

DOCUMENT RESUME

02562 - [A1652634]

[Employee Is Ineligible to Receive Civil Service Annuity because of Refusal to Waive Retired Military Pay]. B-187891. June 3, 1977. 6 pp. + 2 enclosures (2 pp.).

Decision re: Charles M. Kindick; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel Management (805).

Organization Concerned: Department of the Army; Civil Service Commission.

Authority: Back Pay Act (5 U.S.C. 5596); 5 C.F.R. 550.803(e). 10 U.S.C. 3911. 52 Comp. Gen. 429. 11 Comp. Gen. 202. B-167782 (1970). P.P.M. Supplement 990-2, Book 550, subch. 8.

The claimant requested reconsideration of a settlement which disallowed his claim for backpay. Voluntary retirement of a civilian employee, subsequently restored because he refused to waive retired military pay to qualify for an annuity, is not an unjustified or unwarranted personnel action entitling him to backpay. Contrary to claimant's contention, the personnel office states that he was informed of the waiver requirement prior to separation. Disputes as to facts must be resolved in favor of the administrative office in the absence of sufficient evidence to the contrary. (Author/SC)

Robert Rissler
Civ. Pers.

2634
02562

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-187891

DATE: June 3, 1977

**MATTER OF: Charles M. Kindick - Backpay, Ineligible for
Annuity Because of Refusal to Waive Retired
Military pay**

DIGEST:

Voluntary retirement of civilian employee, subsequently restored because he refused to waive retired military pay to qualify for annuity, is not an unjustified or unwarranted personnel action entitling him to backpay where, contrary to his contention, personnel office states he was informed of waiver requirement prior to separation and where he should have known there was a question about the matter, since disputes as to facts must be resolved in favor of the administrative office in absence of sufficient evidence to the contrary.

This action is in response to a request from Mr. Charles M. Kindick for reconsideration of our Claims Division settlement dated October 12, 1976, which disallowed his claim for backpay. Mr. Kindick's claim is based on his assertion that he applied for optional retirement because he was misled into believing that he could use his military service to establish eligibility for civil service retirement without waiving his retired military pay. Therefore, he contends, his separation for retirement was an unwarranted or unjustified personnel action.

The record shows that on April 30, 1973, Mr. Kindick, a civilian employee of the Department of the Army receiving retired military pay based on 20 years or more of military service (10 U.S.C. § 3911), wrote to the U.S. Civil Service Commission concerning his retirement from the federal service in his civilian capacity. His letter in pertinent part was as follows:

"I understand that I can waiver my retired military pay and use the military service to determine my eligibility for retirement and for computation of my civil annuity. * * *

"Is it possible to use the military service to establish only my eligibility for civil service retirement without waiving

B-187891

my military retired pay and compute my civil service annuity only on the number of years I worked as a civil service employee?

* * * * *

"Will you in addition to providing answers to my questions please cite the pertinent regulations applicable in this instance."

Unexplainably, the Civil Service Commission did not answer Mr. Kindick's question concerning establishing eligibility for an annuity and did not cite any regulations in its reply, dated June 13, 1973. Instead the Commission's letter provided information concerning the computation of annuities. In pertinent part it read as follows:

"If your military retired pay is awarded under any provision of Title 10 other than Chapter 67, it would be necessary that you waive your retired military pay if you wish to receive credit for active military service in computing your civil service annuity. * * *

* * * * *

"However, if you have 5 or more years of civilian service you may elect to have your annuity based on only your civilian service. This would not bar your receiving the annuity concurrently with your military retired pay and Social Security benefits. * * *

More than a year and a half later, on February 14, 1975, his 59th birthday, Mr. Kindick applied for voluntary retirement, to be effective February 28, 1975, at which time he would have 20 years, 1 month, and 18 days of military service, plus 11 years and 1 day of civilian service, for a total of 31 years, 1 month and 19 days. The personnel office with which Mr. Kindick filed his application states that he was counseled concerning the requirements for voluntary retirement, that he was informed that he would have to waive his retired military pay to qualify, and that it was only upon his assurance that he intended to make such a waiver that his application was accepted and processed. The personnel office further states that Mr. Kindick did not inform it of his prior correspondence with the Civil Service Commission. Mr. Kindick denies that he was counseled at all concerning his retirement.

B-187891

In any event, Mr. Kindick separated on February 28, 1975, and by letter dated May 8, 1975, the Commission informed him that his retirement application could not be acted upon until he furnished information concerning his military service. He returned this letter with the following notation:

"It is not my intention to combine my military and civil service. The way I compute it is profitable to keep them separated. My military retired pay is currently \$773.92. Please advise which way is better for me combined or separated service."

Shortly thereafter, by letter dated June 18, 1975, the Commission informed Mr. Kindick that he must waive his retired military pay if he wished to receive an immediate annuity and that if he did not his annuity would be deferred until he became 62 years of age. Mr. Kindick states that he did not receive this letter until July 23, 1975, the date he replied, in pertinent part, as follows:

"My decision to retire was based on a letter from your office dated 13 June 1973. In that letter (a copy is attached) it was stated that I would have to waive my military retired pay if I wanted to receive credit for the active service in computing my civil service annuity. Paragraph 2 of the same letter stated that I could have my civil service annuity based only on my civilian service in which case I would draw two separate checks each based on their own service. No mention was made of a deferred annuity.

* * * * *

"Based on the information available to me I decided to retire and believe that I should begin drawing my civil service annuity based on my civil service only, immediately. If in fact I cannot use the service in this way I would not have been eligible to retire and my retirement application would have been erroneously approved and I should be returned to the rolls until I have the requisite time to make me eligible to retire.

B-187891

"In case I choose to waive my military retired pay to receive the stated annuity can I withdraw the waiver when I am 62 years old and revert to drawing my military pay plus the 'deferred annuity.'"

Subsequently, by letter dated August 5, 1975, the Commission informed Mr. Kindick that his application for retirement has been disallowed, and, in answer to his question, advised him that a waiver of retired military pay necessary to establish eligibility for a civil service annuity could not subsequently be revoked, citing 52 Comp. Gen. 429 (1973). By another letter of the same date the Commission informed Mr. Kindick's personnel office of the disallowance of his application for retirement and stated, in pertinent part, as follows:

"This action is necessary because Mr. Kindick did not meet the condition for voluntary retirement on the date of his separation since he is only 59 years old and his creditable civilian service totaled only 11 years 2 months. Military Retired Pay has informed us that Mr. Kindick is in receipt of retired pay and has not waived it, therefore military time cannot be used.

"Since Mr. Kindick does not meet the minimum requirement for voluntary retirement, his separation is considered erroneous. In this connection your attention is invited to a decision of the Comptroller General (11 Comp. Gen. 202) which states in part:

'However, a separation from the active roll solely for the purpose of granting retirement which action is later found to have been erroneous, is not a separation from the service within the meaning of the above mentioned principle.'

"Mr. Kindick should, therefore, be restored to the rolls of your agency until title to annuity is perfected.

* * * * *

B-187891

"Also unless there is some circumstance of which we are not aware of, Mr. Kindick is entitled to back pay covering the period February 2, 1975 to the date your restore him to your rolls under provision of the Back Pay Act (5 United States Code 5596) Civil Service Commission Regulations (5 C.F.R. 550.303(e).)"

Pursuant to the Commission's direction Mr. Kindick was restored to the rolls on September 15, 1975. On October 30, 1975, he filed a claim for backpay for the period he was off the rolls, February 28 to September 15, 1975, a sum computed by his agency to be \$11,502.40 before deductions.

Backpay is governed by 5 U.S.C. 5596 and the implementing regulations and instructions of the Civil Service Commission in 5 C.F.R. 550.801 ~~et seq.~~ and subchapter 8, book 550, Federal Personnel Manual Supplement 990-2. These authorities provide that backpay may be awarded upon a finding, based on an administrative determination or a timely appeal, by appropriate authority that an employee has undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or any part of the pay of the employee.

In the case at hand, Mr. Kindick's personnel office has found that his separation was not an unjustified or unwarranted personnel action entitling him to backpay under the provisions of 5 U.S.C. § 5596 because: (1) there was no administrative error in computing his creditable service entitling him to backpay under the provisions of paragraph SB-51., book 550, FPM Supp. 990-2; and (2) his ineligibility for an immediate civil service annuity resulted solely from his refusal to waive his retired military pay, a matter about which he was informed prior to his separation.

Mr. Kindick's statement that he was not informed of the waiver requirement is in direct conflict with the statement of his personnel office. However, this Office does not conduct adversary hearings in adjudicating claims but decides them on the basis of the written record presented by the parties. When that record reflects a dispute between the parties as to material facts which cannot be resolved without adversary proceedings, it is the long standing practice of this Office to resolve the matter in favor of the Government. B-167782, January 21, 1970.

B-187891

We find no sound basis for deciding otherwise in this case. Moreover, it seems to us that, possessed of the knowledge the record indicates he had, Mr. Kindick should have known that there was at least a question about the waiver requirement and should have sought clarification of this matter prior to his separation if, as he contends, such clarification was not volunteered by his personnel office.

In view of the foregoing, we are of the opinion that his personnel office was correct in its finding that Mr. Kindick's separation was not an unjustified or unwarranted personnel action entitling him to backpay and that the Commission's letter of August 5, 1975, did not constitute a contrary finding on timely appeal within the purview of 5 U.S.C. § 5596 and 5 C.F.R. 550.803. Therefore, the disallowance of Mr. Kindick's claim by the Claims Division is sustained.


Deputy Comptroller General
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

Robert Rissler
Civ. Pers.

B-187891

June 3, 1977

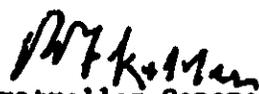
The Honorable James J. Florio
United States House of Representatives
114 East High Street
Glassboro, New Jersey 08028

Dear Mr. Florio:

This replies further to your letter of November 15, 1976, requesting reconsideration of the disallowance by our Claims Division of the claim of Mr. Charles M. Kindick for backpay, and encloses a copy of our decision of today, B-187891, sustaining the disallowance.

We regret that our decision could not be favorable to your constituent. However, we were unable to find any sound grounds in the record before us for reversing the prior determination of our Claims Division on this matter.

Sincerely yours,


Deputy Comptroller General
of the United States

Enclosure

Robert S. Riddle
Civ. Pers.

UNITED STATES GOVERNMENT

GENERAL ACCOUNTING OFFICE

Memorandum

TO : Director, Claims Division

June 3, 1977

Deputy
FROM : Comptroller General *Rykelin*

SUBJECT: Claim of Mr. Charles M. Kindick B-187891-O.M.

Returned herewith is file 2-2628318 forwarded for our consideration on November 22, 1976, together with a copy of our decision of this date, B-187891, which sustains the disallowance of Mr. Kindick's claim for backpay.

Congressman James J. Florio is interested in this case and a copy of our letter sending him a copy of the decision is attached for your files.

Attachments