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DECISION



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

FILE: B-196823/B-183828

DATE: May 20, 1980

MATTER OF: Commander Alfred H. Gaehler, USN, Retired

DIGEST: The Dual Compensation Provisions in 5 U.S.C. 5532, reduce the retired pay entitlements of retired officers of Regular components who are employed in civilian positions with the Federal Government. The fact that under a State community property law the spouse of the retiree is considered to be entitled to part of the retired pay does not permit that part of the member's retired pay to be excluded from dual compensation reduction since Federal law controls payment of such pay.

This action is in response to correspondence from Commander Alfred H. Gaehler, USN, Retired, concerning his entitlement to refund of certain deductions made from his military retired pay. ^{stat}

The file reflects that for the major portion of his post-retirement years, Commander Gaehler was employed by the Federal Government in a civilian capacity. Since he was a retired Regular officer of the Navy, his military retired pay became subject to the limitations contained in the Dual Compensation Act, 5 U.S.C. 5532, and his retired pay was reduced accordingly.

Commander Gaehler questions the legality of that reduction. He states that he is a resident of the State of California, a community property state, and asserts that one-half of his military retired pay belongs to his wife. He contends that since only one-half of his retired pay is his, the dual compensation reduction is for application only to that portion.

Commander Gaehler refers to certain court actions regarding the division of property under the California community property laws. The court decisions referred to in his letter and the news article attached held that in the division of property upon the dissolution of

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marriage under California community property law, anticipated pension or retirement benefits should in most instances be taken into account. Those decisions are not directly applicable to the situation here. Here there is no dissolution of a marriage or contingent pension benefit. The question involves the retiree's entitlement to retired pay. It has been recognized that Federal law is supreme and must control when there is a conflict between it and State law. Wissner v. Wissner, 338 U.S. 655 (1950). This principle was recently applied by the Supreme Court in a case involving the propriety of considering a contingent Railroad Retirement benefit in the division of community property. The court prohibited consideration of such benefit based upon the supremacy of Federal law. Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979). Also recognized in that decision was the control that may be exercised by Congress over the payment of pension or retirement benefits.

Subsection (b) of 5 U.S.C. 5532 provides:

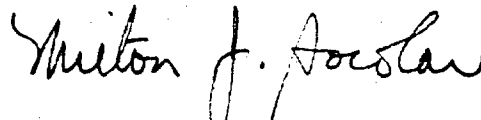
"(b) A retired officer of a regular component of a uniformed service who holds a [civilian] position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retainer pay shall be reduced * * *."

It is evident from that provision that a retired officer of a Regular component employed in a civilian capacity with the Federal Government is not entitled to receive retired pay at the same rate as he would be entitled if he were not so employed. On the question of the constitutionality of such distinction, see Puglisi v. United States, 215 Ct. Cl. 86 (1977), cert. denied. 435 U.S. 968 (1978). The Congress has limited the amount of retired pay to be paid retired Regulars who are employed in Federal positions. This law must govern over any provision of State law which might otherwise defeat its purpose.

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Therefore, the fact that under a State community property law the spouse of the retiree is considered to be entitled to part of the retired pay does not permit that part of the member's retired pay to be excluded from dual compensation reduction since Federal law controls payment of such pay. Thus, because of the limitations imposed by 5 U.S.C. 5532(b), Commander Gaehler's retired pay entitlement is actually less than it would otherwise be. This reduced amount represents his maximum retired pay entitlement under Federal law.

Accordingly, he is not entitled to any additional amount predicated on the fact that he resides in a State which has a community property law.



For the Comptroller General
of the United States