

1-14063
Walsh



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Colonel Jimmy C. Hicks, USAF (Retired);
Lieutenant Colonel Claude V. Hall, Jr., USA
(Retired) - Dual Compensation Restrictions

File: B-236399; B-238303

Date: May 29, 1991

DIGESTS

1. A retired Air Force Colonel employed by the Office of the Comptroller of the Currency (COC), whose compensation is derived from assessments on banks, holds a position in the executive branch and is not thereby exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531, 5532. The COC is a bureau within the Department of Treasury and the Comptroller performs his duties under the general direction of the Secretary of the Treasury. Because the COC is within an agency funded by appropriated funds it is not separated from general federal revenues so as to be a nonappropriated fund instrumentality as that term was used in Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986), in exempting employees of certain nonappropriated fund instrumentalities from dual compensation reductions.
2. A retired Army Lieutenant Colonel employed by the Federal Deposit Insurance Corporation (FDIC), whose compensation is derived from assessments on banks, is not thereby exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531, 5532. The FDIC is a government corporation owned or controlled by the United States and thus is one of the entities specifically enumerated in the definition of positions subject to dual compensation reductions in subsection (b) of 5 U.S.C. § 5532. Because the Federal Deposit Insurance Corporation is authorized to borrow from the Treasury and pledge the full faith and credit of the United States to the payment of its obligations it is not separated from general federal revenues so as to be a nonappropriated fund instrumentality as that term was used in Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986).

DECISION

We have received requests from the Department of the Air Force and the Department of the Army respectively concerning the application of the Dual Compensation Act of 1964, 5 U.S.C. §§ 5531, 5532, to retired military officers who hold civilian positions. Since the question before us in both cases is essentially the same, we consider them together.

The Air Force request deals with Colonel Jimmy C. Hicks, who retired from active service on September 30, 1981. On September 14, 1987, he took a civilian job as an associate bank examiner with the Office of the Comptroller of the Currency (OCC). The Air Force subsequently determined that Colonel Hicks was subject to the act's provisions, which require a reduction in the retired pay of a regular military officer who holds a position (as defined in the dual compensation provisions) with the federal government. The Air Force has determined that Colonel Hicks is indebted to the United States in the amount of \$8,005.75, representing overpayment of retired pay for the period September 14, 1987, when he started working for OCC, through November 30, 1988, when the deductions from his retired pay actually began.

In the case of the Army, the request concerns Lieutenant Colonel Claude V. Hall, Jr., who retired from active service in 1973. From 1984 to the present, he has been working for the Federal Deposit Insurance Corporation (FDIC). In March 1988, the Army determined that Colonel Hall's retired pay was subject to reduction under the dual compensation provisions. As a result of that determination, Army found that he had been overpaid by \$41,538.61 from November 1984 to February 1988. His retired pay is currently being reduced to reflect his civilian employment.

Colonel Hicks and Lieutenant Colonel Hall each maintains that the Dual Compensation Act does not apply to him because his salary comes from fees and assessments paid by member banks rather than from appropriated funds. In the alternative, Colonel Hicks asks that a waiver of his indebtedness be granted pursuant to 10 U.S.C. § 2774. Air Force endorses this waiver request.

For the reasons discussed below, we find that both Colonel Hicks and Lieutenant Colonel Hall are subject to the dual compensation provisions, but we grant waiver of Colonel Hicks' indebtedness and will consider favorably a request for waiver of Lieutenant Colonel Hall's debt if Army endorses such a request.

DISCUSSION

Subsection (b) of 5 U.S.C. § 5532 requires that the retired pay of a retired officer of a regular component of a uniformed service be reduced by a specified formula if the retiree holds a "position," which is defined in section 5531(2) as:

". . . a civilian office or position in the legislative, executive, or judicial branch of the government of the United States (including a government corporation and a nonappropriated fund instrumentality under the jurisdiction of the armed forces)."

In Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986), the Court of Appeals ruled that employees of the Board of Governors of the Federal Reserve System do not hold positions within the coverage of the Dual Compensation Act because the Board is a nonappropriated fund instrumentality not under the jurisdiction of the armed forces. In reaching its holding, the court reasoned that since the act specifically covers positions in nonappropriated fund instrumentalities under the jurisdiction of the armed forces, positions in such instrumentalities not under the jurisdiction of the armed forces, such as employees of the Board, are not covered.

The court defined a nonappropriated fund instrumentality as one where there has been a clear expression by the Congress that the agency was to be separated from access to federal revenues to fund its operations. Id. at 1005. The fact that an employee's salary is paid from fees or assessments collected from private sources, by itself, is not sufficient to show that the employee works for a nonappropriated fund instrumentality. 67 Comp. Gen. 436 (1988). Under the Denkler test, it is necessary to show that the employee's agency is clearly separated from access to federal revenues.

In our opinion, OCC does not meet this test. We recognize that the OCC, like the Board, obtains its funds from fees and assessments levied on banks, and that the salaries of its employees may be fixed without regard to the rules generally applicable to federal employees. 12 U.S.C. §§ 481, 482. However, the OCC, unlike the Board, is a bureau within the Treasury Department and the Comptroller of the Currency performs his duties "under the general direction of the Secretary of the Treasury." 12 U.S.C. § 1. By virtue of that fact, OCC employees are employees of the Treasury Department. As such, they hold positions in the executive branch of the government and thus are within the ambit of the statutory definition. Further, their positions are within an agency which is funded by appropriated funds. Under these circumstances, we cannot say that OCC is entirely separated

from access to appropriated funds. Therefore, we conclude that OCC is not a nonappropriated fund instrumentality within the meaning of Denkler.

We reach a similar conclusion with regard to employees of FDIC. The FDIC is a government corporation, which means a corporation owned or controlled by the United States, 5 U.S.C. § 103; 31 U.S.C. § 9101(2); B-221677, July 21, 1986; Rauscher Pierce Refsnes, Inc. v. FDIC, 789 F.2d 313, 316 (5th Cir. 1986). While FDIC's operations are also funded from bank assessments and fees, the corporation is authorized to borrow from the Treasury, and the full faith and credit of the United States is pledged to the payment of any obligation issued after August 9, 1989, if certain conditions are met. 12 U.S.C. §§ 1824, 1825(d). In view of these provisions, we do not regard FDIC as being clearly "separated from general federal revenues". 782 F.2d at 1005. Accordingly, we do not find that employees of the FDIC are exempt from the dual compensation provisions.

Our conclusion with regard to OCC and FDIC employees is supported by the legislative history of the Dual Compensation Act of 1964. As the Denkler court noted, the parenthetical clause concerning nonappropriated fund instrumentalities appears to have been included in the legislation in response to a letter from our Office. In our letter to the Committee considering an earlier version of the legislation, we stated that in the absence of a clear expression of legislative intent to the contrary, we would not construe the term "civilian office" as applying to a position in an armed forces post exchange and other nonappropriated fund activity. 782 F.2d at 1006.

Thus, before Denkler was decided, it was our conclusion that the parenthetical clause, which is at the heart of the Denkler holding, had been included in the legislation to assure that all civilian positions in the government, with no exceptions, would be covered. 63 Comp. Gen. 123, 127 (1983). We subsequently modified our conclusion after Denkler was decided to recognize that employees of the Federal Reserve Board would no longer be considered subject to dual compensation. 67 Comp. Gen. 436, supra.

We continue to believe however that Congress intended to cover virtually all civilian positions in the government when it passed the 1964 legislation. While under the Denkler holding a limited class of civilian positions are exempted from dual compensation restrictions, we do not think the exemption should be extended to include employees of a bureau within the Treasury Department and to employees of government corporations, considering that the act specifically lists such entities as being included within its coverage.

Accordingly, we hold that the dual compensation provisions are applicable to the retired pay of both Colonel Hicks and Lieutenant Colonel Hall, and their retired pay should be reduced. Colonel Hicks' indebtedness as a result of past overpayments of military retired pay may be waived pursuant to 10 U.S.C. § 2774. Further, we see no reason why Lieutenant Colonel Hall's indebtedness should not also be waived, subject to the receipt of such a request approved by Army.

for *Milton J. Joster*
Comptroller General
of the United States