

October 29, 1999

In Re:

[Redacted]

Claimant

Claims Case No. 99071918

CLAIMS APPEALS BOARD DECISION

DIGEST

A member retired from the regular component of the Army (RA) under 10 U.S.C. § 1293 as a chief warrant officer (W3). Early in his military career he had served as a captain in the United States Army Reserve (USAR). Under 10 U.S.C. § 3964, when his active duty time plus his time on the retired list equaled thirty years, he was entitled to be advanced to the highest grade in which he served on active duty. Since there is no authority under 10 U.S.C. § 3964 for the member to be moved from the retired list of the RA to the retired list of the USAR when advanced, he was properly advanced to the rank of captain in the RA. The member became a civilian employee after his military retirement. His military retired pay remained subject to 5 U.S.C. § 5532, the Dual Compensation statute.

DECISION

We have been asked to render a decision regarding the claim of a retired Army officer for the amount of money by which his retired pay has been reduced under the Dual Compensation statute.

Background

In September 1968, the member was commissioned a reserve officer in the Army of the United States (AUS). Two years later he was promoted to captain in the United States Army Reserve (USAR). In September 1973, he was released from active duty in the USAR under honorable conditions, but he continued his military career in the regular component of the Army (RA) as a chief warrant officer (W3). On December 1, 1987, he was placed on the retired list as a W3 of the regular component under 10 U.S.C. § 1293. At some time after his retirement the member became an employee of the Defense Investigative Service. Because he was a warrant officer retired from the RA, his military retired pay was then subject to reduction under 5 U.S.C. § 5532, the Dual Compensation statute.⁽¹⁾ That reduction was properly made in his retired pay.

Under 10 U.S.C. § 3964, a warrant officer who retired with less than 30 years of active service is entitled, when his active service plus his time on the retired list totals 30 years, to be advanced to the highest grade in which he served on active duty satisfactorily. In April 1996, the member submitted a request to the Army Board for Correction of Military Records (ABCMR) for correction of his records to show that he retired as a captain in the USAR as of July 20, 1991, when he would have met the time requirement in 10 U.S.C. § 3964. The ABCMR submitted his application the Army Reserve Personnel Command for an advisory opinion, and it was determined that under 10 U.S.C. § 3964 the member should have been advanced to the rank of captain on the retired list of the RA effective July 20, 1991. Since the failure to advance the member was considered an oversight, it was corrected by the issuance of orders dated October 27, 1998, by the appropriate personnel authorities rather than by ABCMR action. Upon the issuance of those orders, the member

should have been paid retroactively the difference in retired pay to which he was entitled due to the advancement, minus the additional deductions required under 5 U.S.C. § 5532(b), but he was not paid the additional amount at that time. Although he remained subject to the Dual Compensation statute at the rank of captain, the required Dual Compensation deductions were erroneously terminated after the orders were issued. In April 1999, the member was advised that he was still subject to the Dual Compensation statute, and his retired pay account was audited and adjusted.

Because the member's service as a captain was in the USAR, he argues that he should have been advanced to that rank in the USAR rather than the RA. As a retired captain in the USAR, he would not be subject to the Dual Compensation statute, effective the date of his advancement. He therefore claims the full amount of his current retired pay as well as a refund of the Dual Compensation deductions already collected from him, which the Defense Finance and Accounting Service (DFAS) calculates to be \$77,272.27 as of June 30, 1999.⁽²⁾ Because the Army stated in a letter to him that it was aware of no authority for advancing him on the retired list of the USAR when he had retired from the RA, he cites an ABCMR determination regarding another retired officer.

Discussion

As outlined above, the member was retired as a W3 of the RA under 10 U.S.C. § 1293 and was advanced on the retired list to the rank of captain in the RA under 10 U.S.C. § 3964. Like the Army, we are aware of no authority under which the Army could have transferred him from the retired list of the RA to the retired list of the USAR upon advancement. The Comptroller General's decision in 49 Comp. Gen. 618 (1970) clearly indicates that there is no component change upon advancement.⁽³⁾ In that decision the Comptroller General states that a member will advance without regard to whether or not the service in which the member held the higher grade is the one from which he retired. Furthermore, it is a rule of statutory construction that statutory provisions with unambiguous and specific directions may not be interpreted in any manner that will alter or extend their meaning; another rule provides that omissions are treated as intended. *See* 61 Comp. Gen. 461 (1982); and 56 Comp. Gen. 943 (1977).

In response to the member's submission of an ABCMR determination involving another member, we are aware of no instance in which an ABCMR determination has been used as precedent to change another member's record. ABCMR corrections are not used for that purpose because they are based on equitable considerations, and therefore each correction is based on the specific details of an individual member's case. Since military pay entitlements are governed by statute, military personnel authorities must apply the appropriate statutes without regard to equitable considerations. Moreover, the correction of factual matters in a military record by the ABCMR under 10 U.S.C. § 1552 is final and conclusive on all officers of the United States unless procured by fraud. In the case before us, the ABCMR could have granted the member's petition and corrected the member's record to show that he was retired as a captain on the USAR retired list effective July 20, 1991. Instead, the ABCMR let the member's advancement on the RA retired list stand. We view the ABCMR's failure to change the member's component to USAR as final and conclusive and not subject to review by this Office. *See Lieutenant George K. Huff, USN, 55 Comp. Gen. 961, 964-965 (1976).*

In 44 Comp. Gen. 297 (1964), the Comptroller General dealt with retired enlisted members who became civilian government employees and then were advanced on the retired list to officer rank due to temporary service as officers at some time during their military careers. The Comptroller General was asked whether their retired pay was subject to reduction under the Dual Compensation statute after their advancement.⁽⁴⁾ The Comptroller General stated that although they were receiving the retired pay of officers, their status for Dual Compensation purposes was determined by their retirement as enlisted members. Status at retirement was generally the controlling factor. However, if such a member served on active duty as an officer after retirement and then re-entered retirement as an officer, the Comptroller General stated that he thereafter held officer status for Dual Compensation purposes. We agree with the Comptroller General's decision, and we view it as analogous to the case before us. *See also Captain Virgil W. Whitehead, USMC (Retired), B-238128, Mar. 8, 1991.*

Based on the two decisions cited above, it is our view that the member's status for Dual Compensation purposes was determined at his retirement. In 44 Comp. Gen. at 297, the Comptroller General indicated that advancement on the retired list is a means to reward with increased retired pay a member who served satisfactorily at a higher rank at some time during his military career.⁽⁵⁾ It was the Comptroller General's view, and it is our view, that advancement is generally not intended to change the member's retired status for purposes such as the Dual Compensation statute.⁽⁶⁾ The member in the case before us points out some inconsistencies regarding his advancement on the retired list. He notes that he never served as a captain in the RA, and he is unsure of the status he would hold if he were recalled to active duty. He points out that he was given a certificate which indicates that he retired from the RA as a captain in 1998, but his last DD Form 214 indicates that he retired as a W3 in 1991. We appreciate the member's concerns, but we view the inconsistencies he notes as further evidence of the correctness of the Comptroller General's decisions.

Conclusion

Since the member remained subject to the Dual Compensation statute for the time in question, his claim is denied.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Christine M. Kopocis

Member, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

1. Under 5 U.S.C. § 5532(b), the military retired pay of a retired warrant officer or commissioned officer of the RA who holds a civilian office after retirement is subject to reduction by a formula set out in the statute. The reduction is not required for retired USAR members. Section 5532 is repealed by § 651 of the National Defense Authorization Act for Fiscal Year 2000, effective October 1, 1999. The reductions required under § 5532 cease as of that date.

2. The Barring Act, 31 U.S.C. § 3702, limits retroactive payment of such a claim to the six years preceding the filing of the claim.

3. *See also Miller v. United States*, 180 Ct. Cl. 872 (1967).

4. The retired pay of retired enlisted members is not subject to reduction under 5 U.S.C.

§ 5532(b). The retired pay of retired warrant officers and commissioned officers is subject to reduction under that statute.

5. *See also Miller v. United States*, 180 Ct. Cl. at 872; and 49 Comp. Gen at 618.

6. In the case before us, advancement from Chief Warrant Officer to Captain in the RA would not change the member's status for Dual Compensation purposes, since both warrant officers and commissioned officers were affected by 5 U.S.C. § 5532(b).