

**DECISION**

25012  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

**FILE:** B-208041**DATE:** May 3, 1983**MATTER OF:** Martin Mendelsohn - Payment for Services  
Performed Before And After Appointment

**DIGEST:** A consultant to the U.S. Holocaust Memorial Council who received overpayments of salary during his 2-month appointment seeks to have work performed before and after the period of his appointment credited against his indebtedness. Claimant cannot be considered de facto employee and thus entitled to payment for reasonable value of services since he did not act under color of authority and had no reasonable expectation of payment.

This decision results from Mr. Martin Mendelsohn's appeal from a determination made by our Claims Group, Z-2832722-121, April 8, 1982, to deny waiver of certain overpayments made to him in connection with his employment as a consultant to the United States Holocaust Memorial Council. For the reasons explained below, we reach the same result as did our Claims Group, but do so by a different analysis.

Mr. Mendelsohn was appointed by the Holocaust Council to a temporary 1-month position effective November 5, 1980. That appointment was extended for an additional 30 days, not to exceed January 1, 1981, so that Mr. Mendelsohn was officially employed from November 5, 1980, to December 31, 1980. On the basis of timesheets prepared according to Mr. Mendelsohn's statements of the hours he worked, he was paid for 240 hours of service at \$21.42 per hour for a total of \$5,140.80. However, in a letter dated January 30, 1981, prepared at the request of the Director of the Holocaust Council, Mr. Mendelsohn compiled a record of his time chargeable to the Council, which revealed that he had worked a total of 114.5 hours. Only 61.5 hours were attributable to the period covered by his official appointment. The remaining 53 hours

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were attributable to work Mr. Mendelsohn claims he performed before and after the period of his appointment. It was determined, therefore, that Mr. Mendelsohn was overpaid for 178.5 hours in the gross amount of \$3,823.47. Repayment for 24 hours was collected through cancellation of Mr. Mendelsohn's final check. Mr. Mendelsohn apparently repaid an amount equal to the compensation for the 101.5 hours not worked, and requested waiver repayment of the additional 53 hours, which were worked before and after the period of his appointment. Our Claims Group denied waiver of the gross amount of the overpayment stating that Mr. Mendelsohn should have known he was not entitled to be paid for the additional 178.5 hours since he reported the number of hours he worked each pay period, and there was no evidence he requested authorization to work prior or subsequent to the period of his appointment.

From our reading of the record in this case it appears that Mr. Mendelsohn, rather than urging waiver of compensation he received for periods of non-service, is instead requesting that work he performed before and after the period of his appointment be credited against his total indebtedness. As a result, we believe this case is more properly characterized as a claim for payment for a period of de facto employment rather than a request for waiver.

Decisions of this Office have long recognized that an individual who performs the duties of a Federal office or position with apparent right and under color of an appointment is to be regarded as a de facto employee and may retain salary already received. 30 Comp. Gen. 228 (1950). In 52 Comp. Gen. 700 (1973) we extended the de facto rule to permit payment for the reasonable value of services to persons who served in good faith so as to allow such persons reimbursement for unpaid compensation. In certain cases where an individual has been appointed to a position and the appointment is subsequently found to have been improper or erroneous, we have held that the individual, as a

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de facto employee, is entitled to receive credit for good faith service for purposes of leave accrual. Victor M. Valdez, Jr., 58 Comp. Gen. 734 (1979) and Thomas C. Collins, 61 Comp. Gen. 127 (1981).

Although the Valdez decision is limited to cases in which an agency improperly appoints an individual, we have recognized that the lack of an appointment is no obstacle to de facto status and payment of unpaid compensation in certain cases where services are nonetheless rendered in good faith and under color of authority. Thus, in 55 Comp. Gen. 109 (1975) we held that a retired Army officer serving without an appointment as an assistant to an Ambassador could be paid the reasonable value of his services despite the lack of an appointment. In that case, the individual's services were rendered pending routine security investigation with the knowledge that he had not been appointed, but with the understanding that he would be compensated for his services by means of a retroactive appointment. The holding in that decision was applied in William H. Keel, Jr., et al., B-188424, March 22, 1977, to compensate individuals who were ordered by competent authority to enter on duty in advance of their official appointments, and who performed the duties of the positions to which they were subsequently appointed with apparent right and under color of authority. To the same effect, see Jane Hartley, et al., B-189351, August 10, 1979.

Since the services for which Mr. Mendelsohn claims compensation were not rendered under an erroneous appointment, but occurred before and after the period of his appointment, his entitlement to compensation is governed by 55 Comp. Gen. 109 (1975) and the Keel and Hartley line of decisions. In those cases the individuals found to be de facto employees performed the duties of regular positions in good faith, under color of authority and with the reasonable expectation that they would be paid for their services.

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Mr. Mendelsohn states that he served before and after his appointment at the specific request of a Council member or staffer, and did so in good faith with the assumption that he would be compensated. In a letter of July 17, 1981, he claims that prior to his appointment he:

\*\*\* attended a meeting with U.S. Army historians, arranged and attended a meeting between the head of the Modern Military Records Branch of the National Archives and the Vice Chairman of the Council, conferred with representatives of the U.S.S.R. and with a U.S. Department of State Soviet Desk Officer. \*\*\*

In a letter dated May 3, 1982, the Director of the Holocaust Council stated as follows.

"A substantial part of Mr. Mendelsohn's claim is for 31.5 hours of work allegedly done prior to November 5, 1980. During that period, Mr. Mendelsohn was actively involved in a political campaign for a member of Congress who was running for the Senate. I had received an informal opinion from the Department of Interior that there would be possible problems under the Hatch Act if Mr. Mendelsohn were to work for the Holocaust Memorial Council at the same time. Since it has been the Council's policy to avoid even the appearance of impropriety, I did not pursue the matter further. I simply explained the difficulty to Mr. Mendelsohn, and he and I agreed that he would not become an employee of the Council until after the election, on November 5. \*\*\*

Mr. Mendelsohn acknowledges that this conversation occurred, but states that subsequent to it he received a

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letter dated October 8, 1980, from the Vice Chairman of the Holocaust Council, inviting him to attend a meeting with the Chief of Military History, Department of the Army on October 14, 1980. Mr. Mendelsohn states that he attended that meeting and took notes for the benefit of the Council. He contends that if he was not to have been there or was not to be compensated, he should have been informed at that time or soon thereafter.

Although Mr. Mendelsohn does not contest that he knew his official appointment was to end on December 31, 1980, he nevertheless makes the argument that he should be compensated for services performed after that date. He states that on January 15, 1981, he received a memorandum dated December 30, 1980, from the Director of the Council asking what work he had already performed and what overseas visits he planned to make. Mr. Mendelsohn says that on the basis of this memorandum he assumed he was to carry on as he had previously done, especially because his appointment had been renewed previously without his request. Therefore, he explained that, through the month of January, he continued to respond to requests for assistance made by members of the Holocaust Council.

It does not appear that Mr. Mendelsohn served during these periods under color of authority or with the assurance or reasonable expectation that he would receive compensation. It was clearly expressed to Mr. Mendelsohn, and he apparently agreed that he was not to become an employee of the Holocaust Council until November 5, 1981. The letter from the Council's Vice Chairman inviting Mr. Mendelsohn to attend the meeting with the Army's Chief of Military History did not supersede that agreement, and did not provide authority for him to begin work, especially in light of the not uncommon practice of the Government to invite an individual with a particular expertise to attend a meeting

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and to share the benefit of his views without compensation. See Dr. Frank Von Hippel, B-196088, November 1, 1979.

Similarly, the Council Director's memo of December 30, 1981, to Mr. Mendelsohn did not provide him with authority to work after the expiration of his appointment, which Mr. Mendelsohn knew was to occur on December 31, 1980. In order to satisfy the good faith requirement for de facto employment Mr. Mendelsohn should have made inquiry as to whether his appointment was being renewed.

In summary, we do not believe that the Holocaust Council provided Mr. Mendelsohn any assurance that he would be compensated for services performed before or after the period of his appointment, and, therefore, his expectation of compensation for those services was not reasonable. Mr. Mendelsohn's claim is denied.

It appears that after the determination made by our Claims Group, Mr. Mendelsohn repaid a sum equal to the compensation for the contested 53 hours. If all compensation except for that attributable to the 61.5 hours Mr. Mendelsohn worked during his appointment has been repaid, no further action need be taken.

for   
Comptroller General  
of the United States