



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Major Gilbert S. Sanders, U.S.A.F. (Retired)
(Deceased) - Employment By a Foreign Government

File: B-231498

Date: June 21, 1989

DIGEST

Although not entirely clear, it appears from the record that a corporation employing a retired Air Force officer was owned by a foreign government thereby triggering the requirement of 37 U.S.C. § 908 that secretarial approval for employment be obtained. In view of the uncertainty concerning foreign ownership of the corporation when the retired officer was employed by the corporation and the good faith actions of the officer in seeking approval of the employment, any payments of retired pay which may have been erroneous under the terms of the statute may be waived under 10 U.S.C. § 2774.

DECISION

This action relates to a potential claim of the Air Force in the amount of \$58,500.64 against the estate of Major Gilbert S. Sanders, U.S.A.F., which arose in connection with his employment by Arabian American Oil Company (ARAMCO). Two questions have been presented. The first is whether Major Sanders, a retired Regular officer, by virtue of his employment with ARAMCO, a corporation now owned by the Government of Saudi Arabia, violated the foreign employment restrictions in article I, section 9, clause 8, of the Constitution and 37 U.S.C. § 908 which require approval of employment by a foreign government. The second question is whether, if the restrictions have been violated, the claim arising from the violation may be waived under 10 U.S.C. § 2774.

As explained below, although Major Sanders was subject to the constitutional restrictions relating to employment by a foreign government, it was not clear whether, at the time of his employment by ARAMCO, the corporation was owned by a foreign government. In any event, in view of the particular

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circumstances involved here, any claim of the United States for the erroneous payment of retired pay may be waived.

BACKGROUND

Major Gilbert S. Sanders, U.S.A.F. retired from the Air Force on July 1, 1979. He began working for ARAMCO on September 8, 1980, and requested approval of the employment from the Air Force Military Personnel Center on October 7, 1980. Due to unexplained circumstances, the request was not received. The Air Force, on reviewing Major Sanders' October 2, 1980 DD Form 1357 (a statement of employment filed with the Department by retired regular officers) questioned whether ARAMCO was an entity of the Saudi Arabian Government. (Secretarial approval of a request separate from the DD Form 1357 is required in order to comply with 37 U.S.C. § 908.) On January 17, 1982, Major Sanders received notice from ARAMCO that it was a Delaware Corporation and that the State Department had advised ARAMCO that it was not necessary to seek approval for employment.

Subsequently, the Air Force, by letter dated August 19, 1982, informed Major Sanders of the need to request permission for such employment from the Secretary of the Air Force and the Secretary of State. Major Sanders did not receive this letter, nor did he become aware that his October 7, 1980 request had not been received by the Air Force until January 15, 1983. Major Sanders resubmitted the request on January 19, 1983, and permission was granted by the Air Force on April 25, 1983, and the Department of State on May 5, 1983.

Major Sanders was employed by ARAMCO without approval from September 8, 1980, through May 4, 1983. During this period, he continued to receive retired pay from the Air Force. Major Sanders died on June 8, 1986, and a \$58,500.64 debt has been established against his estate, representing the amount of retired pay he received prior to receiving approval on May 5, 1983, for this employment.

ANALYSIS

Article I, section 9, clause 8 of the Constitution prohibits any person "holding any Office of Profit or Trust" under the United States from accepting any compensation, office, or title from a foreign government without the consent of Congress. It is well established that the prohibition applies to retired regular officers of the

uniformed services. See 65 Comp. Gen. 382 (1986); 58 Comp. Gen. 487 (1979). Therefore, Major Sanders was subject to this constitutional prohibition while he was employed by an entity of a foreign government.

In 1977 Congress granted consent for reserves and retired members to accept employment with a foreign government by enacting a statute now codified at 37 U.S.C. § 908. That provision authorizes acceptance of such employment if the Secretary concerned and the Secretary of State grant approval.

We have held that when a retired member accepts foreign employment with a foreign government or a corporation owned by a foreign government without approval he may not retain the pay received for the United States during the period of that employment. When approval has been granted 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. 61 Comp. Gen. 306 (1982).

It is unclear from the record when ARAMCO became an entity of the Saudi Arabian Government. A July 17, 1980, memorandum prepared in a separate matter by an Assistant General Counsel, Department of the Air Force, indicates that the Department of Commerce informed the Air Force that as of June 10, 1980, the stock of ARAMCO was owned by four U.S. corporations, even though 60 percent of its production assets were owned by Saudi Arabia. The memorandum also states that ARAMCO was not owned or controlled at that time by the Saudi Arabian Government and that the exact status of ARAMCO seemed likely to remain a source of confusion for some time.

On the other hand, a telegram from the U.S. Consul in Dhahran to the Department of Commerce dated January 5, 1982, indicates that four U.S. companies owned ARAMCO until 1973, when the Saudi Arabian Government acquired a 25 percent interest, which developed into sole ownership by 1980. Similarly, a letter dated January 17, 1982, to Major Sanders from A.D. Brosterhaus, who was apparently an official with ARAMCO, indicates that the State Department had advised ARAMCO that while ARAMCO remained a Delaware corporation, U.S. employees would not need secretarial approval for employment with it.

On the record before us, we cannot determine whether ARAMCO was owned by a foreign government during the period of Major Sander's unapproved employment. However, we do not

believe it is necessary to resolve this question because it is our view that the facts of this case support waiver of any claim the government may have against him.

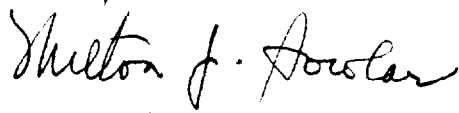
Section 2774 of title 10, United States Code, provides authority to waive claims of the United States arising out of erroneous payments of military pay and allowances made to or on behalf of a member or former member of the uniformed services, if collection "would be against equity and good conscience and not in the best interest of the United States." The collection of an erroneous payment may not be waived under the statute, however, if there is an indication of "fault" on the part of the member.

At the time Major Sanders requested approval of his employment, October 7, 1980, the status of ARAMCO was in transition. It thus was not unreasonable for Major Sanders to have failed to follow up with the Air Force when no response was received to his October 7, 1980, request for approval of foreign employment because it would have been reasonable for him to assume that the U.S. government had determined that the corporation was not foreign owned and that no request was required. The fact that he acknowledged the employment on the DD Form 1357 at approximately the same time lends support to his statement that he, in fact, did attempt to inform the Air Force of the employment and did attempt to request approval for the employment.

It is our view, on the basis of the facts of record, that Major Sanders acted in good faith from the outset of his employment with ARAMCO and that he should not be penalized, in view of the unsettled status of his employer, for not pursuing further his employment approval request. With respect to the period between January 15, 1983, when Major Sanders became aware that a renewed foreign employment approval request was required, and May 5, 1983, when his request finally was approved, the record reflects that Major Sanders responded to the Air Force's belated demand for an approval request within 4 days while the approval was not forthcoming for some 3-1/2 months. We believe it would not be equitable to require forfeiture of Major Sanders's retired pay for this period. By the time the Air Force informed Major Sanders of the need to request approval of his employment he had been employed by ARAMCO for several years on the apparent assumption that no approval of his employment was required and the subsequent delay in approving his timely submitted request was clearly attributable to the government, not to Major Sanders. Thus,

we conclude that no fault is attributable to Major Sanders in this matter. Collection of the debt, therefore, would be against equity and good conscience and not in the best interests of the United States.

Accordingly, the debt should be waived.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States