

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548****FILE:** B-208523**DATE:** April 13, 1983**MATTER OF:** Massachusetts National Guard Technicians**DIGEST:**

Massachusetts National Guard technicians who had elected State rather than Federal retirement coverage, as provided in the National Guard Technicians Act of 1968, improperly converted to Federal Civil Service retirement after they separated from the Massachusetts National Guard and were later rehired. No reimbursement is allowable for interest expense to restore state retirement coverage, even though the costs accrued because of mistaken and unauthorized conversion to the Federal Civil Service retirement system. The Government is not liable for the unauthorized acts of its agents. Further, without a statutory or contractual provision for interest and attorney fees claimed, reimbursement of these items must be denied.

Several Massachusetts National Guard technicians claim reimbursement for costs of interest and attorney fees they indicate they incurred because they were mistakenly placed under the Federal Civil Service retirement system without authority. The National Guard Bureau, Departments of the Army and the Air Force, in submitting the technicians' claims to us, recommends payment because of the mistake, but states it could find no authority to allow the claims.

We find that the claims may not be paid because there is no contractual or statutory provision permitting reimbursement of the interest or attorney fees requested. Without such authority losses arising from mistaken and unauthorized actions of agency officers and employees may not be paid by the Government.

Background

The claimants were employed as civilian technicians with the Massachusetts National Guard when the National Guard Technicians Act of 1968, became effective in January

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1969. See Public Law 90-486, 82 Stat. 755, August 13, 1968 (32 U.S.C. § 709 and § 709 notes). Under that Act, National Guard technicians were changed from state employees to Federal employees. Since many technicians were participating in state retirement programs, section 6 of the Act authorized them to elect before January 1, 1969, to remain covered by their state retirement system rather than switch to the Federal Civil Service retirement system. For those who elected to remain with their state system, section 6 of the Act also provided authority for the Federal Government to make the required employer's contributions to the state system.

The claimants in this case elected to remain covered by the Massachusetts State retirement system rather than the Federal system. At the time of election, they were informed that their choice to retain Massachusetts State retirement coverage was an irrevocable option for as long as they were continually employed by the Massachusetts National Guard. However, they were also told by National Guard officials that they would be converted to the Federal Civil Service retirement system if after separating from employment they were rehired by the Massachusetts National Guard after the effective date of the Technicians Act. Later they did separate, and after a break in service the Massachusetts National Guard rehired them as technicians. They then withdrew their contributions that had accumulated in the Massachusetts State retirement system and were converted to Federal Civil Service retirement coverage. For periods up to 10 years, Federal retirement deductions were made from the claimants' pay and, along with the Federal employer's contributions, were transferred to the Civil Service Retirement and Disability Fund.

However, in 1977 a question arose as to the propriety of these actions, and the Personnel Officer of the Massachusetts National Guard sought clarification from the United States Civil Service Commission (now Office of Personnel Management). By letter of December 16, 1977, an official of the Civil Service Commission informed the Personnel Officer of the Massachusetts State National Guard that under Public Law 90-486 an election in 1969 to remain in a state retirement system was final, and a National Guard technician could not convert to Federal Civil Service retirement upon being rehired as a technician in the same

state after a break in service. This information revealed that the claimants conversion to Federal Civil Service retirement had been a mistake. Consequently the claimants were transferred from the Federal Civil Service retirement system to the Massachusetts State retirement system along with the employees' and employer's contributions to the Federal system.

In addition to the transfer of contributions which took place, the claimants believe that they should be reimbursed for other costs arising from their reentry into the Massachusetts State retirement system after the intervening period when they were mistakenly under Federal retirement system.

The reimbursement requested includes two elements of interest charged the claimants in order to fully restore their Massachusetts State retirement coverage. At the commencement of the interim period under Federal Civil Service retirement, the claimants withdrew the balance of their contributions then accumulated in the Massachusetts State retirement system. All of the claimants request reimbursement of interest that would have accrued on this balance during the interim period had it not been withdrawn, and which they indicate the Massachusetts system requires them to pay. The second element is sought by six of the claimants who believe they are entitled to reimbursement of interest on additional contributions that they would have paid into the Massachusetts State retirement system had they not left that system during the interim period.

In addition, two of the claimants through their attorney request the difference between their payroll deductions (7 percent of their pay) for Federal Civil Service retirement during the interim period and what they say their contributions to the Massachusetts State retirement system (5 percent of their pay) would have been if they had continued that coverage uninterrupted. These two claimants also ask that their attorney fees for presenting the claims be paid.

Applicable Law and Conclusions

Concerning the technicians' eligibility to be covered by the Federal Civil Service retirement system, that was a

matter for determination by the Civil Service Commission (now Office of Personnel Management) which has the authority to administer that system. 5 U.S.C. § 8347; 55 Comp. Gen. 684, 687-688 (1976); and Matter of Ortiz, B-193337, January 4, 1979. As to the irrevocability of elections to remain under state retirement coverage pursuant to the National Guard Technicians Act, the Civil Service Commission published the following information dated April 30, 1969:

"(1) * * * A technician's election to remain in a State retirement plan is irrevocable and cannot be changed later so that service credit can be allowed under the Civil Service Retirement System."

Federal Personnel Manual Supplement 831-1, Subchapter S3, paragraph S3-3, Installment 20, April 30, 1969. This provision was reissued December 10, 1971. Thus, as the Commission officially advised the National Guard Personnel Officer in the 1977 letter it was the Commission's position that a technician's choice to remain under a state retirement system was irrevocable and that conversion to Federal Civil Service retirement was unauthorized, even after a break in service and reemployment with the state.

It appears that the corrective action taken to return the claimants to the state retirement system with concurrent transfer of funds to that system was all the action the law allows to correct the error. Although we have not been furnished a full accounting of the transfer of funds from the Federal Civil Service Retirement Fund to the Massachusetts system, we may assume that the difference between the 7 percent Federal contribution and the 5 percent Massachusetts contribution was used either to pay interest on the late deposit to the Massachusetts fund or was refunded to the employees. There is no authority we are aware of under which we could authorize payment of the claims for interest and attorney fees. However, the question of whether interest may be paid on the amounts erroneously paid into the Federal Civil Service retirement system for the period they were deposited in the Civil Service Retirement Fund is a matter for determination by the Office of Personnel Management. That office may be willing to consider further the question of appropriate interest payments with respect to the amounts erroneously paid into and held in the fund.

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It is a well-settled rule of law that interest may be assessed against the Government only if provided for by contract or specifically authorized by statute. 53 Comp. Gen. 824 (1974) and Matter of Albrado, 58 Comp. Gen. 5 (1978). Similarly for payment of attorney fees, a contract or statutory authorization is required. Matter of Jackson, B-193272, August 21, 1981. Such authorization is absent in the present case.

Also, while the claimants may have incurred some expense due to the erroneous actions or advice of the National Guard officials, that alone provides no basis for us to authorize payment. In the absence of a statute providing otherwise, the United States is not responsible for the unauthorized advice or acts of its agents. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947); 58 Comp. Gen. 35 (1978); 56 Comp. Gen. 85 (1976); 53 Comp. Gen. 11 (1973).

Accordingly, payment of these claims is not authorized.

Milton J. Fowler
for Comptroller General
of the United States