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GENERAL COUNSEL'S OPINION NUMBER 55-34, DATED 15 FEBRUARY 1955

A review of some of the rights, obligations and limitations arising out of Federal employment.

TO THE INSPECTOR GENERAL

1. We harbor the thought that the contentions which are often advanced in support of the recommendations for relief of Government officers, employees, and agents, arising out of alleged mistake or error, are in part based on a misconception of (a) the employer-employee relationship where the Government acts as the employer; (b) the nature of public office and trust; (c) public funds; and (d) the consequential rights, obligations and limitations that flow from the aforesaid. Some reference thereto may be helpful.

2. It has been frequently stated that Government employment involves the surrender of certain rights, and this is properly so, for when the sovereign acts in the field of civil service, it may do so on such terms and conditions as it sees fit to impose. It goes without saying that there is little opportunity for judicial review of administrative discretion when applied to the executive administration of Government business in which the public interest predominates. When the legislative body creates rights in individuals against the Government, it may do so on its own terms and may even limit those individuals to administrative remedies. Obviously, if a right is conferred by statute, then there is a right in the normally understood statutory sense, e.g., the Lloyd-LaFollette and Veterans' Preference Acts. In matters concerning the executive administration of Government business, the employee assumes no independent bargaining position by virtue of his Government employment. Other examples come to mind. Under the Taft-Hartley Law, while Government employees may belong to unions, participation in strikes is unlawful and such employees are subject to immediate discharge and forfeiture of civil service status. Under the Hatch Act, Federal employees are precluded from active participation in political management or political campaigns. Under the various loyalty and security standards which have existed in the executive establishments, Government employees are subject to dismissal if investigation reveals a failure to measure up to certain statutory and regulatory standards. In the absence of a recognizable right, the statutes and implementing regulations as administered by the appropriate Government agency are the inevitable standards to which the propriety of disbursements must be related. In the absence of legal impropriety on the part of the administering or regulatory agency, the officer or employee is bound to accept the decision with finality as part of his condition of employment.

3. Three examples are illustrative. Others will undoubtedly occur to the reader. 14 Comp. Gen. 179 involved the appointment of a retired Naval officer retired for length of service to the position of Assistant Deputy Commissioner, Bureau of Internal Revenue, a permanent full-time position. The Comptroller General ruled that the appointment was void ab initio, that there was no authority whereby the civilian position might be retained and an election made to receive either the retired pay or the compensation of the civilian position and, finally, that there was

no entitlement to compensation for services already rendered. In 32 Comp. Gen. 539, an employee received a travel advance and expended the funds in reporting to his first duty station. The advance was granted under apparent administrative authority. The Comptroller General referred to the long-established rule that an employee must bear the expense of reporting to his first duty station where his compensation is fixed by law or regulation. The Comptroller General acknowledged that the advance of funds was erroneous but emphasized that such action did not preclude recovery by the Government since it was a well-settled principle that the United States was not bound or estopped by an erroneous payment made by its officers, with or without jurisdiction, and whether made under mistake of fact or of law. In Johnson v. United States, 175 F 2nd 612, an Army officer was granted a per diem of $5.00 from NRA funds to absorb the high cost of living in Washington, D. C. Although the District Court found that a verbal ruling had been secured from the Comptroller General to the effect that the NRA funds could be lawfully used for said purpose, the Comptroller General disallowed the payments upon the submission of the voucher and sought collection in the aggregate sum of $3,355. The matter was taken to the Court of Appeals by the officer where he received an adverse decision. One of the arguments advanced by the appellant, which we believe to be of interest, was that a great injustice would be done when military officers were being called upon to serve their country in various civilian fields and could only lay claim upon the entitlements of military office. The Court acknowledged that the military pay of an officer might be wholly inadequate when called upon to discharge the duties of a civilian office requiring greater expenditures. However, the Court held that this was a matter of legislative concern and, in the absence of an expression by the legislative body, the payment must be held to have been improper and therefore for collection with no apparent regard as to whether it had been expended.

4. We believe that a basic philosophy attaches to these cases which, we repeat, are merely illustrative of what can and does happen in the executive administration of Government business. A quick reference to the decisions of the Comptroller General and the Court of Claims will document this statement a thousandfold. We believe that the risks and burdens which appear to affect employees can be better understood if some consideration is given to the basic concepts of public office, the position of the Government as a sovereign, the characteristics of public funds, the status of improper payments of public funds, and the immunity of the Government from certain defenses which are normally available in the arena of private litigation. As previously indicated, the position of the Government in the field of civil service is a matter of privilege. The employee enters upon his employment upon such terms and conditions as the sovereign prescribes. If a right is granted, it may be granted with qualifications or no qualifications. There is considerable law on the subject that a public office is not property within the Constitutional guarantee, that the emoluments thereof are subject to legislative modifications and control, and, generally speaking, that the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. Taylor and Marshall v. Beckham

(No. 1), 178 U.S. 548, 20 S. Ct. 390, 44 Lawyers' Edition 1187.

5. The Courts have had the occasion to comment upon the refusal by an executive establishment to grant annual leave to its employees, the refusal of which involved a loss of such leave. The language of the Court in Field v. Giegengack (73 F. 2nd 945, 947) is considered interesting.

> "... Under these statutes, leave of absence tentatively accrues to a beneficiary by virtue of his service, yet is not earned in the sense that his wage is earned, which becomes absolutely due and inevitably payable upon his performance of his work. But the leave must be specially sought, granted, and used, under certain conditions and within certain times, determined within the statutory maximum and regulations, by the public printer, with due regard to the needs of the service and justice to the individual. The nature of this leave is well described by the Court of Claims in Harrison v. United States, 26 Ct. Cl. 259, 270: 'The law imposes both the duty and the responsibility of granting or refusing leaves of absence exclusively upon the Public Printer. It is his duty to administer the statute according to its spirit and intent and with a proper regard to the just interests of both parties. He is authorized to administer it by 'regulations,' and may prescribe general rules which would practically exclude individual applications. He may make the leave of absence dependent upon good conduct, and in the exigency of pressing work, when other employees could not be procured, he would be justified in refusing it altogether. The employee has no legal right to a leave of absence until it be granted, and can no more dictate when he will take his vacation than a student in college or a boy in school. The Public Printer must determine the times and seasons and periods of absences as the needs or exigencies of his department may permit.'"

In Wetzel McNutt, 4 F. Supp. 233, the Court commented upon the properties of a public office. Again, we believe the language to be pertinent.

> "... It has been repeatedly held that public office is not an inherent property right within the protection of the Fourteenth Amendment to the Federal Constitution. The regulation of a salary or the curtailment of appointment to an office are not within the import of the term 'contract', or within the vested private personal rights protected by the amendments to the Constitution. As the Supreme Court says in Butler et al. v. Pennsylvania, 10 How. (51 U.S.) 402, at page 417, 13 L. Ed. 472: 'They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them.'
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> "(2) Public offices are mere agencies or trusts and not property as such. The nature of the relation of a public officer to the public is inconsistent with either property or

> contract rights. The establishment of a contrary principle would arrest everything like progress or improvement in government, and the latter would become one great pension establishment on which to quarter a 'host of sinecures.' Butler v. Pennsylvania, supra; Taylor & Marshall v. Beckham, 178 U.S. 548, 20 S. Ct. 1009, 44 L. Ed. 1187."

6. It goes without saying, for reasons of public policy, that the sovereign cannot be sued in its own courts or in any other, without its consent and permission. This principle has been uniformly recognized and enforced both by the Federal and the state courts since the foundation of the Government. Only when the sovereign has voluntarily placed itself in the position of a litigant, whether in its own courts or otherwise, will it be held to have laid aside its sovereignty and to have assumed the garb of an ordinary litigant. It is also a principle of public policy that the public interests should not be prejudiced by the mistake or negligence of its officers or employees to whose care they are confided and, consequently, we have the rule that the sovereign when asserting rights is not bound by statutes of limitations, laches, estoppel, or any other affirmative defenses unless the legislative body has clearly manifested an intention to the contrary. This is the almost universally stated rule in the courts where the Government sues as a plaintiff. The aforesaid principles have evolved in most instances out of the non-employee relationship and it would follow as a matter of logic, a fortiori, that a lesser amount of actionable right is possessed by the sovereign's aggrieved employees. Hence, this office has stated upon occasion that it would interpose no objection to disputed payments where the litigative prospects of the employee arising out of statute or regulation are favorable but there is security objection to seeking redress. Again, where the legislative history, in the area of private bills of relief, has been favorable on the application of employees and again security considerations create a bar for the application of relief, this office has interposed no objection. In short, where an actual or prospective right is incapable of fruition because of Agency requirements, then the grant has been considered appropriate on a substitutive basis. However, absent the actual or prospective right, there can be no obligation on the part of the Government and, as has frequently been stated, obligation under ordinary circumstances is the sine qua non of an authorized expenditure.

7. Generally stated, the nature of public moneys requires authority of law prior to an expenditure of public funds and that public funds can be used only for public purposes and not for the advantage of private individuals. The expressions of the courts in this area are enlightening. It is frequently stated that the Government is not bound or estopped by the erroneous payments made by its officers, with or without jurisdiction, and whether made under mistake of fact or of law. In Barnes v. the District of Columbia, 22 Court of Claims 366, 394, the reasons for this general principle are clearly stated.

> "... the doctrine that money paid can be recovered back when paid in mistake of fact and not of law does not have so general application to public officers using the funds

> of the people as to individuals dealing with their own money where nobody but themselves suffer for their ignorance, carelessness, or indiscretion, because in the former case the elements of agency and the authority and duty of officers, and their obligations to the public, of which all persons dealing with them are bound to take notice, are always involved."

In Wisconsin Central Railroad v. United States, 164 U.S. 190, the court concurred in the statement of this principle as follows:

> "... We concur in these views, and are of opinion that there is nothing on this record to take the case out of the scope of the principle that parties receiving moneys illegally paid by a public officer are liable ex aequo et bono to refund them.
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> "As a general rule, and on grounds of public policy, the government cannot be bound by the action of its officers, who must be held to the performance of their duties within the strict limits of their legal authority, where, by misconstruction of the law under which they have assumed to act, unauthorized payments are made. Whiteside v. United States, 93 U.S. 247 (23:882): Hawkins v. United States, 96 U.S. 689 (24: 607), and cases before cited. The question is not presented as between the government and its officer, or between the officer and the recipient of such payments, but as between the government and the recipient, and is then a question whether the latter can be allowed to retain the fruits of action not authorized by law, resulting from an erroneous conclusion by the agent of the government as to the legal effect of the particular statutory law under or in reference to which he is proceeding."

As you will note from the above language, the Government is not interested as to how the improper payment came about; it is merely interested in the fact that an improper payment has been made and the issue is therefore drawn between the Government and the recipient of the improper funds. We should like to add at this juncture that the receipt of improper payments does not occasion damage in the normal sense. There is no deprivation of property or injury to person. What is involved in the usual cases which have come to the attention of this office is the overpayment of funds to which the individual had no, and may never have, any right. The sense of the judicial reasoning is that the individuals concerned have received more than they were lawfully entitled to, and that, since the funds involved are the public funds, such funds, in good conscience and equity, ought to be returned to the public from whence they originated.

8. United States v. Sutton Chemical Company. 11 F. 2nd 24, contains an interesting collection and discussion of cases. Some of the language is offered for pertinency:

> "The government's contention, briefly, is that, as a general proposition of law, established by a long line of

> decisions, it may always recover back moneys improperly paid by its officers to persons not entitled thereto; that it is immaterial whether such payments are made under a mistake of law or of fact; whether because in excess of authority, or based upon an erroneous interpretation of a contract later found to be incorrect, or because of the reliance upon facts found subsequently not to exist; that in all such cases, when it can be shown that the money was paid out without legal liability therefor, a refund can be lawfully enforced; and that the rules as to the binding effect of an account stated, or a compromise, or a settlement in accord and satisfaction, between private persons, are not applicable to the government. The government further claims that actions on the part of its agents, charged with the paying out of moneys, are not final determinations, and do not preclude or estop it from subsequently securing the return of an overpayment. Authorities to sustain these general propositions are cited by the government. Sutton v. United States, 41 S. Ct. 563, 256 U.S. 575, 65 L. Ed. 1099, 19 A. L. R. 403; Pine Logging Co. v. United States, 22 S. Ct. 920, 186 U.S. 279, 46 L. Ed. 1164; Wisconsin Central Railroad v. United States, 17 S. Ct. 45, 164 U.S. 190, 41 L. Ed. 399."

The court concurred with this contention. As we have previously stated, if these principles are applicable in the arena of private litigation, much more so does it follow that they are applicable in the executive administration of Government business in the area of civil service.

9. With respect to the recovery of public moneys improperly paid out by its officers, employees, and agents, it may be generally stated that the Government is not bound by such action because of misinterpretation of facts or misconstruction of law under which such officers, employees, or agents assume to act, and parties receiving such public moneys are held liable ex aequo et bono to refund them. United States v. Hagen, Cushing Co., 29 F. Supp. 564. This principle finds restatement throughout the decisions of the courts. A few citations are noted: United States v. Paddock, 178 F. 2nd 394; United States v. Wurts, 303 U.S. 414; Heidt v. United States, 287 U.S. 601; Grand Trunk Western RY Co. v. United States, 252 U.S. 112. Before departing from this subject of the recovery of public funds resulting from improper payments, the language contained in Heidt v. United States, supra, at p. 560 is considered to be a good summary.

> "One contention is that by long continuance of the payments with knowledge of the facts the United States is estopped to recover. A voluntary payment made by an individual under no mistake of fact is ordinarily not recoverable, because he may do what he wills with his own money. But the rule is quite otherwise in payments of public money made by public officers. Norfolk County v. Cook, 211 Mass. 390, 97 N. E. 778, Ann. Cas. 1913B, 650 and note. They have no right of disposal of the money, but must act according to law, the law operating as a limitation on their authority to pay. United States v.

> Burchard, 125 U.S. 176, 8 S. Ct. 832, 31 L. Ed. 662. The long continuance of overpayments illegally made does not prevent their recovery, even when contractual relations are involved. Grand Trunk Western Ry. Co. v. U.S., 252 U.S. 112, 40 S. Ct. 309, 64 L. Ed. 484. Much less where, as here, no contract has been made on the faith of them, for a soldier's services and pay are regulated wholly by law. (Emphasis supplied) While there is hardship in recalling money which has probably been spent, there is no basis for an estoppel because of a change of condition on the faith of the conduct or representations of another."

10. With respect to the availability of affirmative defenses, such as estoppel, laches, statute of limitations, on the part of aggrieved employees, assuming they possess an actionable right, and private parties, it may be simply stated that the Government, acting in its governmental capacity, that is, in the executive administration of Government business, cannot be bound or estopped by the unsanctioned acts of its agents, and more so, by the acts of its officers and employees. As is frequently stated, knowledge of Government law and regulations is imputable to officers and employees. The corollary proposition in the area of private litigation is that the authority of an officer or agent to act in behalf of the Government must stem from the Constitution or from a Federal statute. Such persons possess only such authority as is given to them either expressly or by necessary implication and it is generally held that the risk of lack of authority falls on those dealing with the Government.

LAWRENCE R. HOUSTON
General Counsel

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