



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Colonel Joe H. Engle, USAF (Retired)--  
Air National Guard Appointment  
File: B-227435  
Date: September 25, 1987

### DIGEST

Retired officers of the Regular Air Force who are duly appointed as Reserves of the Air Force for service in the Air National Guard of the United States are entitled to the pay and allowances prescribed by law for duty performed under their Reserve appointments, provided that they waive their military retired pay on the days for which they claim National Guard pay and allowances. Current Air National Guard regulations limit this arrangement to appointments to the position of Adjutant General or Assistant Adjutant General of a State. If the Secretary of the Air Force concludes that retired members of the Regular Air Force should be eligible for appointment to other positions in the Air National Guard, however, the Secretary may amend the regulations to authorize such additional appointments.

### DECISION

The issue presented here is whether a retired colonel of the Regular Air Force may accept an appointment as a Reserve officer of the Air Force, and on the basis of that appointment receive compensation for service performed in the grade of brigadier general in the position of Air National Guard Advisor to the United States Air Force's Space Command.<sup>1/</sup> Air National Guard regulations preclude the appointment of a retired member of the uniformed services except to the positions of Adjutant General or Assistant Adjutant General of a State. Therefore, unless the Secretary of the Air

<sup>1/</sup> This action is in response to a request for an advance decision received from the Assistant Secretary of the Air Force for Manpower and Reserve Affairs. The Assistant Secretary's request has been assigned submission number SF-AF-1475 by the Department of Defense Military Pay and Allowance Committee.

Force amends the regulations, or unless the appointment is to the position of Adjutant General or Assistant Adjutant General, the retired member is not entitled to pay and allowances for his Air National Guard service, since he will not be accorded federal recognition.

#### BACKGROUND

Colonel Joe H. Engle is a retired Regular Air Force officer. He retired on December 1, 1986, under the authority of 10 U.S.C. § 8918 on the basis of his completion of 30 years of active duty.

The Governor of the State of Kansas has tendered an appointment in the Kansas Air National Guard to Colonel Engle. The concerned Air Force officials state that if Colonel Engle is federally recognized in that capacity, and is tendered an appointment as a Reserve officer of the Air Force for service in the Air National Guard of the United States, he will be assigned as the Air National Guard Advisor to the Commander, United States Air Force Space Command. This is a drill status position which carries an authorized reserve grade of brigadier general. Air Force officials have advised us that the proposed appointment would not entail service concurrently in the position of Adjutant General or Assistant Adjutant General of the State of Kansas.

The Air Force officials further state that doubt has arisen concerning Colonel Engle's entitlement to compensation for service performed under this proposed Reserve appointment because of our decision in 40 Comp. Gen. 51 (1960). There we expressed the view that it had been improper for a retired member of the Regular Marine Corps to join the Air National Guard.

The Air Force officials note that in 40 Comp. Gen. 51, supra, we expressed the view that the particular service member involved in that case may have become subject to conflicting simultaneous calls to active duty by both the Marine Corps and the Air Force as the result of his dual membership both in the Regular Marine Corps and in the Air National Guard. The officials state that although Colonel Engle's situation is in some ways analogous to the circumstances of that case, a significant distinction exists in that he will not be subject to possible conflicting calls to active duty by 2 separate branches of the armed forces. Rather, even though he will have the dual status of belonging to both the Regular and the Reserve components of the Air Force, in the event of a mobilization of the armed forces he will be subject to a call to active duty

exclusively by the Air Force. The officials suggest, therefore, that Colonel Engle's acceptance of an appointment as a Reserve of the Air Force should not be viewed as objectionable, since it will not conflict but will instead be compatible with his status as a retired member of the Regular Air Force.

#### ANALYSIS AND CONCLUSION

We are not aware of any provision of federal statute prohibiting service members who are on the retired lists of the Regular components of the uniformed services from accepting appointments in the Air National Guard as Reserve officers of the Air Force.<sup>2/</sup> Applicable provisions of regulation of the Air National Guard which have been issued by order of the Secretary of the Air Force, however, contain the following prohibition:

**"3. Persons Ineligible for Appointment/Federal Recognition:** The following persons are ineligible for appointment or Federal recognition:

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"f. Persons on a retired roll. An individual on the retired roll of any of the Armed Forces, the Coast Guard, the Merchant Marine, Health Services and Mental Health Administration, or National Oceanic and Atmospheric Administration. Exception: Retired Air Force officers who obtain favorable Secretary of the Air Force determination for appointment to general officer grades in the Air National Guard of a State with assignment as the Adjutant General or Assistant Adjutant General."<sup>3/</sup>

In 40 Comp. Gen. 51, supra, we held that it was improper for a retired member of the Regular Marine Corps to join the Air National Guard. This result was required by the applicable provisions of the Air National Guard regulations then in

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<sup>2/</sup> See, generally, 10 U.S.C. Chapter 34 and 32 U.S.C. Chapter 3 concerning appointments in the Reserve components of the armed forces and in the Army and Air National Guard.

<sup>3/</sup> Paragraph 3, Air National Guard Regulation 36-02. To similar effect, see also paragraph 3, Air National Guard Regulation 36-01.

effect which, like the regulation quoted above, restricted military retirees from becoming active members of the Air National Guard. Although the conclusion reached in that decision was predicated on the applicable regulations, as indicated, in the decision we also observed generally that simultaneous membership in both the Marine Corps and the Air Force appeared to create a situation in which the service member might become subject to conflicting military orders from 2 separate branches of the armed forces, in the absence of any explanation or basis for the arrangement.

Conversely, our Office and the federal courts have recognized that under the applicable regulations a retired officer of the Regular Air Force may properly accept an appointment as a Reserve officer of the Air Force and serve in that capacity in a higher grade with the Air National Guard while holding the position of Adjutant General or Assistant Adjutant General of a State.<sup>4/</sup> In that situation, however, military retired pay may not be paid concurrently with compensation for National Guard service, and the applicable federal statutes instead provide for a waiver of military retired pay on the days for which compensation is claimed for service performed under the National Guard appointment.<sup>5/</sup> Also, in that situation inactive duty "drills" or active duty for training performed in a higher grade under the National Guard appointment may not serve as a basis for a recomputation of military retired pay at a higher rate.<sup>6/</sup>

Based on the foregoing, we would have no objection to the appointment of Colonel Engle as a Reserve officer of the Air Force and his assignment to a position which carries an authorized reserve grade of brigadier general in the Air

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4/ See Adams v. United States, 230 Ct. Cl. 1016 (1982); and B-163446, March 8, 1977. See also 47 Comp. Gen. 654 (1968), to similar effect concerning retired officers of the Regular Army who are tendered appointments in the Army National Guard.

5/ 10 U.S.C. § 684. See, generally, 44 Comp. Gen. 613 (1965).

6/ See Adams v. United States, supra (footnote 4). As an exception, a recomputation would be authorized if the retired officer incurred a physical disability rating of at least 30 percent while recalled to active duty, including active duty for training. See 10 U.S.C. § 1402(b) and (d).

National Guard if he meets the standards for eligibility specified by the applicable regulations. As indicated, that procedure is not prohibited by statute, and his eligibility and suitability for the National Guard position is otherwise primarily a matter for determination by those vested with the power of appointment, and not by our Office.

However, the Secretary of the Air Force has promulgated Air National Guard regulations, cited above, which would preclude Colonel Engle's proposed appointment unless it is an "assignment as the Adjutant General or Assistant Adjutant General of a State." Accordingly, in the absence of a change by the Secretary of the Air Force in the Air National Guard regulations authorizing such an appointment, or unless Colonel Engle is appointed an Adjutant General or Assistant Adjutant General of a State, he would not be entitled to pay from the federal Government under that appointment, since federal recognition could not be extended.

Alternately, if the Secretary of the Air Force amends the applicable Air National Guard regulations to authorize the proposed appointment, and Colonel Engle is then duly appointed a Reserve officer of the Air Force and is assigned to duty with the Space Command in the grade of brigadier general, our view is that he will be entitled to the pay and allowances prescribed by federal law for services performed under that appointment, provided that he waives his military retired pay on the days for which he claims the National Guard pay and allowances. Further, in that event it should be understood that inactive duty or active duty for training he may perform with the National Guard will generally not serve as a basis for a recomputation of his military retired pay at a higher rate.

*for* *Harry R. Van Cleave*  
Comptroller General  
of the United States