



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Clair H. Upton

File: B-252125

Date: July 20, 1993

DIGEST

A retired Coast Guard member who did not notify the Coast Guard Pay and Personnel Center when he took a federal position and subsequent retired pay was not reduced as it should have been under the Dual Compensation Act is not entitled to waiver of the debt resulting from erroneous overpayment because he was not without fault under 10 U.S.C. § 2774.

DECISION

This action is in response to a request from Clair H. Upton for reconsideration of our Claims Group's denial of his application for waiver of the claim against him for a refund of overpayments of military retired pay he received between July 27, 1980 and February 28, 1990. We find his waiver application was properly denied.

Mr. Upton retired as a Chief Warrant Officer (CW03) from the Coast Guard in 1972 under conditions which entitled him to retired pay. He was employed by the U.S. Forest Service on July 27, 1980. At that time his retired pay should have been reduced in accordance with the provisions of the Dual Compensation Act (5 U.S.C. § 5532). However, neither the Forest Service nor Mr. Upton notified the Coast Guard Pay and Personnel Center of his federal government employment. As a result, Mr. Upton received an overpayment of \$39,485.34 over nearly 10 years.

The Coast Guard denied Mr. Upton's request for waiver because it found that he was at least partially at fault in failing to notify the service of his civilian employment. Our Claims Group denied the appeal of Mr. Upton and sustained the Coast Guard's determination. Both the Coast Guard and the Claims Group point out that Mr. Upton completed and signed a certification form (Form CGHQ-4721) when he retired from the Coast Guard stating he would inform the Coast Guard Commandant (FP) "immediately" upon assuming a position with the federal government.

Mr. Upton's request for reconsideration is based on several assertions; that he had no knowledge of the Dual Compensation Act; that there was an 8 year delay between his military retirement and civilian government employment; that he made no effort to hide his military service and retirement pay from the Forest Service when he applied for work there; and that he believes that a prior decision of our Office should be used as a basis for granting his waiver request.

Regarding his lack of knowledge of the Dual Compensation Act, we note he states in his waiver application to the Coast Guard dated April 3, 1990, "I advised the U.S. Forest Service of my status as a Warrant Officer upon employment. I was advised by the Personnel Officer that I was not involved in any reductions of pay." It is clear from this statement that Mr. Upton was aware of a potential dual pay issue in 1980 when he took the Forest Service position, though he may well have been unfamiliar with the Dual Compensation Act or the term "dual compensation".¹ Had he then taken the step of consulting the materials he received when he retired, in particular publication CD-366 "Your Guide in Retirement," he would have been fully informed of the requirements applying to him.

The fact that there was a period of 8 years between his military service and his subsequent civilian government employment does not excuse the failure to be aware of the dual compensation statutes. See Commander Loyd F. Galyeon, USN (Retired), B-224900, Feb. 24, 1987 (8 year period), and more recently Captain Ronald L. Bouchard, USAF (Retired), B-251128, May 4, 1993 (5 year period, in a case which closely parallels the current case). Mr. Upton does not contend he no longer possessed materials he was provided at the time of his retirement; indeed he notes that he had retained copies of several retirement documents dating from 1972.

While Mr. Upton provided the Forest Service with full information on his military service when he took a position in 1980, it is less clear from the record before us that he fully disclosed his receipt of military retired pay. He checked "yes" in response to the question "Do you receive or do you have an application for retirement or retainer pay pension, or other compensation based upon military, federal

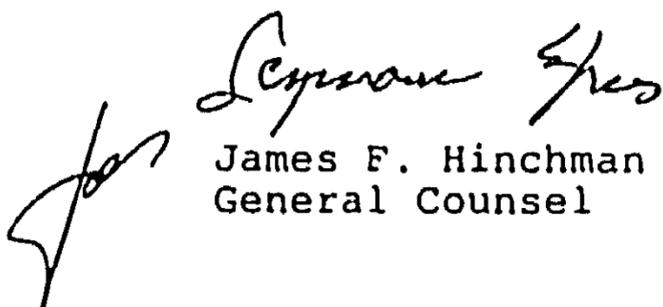
¹Though Mr. Upton was apparently misinformed by the Forest Service that they would "take care of it", or that he was "not involved in any pay reductions," he is not now pressing his request as an instance of erroneous advice, and even if he were, adding that argument would not affect our current decision.

civilian, or District of Columbia Government service?", but did not provide the further information required by a response of "yes" to the question, as it appears on a declarations form he completed on July 28, 1980. The fact that the question is posed in the alternative leaves his situation unclear without the further details he did not provide.

Finally, regarding our decision in the matter of Commander Ludvik Pfeifer, NOAA (Retired), B-243398, May 20, 1991, which the claimant cites as precedent for his waiver, we found there that waiver was proper because the former member had been hired in a manpower shortage position and that his moving expenses had been paid, normally not reimbursed for federal employees, and therefore he reasonably believed that his special job category exempted him from the dual compensation statutes. Such extraordinary circumstances were not present in the employment of Mr. Upton.

Thus, Mr. Upton's contentions leave unaffected the prior conclusion that he was at least partially to blame for the overpayment he is now asked to repay. In our view, a person in his position who sought to keep himself reasonably informed of requirements applying to him should have been aware of his obligation to inform his military finance center if he assumed federal employment. Accordingly, we sustain the action of the Claims Group.

If the Coast Guard determines that our decision creates a hardship for Mr. Upton, the Coast Guard may wish to exercise authority granted to it under 4 CFR § 102.11 to arrange a repayment plan which takes any hardship appropriately into account.



James F. Hinchman

James F. Hinchman
General Counsel