authority of 5 U.S.C. § 3109 is entitled to annual and sick leave if he is eligible under the provisions of chapter 63, subchapter I, title 5, Unites States Code. See Copp Collins, 58 Comp. Gen. 167 (1978). For the purposes of this subchapter, an "employee" who is entitled to annual and sick leave does not include "a part-time employee who does not have an established regular tour of duty during an administrative workweek." See 5 U.S.C. § 6301(2)(B)(ii). The term "part-time employee" includes employees hired on an intermittent or when-actually-employed basis, and the term applies to experts and consultants serving on an intermittent basis. See Collins, supra, and decisions cited therein.

The mere fact that a person works 80 hours per pay period does not entitle him to leave benefits unless his work is pursuant to a regular tour of duty prescribed in advance. See 31 Comp Gen. 215 (1951); and John W. Matrau, B-191915, September 29, 1978. Our Office will look to the nature of the actual work performed and not the official job designation, in determining whether an employee has a regular tour of duty under which he is required to perform duty at a definite and certain time during each of the two administrative workweeks in a biweekly pay period pursuant to an established schedule. See Kenneth L. Nash, 57 Comp. Gen. 82 (1977).

Through his attorneys, Dr. Pass argues that he is entitled to leave benefits for the period from December 8, 1973 to June 8, 1974, during which he assumed the greater responsibilities of "project coordinator" with duties coextensive with those of regular full-time employees. He has submitted a proposed revision to his work statement issued December 26, 1973, reflecting those added responsibilities, which he claims required him to maintain day-to-day involvement with ongoing projects.

On the other hand, we are advised by HUD that this revised work statement was never approved because, as a consultant,

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Dr. Pass could not perform or supervise operating functions nor negotiate on behalf of the agency. Dr. Pass contends that he could meet his new responsibilities only insofar as he maintained a regular full-time tour of duty, but he concedes that he was not specifically ordered to report for duty on a regular basis.

The record before us does not clearly establish that Dr. Pass served a regular tour of duty under which he was required to perform duty at a definite and certain time during two administrative workweeks pursuant to an established schedule. See Nash, supra. Although Dr. Pass may have shared certain project responsibilities with regular full-time employees, that fact, in itself, does not entitle him to annual and sick leave benefits in the absence of evidence to show that he was required to work a regular tour of duty. Furthermore, as we held in Collins, supra, the agency's awareness that Dr. Pass was working substantially full-time may raise a question as to whether he was properly appointed on an intermittent basis. However, that awareness does not establish that Dr. Pass had a prescribed regular tour of duty. Therefore, we conclude that Dr. Pass is not entitled to annual or sick leave benefits for the period claimed.

The agency has also questioned whether Dr. Pass was properly reimbursed for travel expenses between his residence in New York and his official duty station, Washington, D.C., and whether he was properly paid per diem while in Washington during the period that he served as a consultant.

Through his attorneys, Dr. Pass claims that he was employed as a consultant by HUD from July 3, 1973 to August 18, 1974. Dr. Pass argues that he was never aware that his employment status changed from "intermittent" to "temporary" or that this designation affected his entitlement to travel expenses. He argues further that he should retain this travel reimbursement in view of the unique fact situation in this case and pursuant to his contract with HUD as evidenced by the travel orders issued July 13 and December 3, 1973. In the alternative, Dr. Pass argues that any erroneously paid travel expenses should be waived. Finally, Dr. Pass seeks reimbursement for attorney fees in connection with this case.

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During the period he served as a consultant, Dr. Pass' entitlement to travel expenses was governed by the following authority of 5 U.S.C. § 5703(b) (1970):

"An individual employed intermittently in the Government service as an expert or consultant and paid on a daily when-actually-employed basis may be allowed travel expenses under this subchapter while away from his home or regular place of business, including a per diem allowance under this subchapter while at his place of employment."

Intermittent employment is defined as occasional or irregular employment on programs, projects, problems or phases thereof requiring intermittent service. The Federal Personnel Manual, at chapter 304, S1-2a(5), specifically provides that "when an intermittent expert or consultant works more than one-half of full-time employment, i. e., he is paid for all or any part of a day for more than 130 days in a service year, his employment automatically ceases to be intermittent and becomes temporary." See Harvey J. Nozick, B-187389, July 19, 1978. There is no special authority to pay the travel and transportation expenses of an expert or consultant who is employed on a temporary rather than an intermittent basis, and such an individual, just as a permanent employee, must bear the cost of travel and transportation from his residence to his official station as well as his expenses while at his official station. See John P. Quillin, B-180698. August 19, 1974.

Although the Standard Form 50 documenting Dr. Pass' appointment on July 2, 1973, does not indicate whether he was employed intermittently or on a temporary basis, he was initially appointed for a period of only 3 months. For this reason and since there is no indication that he was initially expected to work a prescribed tour of duty, we find no basis to question transportation and per diem expenses paid to him as an intermittent consultant during the first 130 days of his employment. However, once Dr. Pass had worked 130 days from the date of his appointment on July 2, 1973, he could no longer be considered an intermittent consultant. As a temporarily employed consultant he was no longer entitled to travel expenses between his residence in New York and his place of duty in Washington,

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D. C., or to per diem while in Washington. The fact that travel orders issued to Dr. Pass may have indicated that New York was his official duty station does not serve to validate payments improperly made inasmuch as the record clearly indicates that Dr. Pass performed substantially all of his official duties in Washington.

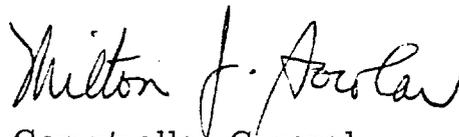
We note that effective July 2, 1974, Dr. Pass was reappointed as an intermittent consultant, and he served in that capacity until August 18, 1974. As an intermittent consultant, Dr. Pass was entitled to reimbursement of travel expenses under 5 U.S.C. § 5703(b) in this subsequent service year, and any payments he received during this period were proper. See Nozick, supra.

While the circumstances that resulted in overpayments of travel expenses being made to Dr. Pass appear to have been due in part to HUD's failure to exercise proper controls over its use of consulting services, there is no authority to waive the erroneous payments. Erroneous payments of travel and transportation expenses are clearly excluded from consideration under the waiver statute, 5 U.S.C. § 5584. See Nozick, supra. Although Dr. Pass was never informed that his entitlement to travel expenses changed during the period of his employment as a consultant, he is not therefore entitled to such benefits since it is well settled that the Government cannot be bound beyond the actual authority conferred upon its agents by statute or regulation. See M. Reza Fassihi, 54 Comp. Gen. 747 (1975), and court cases cited therein.

Finally, with regard to Dr. Pass' claim for attorney fees, we point out that the only authority for such an award would be under the Back Pay Act, 5 U.S.C. § 5596, as amended by section 702 of Pub. L. 95-494, approved October 13, 1978, 92 Stat. 1216. Under that statute an employee, who was found by an appropriate authority to have been affected by an unjustified or unwarranted personnel action, is entitled to reasonable attorney fees related to the personnel action. See 5 U.S.C. § 5596(b)(1)(A)(ii). There has been no determination that Dr. Pass has been affected by an unjustified or unwarranted personnel action, and we find no basis to award him attorney fees under this authority.

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Accordingly, we hold that Dr. Pass is not entitled to leave benefits and that he must repay erroneous travel expenses paid to him while he was temporarily employed as a consultant. Insofar as Dr. Pass' attorneys are correct in stating that overpayments of travel expenses were made to other consultants under similar circumstances, those overpayments should also be collected.

A handwritten signature in cursive script, reading "Milton F. Scovlan".

For the Comptroller General
of the United States