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Comptroller General  
of the United States

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Washington, D.C. 20548

## Decision

**Matter of:** Major James D. Dunn and Senior Master  
Sergeant Marcus A. Jenkins

**File:** B-251084

**Date:** October 12, 1993

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### DIGEST

1. Employment during a period of terminal leave and after retirement of an Air Force member as a teacher in a local borough high school in the United Kingdom, which school is a component of a foreign local government, is prohibited employment during terminal leave and requires approval of employment under 37 U.S.C. § 908 after retirement since this is employment by a "foreign state." Active duty and retired pay received before the member obtained approval may be waived under 10 U.S.C. § 2774 because of member's good faith effort to obtain a legal opinion regarding the status of the teaching position.

2. Air Force member, on terminal leave before effective date of retirement and therefore still on active duty, should not have accepted employment with Saudi Arabian Airline, a corporation owned by the Kingdom of Saudi Arabia, until retirement and receipt of Secretarial approvals under 37 U.S.C. § 908. Compensation received before retirement is considered received for the United States and creates a debt of the member in favor of the United States. Debt may not be waived under 10 U.S.C. § 2774 because member was not without fault.

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### DECISION

A decision has been requested concerning whether the employment of Major James D. Dunn and Sergeant Marcus A. Jenkins by foreign entities while they were on terminal leave and after they had retired is prohibited and whether such employment affects their active duty pay and allowances and retired pay.<sup>1</sup>

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<sup>1</sup>This decision is issued in response to a request from Richard L. Burton, Chief, Systems Development Division, Directorate of Retired Pay Operations, Defense Finance and Accounting Service (DFAS), Denver Center. The matter was forwarded to us after the DFAS/Headquarters assigned it Control Number 92-12-M.

Major Dunn retired from the Air Force effective March 1, 1992. On January 1, 1992, while he was on terminal leave, he accepted employment as a teacher at Ashcroft High School, Luton, Bedfordshire County, United Kingdom. On July 28, 1992, Major Dunn's foreign government employment was approved by the Secretary of the Air Force and by the Secretary of State on August 20, 1992, under 37 U.S.C. § 908.

Sergeant Jenkins retired from the Air Force effective April 1, 1992. On February 13, 1992, while he was on terminal leave, he accepted employment as a flight engineer with Saudi Arabian Airline, which is owned and operated by the Saudi Arabian government. His employment was approved by the Secretary of the Air Force on February 25, 1992, and by the Secretary of State on March 1, 1992. Both approvals were effective as of April 1, 1992, the date of Sergeant Jenkins' retirement.

"Terminal leave" is based on regulation and occurs when active duty members complete their administrative processing before their retirement date and then go on leave without returning to the separation site at the time of retirement. DOD Directive 1327.5, ¶ F.22. A member on terminal leave is still on active duty.

Article I, section 9, clause 8, of the Constitution of the United States provides: "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." Because retired members of the uniformed services retain their status as members of their service and receive retired pay by virtue of their continuing status, this constitutional prohibition applies to them as well as those on active duty. 53 Comp. Gen. 753 (1974).

Congress has given its consent to the acceptance by a retired member of the uniformed services of civil employment by a foreign government and compensation for that employment if the retired member receives the approval of both the Secretary of State and the Secretary of the service concerned. 37 U.S.C. § 908. The failure to obtain the required approval causes the withholding of retired pay in an amount equal to the emoluments received from a foreign government. When approval is received, it is prospective only and does not have retroactive effect. 58 Comp. Gen. 487 (1979). However, the authorization for employment provided by 37 U.S.C. § 908 only applies to members who retire or who are in the reserves. It does not apply to members, like Major Dunn and Sergeant Jenkins, while they

are on terminal leave because during that time they are still technically on active duty.

The submission first requests our views whether employment by a foreign government while on terminal leave should terminate a member's military appointment, in which case he would lose the time in which he was employed before the effective date of his retirement as creditable service in computing his years of service in the calculation of his retired pay. Termination of Major Dunn's appointment would deprive him of the years of service necessary to qualify for retired pay.

In an analogous situation, we found that the acceptance of a position by a member on terminal leave with a state government would violate the provisions of 10 U.S.C. § 973(b) which prohibit such employment, because the member was still on active duty. 56 Comp. Gen. 855 (1977). At the time of that decision, section 973(b) stated that the acceptance of such a position would terminate the member's military appointment. However, that provision was deleted when the statute was amended by Public Law 98-94, Title X, § 1002(a), Sept. 24, 1983 (97 Stat. 655). Section 1002(b)(2) now specifically states that any action under the section should not result in the termination of a military appointment.

Without a statutory termination requirement such as the repealed provision discussed above, we do not believe that termination should be required. An individual who accepts foreign government employment while on terminal leave should be treated in the same way a retiree in that situation is treated. Concerning retired members who accept foreign employment without the requisite approval, the Department of Defense Military Retired Pay Manual, Section E, Para. 20141(b)(2), states that compensation received from a foreign government without approval is considered received by the retired member for the United States and a debt in favor of the government results.

Ashcroft High School is a component of local government in England. The statutes governing education in England provide that county secondary schools, of which Ashcroft is one, are established and maintained by Local Education Authorities (LEAs). LEAs are part of the county councils that are local government in England and Wales. Under the Education (No. 2) Act of 1986, Ch. 61, § 35, the appointment and dismissal of staff, including teachers, of county schools is under the control of the LEAs. Although a county school has a non-governmental community organization in charge of running the school, which organization is to be consulted before a staff member may be dismissed, the staff remain the employees of the LEA. See Education (No. 2) Act,

1986, § 41 and Meredith, Government, Schools and the Law, 149 (1992).

The issue, therefore, is whether an employee of a component of a foreign local government is an employee of a "foreign State" within the meaning of the constitutional prohibition. In 44 Comp. Gen. 130 (1964), we held that a retired member who held a teaching position with the Department of Education of the State of Tasmania, Australia, held a position with a "foreign State" within the meaning of the constitutional provision. While noting that Tasmania did not have international status as a country, we concluded that a component state of a foreign country must be considered a "foreign State" under the constitutional prohibition.

We see no reason to change our view. The intent of the constitutional prohibition is to curb foreign influence upon government officials. Foreign governmental influence can just as readily occur whether a member is employed by local government within a foreign country or by the national government of the country. For this reason, we believe that the term "foreign State" should be interpreted to include local governmental units within a foreign country as well as the national government itself.

In this connection, when Congress amended the Foreign Gifts and Decorations Act of 1966 to provide for the acceptance by federal employees and members of gifts from foreign governments, it specifically included a definition of the term "foreign government." The term is now defined in the Act as including "any unit of foreign governmental authority, including . . . State, local, and municipal government." 5 U.S.C. 7342 (a) (2). See 1977 U.S. Code Cong. and Adm. News, p. 1651. Although Congress has not defined the term "foreign government" as used in 37 U.S.C. § 908, we see no reason why the definition Congress used for that term in the Foreign Gifts and Decorations Act should not also be used to determine if a member must obtain approval before accepting foreign employment.

As DFAS points out, in B-152844, December 12, 1963, we said that the constitutional prohibition would not apply to a retired officer offered employment by a publicly-owned university in a foreign country, provided the university was free from any governmental control. However, the record there suggested that the university was a self-governing entity not under the control of the government, and that the member's employment contract was not subject to review or question by or on behalf of the foreign government.

Here, in contrast, a local foreign governmental body has the authority to appoint and dismiss teachers in secondary schools such as Ashcroft.

We thus consider that Major Dunn is employed by a foreign government and that his employment comes within the constitutional prohibition.

Sergeant Jenkins' employment with the Saudi Arabian Airline, a corporation owned by the Kingdom of Saudi Arabia, is also employment by a foreign government. 58 Comp. Gen. 487 (1979). Although his employment after the date of his retirement was approved as required, his employment while on terminal leave violated the same prohibition.

Salary payments to Major Dunn and Sergeant Jenkins by the foreign governments that employed them absent approval pursuant to 37 U.S.C. § 908 caused them to be indebted to the United States for those payments. A debt owed by a retiree, such as those owed by Major Dunn and Sergeant Jenkins, is collected by withholdings from the retired pay of the retirees. If payments of retired pay are made in full, with no withholdings following the determination of the existence of a debt, such payments are erroneous to the amounts that should have been withheld.

Debts arising because of erroneous payments may be waived, under 10 U.S.C. § 2774, if such payments were made to the member; there is no indication of fault, fraud or misrepresentation by the member; and collection of the erroneous payment would be against equity and good conscience.


As reported by DFAS, Major Dunn was unaware of the need to obtain such approval and acted in good faith and was without fault in the matter. He first submitted his application for approval of employment on August 2, 1991, which application was returned with the advice to resubmit it 60 days before his retirement date. Meanwhile, he consulted a lawyer at Randolph Air Force Base who advised him that his teaching position would not violate the constitutional prohibition and, therefore, Secretarial approval was not necessary. For that reason Major Dunn did not resubmit his application until July 1992 after DFAS advised him in June 1992 that there was some question regarding the status of his employment. As noted above he received the approval in late August 1992.

Such approvals are prospective only. Therefore, the active duty and retired pay Major Dunn received from January 1, 1992, until the August approvals were erroneous payments. However, because of the steps taken by Major Dunn to attempt

to meet the restriction, we find him without fault and waive the debt.

On the other hand, Sergeant Jenkins' salary from the airline from February 13, 1992 until April 1, 1992, while still on active duty, is a debt to the United States that we do not waive. Since he was aware that he needed approval to undertake his employment upon retirement, we find that he should have been aware that his employment while on terminal leave was unauthorized. We cannot say that he was without fault in the matter and thus waiver is not appropriate.

Accordingly, collection from Sergeant Jenkins' retired pay should be made in an amount equal to that received from his employment before his retirement date.

*for*   
Comptroller General  
of the United States