



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Captain Jack R. Griffin, USN (retired) and  
Commander Francis M. Kirk, USN (retired)

**File:** B-236979

**Date:** April 19, 1990

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### DIGEST

A retired Regular officer of the Navy employed with the Panama Canal Commission does hold a "position" under the Dual Compensation Act. Therefore, the retired pay of a retired Regular officer who is employed by the Commission is subject to reduction under the Act. A further reduction must be made if the total of his retired pay and his civilian compensation exceeds level V of the Executive Schedule.

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### DECISION

We have been asked to resolve whether employment with the Panama Canal Commission by two retired Regular officers of the Navy is subject to the retired pay reduction provisions of the Dual Compensation Act, 5 U.S.C. §§ 5531 and 5532.<sup>1/</sup> For the following reasons, we conclude that such employment is covered by the Dual Compensation Act.

Captain Jack R. Griffin, USN (retired), and Commander Francis M. Kirk, USN (retired), are retired Regular officers of the Navy currently employed with the Panama Canal Commission (Commission). Captain Griffin was retired from the Navy in 1981 and immediately was employed by the Commission. Commander Kirk was retired in 1981 and commenced work with the Commission in 1984. The Navy has considered their employment to be covered by the Dual Compensation Act, and their retired pay has been reduced in accordance with that act. The officers contend that since the Commission operates with funds collected from shippers who use the Canal, the Commission is a nonappropriated fund

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<sup>1/</sup> The question was presented by W. C. Simpson, Disbursing Officer and was assigned number DO-N-1746 by the Department of Defense Military Pay and Allowance Committee.

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instrumentality and their employment is not covered by the Dual Compensation Act, citing Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986). Captain Griffin also points out that compensation received from the Commission is not paid under a statutory pay system and he suggests that Commission compensation therefore is not subject to the pay cap in 5 U.S.C. § 5532(c).

The Dual Compensation Act, 5 U.S.C. §§ 5531 and 5532 requires that the retired pay of a Regular retired officer be reduced if he holds a "position" with the United States Government. Additionally, the retired pay of a retired member of a uniformed service must be reduced if his retired pay together with his civilian compensation exceeds level V of the Executive Schedule. Position is defined in 5 U.S.C. § 5531(2) as:

". . . a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including a Government corporation and a nonappropriated fund instrumentality under the jurisdiction of the armed forces) or in the government of the District of Columbia; . . ."

The Panama Canal Commission was established by the Panama Canal Act of 1979, 22 U.S.C. §§ 3601-3871. Section 3611 of the Code states that the Commission is an agency in the executive branch of the government. Furthermore, section 3712 provides that tolls and other fees collected from shippers who use the Canal shall be deposited into a revolving fund in the Treasury and the fund then used to pay the Commission's expenses. Under 22 U.S.C. § 3712(c)(1), the Commission cannot obligate or spend funds from the revolving fund unless specifically authorized by law. Congress authorizes funds to be withdrawn from the revolving fund for use by the Commission for specific purposes. (See, e.g., Department of Transportation and Related Agencies Appropriations Act, 1989, September 30, 1988, 102 Stat. 2125, 2145.)

In Denkler v. United States, 782 F.2d at 1003, the court held that military retirees are exempt from the provisions of the dual compensation laws when working for the Board of Governors of the Federal Reserve System. The court's decision was based on the fact that the Board did not operate with appropriated funds and as a result it was a nonappropriated fund instrumentality of the government not under the jurisdiction of the armed forces. As such, a

position with the Board did not meet the criteria of 5 U.S.C. § 5531, quoted above.

We followed the court's judgment in Denkler in our decision Lieutenant Ralph E. Marker, Jr., 67 Comp. Gen. 437 (1988) with regard to three retired Regular officers who were employees of the Board of Governors of the Federal Reserve System. We analyzed the statutes governing the Board of Governors of the Federal Reserve System and agreed that it is a nonappropriated fund instrumentality not under the jurisdiction of the armed forces and that its employees are therefore not subject to the Dual Compensation Act.

In that decision, however, we also analyzed the laws governing the Office of Civilian Radioactive Waste Management and concluded that this entity was not a nonappropriated fund instrumentality because its funds came from user fees which were deposited in the Treasury for use in paying the Office's expenses. We pointed out in that decision that we have consistently held that user fees which are deposited in a fund in the Treasury and then used to pay an agency's expenses constitute appropriated funds. See also B-193573, Dec. 19, 1979. Thus, we concluded that retired Regular officers employed with the Office of Civilian Radioactive Waste Management are subject to the Dual Compensation Act.

Funds collected by the Commission and deposited in a revolving fund in the Treasury and then withdrawn from the fund pursuant to appropriation acts also must be considered appropriated funds. Accordingly, it is our view that the Denkler decision has no bearing on employment with the Commission and that retired Regular officers employed by the Commission do hold "positions" within the meaning of the Dual Compensation Act and their retired pay must be reduced in accordance with that Act.

The Federal Labor Relations Authority concluded in 13 FLRA No. 87, December 15, 1983, that compensation paid by the Commission is not subject to the pay ceiling provision in 5 U.S.C. § 5308 since the Commission's compensation system is not a statutory pay system governed by chapter 53 of title 5, U.S. Code. Captain Griffin argues that compensation paid by the Commission should not be considered in applying 5 U.S.C. § 5532(c) as well.

The Authority's decision has no bearing on the issue of the reduction of retired pay required by 5 U.S.C. § 5532(c). Section 5308, by its terms, imposes a ceiling only on pay subject to subchapter I of chapter 53. Section 5532(c) in

contrast applies to any retired officer who holds a "position" as defined in 5 U.S.C. § 5531.

Accordingly, the retired pay of Captain Griffin and Commander Kirk is subject to reduction in accordance with 5 U.S.C. § 5532(b) as a result of their employment with the Panama Canal Commission. Additionally, the officers are subject to a further reduction under 5 U.S.C. § 5532(c) if the compensation received from the Commission when combined with their retired pay exceeds the rate payable for level V of the Executive Schedule.

*for* *Milton F. Jovan*  
Comptroller General  
of the United States