



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: LTC Robert E. Fitzgerald, USA (Retired)

File: B-238761

Date: March 1, 1991

DIGEST

Former Army officer who accepted government civilian employment upon retirement from the Army received erroneous payments of retired pay because of administrative error by civilian officials in not reporting increases in his civilian pay to the Army for purposes of reducing his retired pay pursuant to the dual compensation laws. The resultant debt may be waived under 10 U.S.C. § 2774 since, under the circumstances, the retired officer could not reasonably be expected to have recognized that he was being overpaid.

DECISION

This action is in response to a request for reconsideration by LTC Robert E. Fitzgerald, USA, Retired, of our Claims Group's denial of waiver of a debt he incurred as a result of erroneous payments of retired pay. The erroneous payments were caused by a failure to properly apply the dual compensation law, 5 U.S.C. § 5532, when LTC Fitzgerald was employed in a civilian position with the government after he retired from the Army. For the following reasons, we believe that waiver is appropriate.

LTC Fitzgerald retired from the Army on June 1, 1979, and was immediately employed by the Central Intelligence Agency (CIA). The dual compensation law requires a reduction in retired pay in that circumstance according to a formula set out in the statute.

From 1979 until 1985 the CIA provided information to the Army regarding increases in LTC Fitzgerald's pay so that his retired pay could be reduced accordingly. The CIA failed to do so beginning in 1985. The resulting overpayment for the period January 6, 1985, through July 31, 1987, was \$14,214.82.

Our Claims Group, in its denial of his request for waiver, concluded that LTC Fitzgerald must have been aware of the dual compensation restrictions and process; was not misled by the Army as to his entitlements during the period in question;

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and, under the circumstances, could not reasonably have expected to retain the overpayments.

In appealing our Claims Group's decision, LTC Fitzgerald takes issue with the suggestion that because he knew of the dual compensation restrictions on his total pay he must have known he was being overpaid. LTC Fitzgerald asserts that his tenure at the CIA was marked by numerous fluctuations in retired pay, some fully explained and others not; periods in which he received no pay at all but for which he later was told he had been overpaid; and an ever changing array of payments, apparent underpayments, and alleged overpayments. LTC Fitzgerald says that because of numerous salary and cost of living changes from 1979 on, he seldom received the same pay over any extended period, so it was difficult to know what to expect with any series of paychecks. LTC Fitzgerald maintains that there was no reasonable way for him to know, amidst this confusion, that he was being overpaid in violation of the dual compensation laws simply because his annual civilian salary had increased.

Claims for waiver of collections of erroneous overpayments of military pay and allowances are provided for by 10 U.S.C. § 2774. The Comptroller General may waive a debt where collection would be against equity and good conscience and not in the best interest of the United States. Claims may not be waived, however, when the member was at fault or there is an indication of fraud, lack of good faith or misrepresentation on his part.

We have reviewed the administrative record in detail, and we find it extremely difficult to understand the Army's treatment of LTC Fitzgerald's retired pay not only during the period involved in the current waiver request, but throughout the period since LTC Fitzgerald's retirement. Our review shows a continual problem regarding the government's ability to ensure that the appropriate amount of LTC Fitzgerald's retired pay was deducted pursuant to the dual compensation law. Due to administrative errors on the part of the CIA and Army, LTC Fitzgerald was overpaid beginning with the first month of his civilian employment. (He repaid that amount, through deductions from his retired pay.) Subsequently, there were times when dual compensation deductions were incorrectly calculated; as a result of these errors, LTC Fitzgerald was overpaid a number of times from 1980 through 1984 and, in each case, the overpayment was collected from his retired pay in increments over a series of pay periods.

Beginning in January 1985 LTC Fitzgerald received a series of increases in his CIA salary, with the first one taking him over the pay cap imposed by the dual compensation law. In none of these instances was LTC Fitzgerald's retired pay

reduced through an increase in the dual compensation deduction specifically tied to the promotion, so that by the end of the 2-1/2 year period in issue LTC Fitzgerald had received the extra \$14,214.82 for which he requests waiver. Throughout that period, however, LTC Fitzgerald's retired pay changed a number of times, some of which were explained on his retired pay statements (for example, a cost of living adjustment), and others that were not. It is unclear from our review how LTC Fitzgerald was to know the bases for those changes.

Further, the record shows a number of attempts on LTC Fitzgerald's part during his CIA employment to assure the accuracy of his retired pay, including phone calls, written requests and, ultimately, a request to have his retired pay suspended until the matter was resolved. Our understanding of these attempts is not that they were motivated by knowledge that he was being overpaid, but that LTC Fitzgerald wanted to be sure, in light of the dual compensation restrictions and all the changes and apparent confusion about his pay, that he was being paid properly.

The standard we employ in determining fault for purposes of waiver under 10 U.S.C. § 2774 is whether a reasonable person should have been aware that he was receiving a payment in excess of his proper entitlement. See Admiral James D. Watkins, USN, (retired), B-235501, June 23, 1989.

We have recognized that the dual compensation restrictions are a complex area of the law. Id. On this record, we do not agree with the Claims Group that LTC Fitzgerald reasonably should have been aware of the overpayments in issue.

Accordingly, it is our view that LTC Fitzgerald was without fault in the matter, and the debt should be waived. The Claims Group's decision is reversed.

for 
Comptroller General
of the United States