Roy F. Watts, Petitioner, v. Office Of Personnel Management, Respondent

No. 85-2435

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

814 F.2d 1576; 1987 U.S. App. LEXIS 197

April 1, 1987, Decided

PRIOR HISTORY:
[1]**

Appealed from: Merit Systems Protection Board.

DISPOSITION:
Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner pilot sought review of a decision of respondent, the Merit Systems Protection Board (board), which affirmed an administrative decision that the pilot was not entitled to civil service retirement benefits under *5 U.S.C.S. § 8332*.

OVERVIEW: The pilot, who had worked for various Central Intelligence Agency (CIA) "proprietary" corporations, filed a claim with the CIA for retirement benefits. An administrative law judge (ALJ) determined that the pilot was ineligible for civil service retirement benefits because he had never been "appointed in civil service," as required by *5 U.S.C.S. § 2105*, and he was thus not an "employee" for the purposes of the civil service system. The board affirmed the decision of the ALJ. The pilot sought judicial review of the board's decision. The court affirmed, holding that the pilot had not been "appointed" within the meaning of § 2105 because he never executed any document creating a nexus between him and the government, he was never given an oath of office, and he was not aware of the CIA's involvement until after his employment contract was executed. The court thus determined that the pilot was not eligible for civil service retirement benefits. The court also held that the board did not abuse its discretion in denying the pilot certain discovery or in denying the pilot's request for an evidentiary hearing.

OUTCOME: The court affirmed the decision of the board.

LexisNexis(TM) HEADNOTES - Core Concepts

Pensions & Benefits Law > Government Employee Retirement > U.S. Civil Service Retirement System
[HN1] The provisions of *5 U.S.C.S. § 8332* establish that service as an "employee" is creditable for civil service purposes. The term "employee" by cross-reference is defined in *5 U.S.C.S. § 2105*(a) as follows: (a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is -- (1) appointed in the civil service by one of the following acting in an official capacity; (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. An individual must satisfy all three elements of § 2105(a) to be considered a federal employee. The requirements for these elements are strictly construed.

Pensions & Benefits Law > Government Employee Retirement > U.S. Civil Service Retirement System
[HN2] The question of appointment, by itself, controls the question of whether an individual is an "employee" for the purpose of civil service retirement.

Pensions & Benefits Law > Government Employee Retirement > U.S. Civil Service Retirement System
[HN3] The status of "employee" requires an unequivocal intention to bring an individual within the civil service. Employees of government proprietaries, without appointment, are not such "employees."

COUNSEL:

Bernard Fensterwald, III, Fensterwald, Alcorn & Bowman, P.C., argued for Petitioner.

Robert A. Reutershan, Assistant Director, Commercial Litigation Branch, Department of Justice, argued for Respondent. With him on the brief were Richard K. Willard, Assistant Attorney General, David M. Cohen, Director and Carol N. Park-Conroy. Also on

the brief were Hugh Hewitt, General Counsel, Thomas F. Moyer, Assistant General Counsel and Earl A. Sanders, Attorney, of Counsel.

JUDGES:

Davis and Archer, Circuit Judges and Nichols, Senior Circuit Judge.

OPINIONBY:

NICHOLS

OPINION:

[*1577] NICHOLS, Senior Circuit Judge.

Roy F. Watts appeals the decision of the Merit Systems Protection Board (MSPB or board) Docket No. DC08318110229 affirming the conclusion of the Office of Personnel Management (OPM) that Watts is not entitled to civil service retirement benefits pursuant to *5 U.S.C. § 8332* for his employment with proprietary corporations of the [*1578] Central Intelligence Agency (CIA). We affirm.

Background

Watts was employed as a pilot between April 12, 1947, and April 28, 1967, by [**2] various CIA "proprietary" corporations, defined as entities owned by the CIA while operating ostensibly as ordinary commercial enterprises. The first position Watts held was with the China National Relief and Rehabilitation Administration (CNRRA) Air Transport. CNRRA, originally Chennault Air Transport, was a private partnership created at the end of World War II to fly relief supplies throughout postwar China and to assist the anti-communist effort in China. The CIA used the services of CNRRA, later the Civil Air Transport (CAT), on a contract basis from 1947 until 1950. In 1950 the CIA purchased the company. In 1959 CAT was renamed Air America, Inc.

Watts was employed by Air America and its predecessor companies from April 12, 1947, to July 10, 1961. At the time Watts signed an employment contract with the first company, CNRRA, it was privately owned and not a CIA proprietary. Watts' original contract was with CNRRA only, and he did not execute any agreement with the CIA. The terms of Watts' original contract with CNRRA were assumed by each successor to CNRRA and the contract was not altered after the CIA purchased CAT, as then named. Watts has stated that he perceived no change, [**3] formal or informal, in the nature of his duties after the CIA acquired CAT. The duties assigned Watts were a mix of ordinary and covert operations.

Watts was later employed between October 1, 1962, and December 17, 1966, for Intermountain Aviation, Inc. (Intermountain), another CIA proprietary. When first hired by Intermountain, Watts was not aware of its connection with the CIA, although sometime after he was hired he learned that Intermountain was also a CIA proprietary. In 1966, Watts, about to leave Intermountain, was offered a GS-13 career appointment as a federal employee. He declined the offer and resigned from Intermountain in December 1966. Watts makes no claim to retirement benefits beyond December 1966. In January 1974, Watts petitioned the CIA for recognition of his work and claimed retirement benefits, beginning the various proceedings leading to the current appeal to this court. A United States District Judge held he should have a "full and fair hearing" before the "appropriate arm of the CSC" (Civil Service Commission), to which the MSPB succeeded.

The Administrative Law Judge (ALJ) of the MSPB disregarded all asserted facts but those which were undisputed. He considered [**4] summary judgment was permissible because the case arose before the Civil Service Reform Act of 1978, Pub. L. No. 95-454, which seems to disallow this useful device in adjudication of employee appeals. He cited *5 C.F.R. § 772.31* (1978). He granted OPM's motion for summary judgment on the grounds that Watts was not "appointed in the civil service" as required by *5 U.S.C. § 2105*, which sets out the current statutory definition of an employee eligible for civil service retirement benefits. The ALJ, in reaching this conclusion, considered Watts' testimony and concluded that it is "abundantly clear" that Watts never considered himself a federal employee and neither was he considered an employee by the CIA. There was no intent on either side, according to the ALJ, to effectuate an appointment to the civil service. The full board, by order on January 11, 1985, declined to review this initial decision and therefore adopted the decision. Watts' appeal to this court followed, delayed by a stay by this court pending the outcome of the court's decision in *Horner v. Acosta, 803 F.2d 687 (Fed. Cir. 1986).*

Analysis

I

The legal issue on appeal is [**5] whether an employee of a CIA proprietary is "appointed in the civil service" and, therefore, entitled to civil service retirement benefits solely on the basis of the CIA's ownership of the corporation. As is explained below, Section III, the requirement that the "employee" be "appointed" excludes one whose services are retained merely by contract.

[*1579] The value of Watts' work is not denied or questioned, but Congress clearly did not intend to award retirement benefits to all persons who might be thought

to deserve them. It can, itself, add to the entitlements it has created when it deems it right to do so. The importance of this case is its extraordinary implications for the civil service. The position urged by Watts would create a new category of employees who, without formal appointment or even awareness of the government's role when employed, would become "appointed" civil servants, in numbers unknown, and without thought as to their effect on actuarial soundness of the retirement fund. The implications of Watts' position might extend further to cover employees of corporations, privately owned, yet primarily producing goods or services for the government. We conclude **[**6]** that, in the absence of formal or even intended appointment, Watts is not an "employee" for the purposes of the civil service system.

[HN1] The provisions of *5 U.S.C. § 8332* establish that service as an "employee" is creditable for civil service purposes. The term "employee" by cross reference is defined in *5 U.S.C. § 2105*(a) as follows:

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is --

(1) appointed in the civil service by one of the following acting in an official capacity -- ...
(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.

5 U.S.C. § 2105(a).

In *Acosta*, this court concluded that an individual must satisfy all three elements of section 2105(a) to be considered a federal employee and that the requirements for these elements are strictly construed. **[**7]** *Acosta, 803 F.2d at 691-92.*

The question of the nature of "appointment" was at the heart of the case in *Acosta* as it is here. The board had held that the contract executed between the Navy and the employees was sufficient to establish "appointment." Judge Archer writing for the court rejected this argument and noted that:

The established rule is that one is not entitled to the benefit of a [government] position until he has been duly appointed to it. *** The precedents binding on this court have required that there be a significant degree of formality in the appointment process.

Acosta, 803 F.2d at 692.

These principles were derived in part from *Baker v. United States, 222 Ct. Cl. 263, 614 F.2d 263, 268 (Ct. Cl. 1980)* (concluding that "an individual cannot hold a government position *** nor receive the salary and other benefits pertaining thereto, until he or she has been appointed to that position by a person authorized to make that appointment") and *Costner v. United States, 229 Ct. Cl. 87, 665 F.2d 1016, 1020 (1981)* ("an abundance of federal function and supervision will not make **[**8]** up for lack of an appointment").

In concluding that the respondent employees were not "appointed" in the civil service, Judge Archer examined the indicia of appointment such as whether the employees were paid through the civil service system, given an oath of office, or asked to sign an SF 50 or 52. *Acosta, 803 F.2d at 694.* As noted in a footnote, another indication of civil service status was that one was not subject to Social Security withholding. The court concluded, in the absence of these indicia or a clear and unequivocal document of appointment, that there was no appointment to the civil service within the meaning of *5 U.S.C. § 2105*(a). *Id.*

Although the parties in *Acosta* stipulated that each of the respondents was engaged in the performance of a federal function and was supervised by a federal official, thereby eliminating two of the section 2105(a) tests from the court's scrutiny, we read *Acosta* to mean that [HN2] the question of appointment, by itself, controls the question of whether an individual is an "employee" **[*1580]** for the purpose of civil service retirement. *Accord Baker, 614 F.2d at 266.* **[**9]**

II

We now address, in light of the opinion in *Acosta*, the question of whether Watts was "appointed" to the civil service by virtue of his employment with a CIA proprietary. As a preliminary matter, we note that Watts' argument that different standards apply to pre-title 5 claims for retirement was directly rejected in *Costner*. In that case, the court found that:

Section 2105(a) was first enacted in 1966 in the wholesale revision of title 5. *** The legislative history is quite clear, however, that its provisions represented existing law and made no changes in the substantive requirements imposed on the plaintiff [to establish that he is an "employee"]. *** The commission [Civil Service Commission] has used precisely these same criteria since 1944. (citations omitted)

Costner, 665 F.2d at 1019 n.14.

In regard to the issue of appointment, Watts, citing the holding in *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803),* argues that formalities of appointment are only evidence of appointment and do not control whether there actually was an appointment. In effect, Watts argues that the circumstances as a **[**10]** whole indicate the intention to appoint Watts to the civil service. The court in *Acosta* distinguished *Marbury* and rejected precisely this argument, noting that *Marbury* involved a failure to deliver a commission, not a requirement of appointment. *Acosta, 803 F.2d at 693.* The formalities of the appointment *were* observed in *Marbury. Id.* In *Costner* the former Court of Claims also rejected the "totality of the circumstances" test suggested by Watts for determining whether there is "appointment." *Costner, 665 F.2d at 1020.*

Watts offers no other basis for finding "appointment" to the civil service. The undisputed facts of this case indicate that Watts never executed an SF 50 or 52 or any other standard form or document creating a nexus between him and the government, was never given an oath of office, and was not aware of the CIA's involvement until after his employment contract was executed. Acceptance is important, as membership in the civil service imports burdens as well as benefits. The cases mentioning standard forms and oaths of office do not necessarily exclude other rituals that may be devised to signalize an appointment **[**11]** from time to time. The essential prerequisites are an authorized appointing officer who takes an action that reveals his awareness he is making an appointment in the United States civil service, and action by the appointee denoting acceptance. The evidence that the CIA at one point offered Watts a "career position" in the federal service in 1966, and he refused, implies that both he and the CIA correctly did not consider that he was already in the civil service. It is clear the CIA knew how to create positions whose incumbents were "employees" within the statutory definition.

We do not accept the proposition suggested by Watts that an individual can become a federal employee in a passive manner without appointment, or with appointment only to the service of a private carrier, and even without an awareness at the beginning of the contractual relationship, of the involvement of the government. [HN3] The status of "employee" requires an unequivocal intention to bring an individual within the civil service. *Acosta, 803 F.2d at 692-94.* Employees of government proprietaries, without appointment, are not such "employees." The case of the overt government corporation, such as **[**12]** the former Reconstruction Finance Corporation, differs for many reasons and our holding does not apply to it. We hold that the board's finding that Watts was never "appointed" in the civil service is supported by all the facts.

III

As an alternative to relief under the provisions of section 2105, Watts argues that he is entitled to civil service credit for "contract services" pursuant to the provisions of the Federal Personnel Manual Supplement. FPM Supp. 831-1, Subch. S3-3(c) (March 29, 1985). Watts **[*1581]** also suggests relief is available under *5 C.F.R. § 831.201* as well as other "informal" internal guidance. In *Acosta*, this court reversed the board on this point:

> [Congress] *** defined employee for purposes of the CSRA in a manner which is inconsistent with the FPM language on contract service. Thus *** it [FPM Supplement] has been made obsolete by the enactment of the statutory definition of employee. And the broad decision of the Board that appointment is not a required element of respondents' case cannot withstand the express appointment requirement of the statutory definition.

Acosta, 803 F.2d at 695.

Appointment **[**13]** is the normal way of filling a civil service position, and it is distinguished from employment by contract. *United States v. Hopkins, 427 U.S. 123, 49 L. Ed. 2d 361, 96 S. Ct. 2508 (1976).* In that case, consent to suit on contracts of nonappropriated fund agencies in *28 U.S.C. § 1491* is held to exclude appointed employees' pay claims. An employment contract is not necessarily inconsistent with an appointment. We do not wish to be understood as holding that the government may not employ a person under both forms simultaneously. The point is that the occurrence of either one does not necessarily imply the other.

IV

Watts asserts procedural due process error in this case and claims he was not allowed adequate discovery. We conclude that neither grounds provide reversible error. Watts has failed to assert what he might have learned from additional discovery, and it is precisely his own assertions of the facts as to his employment that refute his claim that he was an "employee" during his service with CIA proprietaries. Without support provided for the relevance of additional discovery, we find there was no abuse of discretion in denying such **[**14]** discovery.

Watts' due process issue concerns the board's decision that an evidentiary hearing in this case was not

necessary and not required by statute. Watts concedes that he is not entitled to a hearing under the "old rules" applicable to his case. Based on our review of *5 C.F.R. § 1201.191*-(b) concerning pending proceedings and the then applicable *5 C.F.R. § 772.311(a)* (1978) concerning appeals to the CSC, we agree that a hearing, prior to the enactment of the Civil Service Reform Act, was discretionary. Watts suggests, however, that the board abused its discretion in failing to provide a hearing. We hold, from a review of the record, that the board did not abuse its discretion by denying Watts' request for a hearing which, in view of absence of dispute as to the facts, really meant an opportunity for oral argument as to the law. The board relied on adequate and extensive written testimony provided by Watts and other appellants joined in the appeal to the board as well as on documents and records provided by the appellants.

Watts' additional contention that the record was insufficient to reach a conclusion using standards parallel to summary judgment is also without merit. **[**15]** The OPM properly considered the available facts in light least favorable to the government and reached a "summary judgment," upheld by the board, based on evidence primarily presented by Watts and other appellants. This conclusion that "summary judgment" was appropriate is tied as well to the conclusion that an oral hearing was discretionary and, in this case, not necessary.

Conclusion

The board's conclusion that Watts was not "appointed" to the civil service as per *5 U.S.C. § 2105*(a) or entitled to civil service benefits under other pre-CSRA standards is consistent with all the facts and correct as a matter of law.

AFFIRMED.

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MARIAN S. BEVANS, Petitioner, v. OFFICE OF PERSONNEL MANAGEMENT, Respondent

No. 89-3396

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

900 F.2d 1558; 1990 U.S. App. LEXIS 5593

April 12, 1990, Decided

SUBSEQUENT HISTORY:
[1]**

Rehearing Denied May 23, 1990, Reported at: *1990 U.S. App. LEXIS 5593*

PRIOR HISTORY:
Appealed from: Merit Systems Protection Board.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner claimant sought review of an order of the Merit Systems Protection Board (board), which affirmed the decision of respondent Office of Personnel Management (OPM) that determined the claimant could not include the time her deceased husband spent as an employee of a proprietary corporation of the Central Intelligence Agency (CIA) in her application for federal employee survivorship benefits.

OVERVIEW: The claimant's husband was an attorney with considerable experience in airline work, and he was offered a position with an airline that was a proprietary corporation of the CIA. He was given an oath three days after he was hired. He left that position to work for the United States Air Force. None of his employment with the airline was credited to him for retirement or leave computation purposes, and he made no objections. Upon review, the court found that the husband was not an employee within the definition of *5 U.S.C.S. § 2105*(a) while he was employed by the airline. The court found that the administration of an oath was not enough to establish that the husband was appointed in the civil service. The court observed that there was no evidence that he had been appointed by an individual authorized to make such appointments, no deductions were made for the civil service retirement fund, and there was no evidence that he believed he had been appointed to civil service. Although he was aware the CIA owned the airline, the court found that there was no indication that the CIA only permitted CIA employees to work for the airline. The court affirmed the decision.

OUTCOME: The court affirmed the OPM's decision that determined that the claimant could not include the time her husband spent as an employee of a proprietary corporation of the CIA in her application for federal employee survivorship benefits.

LexisNexis(TM) HEADNOTES - Core Concepts

Pensions & Benefits Law > Government Employee Retirement > U.S. Civil Service Retirement System
[HN1] *5 U.S.C.S. § 8332* provides that service, as an "employee" is creditable for the Act's purposes. The term "employee" is defined in *5 U.S.C.S. § 8331*(1)(A) by reference to *5 U.S.C.S. § 2105*(a), which in turn defines "employee" to mean an individual who, among other requirements, has been appointed in the civil service by one of listed employees acting in an official capacity.

Pensions & Benefits Law > Government Employee Retirement > U.S. Civil Service Retirement System
[HN2] To qualify as an "employee" an individual must have been appointed to that position by a person authorized to make the appointment. Definite, unconditional action by an authorized federal official designating an individual to a specific civil service position is necessary to fulfill the appointment requirement of *5 U.S.C.S. § 2105*(a).

Pensions & Benefits Law > Government Employee Retirement > U.S. Civil Service Retirement System
[HN3] The "essential prerequisites" of a civil service appointment is an authorized appointing officer who takes an action that reveals his awareness he is making an appointment in the United States civil service.

Pensions & Benefits Law > Government Employee Retirement > U.S. Civil Service Retirement System

[HN4] Normally, amounts are deducted from a civil service employee's pay to cover contributions to the civil service retirement fund, and those contributions are a source of the funds from which retirement annuities are paid. The lack of such deductions is strong evidence that the employee did not have a civil service appointment.

COUNSEL:

Richard L. Stanley, Arnold, White & Durkee, of Houston, Texas, argued for Petitioner. With him on the brief was Maureen Ebersole, Baker & McKenzie, of San Francisco, California.

Mark Melnick, Commercial Litigation Branch, Department of Justice, of Washington, District of Columbia, argued for Respondent. With him on the brief were Stuart M. Gerson, Assistant Attorney General, David M. Cohen, Director and Thomas W. Petersen, Assistant Director. Also on the brief were James S. Green, Acting General Counsel, Thomas E. Moyer, Assistant General Counsel and Earl A. Sanders, Attorney, Office of General Counsel, Office of Personnel Management, of Counsel.

JUDGES:

Nies, Circuit Judge, Friedman Senior Circuit Judge, and Archer, Circuit Judge.

OPINIONBY:

FRIEDMAN

OPINION:

[*1560] FRIEDMAN, Senior Circuit Judge.

This petition to review challenges the decision of the Merit Systems Protection Board (Board), affirming the reconsideration decision of the Office of Personnel Management (OPM) that, in determining the petitioner's survivorship benefits **[**2]** of her deceased husband, a federal employee when he died, the time he spent as an employee of a proprietary corporation of the Central Intelligence Agency (CIA) could not be included. *Bevans v. Office of Personnel Management*, No. SF08318910383 (M.S.P.B. Jun. 23, 1989). We affirm.

I

The basic facts, as found by the Board and as shown by the record, are as follows.

In the 1960's and 1970's, the CIA had several so-called proprietary corporations, which it owned. Two of these were Air America, Inc. (Air America) and its subsidiary, Air Asia Company, Ltd. (Air Asia). These companies were air carriers that operated primarily in the Far East and that the CIA used in conjunction with its operations. (Apparently the CIA used these companies interchangeably, and in this opinion we usually refer to either or both of them as "Air America."). Air America had a large number of employees. Some of its officials also were CIA employees.

The petitioner's deceased husband, Henry P. Bevans (Bevans), was a lawyer with considerable experience in airline work. In early 1964, Clyde Carter, the secretary and legal counsel of Air America, suggested to Bevans the possibility of his working for that **[**3]** company. After discussions, Mr. George A. Doole, Jr., the chief executive officer of Air America, who also was an undercover CIA employee, offered Bevans a position as an attorney with Air America. Bevans was to start work in Washington, D.C., but shortly thereafter would be moved to Taipei, Taiwan. The offer of employment, on an Air Asia letterhead, stated: "This letter constitutes the only authorized offer of employment to you from or on behalf of the Company."

Bevans accepted the offer and began work in Washington, D.C., on August 3, 1964.

In a handwritten 1980 letter from Bevans to another former Air America employee, Jerry Fink, in connection with Fink's appeal to the Board from OPM's denial of Fink's claim for civil service retirement credit for Fink's service with that company, Bevans stated:

> Sometime during that first week (probably Aug. 5), after reviewing the corporate files, I raised with Mr. Bastian the question of the exact relationship between Air America and Southern. At that point, I was taken into Mr. Doole's office. He administered to me the oath set out in Title 5, Sec. 3331 and gave me a detailed explan[ation] of the ownership, control and management **[**4]** of Air America, Inc. and its associated companies. [Underlining in original.]

[*1561] Bevans worked for Air America and Air Asia until December 1976. During that employment, government retirement contributions were not deducted from his salary and deductions sometimes were made for Social Security taxes. In March 1977, Bevans went to work as a civilian for the United States Air Force. None of his Air America employment was credited to him for retirement or leave computation purposes, and he made no objection despite the adverse immediate effect that had on the amount of leave. While so employed, he died in January 1982.

His widow, the petitioner, filed an application for survivor benefits. The application was based upon Bevans' service with both Air America and the Air Force. In response to a request from her lawyer, the CIA declined to certify Bevans' employment with Air America "as federal service for the purpose of obtaining certain federal death benefits" because "employees of Air America, Inc., are not federal employees within the meaning of *5 U.S.C. § 2105*(a), which is the operative definition for purposes of civil service retirement **[**5]** credit. *5 U.S.C. § 8331*(1)(A)."

In its reconsideration decision, OPM ruled that "because he was not appointed in the civil service during the term of his contract from August 3, 1964 through December 6, 1976 his service during this period is not creditable for civil service retirement purposes."

The Board affirmed that decision. The administrative judge, whose initial decision became the decision of the Board, found that the petitioner

has failed to establish by preponderant evidence that her husband was appointed to a position in the civil service. There is no clear and unequivocal document appointing Mr. Bevans to the civil service. In addition to the absence of any such document, the other indicia of appointment are also absent. There is no evidence that Mr. Bevans was paid through the civil service system. Though Mr. Bevans was apparently administered an oath of office, there is no evidence that the person who administered the oath was authorized to do so or to hire employees on behalf of the CIA. An appointment to the civil service can only be made by a person authorized to make the appointment. Finally, another indicia of federal employment, **[**6]** at the time, was that a federal employee's salary was not subject to Social Security withholding. The appellant's documents show that Social Security withholding was taken out of her husband's earnings from Air America.

I find, therefore, that the agency's decision to deny civil service credit for Mr. Bevans' service with Air America was proper. It is well established that an appointment is necessary for a person to hold a government position and be entitled to its benefits.

Bevans, slip op. at 6-7 (citation omitted).

II

[HN1] Section 8332 of Title 5 of the United States Code provides that service as an "employee" is creditable for the Act's purposes. *5 U.S.C. § 8332* (1988). The term "employee" is defined in *5 U.S.C. § 8331*(1)(A) (1988) by reference to *5 U.S.C. § 2105*(a) (1988), which in turn defines "employee" to mean an individual who, among other requirements, has been "appointed in the civil service by one of [listed employees] acting in an official capacity. ..."

This court twice has considered whether service with government proprietary corporations or units engaged in intelligence **[**7]** activities qualifies for civil service retirement credit.

Horner v. Acosta, 803 F.2d 687 (Fed.Cir. 1986), involved employment as "independent contractors" pursuant to employment contracts between individual employees and a naval unit and a naval proprietary corporation, both of which were engaged in intelligence activities. The Board ruled that service pursuant to such contracts was entitled to credit for civil service retirement purposes. This court reversed, holding that the employment contracts did not make the individuals "employees," because they had not been "appointed in the civil service." *Id. at 693-94.*

[*1562] The court quoted with approval the statement in *Baker v. United States, 222 Ct. Cl. 263, 614 F.2d 263, 268 (Ct.Cl. 1980),* that [HN2] to qualify as an "employee" an individual must have "been appointed to that position by a person authorized to make the appointment." *Acosta, 803 F.2d at 692.* The court ruled that "definite, unconditional action by an authorized federal official designating an individual to a specific civil service position is necessary to fulfill the appointment requirement of **[**8]** *5 U.S.C. § 2105*(a)." *Id. at 693.* The court noted the "absence of the usual indicia of civil service, such as an executed SF [Standard Form] 50 or 52 as an appointive document. ..." *Id. at 694.* (A Form 50 is a federal government personnel form used to record a personnel action, and a Form 52 is one used to initiate a federal personnel action.) The court concluded:

In view of the Board's express finding that respondents were not appointed in the civil service when they were engaged to work in the unit, and the substantial evidence to support that finding and the Board's erroneous conclusion that contract service, without appointment, is creditable for [CSRA] purposes, we must reverse the Board's decision.

Id. at 696.

Watts v. Office of Personnel Management, 814 F.2d 1576 (Fed.Cir.), *cert. denied, 484 U.S. 913, 108 S. Ct. 258, 98 L. Ed. 2d 216 (1987),* involved the employment of Watts as a pilot by various CIA proprietary companies, including Air America. This court affirmed

the Board's determination that Watts' service with the CIA proprietary corporations **[**9]** did not qualify for retirement purposes because Watts had not been "appointed in the civil service." *814 F.2d at 1580.* The court rejected, as involving an improper test that was rejected in *Acosta*, Watts' argument that "the circumstances as a whole indicate the intention to appoint Watts to the civil service." *Id.* The court then stated:

> Watts offers no other basis for finding "appointment" to the civil service. The undisputed facts of this case indicate that Watts never executed an SF 50 or 52 or any other standard form or document creating a nexus between him and the government, was never given an oath of office, and was not aware of the CIA's involvement until after his employment contract was executed. Acceptance is important, as membership in the civil service imports burdens as well as benefits. The cases mentioning standard forms and oaths of office do not necessarily exclude other rituals that may be devised to signalize an appointment from time to time. The essential prerequisites are an authorized appointing officer who takes an action that reveals his awareness he is making an appointment in the United States civil service, and action by the appointee **[**10]** denoting acceptance.

Id.

A. Under these standards defining the requirement that to qualify for civil service retirement benefits, an individual must have been "appointed in the civil service," the Board did not err in concluding that the petitioner had not shown that Bevans had been so appointed.

As noted, the court in *Acosta* referred to "an executed SF 50 or 52 as an appointive document" as one of "the usual indicia of civil service status." *803 F.2d at 694.* There is nothing in the record to show that either Form 50 or Form 52 was executed for Bevans, and the petitioner makes no claim that it was. Although there are several executed personnel forms in the record that pertain to Bevans, all captioned "Request for Personnel Action," they are Air America forms, not those customarily used to make an appointment in the civil service.

The forms themselves have no indication that they are federal government forms. The spaces for signature list among the potential signers "President," and two of them were signed by that officer. The first line has space for listing the name of the individual for which action is requested "(IN ENGLISH)" and "(IN CHINESE). **[**11]** " As the petitioner's witness Mr. Merrigan, a former Air America attorney who dealt with personnel matters, explained, this was "an Air America form also called Request for Personnel Action. It's also copied, certainly **[*1563]** not identical, but in many respects it's similar to the federal form. It was copied from it."

Moreover, there was no evidence that any of the officials with whom Bevans dealt in obtaining his position with Air America was authorized to make appointments in the civil service. The only authority those company officials appeared to have had was to appoint individuals to positions with their company. All the record shows is that Bevans was appointed to a legal position with Air America, and not to a position in the civil service. Indeed, the letter offering Bevans the position stated that it "constitutes the only authorized offer of employment to you from or on behalf of the Company."

As the court stated in *Watts*, one of [HN3] the "essential prerequisites" of a civil service appointment is "an authorized appointing officer who takes an action that reveals his awareness he is making an appointment in the United States civil service." *814 F.2d at 1580.* **[**12]** That requirement was not met here.

The fact that the individuals with whom Bevans dealt may have been CIA employees as well as Air America officials cannot be viewed, as the petitioner would treat it, as showing that they had authority to make appointments in the CIA or that Bevans received such an appointment by virtue of his appointment with Air America. Some officials of Air America were also CIA agents. Here, however, the record shows only that the Air America officials with whom Bevans dealt in arranging for his employment, including those who were both Air America officials and CIA employees, acted for Air America.

There is no evidence that in hiring Bevans as a lawyer those officials also gave him, or were authorized to give him, an appointment in the CIA. Indeed, Mr. Doole, who signed the letter offering Bevans the position with Air Asia, stated in a 1980 affidavit (given in connection with Jerry Fink's case) that from 1953 through 1971, as a CIA employee, he served as managing director and chief executive officer of Air America and Air Asia, and that "neither my duties as a government employee nor the positions in the corporate structures identified above authorized me **[**13]** to hire or fire a federal employee."

A further indication that Bevans was not appointed in the civil service when Air America employed him is that during his service with that company no deductions were made from his salary for his contributions to the civil service retirement fund. [HN4] Normally, amounts are deducted from a civil service employee's pay to cover

such contributions, and those contributions are a source of the funds from which retirement annuities are paid. *Cf. Costner v. United States, 229 Ct. Cl. 87, 665 F.2d 1016, 1023 (Ct.Cl. 1981).* The lack of such deductions is strong evidence that the employee did not have a civil service appointment.

Additional evidence supporting the Board's finding of non-appointment is that although social security taxes were not withheld from a civil service employee's salary during the time Bevans was employed by Air America, social security taxes sometimes were withheld from his salary.

B. In one respect this is a stronger case for an appointment than *Watts*. One of the facts upon which the court relied in holding that Watts had not been "appointed in the civil service" was that he "was never given an oath of office. **[**14]** " *814 F.2d at 1580.* Here, however, the administrative judge found that Bevans "was apparently administered an oath of office." *Bevans*, slip op. at 7. Since the oath was not administered until the third day of Bevans' employment and only in response to his question about the relationship between Air America and another air carrier, Southern Airways, also apparently a CIA proprietary company, the government suggests that the oath was more likely one of secrecy rather than the oath that *5 U.S.C. § 3331* requires all civil service appointees to take. The Board, however, concluded that because the record did not show that Mr. Doole, the Air America officer (also a CIA employee) who administered the oath, was authorized by the CIA to administer oaths **[*1564]** to new CIA employees, the petitioner failed in her burden of proof.

We need not resolve the petitioner's contention that the government had the burden of proving that Doole lacked the authority he purported to exercise. For even if we assume Bevans was given the oath of office, the administration of an oath would not itself establish that Bevans was appointed in the civil service. The oath **[**15]** is insufficient to overcome the other evidence in the record, discussed above, that Bevans was not so appointed.

C. The petitioner also relied on certain facts following his employment by Air America that allegedly confirm that he received an appointment in the civil service.

1. The petitioner contends that Bevans' appointment in the civil service is supported by identification cards purportedly showing that Bevans was a federal employee. The record contains three such cards.

One card, issued by Air America, merely establishes that Bevans was an employee of that company, which is both undisputed and, as *Watts* indicates, irrelevant to his civil service status.

The second card was issued to Bevans in 1972 by the Department of Defense, and expired in 1975. It does not identify Bevans as a member of the appointed civil service. It merely indicates that the "Medical Care Facilities [to which Mr. Bevans was] Authorized" were "uniformed services" rather than "civilian."

The third card was issued by the American Embassy in Vientiane, Laos. Although the card states that "the person whose name and photograph appear hereon is employed by the United States government," it does **[**16]** not indicate that Bevans was a civil service employee. Not every person "employed by the United States government" has been appointed in the civil service, as *Acosta* shows. Furthermore, the record does not show when this card was issued to Bevans or that it was issued while he was an employee of Air America.

2. The petitioner also contends that because "Mr. Bevans was fully aware of CIA's role before he was appointed," this is strong evidence that he was appointed in the civil service. She points out that one of the grounds for the court's conclusion in *Watts* that Watts had not been appointed in the civil service was that he "was not aware of the CIA's involvement until after his employment contract was executed." *814 F.2d at 1580.*

The principal factual basis for this argument is the assumption that because Bevans practiced aviation law prior to working for Air America, he, like others in the field, must have been aware of the CIA's ownership and control of Air America. Mr. Merrigan testified that Bevans "would have been aware of" the corporation and the CIA relationship, that he "would have been told when he was being hired," and that he "may very well have" **[**17]** "known that the CIA owned Air America before he applied for this job." That speculative testimony does not require the conclusion that Bevans was aware of the CIA's relationship to Air America when he went to work for that company. Indeed, the argument is inconsistent with Bevans' inquiry, made on his third day of work, about the relationship between Air America and an affiliated company, which seemingly reflected his ignorance of the CIA's ownership of that company.

3. The petitioner argues that Bevans' appointment in the civil service as a CIA employee is supported by the fact that while working for Air America he performed various services for the CIA. There is no indication in the record, however, that the CIA permitted only CIA employees to perform such services. Indeed, Mr. Doole pointed out that Mr. Jerry Finks, who was not a CIA employee, performed a number of significant tasks for the CIA. There is no reason to believe that the CIA would not utilize a trusted employee of one of its

proprietary companies, who was not a CIA employee, to do work for it.

To a considerable extent, many of the petitioner's arguments in effect ask this court to substitute its judgment for that **[**18]** of the Board and to draw factual inferences from the record that the Board declined **[*1565]** to draw. Our function as a reviewing court, however, is not to engage in such *de novo* fact finding, but only to determine whether the Board's factual findings are supported by substantial evidence. For the reasons given, we hold that they are so supported.

D. The petitioner argues that even if the objective evidence does not establish that Bevans was appointed in the civil service, Bevans believed that he had been so appointed and therefore should be treated as having been so appointed. The record, however, does not establish that Bevans believed he had been appointed in the civil service.

The argument apparently is that since Bevans was aware that Air America was a CIA proprietary company, and since the officers with whom he dealt in obtaining employment were CIA employees, he necessarily believed that he received an appointment in the CIA when he was appointed as a lawyer with Air America. Not only does the argument lack evidentiary support for crucial elements, but it is a *non sequitur*. The fact that the CIA controlled Air America and that CIA employees may have hired Bevans, **[**19]** does not establish that Bevans, unlike the vast bulk of Air America employees, became a CIA employee when he was employed by Air America, or establish that Bevans believed he had been so appointed in the civil service.

E. Finally, the petitioner contends that even if Bevans was not appointed in the civil service, the government should be equitably estopped from making the contention. The argument rests on the factual assumption, which the record does not establish, that Bevans believed he had received such an appointment. Moreover, there is no evidence that the government misrepresented to Bevans or misled him into believing that he was a civil service employee, or that Bevans relied upon that belief to his detriment.

CONCLUSION

The order of the Merit Systems Protection Board affirming the reconsideration decision of the Office of Personnel Management is AFFIRMED.