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Ms. Haubert
Civ.Pers.

DECISION

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

FILE: B-187854 DATE: February 24, 1977

MATTER OF: John Brosky, Jr. - annuity entitlement effect on severance pay

DIGEST: National Guard technician separated in lieu of reduction in force had previously become eligible for and had begun receiving retirement annuity from state retirement system in which he had elected to participate in lieu of the Federal Civil Service Retirement System. Despite his subsequent participation in the Federal retirement system and the fact that he is not entitled to an immediate annuity thereunder technician may not receive Federal severance pay under 5 U.S.C. 5595 (1970) since retirement annuity and severance pay are incompatible and conflicting benefits. See 54 Comp. Gen. 905 (1975).

By a letter dated November 12, 1976, the National Guard Bureau, Departments of the Army and the Air Force, requested our decision concerning the entitlement to Federal severance pay of Mr. John Brosky, Jr., a former National Guard technician who, at the time of his separation in lieu of reduction in force, was eligible for an immediate annuity under the Pennsylvania State retirement system.

The record indicates that from June 16, 1955, to June 9, 1974, Mr. Brosky was employed as a technician with the Pennsylvania Army National Guard. Although by virtue of section 3(b) of the National Guard Technicians Act of 1968, 32 U.S.C. 709 note (1970), Mr. Brosky had become a Federal employee effective January 1, 1969, he had elected on December 27, 1968, to remain a participant in the Pennsylvania State Employee's Retirement System in lieu of being covered by the provisions of the Federal Civil Service Retirement Act, 5 U.S.C. 8331 et seq. (1970). On June 9, 1974, Mr. Brosky was employed as a technician in the District of Columbia National Guard. At that time, he became subject to membership in the Federal Civil Service Retirement System and retained his membership until August 30, 1975, when he resigned his position after having been identified for reduction in force action.

Since Mr. Brosky was separated involuntarily, he was administratively deemed entitled to $10,628.21 in severance pay benefits, and periodic disbursements of severance pay were authorized. It was subsequently determined that since June 9, 1974, Mr. Brosky was eligible for and had been receiving an annuity from the State of Pennsylvania. This fact was not known to the

District of Columbia National Guard at the time of Mr. Brosky's employment with or resignation from that organization. Mr. Brosky had received $3,486.68 in severance pay benefits when such payments were suspended on December 15, 1975, pending resolution of the issue of his entitlement to severance pay.

The Federal severance pay provision was enacted as section 9 of the Federal Employees Salary Act of 1965, Act of October 29, 1965, Public Law 89-301, 79 Stat. 1118, now codified as 5 U.S.C. 5595 (1970), which provides in pertinent part as follows:

> "(b) Under regulations prescribed by the President or such officer or agency as he may designate, an employee who--
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> (1) has been employed currently for a continuous period of at least 12 months; and
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> (2) is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency;
>
> is entitled to be paid severance pay in regular pay periods by the agency from which separated."

There is no doubt that Mr. Brosky satisfies conditions (1) and (2).

Technicians appointed in the civil service by the adjutants general designated by the Secretary of the Army or Secretary of the Air Force under 32 U.S.C. 709(c) (1970) are explicitly included as employees under 5 U.S.C. 2105(a)(1)(F) (1970). However, for purposes of severance pay entitlement, 5 U.S.C. 5595(a)(2)(iv) (1970) provides that the term "employee" does not include:

> "an employee who is subject to * * * [the Federal Civil Service Retirement Act] or any other retirement statute or retirement system applicable to an employee as defined by section 2105 of * * * title [5] or a member of a uniformed service and who, at the time of separation from the service, has fulfilled the requirements for immediate annuity under such a statute or system * * *."

We recently held in 54 Comp. Gen 905, 913 (1975) that the phrase "any other retirement statute or retirement system applicable to an employee as defined by section 2105" of Title 5 appearing in 5 U.S.C. 5595(a)(2)(iv) (1970) is not limited to Federal or federally administered

retirement statutes or systems. Rather, it at least encompasses those non-Federal retirement systems in which a Federal employee is authorized to participate in lieu of participation in the Federal Civil Service Retirement System. Accordingly, we held that a National Guard technician who had elected to remain a participant in a state employee's retirement plan and who satisfied the requirements for an immediate state retirement annuity at the time of his involuntary separation was precluded from receipt of severence pay from the Federal Government. 54 Comp. Gen. 905, supra.

In the present matter, we are asked whether the result in 54 Comp. Gen. 905, supra, may be distinguished by the fact that Mr. Brosky participated in the Federal Civil Service Retirement System between the time of his eligibility for the state retirement annuity and the date of his resignation from Federal employment. For the reasons stated below, we hold that it may not be so distinguished.

Our decision in 54 Comp. Gen. 905, supra, was based upon the relationship between the purposes of severance pay and annuity benefits. We noted that severance pay was intended by the Congress to be a temporary means to "bridge the gap between employment and reemployment." We therefore concluded that severance pay and retirement annuities were incompatible and conflicting benefits, and held that eligibility for an immediate state retirement annuity precluded payment of severance pay under 5 U.S.C. 5595 (1970). In addition, we stated at 54 Comp. Gen. 905, 912:

> "We note that had Mr. Holland chosen to participate in the Federal Civil Service Retirement System, he would have been entitled to an immediate annuity (5 U.S.C. 8332(b)(6), 8336(d) and 8339(g) and (1) (1970), which would have precluded his receiving severance pay. 5 U.S.C. 5595(a)(2)(iv) (1970). Participation in a State retirement system was in lieu of participation in the Federal Civil Service Retirement System. Section 6 of the National Guard Technicians Act of 1968, supra, 32 U.S.C. 709 note (1970). Therefore, if Mr. Holland were to receive both a State retirement annuity and Federal severance pay, he would be in a more favorable position than his counterparts who had participated in the Federal Civil Service Retirement System."

In the present case, although Mr. Brosky had participated in the Federal retirement system, his period of service at the time of his retirement was not sufficient to entitle him to a Federal annuity. As noted in 54 Comp. Gen. 905, supra, if Mr. Brosky had participated in a

state retirement plan in lieu of the Federal Civil Service Retirement System and were eligible for state retirement annuity, or if he were eligible for a Federal retirement annuity, he would be precluded from the receipt of Federal severance pay. Since that decision was based upon the statutory incompatibility of severance pay and retirement annuities, it is the fact of the employee's eligibility for an immediate retirement annuity under either such system which precludes receipt of Federal severance pay. Because of Mr. Brosky's receipt of a retirement annuity from the State of Pennsylvania he is not entitled to Federal severance pay. This is so regardless of his participation in the Federal retirement system subsequent to his retirement eligibility under the state system and notwithstanding the fact that he is not entitled to an annuity under the Federal Civil Service Retirement System.

The erroneous overpayment of $3,486 to Mr. Brosky is an overpayment of pay under 5 U.S.C. 5584 and may be considered for waiver under that authority. Thereunder waiver may be allowed when collection of the debt would be against equity and good conscience and not in the best interests of the United States. Generally, this requirement will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and that there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim. See 4 C.F.R. 91.5(c) (1976).

In the present case, Mr. Brosky received his retirement annuity from the State of Pennsylvania throughout the period of his employment by the District of Columbia National Guard. As indicated by the Bureau in its transmittal letter to this Office, Mr. Brosky was not required as a condition of employment to provide any information concerning such annuity. There is no indication in the record that Mr. Brosky was in fact aware that the payments of severance pay made to him were in error. Upon separation, he was furnished a notification of personnel action containing the notation that he was entitled to $10,628.21 in severance pay. In these circumstances, we find nothing in the record to suggest the existence of fraud, misrepresentation, fault, or lack of good faith on the part of Mr. Brosky. We are, therefore, exercising our authority under 5 U.S.C. 5584 to waive the claim of the United States against Mr. Brosky for the erroneous payment of severance pay. B-181754, January 22, 1975; B-172195, July 5, 1972.

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Accordingly, Mr. Brosky is not entitled to further payments of severance pay. However, no action should be taken to recover from him the $3,486 erroneously paid.

Acting Comptroller General
of the United States