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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: J. Kenneth Blackwell

File: B-257669

Date: December 8, 1994

DIGEST

The Ambassador, United Nations Human Rights Commission, who was appointed by the President subsequent to his travel to Geneva, Switzerland, to participate in Commission meetings, is not entitled to compensation from the State Department as a de facto employee for the 3-week period prior to his appointment, since he has not met his burden of proof and furnished evidence which would show that he served under color of authority.

DECISION

Mr. J. Kenneth Blackwell requests compensation as a de facto employee of the Department of State for the period January 27 through February 19, 1991, prior to his confirmation under presidential appointment as Ambassador, United Nations Human Rights Commission, on February 19, 1991.¹ For the reasons that follow, Ambassador Blackwell's claim may not be allowed.

Ambassador Blackwell was issued travel orders on January 22, 1991, for travel on January 26, 1991 to Geneva, Switzerland, and return to Cincinnati, Ohio, on March 9, 1991. The purpose of the travel, as shown on the travel order, was for duty in connection with the UN Human Rights Commission, 47th Session, Geneva. Subsequent to his arrival in Geneva, on February 19, 1991, Ambassador Blackwell was appointed by the President to replace the previous representative on the Commission. He was placed on the payroll records of the State Department on that date. According to the administrative report, Mr. Blackwell prior to that date was serving as an unpaid, volunteer member of the Commission.

Ambassador Blackwell filed a claim for compensation as a de facto employee for the period of January 27 through February 19, 1991, the period he spent in Geneva,

¹The request was sent in by Cecelia A. Cooper, Director, Compensation & Pension, United States Department of State.

Switzerland, prior to his Presidential confirmation. In support of his contention that he is entitled to payment, Ambassador Blackwell has furnished a list of various White House and State Department officials who he says requested him to accept the position of United States representative to the Commission effective January 27, 1991.

The State Department denied Ambassador Blackwell's claim on the basis that none of the State Department officials on the list he provided had the authority to hire him. In addition, the State Department points out that private sector individuals often serve on delegations without receiving a salary from the U.S. Government, and that this was the case for several of Ambassador Blackwell's predecessors who served without salary until their employment with the Department was effected. For example, the State Department refers to a previous representative who was appointed by the President on October 21, 1986, but was not employed by the State Department until February 13, 1987.²

A de facto officer or employee is one who performs the duties of an office or position with apparent right and under color of an appointment and claim of title to such office or position. Where there is an office or position to be filled, and one acting under color of authority fills the office or position and performs the duties, such actions are those of a de facto officer or employee, and as such, he/she may be paid for such services. James C. Howard III, 57 Comp. Gen. 406 (1978); James K. Saufley, 57 Comp. Gen. 565 (1978). The lack of an appointment presents no obstacle to de facto status and payment of unpaid compensation in cases where an individual has rendered services under color of authority and in good faith with the reasonable expectation of compensation. Lt. Colonel Robert G. M. Storey, 55 Comp. Gen. 109 (1975); Donald G. Stitts, B-216369, Mar. 5, 1985.

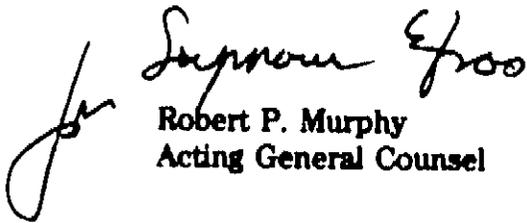
Unfortunately, the record does not support the fact that Ambassador Blackwell served under color of authority with the reasonable expectation of compensation. The burden of proof is on a claimant to establish the liability of the United States and the claimants' right to payment. 4 C.F.R. § 31.7 (1994). The State Department correctly points out that it is not unusual for private sector individuals to serve on delegations without receiving a salary from the federal government. See, Dr. Frank von Hippel, B-196088, Nov. 1, 1979; where we held that an individual could not be compensated for other than his travel expenses where the record did not support the conclusion that he attended meetings under color of authority. Compare William A. Keel, Jr. and Richard Hernandez, B-188424, Mar. 22, 1977; Jane Hartley, Susan van den Toorn, and Thomas Fletcher, B-189351, Aug. 10, 1977; wherein we held that certain employees could be reimbursed as de facto employees for duties performed prior to their appointment where agency and White House

²Internal State Department Memorandum, dated July 8, 1993, from International Organization to Director, Financial Management.

officials were aware of the fact of their employment, but the agency's personnel office was not notified.

Unlike the employees in Hartley, and Keel, supra, there is nothing in the record which indicates that Ambassador Blackwell was directed by anyone in authority to commence his duties at once with the expectation that he would be reimbursed for other than his travel expenses. He has furnished a list of various White House and State Department officials that he states were aware of the fact that he was to receive full compensation prior to his date of appointment. However, the list alone, without accompanying affidavits or signed statements attesting to the fact that he was expected to commence his duties immediately in return for salary compensation does not satisfy Ambassador Blackwell's burden of proof and entitle him to reimbursement.

Accordingly, Ambassador Blackwell's claim for reimbursement as a de facto employee is denied.


Robert P. Murphy
Acting General Counsel