

Great job on an interesting and unusual question!

Thanks,

Nancy

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From: LoPresti, Heather <LoPrestiH@fca.gov>

Sent: Thursday, November 10, 2022 12:20 PM

To: Tunis, Nancy <TunisN@fca.gov>

Cc: Griffin, Ward <GriffinW@fca.gov>; Ogilvie, Clark <OgilvieC@fca.gov>

Subject: Should Poll Workers Remit Fees Earned?

Hi Nancy,

Before I hit send on my response to Jennifer Williams, I wanted to make you aware that she raised an outside activity question that was quite novel. Jennifer called me on election day about an employee who was taking administrative leave to work the poll. This is now allowed under a new Executive Order and OPM implementing guidance as explained below. He received a stipend check, not for expenses, but for working the polls. He was not sure he could keep it because he was on admin leave. Good question! Jennifer didn't know the answer so she called me, but I didn't know the answer, and thus the opinion below. (b) (5)

(b) (5)

If you have any thoughts on the below, please let me know.

(b) (5)

Thanks!!!

Heather

Hi Jennifer,

You inquired whether an employee on administrative leave to serve as a poll worker may keep the fees earned from the local district where he is serving. The short answer is "yes, it would seem so." However, I would feel a lot more comfortable if we could inquire with OPM. It would seem, from a logical perspective, that the treatment of employee earned poll worker fees would be the same as the treatment of fees earned by an employee performing jury duty. The only difference between the two activities is that being a poll worker is encouraged but not mandatory, whereas jury duty is mandatory if you are called to serve. However, based on a strict reading of the law you can keep poll worker fees earned whereas you cannot keep jury duty fees earned. I will explain further.

PRESIDENT BIDEN'S EXECUTIVE ORDER 14019, PROMOTING ACCESS TO VOTING AND THE OFFICE OF PERSONNEL MANAGEMENT'S IMPLEMENTING GUIDANCE

President Biden issued Executive Order 14019—Promoting Access to Voting, on March 7, 2021. Section 6 of this executive order provides that the Office of Personnel Management was to "(b)

Coordinate with the heads of executive agencies, as defined in 5 U.S.C. 105, to provide recommendations to the President, through the Assistant to the President for Domestic Policy, on strategies to better support Federal employees who wish to **volunteer** to serve as non-partisan poll workers or non-partisan observers, particularly during early or extended voting periods.” (emphasis added).

OPM issued guidance on March 24, 2022 implementing a policy to allow federal employees to take up to four hours of administrative leave to “serve” as a poll worker and does not make any mention that the employee must “volunteer” their services or is barred from accepting compensation from the State of locality where serving as a poll worker. The OPM policy guidance states as follows:

Accordingly, effective immediately, executive branch agencies (as defined in 5 U.S.C. 105 but excluding the Government Accountability Office) should grant administrative leave for the purpose of voting or **serving** as a non-partisan poll worker or non-partisan observer, subject to certain conditions and limitations described in the sections below.

- Agencies should also allow employees to use up to 4 hours of administrative leave per leave year to **serve** as a non-partisan poll worker or to participate in non-partisan observer activities at the Federal, State, local (i.e., county and municipal), Tribal, and territorial level. (A “leave year” begins on the first day of the first pay period commencing on or after January 1 of the given year and ends on the day before the first day of the next leave year.) This leave is in addition to any administrative leave an employee uses to vote.

....

- An employee may use up to 4 hours of administrative leave per leave year for the purpose of **serving** as a non-partisan poll worker or non-partisan observer, including training periods. If those duties require the employee to be absent for a longer period of time, the employee must use annual leave (accrued or advanced), earned compensatory time off, or credit hours earned under a flexible work schedule. An employee may also request leave without pay according to agency internal policies and any applicable collective bargaining agreement.

(emphasis added).

NO DOUBLE DIPPING STATUTE APPLIES ONLY WHEN BOTH OF THE EMPLOYEES JOBS ARE PAID THROUGH FEDERAL FUNDS

There is a statute referred to as the “no double dipping” statute, 5 U.S.C. § 5536. Section 5536 provides that “[a]n employee or a member of a uniformed service whose pay or allowance is fixed by statute or regulation may not receive additional pay or allowance for the disbursement of public money or for any other service or duty, unless specifically authorized by law and the appropriation therefor specifically states that it is for the additional pay or allowance.” Basically, this means that you cannot have two federal jobs at the same time, and draw two paychecks from the federal government.

SERVING AS A POLL WORKER IS ANALAGOUS TO SERVIGN AS A JUROR – BOTH ARE CIVIC DUTIES AND BOTH ALLOW ADMINISTRATIVE LEAVE WHICH MEANS YOU ARE BEING PAID BY THE FEDERAL GOVERNMENT TO ENGAGE IN A CIVIC DUTY

The statute 5 U.S.C. § 5537 prohibits an employee from keeping fees earned from serving as a juror when that jury duty was before a court of the United States or the District of Columbia. You cannot keep compensation earned from serving as a juror when it's a federally funded court because you are already collecting a federal paycheck and being paid for jury duty on admin leave. (Section 5537 logically follows the no double dipping statute at 5 U.S.C. § 5536). There is no similar statute applicable for employees serving as poll workers.

Another statute, 5 U.S.C. § 6632, entitles employees to administrative leave, without loss of, or reduction in, pay, etc. when summoned for a judicial proceeding by a court to serve as a juror. This law does not have any distinction that it must be a court of the U.S. government or the District of Columbia. An employee has the right to be paid on administrative leave for jury duty on State or local courts. However, any dollar amount received by a federal employee on admin leave as permitted by Section 6632 must be credited against the employees pay as required by 5 U.S.C. § 5515. While on administrative leave, you have to return fees earned from jury duty even before a State or local court.

In a nutshell, for jury duty, whether your jury duty is with a United States Court or a State or local Court, you cannot keep any payments received if you are on admin leave from your federal job. OPM's [Court Leave](#) policy implements these statutes, and we implement this policy through PPM 882, Absence and Leave. There are no similar statutes that require employees to return fees earned from serving as a poll worker. (As an aside, employees are allowed to keep expenses for things like travel that are reimbursed to them from the court for serving as a juror).

Serving as a poll worker seems like it would be analogous to serving as a juror, in regards to how we treat stipends or payments while the employee is on administrative leave to perform a civic duty. However, the law simply does not support this analogy at this time. As of right now, there is no law that requires an employee to return fees earned while on administrative leave to serve as a poll worker. Nor could I find any GAO cases, or GAO Redbook guidance regarding the issue of whether poll workers on administrative leave may or may not retain fees earned while serving as a poll worker.

STATES AND LOCALITIES ARE FUNDING THEIR OWN ELECTIONS – THEY ARE NOT RECEIVING FEDERAL FUNDS AND THEREFORE THEY ARE NOT PAYING POLL WORKERS WITH FEDERAL FUNDS

Given the “no double dipping statute” at 5 U.S.C. § 5536, if the employee's payment for poll worker services were to be funded with Federal dollars, then the employee would not be allowed to retain the payment. However, based on my research, it does not appear that the Federal government is currently funding State and local elections. It seems that the last time the Federal government provided States and local government with funding for elections was the Help America Vote Act (HAVA) of 2002. Those funds have since run out and the voting process is now funded with State and local funds. As such, the “no double dipping statute,” Section 5536 does not come into play, and there are no other similar statutes applicable.

IN SUMMARY

Based on my reading of the current state of the law, a poll worker may retain fees earned as a poll worker even while on administrative leave from his federal job. Like you, I could not find any clarifying guidance regarding this issue on OPM's website . However, OPM does say that for additional information, agency headquarters-level human resources offices may contact OPM at

pay-leave-policy@opm.gov. It may be worth it, given that this is a novel question, to confirm with OPM that employees on administrative leave serving as poll workers may retain stipends or pay until the law is changed otherwise. If it would be helpful to share my analysis with OPM, please do so. If you have any questions or need further assistance, please do not hesitate to contact me.

Thanks,

Heather

Heather J. LoPresti

She/Her

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