

DECISION

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

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97228

FILE: B-183594

DATE: JUN 4 1975

MATTER OF: Waiver of overpayments of retired pay under the Dual Compensation Act pursuant to 10 U.S.C. 2774.

DIGEST:

Waiver of indebtedness due United States under 10 U.S.C. 2774 which represents overpayment of retired pay in violation of statutory limitation of 5 U.S.C. 59a (1958), which imposed a \$10,000 limitation of combined civilian and military retired pay per calendar year as elected by member, is denied because member should have been aware of overpayment and was partially at fault in not reporting the overpayment to proper administrative officials in order to prevent further overpayment.

This action is in response to a letter dated March 6, 1975, from CWO-4 Salvatore Bosco, USA, Retired, addressed to the Honorable Dante B. Fascell, House of Representatives, which was forwarded to our Office for response, concerning his request for waiver of his indebtedness to the United States arising out of erroneous payments of retired pay in the amount of \$2,198.46, which in effect requests reconsideration of the action taken in his case by the Transportation and Claims Division of this Office dated January 30, 1975, which denied waiver based upon a finding that he was at least partially at fault for the continuing erroneous payments.

The record shows that the member was retired from the Regular Army on November 30, 1961, with a non-combat incurred permanent disability rating of 10 percent. On May 8, 1962, he accepted a civilian position with the Department of the Navy, U.S. Naval Station, Key West, Florida. The member was subject to the \$10,000 yearly limitation on combined civilian earnings and military retired pay as contained in section 212 of the act of June 30, 1932, as amended, 5 U.S.C. 59a.(1958)

Section 59a of title 5, United States Code (1958), provided in part that:

"(a) After June 30, 1932, no person holding a civilian office or position, appointive or elective, under the United States Government * * * shall be entitled,

during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in any of the services mentioned in title 37, at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than \$10,000; and when the retired pay amounts to or exceeds the rate of \$10,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect. * * *

The before-quoted provisions were repealed by Public Law 88-448, 78 Stat. 484, and replaced by subsection 201(a) of that law, which provides generally that effective December 1, 1964, a Regular Army officer may be employed with the Government in a civilian capacity and receive the full salary of the civilian position held. However, during the period for which salary is received, retired pay will be reduced to an annual rate equal to the first \$2,000 of such pay, plus one-half of the remainder, if any. Subsection 201(f) of that law provides that any such member who was employed in a civilian office on November 30, 1964, and on that date was subject to the limitation on compensation of \$10,000 annually under 5 U.S.C. 59a, or has waived retired pay for a civilian salary, may elect to remain subject to that limitation or to be subject to the limitations imposed by the new Law. It is further provided therein that "Such election is irrevocable."

The record shows that on December 4, 1964, the member executed FCUSA Form 2033, wherein he elected to remain subject to the \$10,000 yearly limitation as provided by section 59a of title 5, United States Code, supra, rather than the dual compensation restrictions contained in Public Law 88-448, supra. The file shows that the combined salary and retired pay earned by the member prior to 1967 did not exceed the \$10,000 limitation. However, for the years 1967 through the early part of 1971, the member's combined annual civilian compensation and retired pay exceeded the permitted limitation. The error was discovered on or about April 30, 1971, with the overpayment of retired pay for calendar year 1967 and subsequent years computed as follows:

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<u>Calendar Year</u>	<u>Civilian Salary</u>	<u>Retired Pay</u>	<u>O/P Retired Pay</u>
1967	\$ 6,772.80	\$ 3,397.32	\$ 170.12
1968	7,440.00	2,930.45	370.45
1969	7,983.20	2,691.93	675.13
1970	9,060.00	1,638.93	698.93
1971	10,625.00	283.83	283.83
			<u>\$2,198.46</u>
Collected thru January 31, 1974 -----			<u>1,322.98</u>
Balance due U.S. as of February 1, 1974 -----			\$ 875.48

Section 2774 of title 10, United States Code, provides for the waiver of claims of the United States arising out of overpayments of pay and allowances, excluding transportation and travel allowances, where there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the former member or any other person having an interest in obtaining waiver of the claim.

The Standards for Waiver are contained in Part 4 of the Code of Federal Regulations. Subsection 91.5(c) of Part 4 provides in part that any significant unexplained increase in pay or allowances which would require a reasonable person to make inquiry concerning the correctness of his pay or allowances, ordinarily would preclude a waiver when the employee or member fails to bring the matter to the attention of appropriate officials.

It is clear that the member elected to remain subject to the \$10,000 limitation in effect prior to Public Law 88-448 as evidenced by his signing of FCUSA 2033 on December 4, 1964. It appears that the member knew or certainly should have known the effect of the legal consequences of his election and that he was placed on notice regarding the overpayments when he received his annual W-2 forms from his employing agency and the Department of the Army in 1968, for the year 1967, and each year thereafter. In light of the foregoing, it is our view that the member was clearly at fault in not reporting the overpayment to the proper administrative officials in a timely manner as early as 1968, in order to prevent further overpayments and as a result may not have such indebtedness waived.

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Accordingly, the action taken by our Transportation and Claims Division is sustained.

R.F. KELLER

Deputy Comptroller General
of the United States