



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Military Retirees - Employment Under Contract -
Dual Compensation Restrictions

File: B-231565

Date: November 14, 1988

DIGEST

When the military and naval departments enter into statutorily authorized personal services contracts for the services of retired service members who are specialists in medicine and related fields, the retirees do not thereby become civilian federal employees in established government positions. Hence, they are not covered by the dual compensation restrictions of 5 U.S.C. §§ 5531 and 5532 (1982), which apply to a retired service member who holds a civilian "position" in the government.

DECISION

In this case we conclude that retired military and naval personnel are not subject to reductions in their retired pay under the dual compensation restrictions of 5 U.S.C. §§ 5531 and 5532 (1982) when they enter into contracts with the government under the authority of 10 U.S.C. § 1091 (Supp. IV 1986) to provide health care services.^{1/}

BACKGROUND

Section 1091 of title 10, United States Code, authorizes the Secretaries of the military and naval departments to contract "with persons for services (including personal services) for the provision of direct health care services. . . ." Implementing regulations of the Department of Defense (DOD) permit these personal service contracts "when in-house sources are insufficient to support

^{1/} This action is in response to a request for a decision received from the Judge Advocate General of the United States Navy.

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the medical mission of the military Department."2/
Contractors provide these services in DOD facilities
under the supervision of DOD officials.

The dual compensation restrictions imposed by sections 5531 and 5532 of title 5, United States Code, require reduction in the retired or retainer pay of a retired service member who holds a "position" of civilian employment with the federal government. The term "position" is defined in 5 U.S.C. § 5531(2) as "a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States. . . ."

Officials of the Department of the Navy raise the question of whether these dual compensation restrictions apply to retired service members who are employed by contract to provide health care services under the authority of 10 U.S.C. § 1091. They note that in 45 Comp. Gen. 81 (1965) we held that a retired Army medical officer employed by contract to work under the supervision of DOD officials in conducting physical examinations at an enlistment and induction center did not hold a "civilian office" under the dual compensation laws then in effect. They also note, however, that more recently in 1986, in an advisory opinion to the Congress, we expressed the view that a retired Navy officer became subject to the current dual compensation restrictions of 5 U.S.C. §§ 5531 and 5532 when he entered into a contractual arrangement to fill the position of Manager of Nuclear Power with the Tennessee Valley Authority (TVA).3/

ANALYSIS AND CONCLUSION

There are some basic requisites which must be fulfilled for an individual to have the status of a duly appointed civilian employee of the United States. Generally these include being appointed to an office or position established under law, taking the oath of office, entering on duty, and executing affidavits relating to loyalty, strikes, and purchase of office.4/ Individuals who perform services for the government under contract do not thereby become

2/ DOD Instruction 6025.5, Feb. 27, 1985.

3/ B-222334, June 2, 1986.

4/ See generally, GAO Civilian Personnel Law Manual, tit. I, chap. 2 (1983).

federal employees in the absence of an actual appointment to an established office or position in the government.^{5/} Our view is that physicians serving the government under contract, and not by appointment to a civilian office or position, are not covered by the terms of the dual compensation restrictions of 5 U.S.C. §§ 5531 and 5532, since they do not actually hold positions in the government.^{6/}

This conclusion is not inconsistent with our 1986 advisory opinion concerning the Navy officer who worked for the TVA under a contractual arrangement. We determined that he held an established position in TVA, and that the contractual arrangement under which he was appointed to that position was merely a device used to circumvent a statutory pay limitation. We said that while 5 U.S.C. §§ 5531 and 5532 do "not affect persons serving under a proper contract with Federal agencies, it is our view, stated previously, that Mr. White's contract is not proper. Thus, this contractual relationship also appears to be a circumvention" of 5 U.S.C. §§ 5531 and 5532. Conversely, the services of the health care personnel here in question have been obtained by contracts properly authorized under 10 U.S.C. § 1091. The health care personnel do not hold established positions in the government.

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^{5/} See generally, Horner v. Acosta, 803 F.2d 687 (Fed. Cir. 1986); Costner v. United States, 665 F.2d 1016 (Ct. Cl. 1981).

^{6/} Compare 45 Comp. Gen. 81, supra.