

**DECISION**

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

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**FILE:** B-216090**DATE:** February 12, 1985**MATTER OF:** Robert Lobato - Compensation as a De Facto  
Employee**DIGEST:**

1. An individual was offered a position as an expert for a presidential commission under 5 U.S.C. § 3109. He accepted and began working immediately at the request of the executive director of the commission pending completion of hiring procedures. The individual was never actually appointed because he subsequently rejected a formal offer of employment. However, since he began work in good faith and under color of authority, he is to be considered a de facto employee and may be paid the reasonable value of the services performed while in that status, the value of which may be established at the rate of compensation set for the expert position.
2. An individual, as a de facto employee, may be paid the reasonable value of the services rendered while in that status. However, if he is later notified, becomes aware, or has reason to believe that he has not been properly appointed or that he has no authority to perform the duties of the position, he ceases to be a de facto employee. It cannot be said that his work continuation is in good faith and sufficiently under color of authority so as to permit payment for services rendered beyond the date of notice.

This decision is in response to a request from the Personnel Officer, Office of the Secretary, United States Department of the Interior. It concerns the entitlement of Mr. Robert Lobato to be compensated as a de facto employee for services performed with the Presidential Commission on

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Indian Reservation Economies. We conclude that he may receive compensation for part of the period in question, for the following reasons.

#### BACKGROUND

By Executive Order 12401, January 14, 1983, the Presidential Commission on Indian Reservation Economies was established. The purpose of the Commission was to promote the development of strong private sector presence on Federally recognized Indian reservations, in order to reduce tribal dependence on Federal monies and programs and reduce Federal presence in tribal affairs. Commission funding, staffing, and other services and facilities were to be provided through the Office of the Secretary of the Interior.

The Executive Director of the Commission, Mr. Roy Sampsel, interviewed Mr. Robert Lobato and offered him employment with the Commission as an expert under 5 U.S.C. § 3109 (1982). Since the need for his services was immediate, a verbal request was made to the personnel management specialist of the Department of the Interior's Personnel Office, to meet with Mr. Lobato and complete all employment details as quickly as possible. That meeting was held on November 15, 1983.

During the course of that meeting, Mr. Lobato informed the personnel management specialist of several pertinent facts. The first was that although he was offered an appointment as an expert under 5 U.S.C. § 3109, he preferred an appointment which provided him with civil service benefits. The second was that he had already begun work on November 8 at the request of the Executive Director, Mr. Sampsel. Based on that information, Mr. Lobato was informed that he had yet to be officially appointed to a Federal position, that he should stop working until his appointment could be effected, and that he could not be paid for his services until so appointed. Mr. Sampsel and the Deputy Director were also advised that there was no authority to pay Mr. Lobato until appointed to a position.

As to the type of appointment to be given Mr. Lobato, it was decided that he would be given an excepted appointment under 5 C.F.R. § 213.3199(a) as Director, Program

Design and Assessment, for the Commission, at the grade GS-15, step 10, level. Mr. Sampsel requested that the appointment be made official as rapidly as possible and that every avenue be explored to compensate Mr. Lobato for services already performed.

An SF-52, Request for Personnel Action, was prepared by the Commission, to be effective December 20, 1983. It was received for action in the Division of Personnel Services, Department of the Interior, on December 6, 1983. However, Mr. Lobato decided not to accept employment with the Commission, and the appointment action was canceled on December 8, 1983.

By letter dated May 29, 1984, Mr. Lobato formally requested payment at \$244 per day for the services which he claims to have rendered to the Commission. His itemized bill refers to 4 days of service prior to the November 15th meeting, services on November 15th, and 15 days of service from then through December 8, 1983.

The agency expresses doubt that Mr. Lobato is entitled to payment for any service performed on and after November 15. However, they have suggested Mr. Lobato may be entitled to compensation prior to that date as a de facto employee based on our decisions in 55 Comp. Gen. 109 (1975), and B-193605, January 8, 1979.

#### DECISION

Although Mr. Lobato had been offered employment with the Commission, he was never officially employed by the Commission since the appointment offered was rejected by him and officially canceled prior to its effective date. Therefore, since he performed services for the Commission, his only entitlement to compensation for these services is that as a de facto employee.

We have defined a de facto officer or employee as an individual who performs the duties of an office or position with apparent right, under color of an appointment, and with claim of title to such office or position. Where there is an office or position to be filled and an individual who acts under color of authority fills the position and performs the duties, his actions are considered

to be that of a de facto officer or employee. See John F. Donnelly, B-193605, January 3, 1979, and decisions cited.

With regard to the matter of compensation for services performed, we have held that in the absence of a statute expressly prohibiting payment from appropriated funds to such an individual, or a statute requiring refund of monies already received, a de facto employee may be paid compensation equal to the reasonable value of the services rendered during the period of de facto employment. 18 Comp. Gen. 815 (1939); 52 Comp. Gen. 700 (1973); 55 Comp. Gen. 109 (1975). We have further ruled that the value of those services may be established at the rate of basic compensation set for the position to which appointed or to be appointed. Keel and Hernandez, B-188424, March 22, 1977.

According to the submission, the Executive Director, through the authority of Executive Order 12401, cited above, coordinates hiring activities with the Department of the Interior personnel to assure commission staff maintenance, with final decisions on staff hiring vested in the Executive Director. Apparently, the need for Mr. Lobato's services was so acute that the Executive Director authorized him to begin work immediately while personnel actions to effect his appointment as an expert, and later, as a Federal employee under an excepted appointment, were being completed. The agency submission states further that Mr. Lobato acted in concert with a senior economist at that early date to develop a comprehensive plan to identify problems and areas of concern, which would serve as a guide for work groups when conducting on-site reviews. Following approval of that work plan, he personally directed three of these work groups.

It seems reasonably evident that at the outset, Mr. Lobato performed the duties of the position for which employment was tendered and did so in good faith, based on the apparent authority of the Executive Director to so appoint and require him to begin work. Since Mr. Lobato did begin work immediately, he had every reason to believe that he had a right to that appointed position, that he had the authority to perform the duties required, and that he had a reasonable expectation that he would receive compensation for this work. Therefore, it is our view that

effective November 8, 1983, he became a de facto employee of the Commission. However, we do not believe Mr. Lobato remained a de facto employee for the entire period of his claim.

Implicit in the definition of de facto employee is that the individual assumes the position and performs the duties thereof, in good faith reliance that the person appointing him is authorized to appoint him at that time and require him to begin work. If an individual is notified, or becomes aware that he has not been properly appointed or has no authority to perform the duties of a particular position, it cannot be said that his work continuation is in good faith and sufficiently under color of authority so as to permit payment for services rendered thereafter. William Devine, Jr., B-196940, December 29, 1980.

In the present case, since Mr. Lobato had been made aware of the limitations regarding Federal employment and the payment of compensation on November 15, he is not entitled to be paid as a de facto employee thereafter.

Accordingly, we hold that Mr. Lobato may be considered a de facto employee for the period of November 8-15, 1983, and may be compensated at the rate of compensation he would have received as an expert under 5 U.S.C. § 3109. However, his claim for compensation for services rendered beyond November 15, 1983, is denied.

*for*   
Comptroller General  
of the United States