



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Commander Loyd F. Galyean, USN (Retired)
File: B-224900
Date: February 24, 1987

DIGEST

A retired Navy officer who was aware of the Dual Compensation Act did not notify the Navy Finance Center when he obtained a civil service position with the Department of Energy. As a result his retired pay was not reduced as it should have been under the Dual Compensation Act, and he was overpaid \$26,024.45. Since he should have notified the Navy of his Federal civil service employment, he was not without fault in accepting the resulting overpayments. Such fault precludes favorable consideration of his application to be relieved of his repayment obligations under the provisions of the waiver statute, 10 U.S.C. § 2774.

DECISION

This action is in response to a request from Commander Loyd F. Galyean, USN (Retired), for reconsideration of our Claims Group's August 15, 1986 denial of his application for a waiver of the claim against him for a refund of overpayments of military retired pay he received between 1975 and 1981. It is our view that Commander Galyean is not without fault in this matter, and thus his waiver application was properly denied.

BACKGROUND

Commander Galyean retired from active service with the Navy in 1967. On July 6, 1975, he began civil service employment with the Department of Energy, and he remained an employee of that Federal agency until April 4, 1981. During the entire period of his civilian employment with the Federal Government he continued to receive full military retired pay, in contravention of the Dual Compensation Act. As a result, he was overpaid military retired pay in the total aggregate amount of \$26,024.45. After the discrepancy was discovered, a claim for a refund of that amount was brought against him. He then applied for a waiver of his repayment obligations.

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Commander Galyean asserts that he made a significant contribution to the government while employed by the Department of Energy, recovering \$2.4 million during the course of an audit. He also indicates that his employment as an auditor at the Department of Energy was unrelated to the skills he developed while in the Navy, where he served as an aviator. He further asserts that while at the Department of Energy he read a memorandum which he believed inferred the Dual Compensation Act did not apply to that agency because of emergency conditions, and that he "felt a sense of relief" at the time. For these reasons, he asserts, either the Dual Compensation Act should not apply to his situation, or if it does apply a waiver should be granted with respect to the overpayments of retired pay he received.

ANALYSIS AND CONCLUSION

The Dual Compensation Act of 1964, as amended, and as codified at 5 U.S.C. §§ 5531 et seq., provided at all times pertinent to this matter for a reduction in the retired pay of a retired officer of a regular component of a uniformed service during a period in which he holds a "position." A "position" is defined as a civilian office or position (including temporary, part-time or intermittent), appointive or elective, in the legislative, executive or judicial branch of the United States. See 5 U.S.C. § 5531.

Since Commander Galyean was a retired officer of the Navy receiving retired pay, holding a position at the Department of Energy, an agency in the executive branch of the United States Government, and since there is no evidence indicating he was exempt from the Act, we are required to assume that he was in fact subject to its restrictions, and thus payment of his full retired pay in addition to the salary received from the Department of Energy resulted in overpayments to him.

Section 2774 of title 10 of the United States Code provides that a claim of the United States against a person arising out of an erroneous payment of any pay to or on behalf of a member or former member of the uniformed services, the collection of which would be against equity and good conscience and not in the best interest of the United States, may be waived in whole or in part by the Comptroller General. Waiver may not be granted, however, if there exists in connection with the claim, an indication of fault on the part of the member.

The word "fault" as used in 10 U.S.C. § 2774 has been interpreted as including something more than a proven overt act or omission by the member. Thus, fault is considered to

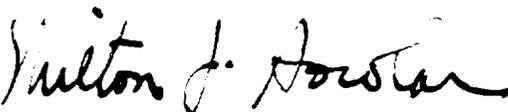
exist if in light of all the facts it is determined that the member should have known that an error existed and taken action to have it corrected. The standard employed by this Office is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlement. See, generally, 4 C.F.R. Part 91; and Colonel Robert L. Johnston, USAF, Retired, B-178042, May 19, 1977. See also Price v. United States, 621 F.2d 418 (Ct. Cl. 1980). In addition, we have specifically held that a retired officer of the uniformed services who accepts civilian government employment may not reasonably rely on vague assurances concerning an exemption from the Dual Compensation Act, and is instead at fault in drawing military retired pay in an unreduced amount if he fails to notify his agency and his military finance office of his dual status, to obtain a definite determination of his entitlements. Rear Admiral Harvey E. Lyon, USN (Retired), B-198955, April 13, 1981.

It is our view that Commander Galyean is not without fault in this matter. As noted by the Navy, dual compensation is routinely discussed in Navy briefings for retired officers as well as in retirement booklets provided to retiring members. It is our view that a reasonable person of Commander Galyean's rank and experience should have known -- that his military retired pay could be affected by his acceptance of a civilian government position and, indeed, Commander Galyean indicates that he was concerned by such a possibility. Based on his awareness of this possibility, our view is that he should have taken affirmative action to determine definitely whether or not he was affected by contacting the the proper Department of Energy officials and the Navy Finance Center to verify his status. Compare Rear Admiral Harvey E. Lyon, USN (Retired), supra.

While Commander Galyean's efforts as an employee of the Department of Energy may have resulted in a benefit to the government, that does not provide a basis for determining whether he was without fault in accepting the overpayments of military retired pay. Similarly, the fact that the skills needed by Commander Galyean to qualify for the civil service position were skills not developed while in the Navy does not affect the issues involved in this matter. In addition, while there may have been a possibility of exemption from the Dual Compensation Act based on employment needs that could not otherwise be readily met (5 C.F.R. § 550.603 (1975)), there is no evidence that such an exemption was ever requested by or for Mr. Galyean. The overriding fact remains that when he accepted a civil service position with the Department of Energy in 1975, he either knew or suspected

that under the Dual Compensation Act this could affect his military retired pay entitlements. Since he did not make a prudent inquiry concerning the consequences of his dual status, we are unable to conclude that he was without fault in accepting the resulting overpayments of retired pay.

Accordingly, the denial of the waiver is affirmed.

for 
Comptroller General
of the United States