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

Decision

Matter of: Major William R. Minton, et al., USAF (Retired)

File: B-237117

Date: July 12, 1991

DIGEST

1. The Dual Compensation Act, 5 U.S.C. § 5531 et seq. (1988), is applicable to retired Air Force officers coaching under personal services contracts with the Air Force Academy Athletic Association.

2. Coaches with the Air Force Academy Athletic Association who initially occupy their positions under personal services contracts that terminate in 1 year or less qualify for the 30-day exception from dual compensation deductions for temporary employees at 5 U.S.C. § 5532(d)(2).

DECISION

This action responds to a request for a decision on the applicability of restrictions in the Dual Compensation Act, 5 U.S.C. § 5531 et seq., to retired regular Air Force officers providing full-time coaching services under contracts with the Air Force Academy Athletic Association (AFAAA).1/ We conclude that the restrictions apply.

Majors William R. Minton, Richard H. Enga, Richard W. Baughman and Richard F. Gugat all retired from the Air Force between 1983 and 1987, and all were qualified for retired pay. After their retirements they accepted positions as Head Basketball Coach, Assistant Football Coach, Head Wrestling Coach, and Head Tennis Coach, respectively, under personal services contracts with AFAAA, a nonappropriated fund activity supervised by the Superintendent of the Air Force Academy.

Majors Minton, Enga and Baughman each had his retired pay reduced under 5 U.S.C. § 5532(b), which provides for reductions in military retired pay for officers who also hold "positions" in the government. Major Gugat's retired pay has not been reduced for dual compensation purposes, but now also

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1/ The question was assigned submission number DO-AF-1495 by the Department of Defense Military Pay and Allowance Committee.

faces adjustment. The initial contracts with Majors Enga and Gugat each ran for a period of 1 year or less, but were renewed for multiple-year terms. Majors Minton and Baughman were each initially awarded multiple-year contracts.

The Air Force contends that the coaches do not hold "positions" for the purposes of 5 U.S.C. § 5532(b) because they have not been officially appointed as employees of the government, and that reductions in retired pay for dual compensation purposes are therefore improper. The Air Force bases its contention on our decision in Matter of Military Retirees, B-231565, Nov. 14, 1988, where we found that retired military and naval personnel who entered into personal services contracts with the government to provide health care services were not subject to dual compensation reductions. The Air Force also asks whether Majors Enga and Gugat qualify for the 30-day exemption from deductions at 5 U.S.C. § 5532(d)(2) for retired officers "employed on a temporary . . . basis," because their initial contracts did not exceed 1 year.

In our view, the individuals involved here are subject to dual compensation restrictions.

In 42 Comp. Gen. 73 (1962), we concluded that the Air Force Academy's head football coach, employed by AFAAA, held a position "under the United States Government" and therefore was subject to the retirement pay reduction provisions of section 212 of the Economy Act of 1932, 47 Stat. 382, 406. In B-165534, Dec. 17, 1968, we held that the equipment manager, also employed by AFAAA, was subject to the Dual Compensation Act (which repealed the Economy Act provision) because AFAAA was a nonappropriated fund instrumentality under military jurisdiction.

We pointed out in the cited decisions that AFAAA is a non-military Air Force activity through which the Academy's Superintendent exercises control of cadets' participation in intercollegiate sports. We further noted that the Superintendent was expressly authorized by the Secretary of the Air Force to prescribe the organization and use of officials needed for managing AFAAA and its activities, under the general supervision of the Air Force Chief of Staff. We stated that in such circumstances the coaching position must be viewed as an appointive one, and therefore within the purview of section 212, and the equipment manager held a position under the Dual Compensation Act. As we stated in the 1968 decision, "To hold otherwise would be to recognize the right of the Secretary of the Air Force to exempt individuals from . . . the Dual Compensation Act where no right of exemption exists."

Specifically regarding the contractual nature of the coaching arrangements, in Applicability of the Dual Compensation Act to the Head Basketball Coach, U.S. Military Academy, B-200240, May 5, 1981, we determined that a military retiree employed as a basketball coach under a personal services contract with the Army Athletic Association, a nonappropriated fund activity, was subject to the dual compensation restrictions in 5 U.S.C. § 5532(b). In that case, the right of government officials to supervise the duties of the coach was determinative in establishing that the coach occupied a "position" in the government, even though other indicia of employment had been removed through the contract between the coach and the Association.2/

We find nothing here to suggest a different result from the ones we reached in the two cited cases. The personal services contracts involved in our decision in Military Retirees, on which the Air Force relies, clearly are different than the coaching ones here. The reason is that those contracts were based on the specific statutory authority at 10 U.S.C. § 1091 to contract "for services (including personal services) for the provision of direct health care services;" that authority is used when in-house sources are insufficient to support the military departments' medical mission. See DOD Instruction 6025.5, Feb. 27, 1985. As we stated:

> "the services of the health care personnel here in question have been obtained by contracts properly authorized under 10 U.S.C. § 1091. The health care personnel do not hold established positions in the government."

Since (1) the coaching contracts involved here do not rest on any similar extraordinary authority, and (2) the Air Force does not suggest that the factual situations at AFAAA is any different than it has been in the past, or is any different in terms of supervision than at the U.S. Military Academy, we remain of the view that the coaches are subject to the dual compensation restrictions in 5 U.S.C. § 5532(b).

2/In contrast, in 54 Comp. Gen. 521 (1984), we found that an employee of the Naval Academy Athletic Association was not subject to the Dual Compensation Act because that group is a purely voluntary organization not required by law or regulation to function under the Navy's jurisdiction, and therefore could not be regarded as a nonappropriated fund instrumentality of the federal government. See also 45 Comp. Gen. 289 (1965) (same conclusion with respect to the Marine Corps Association).

Regarding the applicability of the 30-day exemption from deductions, we have interpreted the phrase "employed on a temporary . . . basis" as used in 5 U.S.C. § 5532(d)(2) as "employment for a definite period of time of 1 year or less," 46 Comp. Gen. 366 (1966). Consistent with our view that dual compensation restrictions apply here, we find that Majors Enga and Gugat qualify for the 30-day exception from dual compensation deductions at 5 U.S.C. § 5532(d)(2) based on their initial 1-year contracts with AFAAA.

for Comptroller General
of the United States