

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548****FILE:** B-216090**DATE:** *May 8, 1986***MATTER OF:** Robert Lobato - Compensation as a De Facto  
Employee - Reconsideration**DIGEST:**

In decision B-216090, February 12, 1985, we ruled that a claimant who qualified as a de facto employee may be compensated the reasonable value of services rendered, but that such de facto status and compensation therefor may not continue beyond the date he was notified that he was without authority to perform the duties of the position. Additional facts in case show that the claimant was in a travel status when he was notified. On reconsideration, the claimant may be considered as continuing in a de facto status for the remainder of that travel period and may receive additional compensation for those 2 days. Decision B-216090, February 12, 1985, is modified accordingly.

This decision is in response to a letter from Mr. Robert Lobato, who has requested reconsideration of his claim for compensation as a de facto employee which was the subject of our decision B-216090, February 12, 1985. On reconsideration, we conclude that he may receive 2 days' additional compensation for the following reasons.

In brief recapitulation, the facts reported were that the Presidential Commission on Indian Reservation Economies was established by Executive Order 12401, January 14, 1983. In early November 1983, Mr. Lobato was interviewed for a position with the Commission as an expert under 5 U.S.C. § 3109 (1982). Since the reported need for his services was urgent, he was requested to begin work immediately and arrangements were made for him to meet with a personnel management specialist of the Department of the Interior at the earliest possible time to complete employment details. That meeting was held on November 15, 1983.

It was further reported that in the course of that meeting, the personnel management specialist learned

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that Mr. Lobato had already begun work on November 8, 1983. Mr. Lobato was, in turn, informed by the specialist that since he had not been officially appointed to a position, he should stop working until his appointment could be effected and that he could not be paid for his service until so appointed.

Through a series of steps taken thereafter, an SF-52, Request for Personnel Action, was prepared by the Commission and submitted to the Division of Personnel Services, Department of the Interior, on December 6, 1983. On December 8, 1983, however, before Mr. Lobato's appointment could be approved, he decided not to accept employment with the Commission and the appointment action was cancelled.

In May 1984, Mr. Lobato asserted a claim for services rendered the Commission. His itemized bill stated that he performed 5 days of work through November 15, 1983, and 15 days of work from November 16 through December 8, 1983.

By decision B-216090, February 12, 1985, we allowed his claim in part. Citing to our decision William Devine, Jr., B-196940, December 29, 1980, we determined that while Mr. Lobato initially qualified as a de facto employee and, thus, was entitled to compensation, such status ended on November 15 when he was informed of the limitations on Federal employment. Further, since he had not been appointed to a position, his work beyond the date of notice could not be considered as having been performed under color of authority so as to permit payment for his services.

In his request for reconsideration, Mr. Lobato has challenged the accuracy of the information provided this Office by the Department of the Interior, upon which our decision was based. More specifically, while he has admitted that he did meet with the personnel specialist, he questions the date of that meeting; the length of that meeting; and the reported content of that meeting. He also states unequivocally that he was subsequently informed by the Commission's Executive Director, Mr. Roy Sampsel, that he, Mr. Sampsel, had complete authority to make the ultimate decision as to employment issues and would insure

that Mr. Lobato would be fully compensated for all past and future services rendered. According to Mr. Lobato, Mr. Sampsel also told him that it was imperative to develop further material for the Commissioners prior to an upcoming trip. Mr. Lobato, therefore, contends that he continued working in good faith based on assurances that lack of proper employment documentation would be rectified. Mr. Lobato goes on to state that, if it was necessary to terminate his services because he could not be paid until formally appointed, that information should have been communicated to him by Mr. Sampsel and followed by a written statement to that effect.

We requested a supplemental report from the Department of the Interior on Mr. Lobato's request for reconsideration. The department has informed us that it made repeated attempts to reach Mr. Sampsel to verify Mr. Lobato's statements, but had been unable to locate him. The department also informed us that its personnel representative affirms her earlier statement that her meeting with Mr. Lobato was held on November 15, 1983, and that her statement is accurate as to what she told him at that meeting.

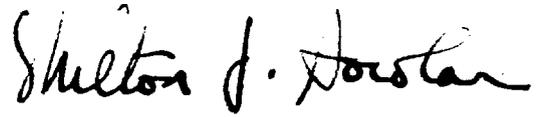
Reconsideration of decisional matters is discretionary on the part of this Office. Further, all requests for reconsideration are to set forth the error made, the basis upon which it is erroneous and the materiality of the error to the decision as rendered. Generally, this Office will reconsider a decision only when a material mistake of law or fact is shown, with the burden of proof being on the claimant to establish each claim element. See Stephen J. Hayden, B-183215, July 14, 1977, and Jack E. Wells, B-169490, February 3, 1976.

Without Mr. Sampsel's report as verification of Mr. Lobato's statements, we are unable to conclude that a material mistake of law or fact was expressed in our original decision of February 12, 1985. Thus, after a careful review of Mr. Lobato's request for reconsideration, we adhere to the general conclusion expressed in that decision.

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Notwithstanding the above, Mr. Lobato is entitled to some additional compensation as a de facto employee. This is based on new information contained in the supplemental report from the personnel officer, Department of the Interior, which we did not have at the time of our February 12, 1985, decision.

According to that report, Mr. Lobato's performance of services involved travel on an as required basis. The Commission was headquartered in Washington, D.C. The travel authorization which had been issued to him and his travel vouchers listed his permanent station as being his residence in the Oklahoma City, Oklahoma, area. With the exception of one date, such duties as he was requested to perform were performed at the Commission headquarters in Washington. The record shows that the date of notice (November 15), came wholly within a travel period (November 14-17, 1985), from Oklahoma City to Washington and return. While the actual date of the meeting between Mr. Lobato and the Personnel Specialist is questioned, it seems generally agreed that the conversation regarding employment matters occurred during that travel period. In view of the fact that Mr. Lobato had traveled to Washington on November 14 and did not return to his home until November 17, 1983, we do not object to the continuation of his de facto employment status and payment of compensation for the remainder of that period (November 16 and 17, 1985), at the rate of compensation he received as an expert under 5 U.S.C. § 3109. Therefore, our decision B-216090, February 12, 1985, is modified accordingly.

*for*   
Comptroller General  
of the United States