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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20546**

FILE: B-198557

DATE: March 25, 1982

MATTER OF: Major Marvin L. Friedman, USAF, Retired

DIGEST: Congress has authorized retired Regular officers of uniformed services to accept compensation for employment by a foreign government if Secretary concerned and Secretary of State approve. In decision B-198557, July 17, 1980, we held that a retiree who accepts foreign employment after receiving Secretary of the Air Force's approval but before Secretary of State's is subject to the rule in B-178538, October 13, 1977, that he must repay the United States an amount equal to compensation received from foreign government. However, we also held that when final approval is given, withholding of retired pay is to be discontinued except to the extent that retired pay was paid for the period of unauthorized employment by a foreign government. B-193562, December 4, 1979, is overruled to the extent it is inconsistent with these decisions.

This decision is in response to a request for clarification of our decision in the Matter of Friedman, dated July 17, 1980. The initial request for decision was presented by the Deputy Assistant Comptroller for Accounting and Finance, USAF, and was assigned submission number DO-AF-1342 by the Department of Defense Military Pay and Allowance Committee. This request for clarification is made by the Deputy for Accounting and Internal Audit, Department of the Air Force.

The issue presented in the initial decision concerned whether a retired Regular Air Force officer was entitled to retired pay when he accepted employment and compensation therefor from a foreign government after receiving approval from the Secretary of the Air Force but prior to the granting of approval by the Secretary of State, as required by section 509 of the Foreign Relations Authorization Act, Fiscal Year 1978, Public Law 95-105, August 17, 1977, 91 Stat. 844, 859-860. The decision in Friedman is affirmed and our reasons for that holding are explained below.

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In summary the facts involved are that following his retirement as a Regular officer in the United States Air Force, Major Friedman received an offer of employment with El Al Airlines, an entity of the government of Israel. In accordance with section 509 of the Foreign Relations Authorization Act, Major Friedman requested approval of the employment from the Secretary of the Air Force on December 25, 1977. On February 7, 1978, the approval was granted with instructions to obtain the Secretary of State's approval prior to accepting the employment. Although he did not request this approval until March 5, 1978, he began work in the El Al position on February 19, 1978. By letter dated March 31, 1978, the Secretary of State's approval was granted. The Department of State's letter indicated that the approval was made retroactively effective to December 25, 1977, the date of Major Friedman's initial application. We held in Friedman that the approval was effective on the date it was granted--March 31, 1978. This holding was supported by prior holdings in 58 Comp. Gen. 487 (1979) and B-175166, April 7, 1978. With respect to Major Friedman's entitlement to retired pay we held, in effect, that the retired pay withheld should not exceed the amount of retired pay accrued during the period of unauthorized employment--February 19 to March 31, 1978.

In the submission it is stated that an apparent inconsistency exists between the holding in this case and our decision B-178538, October 13, 1977. There we held that the amount of retired pay withheld from retirees employed by foreign governments without approval as provided for by Congress is an amount equal to the compensation received from the foreign government. In view of the foregoing, clarification is requested concerning the proper amount of retired pay to be withheld where the amount of compensation earned during the period of unauthorized employment exceeds the amount of retired pay accrued during the same period.

Article I, section 9, clause 8, of the Constitution of the United States, prohibits the acceptance by any person holding an office of profit or trust under the United States, of any present, emolument, title or office from a foreign government without the consent of the

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Congress. Retired Regular officers are members of the military service of the United States and are considered subject to this constitutional prohibition.

Although no specific sanction is provided for in the constitutional prohibition concerning those who accept foreign compensation without congressional approval, in order to give substantial effect to this provision we have adopted and consistently applied the principle enunciated in our October 13, 1977 decision. See 44 Comp. Gen. 130 (1964). Thus, the basis for liability of individuals who accept employment with a foreign government without the required approval is that they may not retain the pay earned from that employment. When approval of the employment is obtained from both of the Secretaries concerned as provided in section 509, future employment and earnings are authorized and further collection of amounts due for unauthorized employment is not required. However, to the extent that retired pay was paid during the period of unauthorized employment it must be collected from the individual.

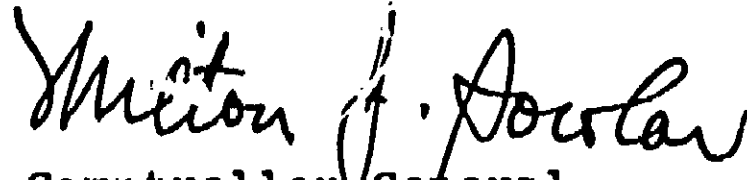
The reason for that rule is that retired pay should not be paid during a period of unauthorized employment except to the extent that pay from employment by a foreign government is less than retired pay. If retired pay was erroneously paid during this period, it must be collected even though the foreign employment is subsequently approved because approval generally may not be retroactive. An exception to the rule against retroactivity was an issue in Friedman. It was determined that the exception was not applicable in Major Friedman's situation.

In Matter of Kammerer, B-193562, December 4, 1979, termination of collection upon receipt of approval from both Secretaries was allowed even though the full amount received from the foreign government had not been collected. That rule was limited to cases of individuals who were employed by a foreign government at the time section 509 of Public Law 95-105 was enacted. In Friedman termination of collection action was allowed for an individual who was not employed by a foreign government at the time of enactment but was employed at a later date before receipt of approval from both Secretaries. This action modified the holding in Kammerer but that fact was not specifically stated. To

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clarify the matter we now overrule Matter of Kammerer, B-193562, December 4, 1979, to the extent it is inconsistent with the holding in Matter of Friedman, July 17, 1980. Thus, after approval of employment by a foreign government by both Secretaries, no further withholding of retired pay will be required except to the extent necessary to recoup retired pay paid during a period of unauthorized employment by a foreign government.

The holding in Matter of Friedman is affirmed in keeping with the above clarification.



For the Comptroller General
of the United States