



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Admiral James D. Watkins, USN, (retired)

File: B-235501

Date: June 23, 1989

DIGEST

A retired regular officer of the Navy who received erroneous payments of retired pay because of administrative error by government employees in not reporting his civilian employment to the Navy may be granted waiver of his debt under 10 U.S.C. § 2774, since he asked on at least two occasions and was assured that his employment had been reported and consistent with his understanding of the law had no reason to suspect he was being overpaid.

DECISION

A retired regular officer of the Navy, Admiral James D. Watkins, requests a waiver under 10 U.S.C. § 2774 of the United States' claim against him, which resulted from his receipt of erroneous payments of retired pay. The erroneous payments were caused by failure to apply the dual compensation law, 5 U.S.C. § 5532, when he was employed in a civilian position with government.

The retired officer was appointed to a temporary government commission under 5 U.S.C. § 3109. His pay was set at the daily rate for Level IV of the Executive Schedule. Since this appointment is considered a "position" within the meaning of that term as used in 5 U.S.C. § 5532, his retired pay should have been limited in accordance with that law.

That law requires a reduction of retired pay in accordance with a formula set out in the statute when a retired regular officer is employed in a position with the government. Additionally, 5 U.S.C. § 5532 requires a reduction in retired pay when the combined compensation of the civilian position and the retired pay reduced under the formula exceeds Level V of the Executive Schedule in a pay period.

045858/138987

The Department of Health and Human Services was designated to supply administrative support to the Commission. At the time of his appointment the officer informed administrative personnel assigned to the commission that he was a retired regular officer and subject to dual compensation restrictions. Consistent with his understanding that the limitation was applicable on an annual total pay basis rather than on a pay period basis, he directed that the Navy be informed of his appointment with a request that his civilian salary be withheld rather than his retired pay when it became necessary, because of numerous allotments from his retired pay. Notwithstanding his direction this was never done. The appointing document did not show that he was a retired military officer and administrative staff in HHS did not process the paperwork in accordance with the Federal Personnel Manual, which requires that a report be made to the Navy Finance Center. Thus, the Navy had no knowledge of his employment and did not limit his retired pay. The officer on at least two occasions asked the administrative staff if they had made the report to the Navy. On these occasions he was assured that his paper work had been processed properly. Affidavits by administrative staff involved support these statements.

The problem was compounded by the officer's misunderstanding of 5 U.S.C. § 5532. He was of the opinion that the civilian salary could be reduced when 5 U.S.C. § 5532 was applied. Further, he was under the impression that the pay cap of the statute was \$81,000 rather than level V rate of \$72,500. Finally, the officer thought that pay cap in the statute applied on a yearly basis rather than on a pay period basis. As a result he did not question the fact that he was receiving his full civilian salary because he assumed it would be adjusted when he reached the combined compensation and retired pay of \$81,000.

The report received from the Navy supports waiver of the officer's debt on the ground that the erroneous payments occurred through error on the part of administrative personnel and the officer acted in good faith.

Under the provisions of 10 U.S.C. § 2774, the Comptroller General may waive collection of certain debts when collection would be against equity and good conscience and not in the best interests of the United States except where in the opinion of the Comptroller General:

" . . . there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member. . . ."

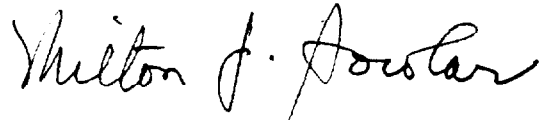
We have interpreted "fault" as used in 10 U.S.C. § 2774 as including something more than a proven overt act or omission by the military member. Thus, we consider fault to exist if in the light of all of the facts it is determined that the debtor should have known that an error existed and taken action to have it corrected. The standard we employ is to determine whether a reasonable person should have been aware that he was receiving a payment in excess of his proper entitlement.

The dual compensation restrictions are a complex area of the law applicable to retired military members. The officer should have been more familiar with the operation of the law. However, the fact that he misunderstood the application of it is understandable. Although retired military personnel do receive briefings explaining the operation of various laws applicable to them at the time they retire, in this case the officer had been retired for more than a year prior to his employment with the government in a civilian capacity. While he was somewhat confused as how the requisite pay deduction calculations would be made, he nevertheless took fully appropriate steps to assure that this dual status would be recognized.

It is our view that the officer acted in good faith by informing administrative personnel on at least two occasions that he was a retired officer subject to the dual compensation act. We also think, given his expectation that the limitation under the law was not to come into play until sometime in the future, that he acted reasonably in not pursuing the matter when he was assured by administrative staff that his appointment had been processed properly and that the Navy had been informed of his employment.

Essentially, the determination in this case turns on whether the officer should be viewed as having been at fault for his confusion as to the correct application of the law; that is, does his misconception that deductions from his pay were not to occur immediately but at some future date serve to make him culpable in any way. We think not, particularly given the positive steps he took to assure proper recognition of his status.

Accordingly, it is our view that the officer acted in good faith and was without fault in accepting the payments and his debt is hereby waived under 10 U.S.C. § 2774.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States