DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-214266 **DATE:** July 30, 1984

MATTER OF: Darrel W. Starr, Jr. - Pay Adjustment Based on Advanced Hiring Rate

DIGEST:

Employee was hired by the Navy, and his pay was set at step 8 of grade GS-15 based on superior qualifications authority in 5 U.S.C. § 5333(a). His pay was later reduced to step 1 based upon instructions of Office of Personnel Management (OPM) that military retired pay cannot be considered in establishing an advanced rate under a superior qualifications appointment. We hold that the Navy exceeded its authority as delegated by OPM by considering military retired pay as current earnings for a superior qualifications appointment. The employee's claim for restoration of his advanced rate is denied.

ISSUE

The issue in this decision concerns the entitlement of a new appointee to an advanced rate of pay based upon his existing pay including military retired pay. We hold that the employing agency exceeded its authority as delegated by the Office of Personnel Management (OPM) by including military retired pay as current earnings in establishing an advanced rate of pay for a new appointee. Therefore, he is not entitled to an advanced rate.

BACKGROUND

This decision is in response to an appeal by Mr. Darrel W. Starr, Jr., from our Claims Group settlement, Z-2845772, March 10, 1983, denying Mr. Starr's claim for reinstatement of his advanced rate of pay. Our Claims Group also partially waived and partially denied waiver of collection of the erroneous overpayments of pay, but Mr. Starr has not specifically appealed that action by our Claims Group.

Mr. Starr was hired on June 1, 1981, by the Department of the Navy, Military Sealift Command, Oakland, California, as a Supervisory Naval Architect, grade

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GS-15. Under 5 U.S.C. § 5333(a) (1982), which permits higher rates of pay based upon an individual's superior qualifications or existing pay, and under a delegation of authority from OPM, the Navy hired Mr. Starr at step 8 of grade GS-15, instead of at step 1.

Following an audit by the OPM of advanced rate appointments by the Navy, OPM notified the Navy that Mr. Starr's rate of pay should have been set at step 1 of grade GS-15 instead of step 8. The OPM found that the Navy had calculated Mr. Starr's existing pay on the basis of his private sector earnings and his military retired pay. By letter of April 15, 1982, OPM advised the Navy that no portion of his military retired pay could be included in computing Mr. Starr's existing pay. The letter of April 15 was based on an internal memorandum dated April 1, 1982, from OPM's central office. The memorandum relied in part on Federal Personnel Manual (FPM) Letter No. 338-9, October 14, 1980, which states, in part, that "* * * an advanced rate may not be used to compensate for military retired pay forfeited under dual compensation law." Paragraph 3d. The memorandum also stated that the prohibition against using an advanced hiring rate to circumvent legal restrictions, such as dual compensation, was included in the agreements delegating to individual agencies OPM's authority to make superior qualifications appointments.

Accordingly, OPM instructed the Navy that, unless Mr. Starr had firm offers of employment or some other basis upon which to set an advanced rate, his rate of pay would have to be corrected to step 1 of grade GS-15. The Navy subsequently reduced Mr. Starr's rate of pay to step 1, retroactively, and our Office waived that portion of the erroneous overpayment that occurred prior to Mr. Starr's notification that his advanced rate was erroneous.

On appeal, Mr. Starr argues that he accepted the appointment with the assurances of Navy officials that his pay would be set at step 8 of grade GS-15 ($54,942 per year) rather than step 1 ($44,547 per year). He further argues that section 5333, which permits advanced rates of pay for new appointees, does not preclude the use of military retired pay in the calculation of an individual's existing pay at the time of appointment.

Mr. Starr's major argument on appeal is that FPM Letter 338-9, which does preclude consideration of military retired pay in superior qualifications determinations, constitutes rulemaking under the Administrative Procedure Act, 5 U.S.C. § 553 (1982), and that since OPM did not publish FPM Letter 338-9 in the Federal Register as proposed rulemaking, this regulation cannot have the force and effect of law.[1] In addition, Mr. Starr contends OPM is without authority to create substantive rules under the dual compensation provisions of 5 U.S.C. § 5532, or to apply such rules through its authority under section 5333, dealing with advanced rates of pay.

Finally, Mr. Starr refers to the delegation of authority agreement between OPM and the Navy which permitted the Navy to make superior qualifications appointments without receiving prior approval from OPM as required by section 5333. OPNAVIST 12300.3. He argues that this agreement is also subject to the rulemaking requirement for publication of the Administrative Procedure Act, citing McDonnell Douglas Corp. v. Marshall, 465 F.Supp. 22 (E.D. Mo. 1978); aff'd sub nom. Emerson Electric Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979).

OPINION

As noted above, 5 U.S.C. § 5333(a) provides the authority to make new appointments above step 1 for positions in grade GS-11 or above. This authority is exercised "* * * under regulations prescribed by the Office of Personnel Management which provide for such considerations as the existing pay or unusually high or unique qualifications of the candidate, or a special need of the Government for his services * * *." The regulations or instructions issued by OPM refer to these as "superior qualifications appointments." 5 C.F.R. § 531.203(b) (1984).

The OPM regulations contained in 5 C.F.R. § 531.203(b) place certain conditions on such appointments (not applicable here), but these regulations do not refer to the exclusion of military retired pay from the individual's existing pay. However, although there is no specific mention of excluding military retired pay in the relevant portions of the Federal Personnel Manual, chapter 338,

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[1] The rulemaking provisions of 5 U.S.C. § 553 apply specifically to OPM. See 5 U.S.C. §§ 1103(b) and 1105 (1982).

subchapter 6, those provisions do elaborate upon the meaning of the statutory term "existing pay" as follows:

> "d. Existing pay. One of the factors to be considered when deciding whether to request an advanced rate for a candidate is the existing pay which the candidate would have to forfeit by accepting Federal employment. Existing pay includes the candidate's income from his/her present position and from any outside employment which forms a regular, continuing portion of the candidate's total income and which the candidate will not be able to continue as a Federal employee." FPM Chapter 338-18 (Inst. 256, May 16, 1979)

This guidance clearly shows that "existing pay" was interpreted by OPM to mean income from the applicant's current position plus any regular, continuing income from outside employment. There is no indication that retirement income of any kind may be taken into account in establishing pay rates.

Section 5333 also provides that superior qualifications appointments must receive the approval of OPM in each specific case. In this respect, OPM had agreed to a delegation of authority with the Department of Defense in 10 areas of personnel management, one of which was superior qualifications appointments. This agreement, dated June 13, 1980, expressly provides at pages 9-10 that actual earnings for purposes of superior qualifications determinations do not include income, such as military retired pay forfeited under the dual compensation law, which the agency is barred from matching by law or Executive order. Thus, the Navy violated one of the express conditions of its delegated authority in considering Mr. Starr's retired pay as part of his current earnings.

Mr. Starr contends that this delegation agreement was not published in the Federal Register as required under the Administrative Procedure Act, citing McDonnell Douglas Corp. v. Marshall, cited above. There is no indication that this delegation agreement was published in the Federal Register, but, contrary to Mr. Starr's contention, we find no requirement to do so.

The case cited by Mr. Starr involved a memorandum of understanding between the Equal Employment Opportunity Commission and the Department of Labor providing for an

exchange of information between the agencies concerning compliance by federal contractors with antidiscrimination laws and regulations. The courts held that this memorandum was procedural in nature and was not subject to the rulemaking requirements of the Administrative Procedure Act. 465 F.Supp. 22 (E.D. Mo. 1978); aff'd 609 F.2d 898 (8th Cir. 1979).

In the present case, the memorandum of understanding involved a delegation of authority of personnel management which was formerly within the control of OPM. This delegation of authority was made pursuant to 5 U.S.C. § 1104 (1982) and regulations which were published in accordance with the Administrative Procedure Act.[2/] We know of no requirement in the Administrative Procedure Act or elsewhere that such a delegation agreement must be published, and we have found no court decisions to that effect.

We do not regard the agreement as a "rule" or "rulemaking" in any sense. The agreement merely constitutes a limited delegation to Defense officials of OPM's statutory authority to approve individual superior qualifications appointments. The limitation here relevant reflects OPM's view that military retired pay should not be used in superior qualifications appointments. Presumably OPM adheres to this view in passing upon those individual appointments submitted to it and seeks to assure, through the instant limitation, that Defense officials exercising its delegated authority do likewise.

Since the Navy exceeded its authority under the specific terms of the delegation agreement from OPM with respect to superior qualifications appointments, we find no basis to allow Mr. Starr's claim.

In view of the above discussion, we find no need to address Mr. Starr's argument that FPM Letter 338-9 was required to be published in the Federal Register under the Administrative Procedure Act. In this case, the Navy exceeded its authority under the delegation agreement. That delegation agreement operated independently of FPM Letter 338-9 and, in fact, predated issuance of FPM Letter 338-9.

[2/] Interim regulations published April 6, 1979, 44 Fed. Reg. 20699; final regulations published September 25, 1979, 44 Fed. Reg. 55130.

Mr. Starr also contends that OPM in effect improperly issued regulations under the dual compensation law, 5 U.S.C. § 5532, by placing the limitation in FPM Letter No. 338-9 concerning the use of military retired pay in consideration of a superior qualifications appointment. While OPM has no explicit authority to issue regulations under 5 U.S.C. § 5532, this does not affect its right to exclude military retired pay from an individual's existing pay under a superior qualifications appointment. As noted previously, OPM has broad, explicit statutory authority to regulate superior qualifications appointments both by issuing regulations and by passing upon specific appointments. It need not exercise this authority in a vacuum; OPM is free to consider the desirability of such appointments in relation to other statutory provisions and policies.

Finally, Mr. Starr argues he was misinformed by Navy officials as to his entitlement to the advanced rate, and he contends he accepted the position on that basis. Although Mr. Starr was erroneously advised about the advanced rate, it is well settled that the Government is not estopped from denying the unauthorized acts or advice of its employees or agents. See Joseph Pradarits, 56 Comp. Gen. 131 (1976); M. Reza Fassihi, 54 Comp. Gen. 747 (1975), and court decisions cited therein.

Accordingly, we sustain our Claims Group's denial of Mr. Starr's claim for restoration of his advanced rate of pay.

for Comptroller General
of the United States