UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MAX WENK v. OFFICE OF PERSONNEL MANAGEMENT	DOCKET NUMBER DC08318210585

OPINION AND ORDER

The Office of Personnel Management (OPM or agency) petitions for review of an initial decision reversing an OPM reconsideration decision which denied appellant service credit for the period from July 1, 1945 through April 30, 1951.

BACKGROUND

Appellant was employed by the Counter Intelligence Corps (CIC) of the United States (U.S.) Army, from July 1, 1945 to April 30, 1951. Appellant testified that during World War II he was engaged in "underground" activities against the Nazi forces in his native Austria. When the allied forces arrived in Austria appellant claims that he worked with the Office of Special Services (OSS) and was later employed by the CIC for nearly six years, as an interpreter and interrogator.

OPM denied appellant credit for this service based upon its conclusion that appellant was not an "employee" within the meaning of 5 U.S.C. § 2105(a), which states:

> (a) For the purpose of this title, 'employee' . . . means an officer and an individual who is -
>
> (1) appointed in the civil service by one of the following acting in an official capacity -
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> (A) the President;
> (B) a Member or Members of Congress, or the Congress;
> (C) a member of a uniformed service; ...
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

OPM based its denial of appellant's claim on a determination that the evidence of record, consisting of letters of commendation, affidavits from a co-worker and two supervisors, and payroll records was insufficient to show that appellant was ever "appointed" to a position with the U.S. government. Although the agency conceded that appellant was "employed" by the U.S. Army during the period in question, it argued that he was an "indirect hire," paid by funds reimbursed by the Austrian government.

Appellant petitioned the Board for appeal, and in an initial decision issued May 28, 1982, OPM's reconsideration decision was reversed. The presiding official noted that the burden of proof placed on appellant was extremely difficult to satisfy because appellant's alleged employment occurred more than thirty years ago and because testimony indicated that no records of employment of Austrian nationals were maintained for fear of reprisals against persons who cooperated with the Allies. The presiding official found that the testimony of both the Chief of the 440th CIC detachment in Austria in 1945, and the Special Assistant to the Army Assistant Chief of Staff for Intelligence, to the effect that CIC detachments were authorized to hire and pay civilians, proved by preponderant evidence that appellant was hired directly by the U.S. Government. Moreover, he found that appellant was performing a "federal function" as required by 5 U.S.C. § 2105(a). He concluded, therefore, that the "totality of the circumstances" surrounding appellant's employment supported a finding that appellant was appointed as a civil service employee and accordingly he reversed OPM's reconsideration decision.

In its petition for review the agency argues that "appointment" should be strictly construed, that some "appointive document" is required, and that the "totality of circumstances" approach was explicity rejected by the Court of Claims in Costner v. United States, 665 F.2d 1016 (Ct. Cl. 1981). In addition the agency argues that the presiding official erred in finding that appellant's service with CIC satisfied the "federal function" requirement of 5 U.S.C. § 2105(a)(3).

ANALYSIS

There are three cumulative elements to the statutory definition of "employee": appointment by an authorized federal employee or officer,*/ performance of a federal function, and supervision by a federal employee or officer. Although there is no dispute that appellant was subject to military supervision, there is substantial disagreement concerning whether appellant has satisfied the remaining two elements of the definition.

Appointment

It is clear that specific documentation such as a SF-52 or SF-50 is not dispositive in determining whether an appointment has been effected. National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981); Scott v. Department of the Navy, 7 MSPB 741 (1981).

The agency contends, however, that some type of formal "appointive document" is necessary and that Costner, supra, precludes the use of a "totality of circumstances" approach to establish an appointment. We disagree. The court in Costner merely stated that in determining whether all three elements were present, "[a]n abundance of federal function and supervision will not make up for the lack of an appointment." Id at 1020. This holding does not preclude using the totality of circumstances to prove the existence of one of the three elements particularly when, as here, direct evidence of appointment is unavailable due to factors beyond the appellant's control. The Court of Claims in

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*/ Federal Personnel Manual Supplement 831-1, section S3-3(a) (September 21, 1981) states that to be considered a federal employee it suffices if a person is either "appointed or employed".

Goutos v. United States, 552 F.2d 922, 924 n.3 (Ct. Cl. 1976), specifically recognized the possibility that oral evidence of intent to appoint might be relevant when a record of appointment is lost. In Costner, the court expressed no intention to overrule that holding; nor can such intention be implied from that decision.

Appellant has conceded that no appointment document has been located. Ralph W. Powers, commander of all CIC forces in Austria until December 1945, and Merrill Kelly, Special Assistant to the Army Assistant Chief of Staff for Intelligence, testified that general procedures for handling contingency expenditures and a concern for security resulted in periodic destruction of records relating to those expenditures. Despite the absence of formal documents, appellant has presented ample, corroborated evidence, through affidavits and direct testimony, to show that his employers intended to appoint him as a civilian in the service of the United States.

Appellant argued that Congress appropriated contingency funds to the military from 1945 to 1951 to be spent for a broad range of needs, including the hiring of civilian employees. Mr. Powers testified that a directive from General Eisenhower establishing the CIC allowed for expenditure of contingency funds, and that such funds were routinely used to pay civilian nationals working for the CIC. Mr. Kelly presented testimony corroborating Mr. Powers' statement that CIC detachments had authority to hire and pay civilian employees.

John B. Burkel, appellant's supervisor during the time in question, testified that he knew appellant, that appellant was a member of the "in-house staff", privy to classified information, and that appellant reported to work on a daily basis for six years. Henry Fuchs, a co-worker at the time, presented an affidavit identifying the positions

held by appellant, including Special Agent in Charge (SAIC) of the Visa Section and SAIC of the General Investigation Branch. Although the agency contends that appellant was an "indirect hire", employed by the Austrian government yet working for the U.S. military, Mr. Burkel, Mr. Powers, and Mr. Kelly testified to the contrary. Moreover, James V. Milano, the Chief of Operations in the Office of the Assistant Chief of Staff for Intelligence for U.S. Forces in Austria, specifically stated that "Mr. Wenk was hired directly by the U.S. Army" and James K. McGregor, Supervisory Personnel Mangement Specialist with the Department of the Army, testified that the Department of the Army does not "refute appellant's claim of having an appointment" although the absence of records prevents confirmation of appellant's employment status or duration.

We find the foregoing testimony sufficient to support appellant's claim that he was "appointed" as an employee of the civil service from July 1, 1945 through April 30, 1951. Although the records may have been destroyed, appellant has presented ample corroborated evidence of intent to effect an appointment on the part of officials authorized to do so.

Federal Function

The agency argues that no federal function was performed by appellant, stating that appellant "was engaged in the type of internal security police functions which would, in other times and in other circumstances, have been performed by Austrian national police forces." The agency's argument is not persuasive. Clearly the role and responsibilities of an occupying U.S. force constitute a federal function.

Appellant was paid from contingency funds, appropriated by Congress for use by the Secretary of War, to carry out sensitive, classified activities by intelligence and counter-intelligence elements of the U.S. Army. Based on these facts, we find that appellant was engaged in a federal function during the period of his employment.

Conclusion

The Board finds, therefore, that appellant has satisfied the requirements of 5 U.S.C. § 2105(a). Between July, 1945 and April , 1951 appellant worked for the CIC as a member of the in-house staff, having accepted an offer of employment from persons acting in their official capacity with authority to appoint individuals in the service of the U.S. Government. In the performance of his tasks appellant was supervised and directed by federal officers.

For the reasons set forth above, OPM's petition for review is hereby DENIED for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115, and OPM is hereby ORDERED to grant appellant service credit for the period from July 1, 1945 through April 30, 1951. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the date of this Order. In the event of agency noncompliance, a petition for enforcement may be filed with the Washington Regional Office pursuant to 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

JUN 8 1984
(Date)

Washington, D.C.

Paula A. Latshaw
PAULA A. LATSHAW
ACTING SECRETARY