

Matter of: Colonel Elvin D. Isgrig, USAF, Retired
File: B-253839
Date: December 20, 1993

DIGEST

Retired Air Force officer who accepted employment with the Navy on a temporary intermittent basis was aware of the dual compensation restrictions and that his retired pay would be reduced, but no reduction of his retired pay was made. Since he had been told that his pay was subject to dual compensation restrictions and he questioned the overpayments, it cannot be said that he was without fault in the matter and waiver is not appropriate.

DECISION

Colonel Elvin D. Isgrig has requested reconsideration of our Claims Group's denial of his request for waiver of his debt caused by an overpayment when his retired pay was not reduced in accordance with the dual compensation law (5 U.S.C. § 5532). We affirm the Claims Group's actions.

Colonel Isgrig was appointed to a position on the Naval Research Advisory Committee (NRAC) as a temporary, intermittent employee effective May 16, 1985 and served in a number of similar appointments through 1991. By letter dated July 30, 1985, the Navy notified Colonel Isgrig of the dual compensation regulations applicable to special government employees who receive military retired pay. He was also notified of the one-time 30-day exemption to the dual compensation restrictions following which his military retired pay would be reduced.

It appears that Colonel Isgrig did not immediately notify the Air Force of his employment and the appropriate deductions to his retired pay were not made by Defense Finance and Accounting Service (DFAS).

The provisions of 5 U.S.C. § 5532 required a reduction of Colonel Isgrig's retired pay based on his intermittent employment in 2 separate computational steps, following the expiration of the initial 30-day exemption period prescribed by 5 U.S.C. § 5532(d)(2). The first step involves a

reduction of his military retired pay on a daily basis for each day of his intermittent civilian employment under the formula prescribed by 5 U.S.C. §§ 5532 (a) and (b), which applies only to retired Regular officers of the uniformed services. The second step (the so-called "pay cap") involves a further reduction under the general requirement imposed by 5 U.S.C. § 5532(c) that combined military retired pay plus Federal civilian salary not exceed the rate of basic pay for Level V of the Executive Schedule for any "pay period."

In June 1987, Colonel Isgrig wrote to DFAS and requested a review of his earnings statements because it appeared that applicable adjustments were not being made to his retired pay. DFAS contacted NRAC and requested Colonel Isgrig's pay records so that the exact amount of the debt could be determined. Due to the failure of NRAC to provide the records to DFAS in a timely manner, DFAS was unable to determine the amount of the debt until 1992. In August 1992 DFAS estimated a debt of \$4803.51, based on the information provided by Colonel Isgrig. During that month the Navy finally provided the requested information and DFAS was able to calculate the actual debt of \$11,797.48. Of that amount, \$6403.14 was determined to be overpaid because of dual compensation restrictions and \$5394.34 was overpaid due to the pay cap limitation.

Colonel Isgrig requested waiver of the debt. DFAS concluded that Colonel Isgrig was notified that his pay would be reduced due to dual compensation restrictions at the time of his employment. Throughout the relevant time period, he was also notified on various Notifications of Personnel Action forms that he was subject to the dual compensation restrictions. At no time was Colonel Isgrig told that he was exempt from the provisions of the dual compensation restrictions, and he should have expected a reduction in his retired pay and eventual repayment of the erroneous payments to the government. However, with regard to the pay cap debt, DFAS notes that Colonel Isgrig was unfamiliar with the complex pay cap formula and would not have reasonably been aware or had reason to suspect his pay would be subject to the pay cap limitation under 5 U.S.C. § 5532(c).

Our Claims Group, by settlement certificate dated November 17, 1992, agreed with the conclusions reached by DFAS and waived \$5,394.34 of the debt. However, overpayment which resulted from the dual compensation restriction, of which Colonel Isgrig was aware, totaling \$6403.14 was not waived.

In his request for reconsideration Colonel Isgrig claims that the settlement certificate of the Claims Group ignores the fact that he questioned his pay in 1987 regarding the

dual compensation restriction and that DFAS was unable to provide a conclusive answer regarding the proper amount of overpayment until 1992.

While the Claims Group's settlement did not discuss that Colonel Isgrig did write DFAS in June 1987 regarding his pay, this does not alter the decision that he was aware of the dual compensation law and that his retired pay was not being reduced in accordance with the law's requirements.

Moreover, despite repeated requests to the Navy, DFAS was unable to obtain the necessary information regarding Colonel Isgrig's pay records until August 1992. While the delay was unfortunate, Colonel Isgrig was aware that DFAS was awaiting information of the records from the Navy so that the exact amount of the debt could be determined and this delay does not provide a basis to allow waiver of the claim.

In fact, in March, 1990, DFAS began automatic reductions in Colonel Isgrig's retired pay on the basis of full time employment following a computer match of his federal employment. However, in April, 1990, the Navy contacted DFAS and advised that Colonel Isgrig was employed only on an intermittent basis. Therefore, DFAS stopped the reduction and refunded the amount withheld and waited until receiving the pay records from the Navy before resuming the reduction. This refund did not mean Colonel Isgrig was not subject to the dual compensation law, as he argues, only that DFAS did not have the complete records to make the proper reduction.

Finally, Colonel Isgrig contends that the "Dual Compensation and Pay Cap Factsheet," dated March 3, 1992 and "Application for Waiver" form, which he received in an April 28, 1992 letter from DFAS, made him aware of the 30 day exemption and the fact that he could file for "waiver". As noted earlier, Colonel Isgrig was made aware of the 30-day exemption in July 30, 1985 letter from the Navy at the time of his employment. Moreover, the "waiver" application form was not for waiver from the dual compensation laws but for waiver of the debt pursuant to 10 U.S.C. § 2774.

The waiver statute, 10 U.S.C. § 2774, provides that the Comptroller General may waive a claim of the United States arising out of an erroneous payment to a service member if collection would be against equity and good conscience and not be in the best interest of the United States. This authority may not be exercised if there exists in connection with the claim, any indication of fraud misrepresentation, fault or lack of good faith on the part of the member.

"Fault" as used in this section has been interpreted as including something more than a proven overt act or omission by the member. Thus we consider "fault" to exist if in

light of all the facts it is determined that the member should have known that an error existed and taken action to have it corrected. The standard used is whether a reasonable person should have been aware that he was receiving payment in excess of the proper entitlement.

In the present case, Colonel Isgrig was notified that he would be affected by dual compensation restrictions from the beginning of his appointment. The record shows that he was reminded of dual compensation restrictions on various personnel forms. We agree with the conclusions reached by DFAS and the Claims Group. Colonel Isgrig should reasonably have known he was being overpaid and should have retained the funds for repayment when the matter was corrected. Accordingly, waiver of the additional \$6403.14 is denied.

James F. Hinchman
General Counsel