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Washington, DC 20548

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B-307681

May 2, 2006

The Honorable Emily J. Reynolds  
Secretary of the Senate

Subject: *Scope of Waiver Authority (2 U.S.C. §130c)*

Dear Ms. Reynolds:

This responds to your April 10, 2006, request for our opinion regarding your authority under 2 U.S.C. § 130c to waive a claim for the amount of erroneous salary payments made to a former United States Capitol Police (USCP) employee in violation of the antinepotism statute, 5 U.S.C. § 3110. Section 3110 prohibits a public official from employing a relative in an agency in which he exercises jurisdiction or control and prohibits payment to an individual so employed. Section 130c authorizes you to waive claims for erroneous payments of any pay or allowances to any officer or employee whose pay is disbursed by the Secretary of the Senate, as well as officers or employees whose pay is disbursed by the Chief of the Capitol Police.

Specifically, you ask (1) whether your authority under section 130c permits you to waive claims for erroneous payments of nonsalary compensation, and (2) whether you or USCP officials may authorize payment of unpaid compensation under section 130c or any other statute or principle of federal law.

For the reasons provided below, we conclude that section 130c permits you to waive claims for erroneous payments of nonsalary compensation to the same extent that you may waive claims for salary payments. However, neither you nor the USCP may authorize payments of any unpaid compensation.

#### BACKGROUND

The antinepotism statute provides that

“A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official.”

5 U.S.C. § 3110(b). Such individual employed in violation of the antinepotism statute “is not entitled to pay, and money may not be paid from the Treasury as pay to an individual so appointed, employed, promoted, or advanced.” 5 U.S.C. § 3110(c). USCP is an agency for purposes of the antinepotism statute. 5 U.S.C. § 3110(a)(1)(B). Consequently, the prohibitions of the statute apply to USCP.

From October 10, 2003, until March 4, 2006, USCP employed a relative of a USCP official exercising jurisdiction and control over USCP. Capitol Police Board Letter,<sup>1</sup> Mar. 31, 2006 (Board Letter), at 1. USCP paid the individual wages through February 18, 2006. *Id.* at 2. We understand that USCP also made contributions to the individual’s Thrift Savings Plan and Federal Employee Retirement System accounts and Federal Employees Group Life Insurance premiums. USCP made no salary payments or contributions for the individual’s service from February 19 through March 4, 2006. *Id.*

In March 2006, the Capitol Police Board determined that the individual’s appointment violated the antinepotism statute. Board Letter at 1. He therefore was not entitled to pay for his service to USCP, and all such payments received for his employment were erroneous payments. *See* B-204266, Apr. 22, 1982. In response to a request for a decision to clarify whether the Chief has authority under 2 U.S.C. § 130c to waive erroneous payments such as these, we concluded that waiver authority resided in the Speaker of the House and the Secretary of the Senate. B-307529, Mar. 28, 2006.

Subsequently, the Capitol Police Board requested that you consider waiving the erroneous payments for full salary and benefits from October 10, 2003, through March 4, 2006. Board Letter. The Board asserted that the individual performed satisfactory services as a police officer for the government during the entire time of his employment. *Id.* at 2. The Board concluded that it would be inequitable to require the individual to repay any benefits received for his employment or for him not to receive pay for services performed from February 19, 2006, through March 4, 2006. *Id.* The Board asked that you waive all salary and nonsalary compensation that the individual received and that you authorize payment for the period in which the individual worked but did not receive compensation.

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<sup>1</sup> Letter from Wilson Livingood, Chairman, Capitol Police Board, William H. Pickle and Alan M. Hantman, Members, Capitol Police Board, to Emily J. Reynolds, Secretary of the Senate, Mar. 31, 2006.

## DISCUSSION

### Waiver of Nonsalary Compensation

Section 130c permits the Secretary of the Senate to waive an erroneous payment of “pay or allowances.” As pertinent here, with the italicized text substituted in accordance with 2 U.S.C. § 1907(a)(1),<sup>2</sup> section 130c(a) provides:

“A claim of the United States against a person arising out of an erroneous payment of any pay or allowances . . . to an officer or employee whose pay is disbursed by *the Chief of the Capitol Police* [the Secretary of the Senate], the collection of which would be against equity and good conscience and not in the best interests of the United States, may be waived in whole or in part by the Secretary of the Senate.”

2 U.S.C. § 130c(a). At issue here is whether the phrase “pay or allowances” includes nonsalary compensation. For the reasons explained below, we conclude that it does.

Section 130c is analogous to other waiver authority that Congress enacted in 1968 addressing erroneous payments for pay or allowances for most federal agencies, 5 U.S.C. § 5584.<sup>3</sup> Reference to section 5584 is particularly useful because Congress enacted section 130c in 1974 to extend to the Secretary of the Senate the same waiver authority that it had granted for most other agencies in section 5584. H.R. Rep. No. 93-1095, at 2 (1974) (“[section 130c] would extend . . . substantially the same authority as that granted in 1968”).

In reaching our conclusion that pay includes nonsalary compensation, we find relevant that the term “pay” as used in section 5584 has long been understood to encompass nonsalary compensation. In the legislative history of section 5584, the Senate Post Office and Civil Service Committee explained the meaning of pay as follows:

“The term ‘pay’ as used in this section *is intended to have its broadest meaning*, as is intended generally when the word is used in title 5, United States Code. As explained in Senate Report No. 1380, 89<sup>th</sup> Congress, accompanying H.R. 10104, which enacted title 5 as positive law, the word ‘pay’ included all terms heretofore in use representing salary, wages, pay, compensation, emoluments, and remuneration for services.”

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<sup>2</sup> See B-307529, Mar. 28, 2006 (considering section 1907’s transfer of disbursing authority to the Chief of Police, section 130c, as it applies to USCP, is deemed to be read with the substitute text).

<sup>3</sup> By its terms, section 5584 does not apply to USCP. B-307529, Mar. 28, 2006.

S. Rep. No. 90-1607 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4398, 4401 (emphasis added).

GAO exercised the section 5584 waiver authority until 1996.<sup>4</sup> In our decisions and regulations, we consistently took the view that the term pay in section 5584 includes nonsalary compensation. In our regulations, we defined pay as follows:

“*Pay* means salary, wages, pay, compensation, emoluments, and remuneration for services. It includes but is not limited to overtime pay; night, standby, irregular and hazardous duty differential; pay for Sunday and holiday work; payment for accumulated and accrued leave; and severance pay.”

4 C.F.R. §91.2(g)(1) (1996), *removed by* 65 Fed. Reg. 33737, 33738 (May 25, 2000).

Consequently, in B-272467, Dec. 13, 1996, we granted waivers to Export-Import Bank employees who received erroneous payments in the form of retention allowances and recruitment bonuses. In B-249410.3, Aug. 28, 1995, we granted waivers to Federal Law Enforcement Training Center employees for debts arising from erroneous excess crediting and use of annual leave. In B-198903, Aug. 6, 1981, we advised the Alaska Railroad that it could forego collection from employees of amounts of agency contributions to employee health and life insurance premiums that exceeded a statutory ceiling, in part because “all of the overpayments would be eligible for . . . waiver consideration under . . . section 5584.”

Clearly, for purposes of section 5584, we have long understood pay to include not just salary but also nonsalary compensation made as remuneration for employment. Contributions to an employee’s health and life insurance premiums, retention allowances, recruitment bonuses, and accrual of annual leave are all forms of remuneration made in addition to salary.<sup>5</sup>

Section 130c uses the same language as that used in section 5584. For the same reasons we concluded that section 5584 would permit waiver of nonsalary compensation, we conclude that section 130c also permits waiver of nonsalary compensation. Such a reading is entirely consistent with the language of section 130c. As the express language of section 130c shows, Congress wanted to provide

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<sup>4</sup> The General Accounting Office Act of 1996 transferred the Comptroller General’s section 5584 waiver authority to the Director of the Office of Management and Budget, or the Director’s delegatee. Pub. L. No. 104-316, §§ 101(a)(3), 101(e), and 103(d), 110 Stat. 3826–28 (Oct. 19, 1996).

<sup>5</sup> *Cf.* B-204266, Apr. 22, 1982. When asked to waive salary payments and travel reimbursements made in violation of the antinepotism statute, we concluded that the travel reimbursements did not constitute pay so were not subject to the statute’s prohibition on pay. We said that “the word ‘pay’ is defined as being remuneration or compensation for service rendered.” *Id.* Reimbursement for expenses incurred on behalf of the government while in official travel status is not remuneration.

relief for persons who, acting in good faith and through no fault of their own, received government payments contrary to law, but under circumstances in which it would be unfair and against equity and good conscience, to make them refund the payments. To the persons to whom Congress intended to provide relief, the hardships and inequities the statute was designed to remedy are the same whether the erroneous payment in question is salary or nonsalary compensation. We conclude that 2 U.S.C. § 130c authorizes the waiver of erroneous payments of nonsalary compensation, assuming the provision's waiver requirements are otherwise met.

#### Payment for unpaid compensation

The next question is whether you or USCP officials may authorize payments of unpaid compensation. While we have not addressed the availability of section 130c to authorize payment of unpaid compensation, we have addressed whether section 5584 allows payment of unpaid compensation, and we concluded that it does not.

In a situation very similar to the case at hand, the Farmers Home Administration asked us to waive erroneous payments already made in violation of the antinepotism statute and asked whether there was authority to pay unpaid compensation. B-204266, Apr. 22, 1982. Applying the section 5584 waiver authority, we waived the erroneous payments of salary, but could not authorize the agency to pay unpaid compensation. The antinepotism statute states that an individual employed in violation of the statute “is not entitled to pay, and money may not be paid from the Treasury as pay” to such an individual. 5 U.S.C. § 3110(c). We said that “in view of the clear language of [the antinepotism statute] prohibiting the receipt of pay from Government funds by an individual ‘appointed’ in violation of its provisions, such individual is not entitled to . . . salary yet unpaid.” B-204266, Apr. 22, 1982. *See also* B-186453, May 2, 1977.

The antinepotism statute imposes an absolute bar on payment to individuals employed in violation of the statute. “Money may not be paid from the Treasury as pay” to such an individual. 5 U.S.C. § 3110. Congress has appropriated no money for this purpose. Without an appropriation for this purpose, no money can be drawn from the Treasury to make the payments. U.S. Const. art. I, § 9, cl. 7 (Appropriations Clause). *Accord, Office of Personnel Management v. Richmond*, 496 U.S. 414, 424 (1990) (since payments of money from the Treasury are limited to those authorized by statute, the Navy may not make a payment of disability annuity contrary to a statutory prohibition).

As discussed above, section 130c uses language identical to the language of section 5584 and was enacted to provide the same authority. For the same reasons we concluded that section 5584 does not allow for payment of unpaid compensation, we conclude that section 130c does not allow for payment of unpaid compensation. Indeed, we are aware of no statute or principle of law that would authorize either the Secretary of the Senate or USCP to make a payment for employment obtained in violation of the antinepotism statute.

In some situations, after weighing the equities, we permitted agencies to pay unpaid compensation when we concluded that a *de facto* employment relationship existed. *See, e.g.*, 58 Comp. Gen. 734 (1979). “A *de facto* officer or employee is one who holds a public office or position with apparent right, but without actual entitlement because of some defect in his qualifications or in the action placing him in the office or position.” 64 Comp. Gen. 395, 404 (1985). Thus, for example, we concluded that the Air Force could pay unpaid compensation to an individual whom the Air Force had erroneously hired due to a mistake in identity. 58 Comp. Gen. 734. After the Air Force realized the error in hiring, it terminated the individual’s employment and withheld his final salary payment and a lump sum payment for his unused annual leave. We said that “*de facto* employees serving in good faith with no fault on their part” may be paid “compensation equal to the reasonable value of their services during the *de facto* period.” *Id.* at 734–35.

In this case, however, the antinepotism statute’s absolute prohibition on payment bars the use of equitable theories to make payment of any unpaid compensation. Officers and employees of the federal government may not disregard statutory provisions and, based on their consideration of equities, make prohibited or unauthorized payments. *Accord, Richmond*, 496 U.S. at 426 (because “[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law” (citation omitted), “judicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized”). We recognized this in our *de facto* employment cases. The *de facto* employee, we said, is entitled to be paid unpaid compensation “unless the appointment was made in violation of an absolute statutory prohibition.”<sup>6</sup> 58 Comp. Gen. at 735–36. In the 1979 Air Force case of mistaken identity, there was no statutory prohibition to the appointment. *Id.* at 736. In this case, there is.

We recognize the apparent inconsistency of waiving, on equitable grounds, erroneous payments already made yet, notwithstanding the equities of a situation, declining to pay unpaid compensation. The seeming inconsistency is based in statute, however. There is a fundamental difference between exercising statutory authority to waive an erroneous payment and making a payment from the Treasury in violation of a statute prohibiting such payment. The statutory waiver authority covers “erroneous payments.” In granting waiver authority, Congress has provided the Secretary of the Senate the discretion to weigh equities and waive erroneous payments already made. Congress, however, has not provided the Secretary of the Senate or USCP any discretion to waive the prohibition on payment itself. For this reason, neither the Secretary nor USCP, before payment is made, may decide to pay an individual on the basis of equities.

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<sup>6</sup> We also applied a second criterion: “[unless] the employee was guilty of fraud in regard to the appointment or deliberately misrepresented or falsified a material matter.” *Id.* at 736.

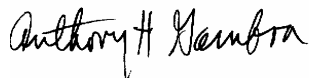
In these circumstances, it is for Congress to decide whether to provide equitable relief. In this regard, Congress may make funds available through private relief legislation when Congress determines that “the equities and circumstances of a case create a moral obligation on the part of the Government to extend relief to an individual.” *Richmond*, 496 U.S. at 431 (citations omitted).

## CONCLUSION

Section 130c authorizes the Secretary of the Senate to waive claims for nonsalary compensation to the same extent that the Secretary may waive claims for salary compensation. The phrase “pay or allowance” encompasses payments made to, or on behalf of, an employee as remuneration for employment.

The antinepotism statute imposes an absolute prohibition on payment. Neither the Secretary of the Senate nor USCP has the discretion to waive that prohibition and to pay, on legal or equitable grounds, unpaid compensation to an individual hired in violation of the statute. In this regard, only Congress through private relief legislation has the constitutional prerogative to extend relief.

Sincerely yours,



Anthony H. Gamboa  
General Counsel

## Digest

1. The Secretary of the Senate has the authority to waive claims for nonsalary compensation to the same extent that she may waive claims for salary payments. 2 U.S.C. § 130c. The phrase “pay or allowances,” as used in her waiver authority, includes all forms of remuneration made to an employee in addition to salary.
2. Neither the Secretary nor the U.S. Capitol Police may pay unpaid compensation to an individual employed in violation of the antinepotism statute, 5 U.S.C. § 3110. The statute imposes an absolute prohibition on payment. It says that an individual employed in violation of the statute “is not entitled to pay, and money may not be paid from the Treasury” to pay such an individual. In these circumstances, only Congress through private relief legislation may authorize payment of unpaid compensation.