



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

80664

Decision

Matter of: Chief Petty Officer John A. Pourtless, Jr. -
U.S. Coast Guard Reserve (Retired)

File: B-255672

Date: April 6, 1994

DIGEST

Correction of Coast Guard member's military record, based on finding of improper separation, resulted in entitlement to retroactive pay and allowances for period following such separation. The payment should not be offset by civilian wages earned during the period after separation, since those wages were from off-duty, full-time employment the member also had performed while still in the service. The member thus would have received the civilian wages during the period covered by the back pay, and therefore would not be enriched unjustly by not offsetting.

DECISION

This is in response to a request for an advance decision pursuant to 31 U.S.C. § 3529 from a United States Coast Guard certifying officer regarding the propriety of the payment of back pay without offsetting for civilian earnings. The entitlement to back pay resulted from a decision by the Board for the Correction of Military Records (BCMR). In our view, payment without offset is proper.

By decision of April 15, 1992, the BCMR ordered the Coast Guard to correct the military record of Chief Petty Officer John A. Pourtless, Jr., to indicate that he was retired on June 1, 1991, by reason of disability. Since Mr. Pourtless had been separated on December 28, 1989, he became entitled to pay and allowances for the extended period of service, and retired pay.

The question presented for advance decision is whether the back pay and allowances now due Mr. Pourtless should be offset by the amount of the civilian earnings he received during the period December 28, 1989, until June 1, 1991.

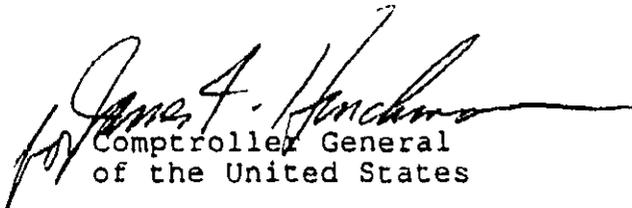
Normally, in the settlement of an account following a correction of records by the BCMR, earnings received from civilian employment during any period in which active duty pay and allowances are payable are to be deducted from such

settlement. 56 Comp. Gen. 587 (1977); Ulmet v. U.S., 17 Cl. Ct. 679 (1989). The rule is based on the general principle that the member has a duty to mitigate the government's monetary obligations in such circumstances, but also on the view that the settlement should not unjustly enrich the member by placing him in a better position financially than he would have been had he not been discharged. Staff Sergeant Luarthur Cochran, USAFR, B-252140, June 3, 1993. The Court of Claims stated in Silver v. U.S., 213 Ct. Cl. 388 (1977):

"this court has uniformly held that a claimant's outside earnings are to be deducted from an award of back pay if such earnings would not have been received by him had he been rendering the Government the employment services called for by the position for which he is found to have been improperly denied compensation".

In Mr. Pourtless' situation, however, the record shows that while he was on military duty Mr. Pourtless had been employed, from 1985 until June 1991, on a full-time basis by General Telephone and Electronics, in his off-duty hours. (Such off-duty employment appears to have been proper under Section E of the Coast Guard Personnel Manual.) Mr. Pourtless thus would have received the earnings from his civilian employment if he had been in the Coast Guard during the period in issue in any event, and therefore would not be enriched unjustly if the wages were not used for offset.

Accordingly, Mr. Pourtless' civilian earnings should not be offset against the payments to which he has been found entitled.


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