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J. M. Mitchell  
M. J. Peris

**DECISION**



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

**FILE: B-187759**

**DATE: February 17, 1978**

**MATTER OF: Colonel Wilfred L. Ebel, USAR**

- DIGEST:**
1. No basis exists for payment of the difference in pay between that of pay grade O-5 and O-6, when an officer's promotion is delayed under 10 U.S.C. 3363(e) even though President has signed a promotion list but thereafter returns it to Secretary of the Army pursuant to his request prior to submission to Senate for confirmation, since Secretary has authority to delay promotion at any time prior to completion of promotion process if investigation is in progress. In any event President clearly has such authority, and return of list prior to forwarding to the Senate is tantamount to agreement with Secretary.
  2. Action by Secretary of the Army under 10 U.S.C. 3363(f) removing member's name from promotion list on basis of investigation revealing that Reserve officer seeking unit vacancy promotion under 10 U.S.C. 3384, did not intend to serve in unit but contemplated being ordered to active duty, appears to be within authority of Secretary although officer had not yet accepted active duty orders.
  3. Claim for active duty pay and allowances may not be paid for services performed by Reserve officer without orders even though Government benefits from the services, particularly where active duty orders were issued but refused by officer.

This action pertains to the claim of Colonel Wilfred L. Ebel, USAR, for pay and allowances of a lieutenant colonel for the period November 18, 1974, through March 25, 1975, while serving in the Office of the Deputy

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Assistant Secretary of Defense (Reserve Affairs). A claim has also been made for difference in pay of a colonel O-6, and lieutenant colonel O-5, for any periods of duty performed from December of 1974 to the date he was actually promoted to colonel.

The record before us consists of material provided by Colonel Ebel's attorney and administrative reports from the Department of Defense and the Department of the Army. Certain statements are disputed; however, we believe the following to be the pertinent facts insofar as they affect Colonel Ebel's compensation claims.

#### Background

On July 12, 1974, a requisition to fill a new position of Director for Reserve Personnel Programs in the Office of the Deputy Assistant Secretary of Defense (Reserve Affairs) was issued. The position was created as an Army Reserve position with the assignment of a Reserve officer on active duty to be made under 10 U. S. C. 265 which authorizes assignment of Reserve officers to positions at the seat of Government and at headquarters responsible for Reserve Affairs, to participate in preparing and administering the policies and regulations affecting Reserve components. Nominations for assignment to the above positions were requested from the Army. Colonel Ebel was one of four officers nominated on October 4, 1974, for the position and on October 24 he was selected by the Deputy Assistant Secretary of Defense (Reserve Affairs) for the position. On the same day the Army was requested by the Military Personnel Division of the Office of the Deputy Assistant Secretary of Defense (Administration) (Comptroller) to issue orders assigning Colonel Ebel to the position at the earliest practicable date. These orders were issued to Colonel Ebel on November 5, 1974, and stated a reporting date of November 18, 1974, with an active duty commitment of 4 years. Colonel Ebel reported for duty in the Office of the Deputy Assistant Secretary on that date.

On November 22, 1974, Colonel Ebel refused the active duty orders, since he desired active duty for training orders. His action in this regard was prompted by the restriction contained in 10 U. S. C. 3380(a) (1970) which provides in part:

"A reserve commissioned officer on active duty (other than for training) who is promoted to a reserve grade that is higher than the grade in which he is

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...serving continues to serve in the grade in which he was serving immediately before that promotion \* \* \*

In this connection Colonel Ebel's name had been submitted to a board for promotion from lieutenant colonel to colonel under the provisions of 10 U. S. C. 3333 (1970) which authorizes promotion of Reserve officers to fill vacancies which exist in the unit in which they are serving.

Thus it appears that in the latter part of 1974 when Colonel Ebel applied for the active duty assignment discussed above, he was also attempting to obtain a promotion from lieutenant colonel to colonel as a Reserve officer under a provision of law permitting such promotion for the purpose of filling vacancies in the unit to which a member is attached. In addition, it has been indicated that he was attempting to obtain a position as full-time executive of the Reserve Officers Association. When the position in the Office of the Deputy Assistant Secretary of Defense (Reserve Affairs) was offered to him, he could not accept without reservation because acceptance of that position on a permanent basis--active duty for 4 years--would have prevented his promotion in his Reserve status. He therefore rejected the orders which were issued placing him on active duty, with his consent, for 4 years and indicated that he hoped to get orders assigning him to the same duty temporarily "for training" until he was promoted, at which time he apparently would have accepted the 4-year tour of active duty. However, the Office of the Deputy Assistant Secretary of Defense (Reserve Affairs) could not issue the orders in question since this was the responsibility of the Department of the Army.

Whether training orders would have been appropriate in the circumstances is questionable since assignments to duty under 10 U. S. C. 265 are authorized for Reserve officers "on active duty (other than for training)." Also, since Colonel Ebel had been selected to fill a specific position, it would not seem that the duties he was to perform could be considered training. Although Colonel Ebel has stated that training orders were issued to others in similar circumstances and believes that the Army failed to issue training orders to him because of "politics" within the Army Reserve, the fact is that training orders were not issued. Further, due to his rejection of the November 5 active duty orders, Colonel Ebel had no valid orders during the period he worked in the Office of the Deputy Assistant Secretary of Defense (Reserve Affairs).

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The report submitted by the Department of Defense states that the Deputy Assistant Secretary and his special assistant agreed to let Colonel Ebel remain in the Office, without orders, until a promotion board could meet to determine whether he would be promoted to colonel. The report also states that the Deputy Assistant Secretary and his assistant wanted to use Colonel Ebel's services while allowing him to remain in such status as would enable him to be promoted to colonel and serve in that grade.

The report from the Department of Defense states that Colonel Ebel stated that he assumed active duty for training orders would eventually be issued with a retroactive effect to November 18, 1974.

Regarding the consideration of Colonel Ebel's promotion at this time, the following chronology of events are listed in the Department of Defense report. On December 15, 1974, the promotion board met and selected Colonel Ebel for promotion to colonel. The Army revoked Colonel Ebel's active duty orders of November 5, 1974, on December 23, 1974. On January 16, 1975, the Secretary of the Army ordered an Inspector General investigation of Colonel Ebel and removed his name temporarily from the promotion list pending results of the investigation. Colonel Ebel was asked to leave the Office of the Deputy Assistant Secretary of Defense (Reserve Affairs) on March 25, 1975, by the Deputy Assistant Secretary upon receiving the Inspector General's report. Also, on March 25, 1975, the Secretary of the Army removed Colonel Ebel's name from the promotion list permanently. On March 27, 1975, a request was made to have retirement points credited to Colonel Ebel. The request was accompanied by a description of Colonel Ebel's duties in the Office of the Deputy Assistant Secretary. This request was denied on May 6, 1975, since the retirement point credit had not been authorized in advance.

The report states that Colonel Ebel worked full time during the period of November 18, 1974, to March 25, 1975, without any official status, military or civilian, and without pay.

On June 28, 1976, the Secretary of the Army accepted retroactively the gratuitous services of Colonel Ebel for the period involved under the provisions of 31 U.S.C. 666. The Department of Defense denied Colonel Ebel's pay claim on March 31, 1977, indicating no legal basis for payment of the claim was known.

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The report received from the Army concerning this promotion indicates that information was received by the Army on January 15, 1975, concerning the activities of Colonel Ebel in connection with his pending promotion to colonel. These alleged activities it is stated were that Colonel Ebel was seeking a unit vacancy promotion as inspector general of a unit which carried the grade of colonel, but that he had no intention of performing the duties of that position, since he had been selected for the position in the Office of the Deputy Assistant Secretary of Defense (Reserve Affairs). On January 16, 1975, the Secretary of the Army ordered the Inspector General of the Army to investigate the allegations concerning Colonel Ebel's activities and asked the White House to return the promotion list which had been sent to the President for the purpose of removing Colonel Ebel's name. This action was taken under 10 U.S.C. 3363(e). The promotion list which the Secretary asked to be returned had been signed by the President on January 13, 1975, and was being held in the White House for forwarding to the Senate. The list was returned by White House personnel to the Secretary of the Army after the President's signature had been withdrawn in accordance with White House practice. A revised list without Colonel Ebel's name was prepared and sent to the White House which was signed on January 20, 1975, and submitted to the Senate on January 21, 1975.

It is contended by Colonel Ebel through his attorney that the actual reason why the Secretary of the Army acted in this case was that he was influenced by certain individuals in a matter involving Army Reserve politics, namely the appointment of a person to be the executive of the Reserve Officers Association.

It is also contended that Colonel Ebel had agreed with his unit commander that he intended to serve in both positions, the Inspector General post in his Reserve unit and the active duty position in the Office of the Deputy Assistant Secretary of Defense (Reserve Affairs).

#### Removal from the Promotion List

We will consider the removal of Colonel Ebel's name from the promotion list first. It appears that Colonel Ebel was selected by a selection board for a unit vacancy promotion under 10 U.S.C. 3383. At the same time he was selected, he was serving, although without orders, in the position in the Office of the Deputy Assistant Secretary of Defense (Reserve Affairs). Apparently, the unit promotion of Inspector General and the position in the Defense Department are considered incompatible.

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and on this basis together with the Inspector General's report indicating that Colonel Ebel intended to remain in the Reserve unit only until his promotion went through and he was ordered to active duty, the Secretary of the Army concluded that Colonel Ebel was not a bona fide candidate for the unit vacancy promotion.

As noted earlier 10 U. S. C. 3380 precludes a Reserve commissioned officer on active duty (other than active duty for training) from receiving the benefits of a promotion while serving on active duty. Furthermore 10 U. S. C. 3388 provides as follows:

"If a commissioned officer of the Army Reserve who enters upon active duty (other than for training) while his name is on a zone of consideration list under section 3383 of this title has had his name submitted to a selection board, or is recommended for promotion under section 3383 or 3384 of this title, his name shall be removed from the list or withdrawn from those recommended for promotion, and he shall be treated as if he had not been considered for promotion."

In view of these statutes it appears that the Congress intended that the unit vacancy promotions be used solely for filling positions in the various units and not be given when an individual is being ordered to active duty. Thus, notwithstanding the various allegations concerning the motivation of the Secretary of the Army in taking the described actions, it appears that a valid reason for acting did exist, which is entirely consistent with congressional intent in this area, even though Colonel Ebel had not entered on active duty.

Concerning the authority of the Secretary of the Army under the provisions of 10 U. S. C. 3363(e) and (f), those provisions are as follows:

"(e) The Secretary of the Army may delay the promotion of a reserve commissioned officer who is under investigation or against whom proceedings of a court-martial or board of officers are pending, until the investigation or proceedings are completed.

"(f) On the basis of the results of an investigation or proceedings of a court-martial or board of

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officers, the Secretary may remove from a recommended list the name of any officer whom he considers to be not qualified for promotion. An officer in an active status whose name is so removed from a recommended list, shall be treated, for the purposes of section 3368 of this title, as if he had been considered but not recommended for promotion."

With respect to these two sections, Colonel Ebel's attorney argues that subsection (e) only permits the Secretary of the Army to delay the actual implementation of a promotion and that this subsection does not provide authority for the removal of a name from a recommended promotion list. Further, he points out that subsection (f) permits permanent removal of an officer's name from a recommended list. It is his view that since the President signed the list containing Colonel Ebel's name, the procedures of that law could no longer be used.

It is our view that the above-quoted provision authorizes the Secretary to delay the promotion of an officer at any time prior to the completion of the promotion process when the circumstances listed in the statute arise. It has been reported that the Secretary ordered the investigation and requested the return of the list on the same day.

We believe that subsections (e) and (f) must be read together as providing a complete procedure by which the Secretary may delay the promotion of officers who are under investigation or are subject to adverse proceedings and revoke any action toward promotion if, after investigation or completion of the adverse proceedings, such action is warranted. Since the method to be used in delaying a promotion is not specified in subsection (e), we do not believe that removal of the name from a recommended list is precluded if such action is appropriate.

In this regard, in D'Arco v. United States, 194 Ct. Cl. 811 (1971), the court held that where an appointment is revocable at the will of the President, the appointment may be revoked at any time before the consummation of the appointment, by the President or the Secretary acting on his behalf. Since an appointment as a Reserve officer is made for an indefinite term and held during the pleasure of the President, it can be revoked at any time by the Executive. See 10 U.S.C. 593(b). Thus, Colonel Ebel could have been denied promotion at any time prior to his receipt thereof.

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Nor are we persuaded by the argument which is based upon the fact that the President had signed a promotion list containing Colonel Ebel's name since it would seem that when the statute conveys the authority to the Secretary of the Army to delay the promotion, this could be done at any time even after Presidential action. However, that would not seem to be germane to the issue at hand, since the record indicates that the Secretary of the Army asked the President or his advisors to return the promotion list and provided reasons for such request. Since the list was returned by the President, it would seem that he was in agreement with the Secretary's action and therefore it was the President who actually delayed the promotion. In any event whether the President or the Secretary of the Army actually took the action seems immaterial since there is authority for either or both to act in such circumstances. See D'Arco v. United States, supra, and cases cited therein.

Likewise, the action under 10 U.S.C. 3263(f) seems to be reasonable in view of the Inspector General's report and the statutes referred to above, and appears to be a proper exercise of administrative discretion, which would not be challenged by the courts or this Office.

In this regard, while allegations have been made concerning the reasons for Secretarial action in this case, the stated reasons for the delay and removal of Colonel Ebel's name from the promotion list are supported by the record.

Accordingly, it is our view that the actions taken in this case were proper and no basis exists for the payment of the difference of the pay and allowances of a colonel O-6 and a lieutenant colonel O-5 during the period involved.

Pay for Services in Office of Deputy Assistant Secretary of Defense

In connection with the duty performed by Colonel Ebel for the period November 18, 1974, through March 25, 1975, it is indicated that he served in the Office of the Deputy Assistant Secretary of Defense (Reserve Affairs) without orders. The record shows that although active duty orders were issued to Colonel Ebel, he refused the orders since, if he accepted the active duty orders, he would not have been entitled to the pay and allowances of a colonel O-6 if and when promoted under the provisions of 10 U.S.C. 3380. However,

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the record also indicates that the Deputy Assistant Secretary of Defense and his assistant agreed to let Colonel Ebel remain in the position until his promotion had been accomplished, since they wanted to use his services. Even though he had refused the initial orders it appears that Colonel Ebel believed that orders would be issued retroactively to cover the period of his service. It would seem that this belief was shared by the Deputy Assistant Secretary and his assistant, since no authority is cited allowing Colonel Ebel to remain in the position. Of course the entitlement to pay and allowances on the basis of retroactive orders is questionable. In any event he continued serving in the position without orders until March 25, 1975, when the Inspector General's report was received and he was asked by the Deputy Assistant Secretary to leave.

In this regard, we fail to see any connection between the investigation concerning Colonel Ebel's promotion and the performance of the service in the Department of Defense, other than the fact that he was serving without orders and was not offered new orders at the conclusion of the investigation. It appears that Colonel Ebel served in the position faithfully and satisfactorily.

As a general rule, a Reserve officer is not entitled to active duty pay and allowances unless he is serving under active duty orders. In this case, however, it appears that much confusion existed as to Colonel Ebel's status. At the time he began work in the Office of the Deputy Assistant Secretary of Defense, orders had been issued placing him on active duty. As a result of his action in refusing to accept these orders they cannot now be used to justify payment to him of active duty pay and allowances. Further, no orders were subsequently issued under which active duty pay could be authorized for this period and the record before us contains no indication that the Department of the Army ever intended to issue such orders, although it appears that officials in that Department were aware that Colonel Ebel continued to perform services for the Deputy Assistant Secretary of Defense (Reserve Affairs).

Colonel Ebel was certainly aware that he was serving without orders and although he may have thought that orders of the type he desired would be issued, his actions show that he was willing to perform the services in question without any assurance that he would be paid.

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No action was taken by the Department of the Army with respect to Colonel Ebel's status until June 28, 1976, when the Secretary of the Army retroactively accepted the gratuitous services of Colonel Ebel under the provisions of 31 U. S. C. 668; which provides:

"Section 665 of this title shall not be construed to prohibit the Secretary of the Army from accepting the gratuitous services of officers of the Army Reserve in the furtherance of the enrollment, organization, and training of the Army Reserve or the Reserve Officers' Training Corps, or in consultation upon matters relating to the military service."

A question has been raised as to whether that action of the Secretary was a valid exercise of the authority granted him in that section. The authority granted by 31 U. S. C. 668 is stated in broad terms, although it has not been used at least in recent years and there are no regulations regarding its implementation. The services were accepted in good faith by the Deputy Assistant Secretary of Defense (Reserve Affairs) and although he was aware of problems regarding Colonel Ebel's status on active duty, and thus his entitlement to pay, the resolution of those problems was primarily the responsibility of the Department of the Army. Due to the complex factual situation and the division of authority regarding Colonel Ebel's status, it does not seem unreasonable that the situation was not resolved until some time after the services were rendered. In the circumstances we do not find sufficient reason to question that action even though it was unusual. Further, if we held that action to be ineffective and a violation of the provisions of 31 U. S. C. 665(b) (prohibiting acceptance of voluntary services) occurred, that provision subjects violators to administrative sanctions only, unless the violation is knowing and willful. There is no indication in the file that any person involved knowingly and willfully violated the prohibition in 31 U. S. C. 665(b). Also, a violation of this statute would not provide any basis for a claim for compensation.

For the reasons stated, even though there is no doubt that the Government received a benefit from Colonel Ebel's services and even though he may have expected to receive pay and allowances for this period on the basis of retroactive orders, he should have known as a Reserve officer, that without orders assigning him to duty he would not be

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entitled to active duty pay and allowances. This is particularly so, since Colonel Ebel of his own volition refused to accept the active duty orders which were issued.

Accordingly, since we are not aware of any orders being issued, payment of pay and allowances for the period Colonel Ebel served in the Office of the Deputy Assistant Secretary of Defense (Reserve Affairs) is not authorized.

*R. F. Kellum*  
Deputy Comptroller General  
of the United States