

**DECISION**

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

1211  
Frazier

27058

**FILE:** B-212226

**DATE:** December 16, 1983

**MATTER OF:** Lieutenant Colonel Robert E.  
Frazier, USA (Retired)

**DIGEST:**

1. The Board of Governors of the Federal Reserve System is authorized to appoint its employees and fix their compensation without regard to the civil service laws, and those employees are paid from sources other than appropriated funds. Nevertheless, the Board performs a governmental function and is an establishment of the Federal Government. Hence, a retired Army officer who obtained civilian employment with the Board was subject to reductions in his military retired pay under the dual compensation restrictions which are currently prescribed by statute and which apply to all military retirees who hold civilian positions in the Government.
2. An Army officer is liable to refund overpayments of military retired pay he received when that pay was not properly reduced under the dual compensation laws on account of his civilian Government employment. However, he is eligible to apply for a waiver of his indebtedness under the statute which authorizes the Comptroller General to waive the collection of overpayments of military pay and allowances.

The issue presented in this case is whether Lieutenant Colonel Robert E. Frazier, USA (Retired), is subject to reductions in his military retired pay under the dual compensation restrictions prescribed by 5 U.S.C. § 5532 on account of his civilian employment with the Board of Governors of the Federal Reserve System. We conclude that

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his military retired pay is subject to those restrictions prescribed by statute.<sup>1</sup>

### Background

Colonel Frazier was retired as an officer of the Regular Army on September 1, 1980. Since that date he has held civilian employment with the Board of Governors of the Federal Reserve System. The Board notified the Army Finance and Accounting Center of his civilian Government employment in April 1981. The Finance Center in turn notified Colonel Frazier that beginning June 1, 1981, his military retired pay would be reduced under the dual compensation restrictions imposed by 5 U.S.C. § 5532. The Finance Center also advised Colonel Frazier that because those restrictions had not previously been enforced, he had received overpayments of retired pay from the Department of the Army from September 1980 through May 1981, and the Finance Center asked him to refund those overpayments.

Colonel Frazier then wrote to the Finance Center disagreeing and asking that the matter be reconsidered. He argued essentially that he did not believe his employment with the Federal Reserve Board should be covered by those dual compensation restrictions since he was not a civil service employee and was not paid from appropriated funds. Army officials reviewed his arguments and eventually acceded in 1982. His retired pay was then reinstated in full, and the amounts previously withheld were refunded.

In March 1983 the concerned officials of the Army Finance and Accounting Center learned that retired Navy

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<sup>1</sup>This action is in response to a request submitted by a special disbursing agent of the Army Finance and Accounting Center for an advance decision concerning the propriety of approving a voucher in favor of Colonel Frazier in the amount of \$776.05, representing additional retired pay payable to him for the period April 1-30, 1983, in the event it may properly be concluded that he is not subject to the dual compensation restrictions of 5 U.S.C. § 5532. The request was forwarded here by the Office of the Comptroller of the Army after being assigned control number DO-A-1422 by the Department of Defense Military Pay and Allowance Committee.

officers employed in a civilian capacity by the Federal Reserve Board were considered by the Department of the Navy to be subject to reductions in their retired pay under the dual compensation restrictions of 5 U.S.C. § 5532. The Army officials then reinstated the reductions in Colonel Frazier's military retired pay commencing on April 1, 1983. In requesting our decision in the matter, Army officials question whether the reinstatement of these reductions in Colonel Frazier's retired pay account on that date was proper and, if so, whether the collection of the overpayments of retired pay received by Colonel Frazier between September 1, 1980, and March 31, 1983, must be collected.

After Army officials requested our decision on that question, Colonel Frazier retained private counsel to represent his interests, and his attorney has presented additional arguments in support of the proposition that the civilian employment of retired military personnel by the Federal Reserve Board should not be restricted by the dual compensation limitations of 5 U.S.C. § 5532. Essentially, the attorney notes that the Board's employees are not subject to the civil service laws and are not paid from appropriated funds, and he suggests that the Board itself is an entity wholly independent of both the executive and legislative branches of the Government. He advances 3 arguments in furtherance of his client's position that the Board and its employees are exempt from the provisions of 5 U.S.C. § 5532. First, he contends that the Congressional debates leading to the enactment of that statute reflect that it was designed as a limitation on expenditures of Government monies or appropriated funds,<sup>2</sup> and he suggests that it should therefore have no application to the Board's employees since they are not paid from Government funds. Second, the attorney suggests that 5 U.S.C. § 5532 is part of the system of laws which govern civil service employment, and as such does not apply to Board employees because the Board is exempt from the civil service laws. Third, the attorney contends that 5 U.S.C. § 5532 is a general statute

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<sup>2</sup>With specific reference to 110 CONG. REC. 3010, 3018, 16184, and 16188 (1964) (statements of Cong. Johansen, Cong. Gross, Sen. Williams, and Sen. Metcalf).

which if made applicable to the Federal Reserve Board would result in a nullification or revocation of specific provisions of the Federal Reserve Act relating to Board employment, and that this result would be impermissible under the rule of statutory construction that a statute dealing with a specific subject is not nullified or submerged by a later enacted statute covering a more generalized spectrum.

Board of Governors of the Federal Reserve System

The Federal Reserve System is an instrumentality of the Federal Government which was created by the act of December 23, 1913, ch. 6, 38 Stat. 251, commonly referred to as the Federal Reserve Act. That Act, as amended, is currently codified in chapter 3 of title 12 of the United States Code, that is, 12 U.S.C. §§ 221-522.

The Federal Reserve System has a Board of Governors composed of seven members who are appointed by the President, by and with the advice and consent of the Senate. 12 U.S.C. § 241. Concerning the appointment of the Board's employees and the payment of their compensation, 12 U.S.C. § 244 provides that:

"\* \* \* The Board shall determine and prescribe the manner in which its obligations shall be incurred and its disbursements and expenses allowed and paid, and may leave on deposit in the Federal Reserve banks the proceeds of assessments levied upon them to defray its estimated expenses and the salaries of its members and employees, whose employment, compensation, leave, and expenses shall be governed solely by the provisions of this chapter and rules and regulations of the Board not inconsistent therewith; and funds derived from such assessments shall not be construed to be Government funds or appropriated moneys. \* \* \*"

This provision exempts the appointment and compensation of the Board's employees from the civil service laws which

apply to most Government agencies.<sup>3</sup> Also, the Board's employees are not paid from "Government funds or appropriated moneys."

Limitations on Military Retired Pay Imposed by Statute  
on Account of Civilian Government Employment

Prior to 1964 a number of different legislative enactments imposed restrictions on the amount of military retired or retainer pay which could be paid to personnel of the uniformed services who obtained civilian employment with the Federal Government. One of these statutes applied to all Regular officers of the armed forces retired for length of service who obtained any civilian employment with the Government, and we held that retired Regular officers who sought employment in a civilian capacity with the Federal Reserve Board were subject to that particular statute.<sup>4</sup> On the other hand, other dual compensation restrictions imposed by statute prior to 1964 applied only as restrictions on the expenditure of appropriated funds, and we held that persons employed by the Federal Reserve System were not subject to those particular restrictions since Federal Reserve

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<sup>3</sup>See Matter of Federal Reserve Board, 58 Comp. Gen. 687 (1979); and Matter of VA Department of Medicine and Surgery, B-196611, December 19, 1979.

<sup>4</sup>See B-145896, June 28, 1961, concerning the application of the act of July 31, 1894, as amended, 5 U.S.C. 62 (1958 ed., repealed), commonly referred to as the Dual Office Act of 1894.

employees were not paid from appropriated funds.<sup>5</sup> All of these pre-1964 enactments have long since been repealed, but they are mentioned here because the decisions of our Office and the Court of Claims which were concerned with the application of those repealed laws appear to have led to uncertainty among Army officials concerning the proper application of the dual compensation laws which are currently in effect.

The current statutory dual compensation restrictions applicable to retired military and naval personnel are codified in sections 5531 and 5532 of title 5 of the United States Code. Section 5531, as derived from the Dual Compensation Act of 1964,<sup>6</sup> provides that these restrictions are applicable to retired personnel who hold:

"\* \* \* a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including a Government corporation and a non-appropriated fund instrumentality under the jurisdiction of the armed forces)\* \* \*."

Subsections 5532(a) and (b) of title 5 prescribe a formula for the reduction of military retired pay of retired Regular officers who are employed by the Government. These provisions were added by the Dual Compensation Act of 1964

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<sup>5</sup>See, for example, A-76647, July 21, 1936; and also 19 Comp. Gen. 363, 365 (1939), concerning the application of the act of May 10, 1916, 39 Stat. 120, as amended by the act of August 29, 1916, 39 Stat. 582, which placed restrictions on the holding of two or more civilian positions at the same time. Compare also Grandall v. United States, 161 Ct. Cl. 714 (1963), in which the Court of Claims considered the application of section 212 of the Economy Act of 1932, as amended, 5 U.S.C. 59a (1958 ed., repealed), to a retired officer of the Army (without component) who was employed by a non-appropriated fund activity.

<sup>6</sup>Public Law 88-448, approved August 19, 1964, 78 Stat. 484.

and were designed to put a ceiling on the amount of compensation retired Regular officers could receive from the Government.<sup>7</sup> Subsection 5532(c) was added by the Civil Service Reform Act of 1978 to insure that all retired military and naval personnel--Regular or Reserve, officer or enlisted--who were appointed to civilian positions in the Federal service would be subject to an absolute maximum rate of combined civilian salary and military retired pay equal to the rate payable for Level V of the Executive Schedule.<sup>8</sup>

Application of 5 U.S.C. §§ 5531 and  
5532 to Federal Reserve Board Employees

As indicated, the statutory charter of the Federal Reserve Board authorizes the Board to appoint its employees and fix their compensation without regard to the civil service laws, and the employees' compensation is not paid from appropriated funds. However, it cannot be disputed that the Board performs a governmental function and is an establishment of the Federal Government.

Regarding the argument that these provisions were enacted to save appropriated funds (the taxpayers' money), we point out that the Dual Compensation Act of 1964 was enacted to consolidate various existing laws dealing with the employment of military retirees in civilian positions to make the limitations clearer and to make it easier for civilian agencies to attract skilled military retirees.<sup>9</sup> Nevertheless the Congress did impose a limitation on the dual payments received by these individuals. Further, the definition of "civilian office or position" specifically includes positions with "a Government corporation and a non-appropriated fund instrumentality under the jurisdiction of

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<sup>7</sup>See Puglisi v. United States, 215 Ct. Cl. 86, 95 (1977); and Matter of Graves, 61 Comp. Gen. 604, 605 (1982).

<sup>8</sup>Subsection 308(a) of Public Law 95-454, approved October 13, 1978, 92 Stat. 1149. See Matter of Graves, cited above, at 61 Comp. Gen. pages 605-606.

<sup>9</sup>See S. Rep. No. 935, 88th Cong., 2d Sess. reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2834.

the armed forces." Obviously, the purpose of these provisions was more than merely to save dollars. In addition, the fact that non-appropriated fund activities under the armed forces are mentioned and the Board is not under the jurisdiction of the armed forces, will not support a conclusion that Congress intended to exclude the Board from its provisions since the parenthetical phrase in which the wording appears is to be viewed as explanatory and not restrictive. The term "non-appropriated fund instrumentality" is an arcane expression used almost exclusively within defense agencies and the military and naval departments, and we therefore find no basis for an inference that Congress intended the Board to be excluded from coverage as a "non-appropriated fund instrumentality not under the jurisdiction of the armed forces." It is further noted that at the time the 1964 act was passed the Court of Claims had recently excluded employees of non-appropriated fund activities of the armed forces from coverage under section 212 of the Economy Act of 1932.<sup>10</sup> It appears that Congress wished to overcome that court decision by making it clear that the dual employment provisions were not to be applied only to individuals paid from appropriated funds.

Moreover, we are unable to find any expression of Congressional intent in the legislative history of the Dual Compensation Act of 1964 that 5 U.S.C. § 5532 be construed as having application only to employment for which compensation is paid from appropriated funds. On the contrary, the legislative documents reflect that the statute:

"\* \* \* is intended to cover employment in any civilian office or position in the Government of the United States or in the municipal government of the District of Columbia whether appointive, elective, under a personal service contract, or otherwise." (Emphasis added.)<sup>11</sup>

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<sup>10</sup>Grandall v. United States (footnote 5, above).

<sup>11</sup>See S. Rep. No. 935, 88th Cong., 2d Sess., cited above (footnote 9), at 1964 U.S. CODE CONG. & AD. NEWS page 2837.



In the Congressional debates referred to by Colonel Frazier's attorney, some statements were made regarding "taxpayer funds," but in the context of those debates it appears that these were simply expressions of concern about the costs of some of the provisions of the proposed legislation, and those remarks do not support the proposition he has advanced.<sup>12</sup>

Regarding the other arguments raised by Colonel Frazier's attorney, we point out that 5 U.S.C. § 5532 prescribes limitations on the receipt of military retired pay by persons who hold any Government position, irrespective of whether the position is within the appointive civil service. In addition, the statute does not place any restrictions on the Federal Reserve Board in hiring or compensating Board employees, and we therefore do not find that the reduction of Colonel Frazier's retired pay under the statute would result in a nullification or revocation of 12 U.S.C. § 244 or any other provision of the Federal Reserve Act. Consequently, we are unable to agree with the arguments made that 5 U.S.C. § 5532 applies only to positions within the classified civil service, or that the statute improperly infringes on specific provisions of the Federal Reserve Act or interferes with the Board's independence. We note that this conclusion is consistent with the way in which the Board treats reemployed annuitants in that the pay of such individuals is reduced by virtue of their entitlement to civil service or Board retirement benefits.

For the foregoing reasons, we conclude that military retirees who obtain civilian employment with the Federal Reserve Board are covered by 5 U.S.C. § 5531, and that they are subject to the reductions in military retired pay prescribed by 5 U.S.C. § 5532 on account of their civilian Government employment. Therefore, we further conclude that Colonel Frazier received erroneous overpayments of military retired pay from September 1, 1980, through March 31, 1983, as the result of the Army Finance Center's failure to make those prescribed reductions during that period.

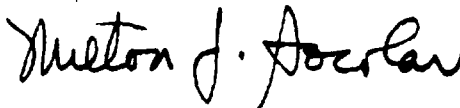
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<sup>12</sup>See 110 CONG. REC. 3006-3021, 16184-16190 (1964).

Collection of Overpayments

Colonel Frazier is in debt to the Government because of the erroneous overpayments of retired pay he received from the Army between September 1980 and April 1983, and he is liable to make restitution in the full amount unless he applies for and is granted a waiver of his indebtedness under the provisions of 10 U.S.C. § 2774.<sup>13</sup> That statute authorizes the Comptroller General to waive the collection of erroneous overpayments of military pay and allowances in certain circumstances if collection action would be "against equity and good conscience and not in the best interests of the United States," provided that there is no indication of fault on the part of the concerned service member.<sup>14</sup>

The question presented is answered accordingly.<sup>15</sup>

  
for Comptroller General  
of the United States

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<sup>13</sup>See Price v. United States, 224 Ct. Cl. 58 (1980).

<sup>14</sup>See 4 C.F.R. parts 91-93; and Matter of Veterinary and Optometry Officers, 56 Comp. Gen. 943, 951-953 (1977).

<sup>15</sup>The voucher submitted with the request for a decision may not be approved for payment and will be retained here.