



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lieutenant Colonel Ralph E. Marker, Jr., USA
(Retired), and others--Dual Compensation
Restrictions
File: B-226546, B-226791
Date: June 3, 1988

DIGEST

1. In Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986), the Court of Appeals for the Federal Circuit held that military retirees were exempt from the restrictions of 5 U.S.C. §§ 5531 and 5532 when employed by the Board of Governors of the Federal Reserve System. The Comptroller General will follow the court's judgment, and overrules the prior contrary administrative decision in Lieutenant Colonel Robert E. Frazier, USA (Retired), 63 Comp. Gen. 123 (1983). Military retirees employed by the Federal Reserve Board who were not plaintiffs in the Denkler litigation may be allowed refunds of amounts previously deducted from their retired pay, subject to the 6-year limitation period prescribed by 31 U.S.C. § 3702(b).

2. A retired Army officer employed in a civilian position with the Office of Civilian Radioactive Waste Management, Department of Energy, is not exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531 and 5532 on the basis of the court's decision in Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986), to the effect that positions with the Federal Reserve Board are not covered by those restrictions because the Board is a "non-appropriated fund instrumentality." The Department of Energy collects fees from corporations which generate nuclear waste, and it uses those funds to pay the salaries of the employees of the Office of Civilian Radioactive Waste Management. However, the funds are required by law to be deposited in the Treasury and are spent by the Department of Energy under statutory authority constituting a continuing appropriation; therefore, they are considered "appropriated funds;" and the Office of Civilian Radioactive Waste Management is not a "non-appropriated fund instrumentality" for purposes of the dual compensation restrictions.

DECISION

In letters dated March 13, 1987, and August 17, 1987, the Director, Retired Pay Operations Army Finance and Accounting Center, requests an advance decision on whether an exemption to the dual compensation restrictions of 5 U.S.C. §§ 5531 and 5532 should be made for retired military personnel holding civilian positions with certain United States agencies or organizations as the result of the 1986 judgment of the Court of Appeals for the Federal Circuit in the case of Denkler v. United States, 782 F.2d 1003.^{1/} The Court of Appeals held that military retirees are exempt from those restrictions when working for the Board of Governors of the Federal Reserve System, based on the court's determination that the Board was a "non-appropriated fund instrumentality" of the United States. We have decided to follow the court's judgment in that case, and to overrule our contrary decision in Lieutenant Colonel Robert E. Frazier, USA (Retired), 63 Comp. Gen. 123 (1983), relating to military retirees working for the Board of Governors of the Federal Reserve System. We have also concluded, however, that the court's opinion in Denkler v. United States, supra, cannot be applied to provide an exemption from the dual compensation laws for military retirees holding civilian positions with other federal agencies or organizations which are authorized to operate in any part with appropriated funds drawn from the United States Treasury.

BACKGROUND

Dual compensation limitations applicable to retired military personnel are codified in sections 5531 and 5532 of title 5 of the United States Code. Section 5532 provides for the reduction of military retirement pay received by retirees who obtain federal civilian employment. Section 5531 provides that these reductions apply to retired personnel who hold any:

^{1/} The request for an advance decision was forwarded here by the Assistant Secretary of the Army for Financial Management after it was approved and assigned submission number DO-A-1471 by the Department of Defense Military Pay and Allowance Committee. This request has been consolidated with another submission, DO-A-1478, involving similar issues.

". . . 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)"

The Board of Governors of the Federal Reserve System was created by an Act of Congress and operates under a federal statutory charter.^{2/} Federal courts have taken the position that it is an "executive agency" of the United States as that term is defined in 5 U.S.C. §§ 103-105.^{3/} However, the Board's operating expenses are not payable from the United States Treasury but instead come exclusively from special assessments levied on the member Federal Reserve banks which are left on deposit in those banks. The Board's charter states that "such assessments shall not be construed to be Government funds or appropriated monies." 12 U.S.C. § 244.

In Lieutenant Colonel Robert E. Frazier, USA (Retired), 63 Comp. Gen. 123, supra, we considered the case of a retired Army officer who had contested the reduction of his retired pay by the Army Finance and Accounting Center on account of his employment with the Federal Reserve Board. We determined that he was subject to the dual compensation limitations of 5 U.S.C. §§ 5531 and 5532 because of his federal civilian employment with the Board. He and three other retired military officers employed by the Board subsequently filed a complaint on the issue in the United States Claims Court. In John M. Denkler, et al. v. United States, Cl. Ct. No. 152-84C (Apr. 19, 1985), the Claims Court agreed with our determination and ordered the officers' complaint dismissed.

The four retired officers appealed the decision of the Claims Court to the Court of Appeals for the Federal Circuit. The Court of Appeals in a divided opinion in Denkler v. United States, supra, reached the conclusion that military retirees employed by the Federal Reserve Board were exempt from the dual compensation laws and reversed the Claims Court's holding. The Court of Appeals decision was based on an interpretation of 5 U.S.C. § 5531,

^{2/} Act of December 23, 1913, ch. 6, 38 Stat. 251, commonly referred to as the Federal Reserve Act, as amended and as codified, 12 U.S.C. §§ 221-522.

^{3/} See e.g., Hilliard v. Volcker, 659 F.2d 1125, 1126 (note 4) (D.C. Cir. 1981).

quoted above, which provides that the dual compensation restrictions are applicable to military retirees appointed to civilian positions in the Government of the United States "including . . . a non-appropriated fund instrumentality under the jurisdiction of the armed forces." The majority opinion noted that under 12 U.S.C. § 244 the Board's operating funds "shall not be construed to be Government funds or appropriated moneys." The majority went on to say that:

"A search of [the Federal Reserve Act] reveals no authorization of appropriations, such as is usually found in the statutory charters of governmental entities which may rely on such appropriations in whole or in any part."^{4/}

The majority in Denkler emphasized that, unlike other federal agencies and offices, the Federal Reserve Board had a statutory charter that lacked "the conventional language authorizing funds to be appropriated, even when other sources are looked to." The majority reasoned that the Federal Reserve Board was consequently to be categorized as a "non-appropriated fund instrumentality" and that since the Board was not "under the jurisdiction of the armed forces," its employees should be classified as exempt from the dual compensation laws. As a result of the decision of the Court of Appeals, final judgment was entered on behalf of the four named plaintiffs and they were awarded payment in the amounts by which their retired pay had previously been reduced under those laws.

ISSUES

The Army has forwarded to us the cases of three other retired officers who have held civilian positions with the Federal Reserve Board: Lieutenant Colonel Ralph E. Marker, Jr., Lieutenant Colonel Carrol P. Hickman, and Lieutenant Robert L. North. Colonel Marker and Lieutenant North have been employed by the Board continuously since 1968 and 1970, respectively. Colonel Hickman worked for the Board between 1965 and 1975. The military pay of all three was reduced under 5 U.S.C. §§ 5531 and 5532 on account of their civilian employment with the Board. The Army questions whether the three officers should now be considered exempt from those dual compensation restrictions, in light of the Court of Appeals' judgment in Denkler v. United States, *supra*, and if so, whether the 6-year statute of limitations of 31 U.S.C. § 3702(b) will operate to preclude a full refund of the retired pay previously withheld from them.

^{4/} Denkler v. United States, 782 F.2d at 1005.

The Army has also forwarded the case of a fourth retired officer, Lieutenant Colonel Harold H. Brandt, for our consideration on the basis of the Court of Appeals' judgment in Denkler v. United States, supra. Colonel Brandt has held a position with the Office of Civilian Radioactive Waste Management, United States Department of Energy, continuously since 1983. The Army has reduced his military retired pay under 5 U.S.C. §§ 5531 and 5532 on account of that employment.

Colonel Brandt notes that his salary from the Department of Energy is derived from payments made by commercial electric utility companies. He suggests that he should therefore be regarded as an employee of a "non-appropriated fund instrumentality," which is "not under the jurisdiction of the armed forces," and that he should consequently be exempted from the dual compensation provisions of 5 U.S.C. §§ 5531 and 5532 under the rationale of the Court of Appeals' judgment in the Denkler case.

ANALYSIS AND CONCLUSION

Employment by the Board of Governors of the Federal Reserve System

Traditionally, we have accorded great weight to the judicial opinions of the federal courts in the administrative settlement of claims and adjustment of accounts.^{5/} With respect to the Court of Appeals' opinion in Denkler v. United States, supra, it appears to us that the issues were fully considered by the Court of Appeals and that further litigation would result in no material change in its interpretation of the law. Hence, we have decided to follow the Court of Appeals' judgment in the Denkler case, and we now overrule our prior contrary decision in Lieutenant Colonel Robert E. Frazier, USA (Retired), 63 Comp. Gen. 123, supra. Thus, we no longer consider retired members of the uniformed services to be subject to the dual compensation restrictions of 5 U.S.C. §§ 5531 and 5532 on account of civilian employment with the Board of Governors of the Federal Reserve System.

Concerning the cases of Lieutenant Colonel Ralph E. Marker, Jr., and Lieutenant Robert L. North, our view consequently is that reductions should no longer be made in their military retired pay because of their current employment with

^{5/} See, e.g., 53 Comp. Gen. 94 (1973) and 49 Comp. Gen. 618 (1970); but compare 50 Comp. Gen. 480, 486 (1971).

the Federal Reserve Board. It is also our view that they are entitled to a refund of the amounts previously deducted from their retired pay based on that employment, subject to the 6-year statute of limitations prescribed by 31 U.S.C. § 3702(b).

As to the date to be used in applying the statute of limitations, 31 U.S.C. § 3702(b) provides that claims against the government which are within the settlement authority of our Office must contain the signature and address of the claimant or an authorized representative, and must be received by the Comptroller General within 6 years after the claim accrues. We have held that a request for an advance decision which does not forward such a signed claim does not toll the running of the limitation period.^{6/} The provisions of the statute of limitations must be strictly applied and cannot be waived or modified.^{7/}

In the present matter, the request for an advance decision did not forward signed claims from Lieutenant Colonel Marker or Lieutenant North. Hence, our conclusion is that they may be allowed refunds of amounts previously deducted from their pay under 5 U.S.C. §§ 5531 and 5532 only during the 6 years prior to the date of the adjustment of their accounts at the Army Finance and Accounting Center, in the absence of their submission of signed claims to our Office in the meantime.^{8/}

For the same reasons, it is our view that any claim of Lieutenant Colonel Carrol P. Hickman for a refund of the amounts that were withheld from his retired pay between 1965 and 1975, based on his employment with the Federal Reserve Board, would now be completely barred by 31 U.S.C. § 3702(b).

^{6/} James W. Gregory, B-201936, Apr. 21, 1981. We have also held that the date of judicial action upon which an administrative claim may be based has no effect on the running of the statute of limitations, when the claimant was not a party to the litigation. Llewellyn Lieber, 57 Comp. Gen. 856 (1978).

^{7/} James W. Gregory, B-201936, supra.

^{8/} See 61 Comp. Gen. 295, 296 (1982).

Employment by the Office of Civilian Radioactive
Waste Management, Department of Energy

The Office of Civilian Radioactive Waste Management was created as an organization within the Department of Energy in 1983 by the Nuclear Waste Policy Act, Public Law 97-425, January 7, 1983, 96 Stat. 2201, as codified, 42 U.S.C. §§ 10101-10226. That Act also established the Nuclear Waste Fund in the United States Treasury, and the Secretary of the Department of Energy is authorized to make expenditures from the Waste Fund for the administrative costs of the radioactive waste disposal program. 42 U.S.C. § 10222(c) and (d). The Waste Fund is funded in part by payments received from commercial utility companies for waste disposal services. 42 U.S.C. §§ 10131(b)(4) and 10222(c)(1). The Waste Fund also consists of "appropriations made by the Congress into the Waste Fund," and unexpended appropriations that were available on January 7, 1983, for civilian radioactive waste disposal activities. 42 U.S.C. § 10222(c)(2) and (3). The Department of Energy reportedly draws amounts from this fund in the Treasury to cover the operating expenses of the Office of Civilian Radioactive Waste Management.

It thus appears that, unlike the Federal Reserve Board, the Office of Civilian Radioactive Waste Management relies primarily for paying its operating expenses on amounts drawn from a special fund in the United States Treasury.

It is fundamental that: "No money shall be drawn from the Treasury, but in consequence of Appropriations made by law."^{9/} We have long held that fees collected by federal agencies for services rendered and deposited in the Treasury represent appropriated funds.^{10/} That is, the statutory provisions requiring that the fees be deposited with the Treasurer of the United States in a special fund and making the fund available for expenditure in carrying out the agency's functions constitute a continuing appropriation of such fees from the Treasury without further action by Congress.

It is, therefore, our view that the monies drawn from the Nuclear Waste Fund in the United States Treasury for the operation of the Office of Civilian Radioactive Waste Management are, as a matter of law, "appropriated funds." Hence, it is also our view that the Office of Civilian

^{9/} U.S. Const. art. I, § 9, cl. 7.

^{10/} See, e.g., Edgar T. Callahan, 63 Comp. Gen. 31 (1983); 35 Comp. Gen. 615, 618 (1956).

Radioactive Waste Management is not a "non-appropriated fund instrumentality" under the definition provided by the Court of Appeals in Denkler v. United States, supra. In the case of the fourth retired Army officer presented for decision, Lieutenant Colonel Harold H. Brandt, our conclusion consequently is that his military retired pay is subject to reduction under 5 U.S.C. §§ 5531 and 5532 on account of his employment with the Office of Civilian Radioactive Waste Management.

A handwritten signature in cursive script that reads "Milton J. Foster".

Acting Comptroller General
of the United States