

General; waiver of indebtedness - dual compensation

A retired Naval officer accepted a civilian position with the federal government, and his military retired pay became subject to the Dual Compensation statute. Due to an administrative error, his pay was not reduced as was required under 5 U.S.C. § 5532. The member is at fault in drawing military retired pay in an unreduced amount because he was aware of the application of the Dual Compensation statute and failed to notify his military finance office of his dual status to obtain a definite determination of his entitlements. Waiver under 10 U.S.C. § 2774 is therefore precluded.

00081601 01/03/2001

January 3, 2001

---

In Re:

[Redacted]

Claimant

---

Claims Case No. 00081601

## CLAIMS APPEALS BOARD DECISION

### DIGEST

A retired Naval officer accepted a civilian position with the federal government, and his military retired pay became subject to the Dual Compensation statute. Due to an administrative error, his pay was not reduced as was required under 5 U.S.C. § 5532. The member is at fault in drawing military retired pay in an unreduced amount because he was aware of the application of the Dual Compensation statute and failed to notify his military finance office of his dual status to obtain a definite determination of his entitlements. Waiver under 10 U.S.C. § 2774 is therefore precluded.

### DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate 00012102, dated April 18, 2000, which denied the waiver request of a retired Navy member. The member's debt arose when the Dual Compensation statute, 5 U.S.C. § 5532, was not applied to the member's retired pay, resulting in a total of \$5,781.85 erroneous payment of retired pay during the period August 3, 1998, through February 28, 1999. [\(U\)](#)

## Background

The service member retired from the Navy, effective January 1, 1994. On August 3, 1998, the member became employed as a civilian employee by the Department of Defense. The member states that when he was hired, he informed the servicing personnel office of his retired military status. They told him that they would notify the Defense Finance and Accounting Service (DFAS) in Cleveland of his federal employment. In addition, the member states that his Notification of Personnel Action (SF 50 B) for his new employment was forwarded to DFAS by his servicing personnel office in September 1998. Due to an administrative error, DFAS did not take action on the SF 50 B for over 6 months and therefore, no offset was applied to the member's retired pay. The member states that he did not question why his retired pay was not reduced during this period because he was under the impression, through personal internet research, that his Veteran's (VA) disability might preclude any reduction in his retired pay. DFAS discovered the error in February 1999, and sent a notification of overpayment of \$5,781.85 to the member. The member states that he then made phone calls to DFAS to inquire about his debt.

The member responded in writing to DFAS on June 11, 1999, requesting waiver of the overpayment and stating that his Notification of Personnel Action (SF 50B) for his new job was forwarded to DFAS in early September 1998. The member stated that DFAS did not take action for over six months. DFAS forwarded the appeal to our Office. Our Office issued a Settlement Certificate denying waiver. The member appealed this denial stating that the rationale and logic used to determine the settlement were "non-sequitur" to the facts and the determination of "partial fault" was based on incorrect assumptions as to actions taken by the member to determine his status. He analogizes his situation to that of *Admiral James D. Watkins, USN (Retired)*, B-235501, June 23, 1989.

## Discussion

We have the authority under 10 U.S.C. § 2774 to waive collection of overpayments of pay and allowances to a member or former member of the uniformed services, the collection of which would be against equity and good conscience and not in the best interest of the United States. Waiver may not be granted if there is any indication of fault on the part of the member or former member in the accrual of the debt. The standard we employ to determine fault is whether a reasonable person, under the specific circumstances of the case, would or should know that he is receiving erroneous payments.

The member was not exempt from the application of the Dual Compensation statute based on his VA status. It has long been held that a retired officer who accepts civilian employment and believes he may be exempt from dual compensation restrictions is at fault in receiving military retired pay in an unreduced amount if he fails to notify his agency and his military finance office of his dual status, to obtain a definite determination of his entitlements. *See Albert L. Bagnaschi, USA (Retired)*, B-240049, Nov. 1, 1990; and *Rear Admiral Harvey E. Lyon, USN (Retired)*, B-198955, April 13, 1981.

The member should have been aware that his retired pay would be affected by his acceptance of a civilian position. Before the repeal of the Dual Compensation statute, upon retirement, Naval officers were generally counseled regarding the statute. In addition, it was custom to provide them with a standard form to sign stating that if they took a civilian position with the government, they would notify the appropriate finance center immediately. Even though the member researched the issue on the internet, and may have been led to believe the Dual Compensation statute did not apply to him because of his VA status, he still had an affirmative duty to personally notify his finance center. The member failed to inform DFAS of his civilian employment. The fact that his civilian personnel office notified DFAS did not relieve him of the duty to notify DFAS himself. His failure to notify and to obtain a definite determination of his entitlements

puts him at least at partial fault for the overpayment. In addition, given the availability of the Dual Compensation law, and given the member's rank and military experience, we think the member should have been aware of the importance of ascertaining for himself his exact status regarding the Dual Compensation law and requested verification in writing. See *Captian Gerald E. Green, USN (Retired)*, B-255699, May 9, 1994.

Finally, the member believes his case to be analogous to *Admiral James D. Watkins, USN (Retired)*, B-235501, *supra*. In that case, the Admiral took steps to insure that his dual status was recognized. He directed administrative personnel to inform the Navy of his new employment, and then he followed up on the matter. Every time, he was incorrectly advised. In contrast, in this case, the member only contacted DFAS-CL after he received the letter advising him of his debt. He did nothing to promptly inform his military pay office of his civilian employment. Although the member states that he knew deductions were not being made to his retired pay, as distinguished from the Admiral's case, the member did nothing on his own to insure that his dual status was recognized for pay purposes.

### Conclusion

We affirm the Settlement Certificate.

/s/

---

Jean E. Smallin

Acting Chairman, Claims Appeals Board

/s/

---

Catherine M. Engstrom

Member, Claims Appeals Board

/s/

---

Erin C. Hogan

## Member, Claims Appeals Board

1. Under the Dual Compensation statute, 5 U.S.C. § 5532, the member's retired pay was subject to reduction by a formula in the statute while he held a "position" in the federal government. Section 5532 was repealed by Public Law 106-65, Div. A, Title VI, 651(a)(1), Oct. 5, 1999, 113 Stat. 664. The repeal was effective October 1, 1999, and was not retroactive.