



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Captain Virgil W. Whitehead, USMC (Retired) -
Request for Waiver

File: B-238128

Date: March 8, 1991

DECISION

Captain Virgil W. Whitehead, USMC (Retired), appeals our Claims Group's denial of his request for waiver of overpayments of retired pay resulting from his civilian government employment after retiring from the Marine Corps. For the reasons set forth below, we sustain the Claims Group's decision and deny waiver.

The record shows that in 1977 Captain Whitehead was advised by the Marine Corps that after serving 10 years as a temporary limited duty officer with over 27 years of active service, he could retire in that status as a captain or revert to his permanent enlisted grade as a master gunnery sergeant. He apparently chose the former and was notified by letter of June 2, 1978, that he would be placed on the Marine Corps Officers Retired List effective July 1, 1978.

On October 1, 1978, Captain Whitehead accepted a position with the federal government as a civilian employee. Due to administrative error, his retired pay was not reduced as it should have been under provisions of the Dual Compensation Act, 5 U.S.C. § 5532(b), resulting in an overpayment of retired pay. The Marine Corps determined that he was overpaid a total of \$15,320.24 from October 1, 1978 through June 17, 1980 and from August 16, 1982 through July 31, 1983, of which \$8,328.00 remains uncollected.

Captain Whitehead contends that, because he was an enlisted member during the entire period of his active duty and served as a temporary limited duty officer for only 10 years of that time, the Dual Compensation Act retired pay reduction provision, 5 U.S.C. § 5532(b), is not applicable to him.

In 44 Comp. Gen. 297 (1964), we held that Navy and Marine Corps enlisted members given temporary appointments as officers in the regular Navy or Marine Corps and retired in their temporary officer status pursuant to 10 U.S.C. § 6323 were subject to the retired pay reduction provision of the Dual Compensation Act while holding a civilian office in the

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federal government. See also 35 Comp. Gen. 657, 662 (1956). ~~Since~~ the record shows that Captain Whitehead elected to be ~~retired~~ in his temporary limited duty officer grade as captain rather than reverting to his enlisted grade and was, in fact, transferred to the Marine Corps Officers Retired List pursuant to that election, his retirement pay should have been reduced under the Dual Compensation Act.

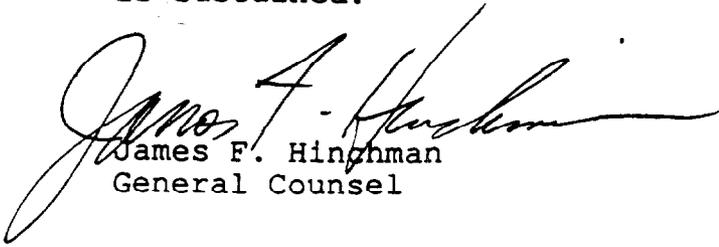
Captain Whitehead argues that his indebtedness should be waived because he had been advised prior to accepting civilian employment that the Dual Compensation Act did not apply to permanent enlisted members upon their retirement. However, the fact that Captain Whitehead may have received erroneous advice provides no legal basis to disregard the restrictions in the Dual Compensation Act. See Dr. Donald J. Mauthe - Request for Waiver, B-235159, Feb. 7, 1990.

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.

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. See Commander Loyd F. Galyean, USN (Retired), B-224900, Feb. 24, 1987.

In denying Captain Whitehead's request for waiver, our Claims Group noted that Captain Whitehead did not submit a Statement of Employment, DD Form 1357, to the Marine Corps Finance Office as he had been instructed to do in the retirement packet provided to him prior to his retirement. As Captain Whitehead began his civilian employment with the government just 3 months after he retired from the Marine Corps, the retirement instructions regarding notification should still have been fresh in his mind, and we conclude that he was at fault for not notifying the Marine Corps Finance Office of his dual status and obtaining a determination of his retired pay entitlement. Consequently, Captain Whitehead's request for waiver was properly denied.

In sum, the denial of waiver by the Navy and our Claims Group is sustained.



James F. Hinchman
General Counsel