



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dr. Donald J. Mauthe - Request for Waiver

File: B-235159

Date: February 7, 1990

DECISION

Dr. Donald J. Mauthe, a retired Air Force Lieutenant Colonel, asks that we reconsider a May 16, 1988, decision by our Claims Group partially denying his request for waiver of the government's claim for erroneous payments of retired pay in the amount of \$31,407.40. Our Claims Group waived \$25,440.30 of that amount, but denied waiver of the remaining \$5,967.10.

After the Claims Group's action, an audit of Dr. Mauthe's retired pay account by the Air Force revealed that he had received additional overpayments of retired pay in the amount of \$10,705.45. Dr. Mauthe also seeks waiver of the claim for these erroneous payments.

For the following reasons, we affirm our Claims Group's decision, and we deny Dr. Mauthe's further request for waiver.

RECONSIDERATION REQUEST

Dr. Mauthe retired from the Air Force in 1985. In February 1986 he accepted employment as a dentist with the Veterans Administration (VA), at an annual salary of \$55,000, and apparently was assured by the VA that his employment was not subject to the restrictions of the Dual Compensation Act, 5 U.S.C. § 5532. That statute basically requires that the retired pay of a retired officer who holds a government position be reduced by a prescribed method, and that the combined total of salary and retired pay not exceed the rate of pay provided for level V of the Executive Schedule.

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The restrictions in the Dual Compensation Act in fact did apply to Dr. Mauthe's situation,^{1/} and once the Air Force learned that he was receiving compensation from the VA it notified him that he owed the government a total of \$31,407.40, representing overpayments from February 25, 1986, through July 31, 1987. The Air Force advised Dr. Mauthe of both the reason for its finding and the maximum amount of pay Dr. Mauthe could receive in his bi-weekly paycheck without violating the Dual Compensation Act.

Dr. Mauthe requested that our Office waive the government's claim pursuant to 10 U.S.C. § 2774, which authorizes the Comptroller General to do so for erroneous payments accepted in good faith by a former service member if collection would be against equity and good conscience and not in the best interests of the United States. Our Claims Group determined that Dr. Mauthe's situation met the standards for waiver except for \$5,967.10 that Dr. Mauthe received after the date he knew of the overpayment, April 6, 1987.

In requesting reconsideration, Dr. Mauthe complains that he was hired by the VA with the understanding that his retirement pay would not be affected, and argues that his total debt of \$31,407.40 therefore should have been waived. The fact that Dr. Mauthe may have received erroneous advice, however, provides no legal basis to disregard the restrictions in the Dual Compensation Act. See 56 Comp. Gen. 943 (1977). As of April 6, 1987, Dr. Mauthe knew the advice he received had been wrong, and from that point forward he clearly was obligated to set aside any further overpayment for eventual refund when the matter finally was resolved. Id. at 952. Waiver of a claim under 10 U.S.C. § 2774 is not appropriate when the payee accepts payments that he knows are erroneous and does not take action to have them corrected. Lt. Wanda S. Janus - Debt Collection, B-233347, Dec. 16, 1988.

^{1/} Shortly after hiring Dr. Mauthe, the local VA officials sent a request to the VA Regional Director that Dr. Mauthe be excepted from dual compensation restrictions. The local officials subsequently were advised that no exception could be made.

FURTHER REQUEST FOR WAIVER

Shortly after the Claims Group issued its decision, the VA advised the Air Force that Dr. Mauthe's salary had increased to \$71,377. The Air Force then audited Dr. Mauthe's account, and notified him of an additional indebtedness of \$10,705.40 for overpayment for the period December 1, 1987 through June 30, 1988. The cause of that overpayment was the Air Force's failure, because it had not known of the salary increase, to reduce Dr. Mauthe's retired pay further in accordance with the pay cap mandated by the Dual Compensation Act.

Dr. Mauthe asks that the new claim be waived because it was not his responsibility to advise the Air Force of changes in his VA salary, and because he could not reasonably have been expected to have recognized the pay error.

We see no basis to waive this claim. By the time this overpayment began, Dr. Mauthe knew that the Dual Compensation Act applied to his situation, knew the pay cap, and should have known that any increase in his VA salary had to be met with a corresponding decrease in his retired pay. Where a member reasonably should have recognized that he was being overpaid, and especially where he should have known the reason underlying the government's error and the amount of overpayment, collection action is not inequitable. Petty Officer James K. Boatman, USN, B-197513, Sept. 24, 1980; Thomas M. Welsch, B-196461, Feb. 13, 1980. Waiver under 10 U.S.C. § 2774 therefore is inappropriate.

In sum, we affirm our Claims Group's May 16, 1988 decision, and we deny Dr. Mauthe's further request for waiver.


James F. Hinchman
General Counsel