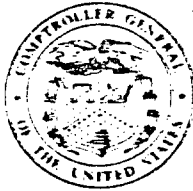


**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-172318

DATE: APR 6 1976

60719

MATTER OF: Lieutenant Commander George K. Huff,  
USN, Retired

99103

- DIGEST:
1. For purposes of establishing employment retention preference (5 U. S. C. 3501(a)(3), and 3502), exemption from reduction in retired pay under the Dual Compensation Act (5 U. S. C. 5532(c)), and full credit for years of military service for annual leave accrual (5 U. S. C. 6303(a)) as a civilian employee of the Federal Government, determinations as to whether a service member's disability retirement from a uniformed service resulted from injury or disease incurred as a direct result of armed conflict or caused by an instrumentality of war during a period of war can only be made by the uniformed service from which he is retired and neither the employing agency nor this Office has the authority to change that determination.
  2. Where a retired service member has sought correction of military records under 10 U. S. C. 1552 and the Correction Board has denied the relief sought, such action is final and conclusive on all officers of the United States and not subject to review by the General Accounting Office.

This action is in response to a letter, with enclosures, from Lieutenant Commander George K. Huff, USN, Retired, in which he requests review of the administrative action taken in his case by the Naval Weapons Station, Seal Island, California, which resulted in his military retired pay being reduced, loss of certain leave credits from his civilian employment and the establishment of an indebtedness to the United States in the amount of \$5,451.81 arising out of the overpayment of military retired pay during the period 1967 to 1972.

The file in the case shows that the member, who was serving on active duty in the United States Navy during World War II, appeared before a Navy Retiring Board on September 24, 1943, apparently

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convened for the purpose of determining his physical fitness to continue on active duty in the Navy. The Board in his case concluded that he was incapacitated for active service by reason of physical disability; that his incapacity was permanent; and that it was contracted in line of duty. By action dated February 29, 1944, the President of the United States approved the proceedings and findings of the Board and the member was placed on the retired list effective March 1, 1944, under the provisions of section 417 of title 34, United States Code (1940 ed.), in the grade of lieutenant commander in conformity with the provisions of subsection 404(h) of the same title.

On May 29, 1967, the member was initially employed at the Naval Weapons Station, Seal Beach, California, under a 700-hour Temporary Appointment as a General Engineer (GS-12). It is indicated that the application for employment (SF-57) which he filed showed that he had performed military service in the Navy from 1923 to 1944. However, it was further indicated that that document showed that he only claimed a 5-point veterans preference but did not claim a 10-point disability preference and while he responded "yes" to the questions on the form concerning disability, he apparently qualified that affirmative response by noting that he had pilot fatigue in World War II and that he failed a physical examination to the rank of full commander and was subsequently retired. In this connection, it was administratively admitted that since the member had not claimed the 10-point disability preference, no follow-up action was taken to verify the basis for his retirement.

In early 1971, incident to a reduction-in-force (RIF) action involving several engineering positions at that Naval Weapons Station-- apparently not the position held by the member--a review of RIF retention registers was conducted. As a result, irregularities were discovered in the member's service computation date and in the crediting of his military service for leave accrual, and RIF purposes under the Dual Compensation Act.

Because of these irregularities, it was apparent that some adjustments had to be made in the member's employment records, however, before doing so, the Naval Weapons Station, by letter dated March 1, 1971, originated a routine request to the National Personnel Records Center (Military Personnel Records), St. Louis, Missouri, to verify whether the member was retired from the Navy, and if so, the basis for such retirement. That request was forwarded by the Chief

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of Naval Personnel, via the Navy Bureau of Medicine and Surgery, to the Navy Judge Advocate General (JAG) for action.

In response to that request, the Navy JAG, by letter dated May 19, 1971, advised the Naval Weapons Station that a review of the member's service records indicated that the disability for which he was retired was service connected, but that his service medical records showed that it was not incurred as a direct result of armed conflict, nor was it caused by an instrumentality of war during a period of war. As a result, the member's employment records were adjusted on June 9, 1971, to reflect that he was a noncombat disability retired Navy officer not exempt from reduction in retired pay under the provisions of 5 U.S.C. 5532 (Supp. II, 1965-66). In addition, the member's service computation date was revised from August 25, 1950, to March 6, 1965, and his leave account adjusted since the change of dates eliminated credit for all military service performed by him other than wartime service.

The file reflects that as a result of that corrective action, the member, by letter dated August 10, 1971, petitioned the Navy JAG to reconsider his retirement status and restore his disability rights and benefits. Following another review of his medical records by the Bureau of Medicine and Surgery, the Navy JAG, by letter dated October 12, 1971, advised the member that the prior determination made in his case that the disability for which he was retired was not as a direct result of armed conflict nor caused by an instrumentality of war during a period of war, was adhered to.

By letter dated March 2, 1972, addressed to the Board for Correction of Naval Records, the member requested their determination of his physical disability status. In response, the Navy JAG, by letter dated March 29, 1972, again affirmed the prior determination of status made in his case.

On May 23, 1972, the Commanding Officer, Naval Weapons Station, transmitted to Navy JAG, a copy of a form letter from the Veterans Administration to the member, dated March 29, 1972, which contained the statement "His disability is combat incurred," and requested that the member's status be further evaluated. On review by the Bureau of Medicine and Surgery, it was concluded that the criteria utilized by the Veterans Administration were not known and that there was no new medical information available which would require modification of the prior determination.

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By letter dated May 24, 1972, from the Navy Finance Center, Cleveland, Ohio, the member was advised that he was subject to a Federal Civil Employment (FCE) deduction--required by the provisions of the Dual Compensation Act--for the periods June 28, through July 29, 1967, and August 30, 1967, through April 30, 1972, and that total overpayment of retired pay during that period was \$5,451.81.

In his letter, the member questions the propriety of such action, contending in effect that his disability retirement in 1944 was based on combat incurred incapacity and that the decision by the Navy JAG took away the benefits which flowed from such retirement status.

The right of a retired member of an armed force to receive his full military retired pay while employed by the Federal Government in a civilian capacity and receive other positive civilian employment benefits which accrue only by virtue of his military service are matters strictly governed by law and the regulations promulgated pursuant thereto.

With regard to entitlement of a member to receive full retired pay while employed by the Federal Government, section 5532 of title 5, United States Code, provides in pertinent part:

"(b) A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he received pay, his retired or retirement pay shall be reduced \* \* \*.

"(c) The reduction of retired or retirement pay required by subsection (b) of this section does not apply to a retired officer of a regular component of a uniformed service--

"(1) whose retirement was based on disability--

"(A) resulting from injury or disease receive in line of duty as a direct result of armed conflict; or

"(B) caused by an instrumentality of war and incurred in line of duty during a period of war \* \* \* or

"(2) employed on a temporary (full-time or part-time) basis \* \* \* for the first 30-day period for which he receives pay."

In determining years of service for purposes of annual leave accrual as a civilian employee, 5 U. S. C. 6303(a) provides in part, that an employee, who is a retired member of a uniformed service, is entitled to credit for his entire active military service only if his retirement is based on disability resulting from injury or disease received in line of duty as a direct result of armed conflict, or caused by an instrumentality of war during a period of war, or for such service as was performed in the Armed Forces during a period of war.

A Federal Government employee's preference eligibility for retention purposes incident to a RIF action is governed by 5 U. S. C. 3502, which provides in pertinent part:

"(a) The Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to--

"(1) tenure of employment;

"(2) military preference, subject to section 3501(a)(3) of this title \* \* \*"

Section 3501(a)(3) defines a preference eligible employee for the purposes of employment retention, to mean a retired member of a uniformed service, but (so far as pertinent here) only if:

"(A) his retirement was based on disability--

"(i) resulting from injury or disease received in line of duty as a direct result of armed conflict; or

"(ii) caused by an instrumentality of war and incurred in line of duty during a period of war \* \* \*"

The Secretary of the military service concerned, and as delegated by him, has all powers, functions and duties incident to the determination of fitness of any member of the Armed Forces under his jurisdiction. This includes authority to determine the nature and cause of a

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disability, if any, of a member at the time his active military service is terminated.

In connection with the foregoing, in order for a member retired for physical disability to receive the maximum benefits while employed by the Federal Government in a civilian position, such disability must be medically determined by the service concerned to be as a direct result of armed conflict or caused by an instrumentality of war during a period of war. Neither this Office nor the employing agency has the authority to change such determination.

However, under the provisions of 10 U. S. C. 1552, the Secretary of such service under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive portion of that military department, may correct any military record of that department when it is considered necessary to correct an error or remove an injustice. Any correction action taken under those provisions "is final and conclusive on all officers of the United States." In this regard, we have been informally advised by the Board for Correction of Naval Records that the member in the present case filed a petition with the Board on July 30, 1973, in an effort to have his records corrected to clearly show that the disability for which he was retired was incurred as a direct result of combat with an armed enemy of the United States. We understand that by action dated October 21, 1974, that petition was denied for the reason that no error or injustice was found to exist in his case.

Thus, in the present case, our authority only extends to the consideration of whether the actions by the Naval Weapons Station adjusting the member's leave credits and employment status and that of the Navy Finance Center to reduce his retired pay entitlement because of the application of the restrictions contained in the Dual Compensation Act and establish his indebtedness because of the overpayment of retired pay, are consistent with that service determination.

Since the record shows that the member's disability was medically determined by the Department of the Navy not to be as a direct result of armed conflict or caused by instrumentality of war, -- the member's employment does not come within the exemption provisions of the Dual Compensation Act or the other before-quoted provisions of title 5, United States Code.

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Accordingly, it is our view, based on the material contained in the file as supplied by the member, that the actions taken by the Naval Weapons Station with regard to his employment records and the Navy Finance Center with regard to his military retired pay, were required and proper.

PAUL G. DEMBLING

~~PAUL G.~~ Comptroller General  
of the United States