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B-115505, Oct 4, 1972, 52 Comp Gen 175

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B-115505, OCT 4, 1972, 52 COMP GEN 175

RETIREMENT - CIVILIAN - ANNUITIES - FORFEITURE - PERSONS CONVICTED OF CERTAIN OFFENSES THE INTEREST INCLUDED IN THE AWARDS OF RETROACTIVE PAYMENTS OF CIVIL SERVICE ANNUITIES TO THE PLAINTIFFS IN 338 F.SUPP. 1141, FROM DATE OF ELIGIBILITY TO DATE OF JUDGMENT - AWARDS BASED ON THE FACT THE SO CALLED HISS ACT, AS AMENDED, 5 U.S.C. 8311 ET SEQ. UNDER WHICH THE PAYMENTS WERE WITHHELD WAS AN EX POST FACTO LAW THAT PUNISHED THE PLAINTIFFS FOR CONDUCT THAT OCCURRED PRIOR TO ITS ENACTMENT - IS PAYABLE, TOGETHER WITH THE ANNUITIES, FROM THE CIVIL SERVICE RETIREMENT AND DISABILITY FUND AND NOT FROM THE PERMANENT INDEFINITE APPROPRIATION FOR JUDGMENTS CONTAINED IN 31 U.S.C. 724A, SINCE THE INTEREST IS PART OF THE DAMAGES AWARDED. HOWEVER, AS INTEREST IS PAYABLE ONLY WHEN PROVIDED FOR IN STATUTES AND CONTRACTS, IN THE ABSENCE OF A COURT DECISION TO THE CONTRARY, THE OBLIGATION TO PAY INTEREST DOES NOT EXTEND TO THOSE INDIVIDUALS WHO DID NOT SUE BUT BY VIRTUE OF 38 F.SUPP. 1141 ARE ENTITLED TO RETROACTIVE PAYMENT OF ANNUITY.

TO THE CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION, OCTOBER 4, 1972:

YOUR LETTER OF JULY 28, 1972, REQUESTS, IN EFFECT, THE DECISION OF THIS OFFICE AS TO WHETHER INTEREST PAYMENTS ORDERED BY A UNITED STATES DISTRICT COURT TO BE PAID TO MR. ALGER HISS AND MR. RICHARD STRASBURGER SHOULD BE MADE FROM THE CIVIL SERVICE RETIREMENT AND DISABILITY FUND (RETIREMENT FUND) OR FROM THE PERMANENT INDEFINITE APPROPRIATION FOR JUDGMENTS CONTAINED IN 31 U.S.C. 724A.

ON MARCH 3, 1972, A THREE-JUDGE UNITED STATES DISTRICT COURT IN HISS V. HAMPTON, 338 F.SUPP. 1141(D.C.D.C. 1972) DETERMINED THAT THE SO CALLED HISS ACT, AS AMENDED, 5 U.S.C. 8311 ET SEQ. WAS AN EX POST FACTO LAW PUNISHING THE PLAINTIFFS IN THAT CASE, ALGER HISS AND RICHARD STRASBURGER, FOR CONDUCT WHICH HAD OCCURRED PRIOR TO SEPTEMBER 1, 1954, THE DATE OF ENACTMENT OF THAT LAW. THE COURT THEREFORE ORDERED THE CIVIL SERVICE COMMISSION TO PAY ANNUITIES PLUS INTEREST TO THE PLAINTIFFS, COMPUTED FROM THE DATE WHEN HISS AND STRASBURGER BECAME ELIGIBLE, RESPECTIVELY, FOR CIVIL SERVICE ANNUITIES. YOU STATE THAT THE COMMISSION INTERPRETS THIS CASE AS RENDERING INEFFECTUAL ANY COMMISSION IMPOSED DENIALS OF ANNUITIES TO INDIVIDUALS WHO VIOLATED THE PROVISIONS OF THE HISS ACT PRIOR TO SEPTEMBER 1, 1954. ACCORDINGLY, IT IS YOUR POSITION THAT THESE INDIVIDUALS ARE ENTITLED TO CIVIL SERVICE ANNUITIES RETROACTIVELY FROM THE DATE EACH BECAME ELIGIBLE FOR RECEIPT OF HIS ANNUITY, BUT THAT SINCE THE COURT ORDERED PAYMENT OF THE ACCRUED ANNUITY WITH INTEREST ONLY WITH RESPECT TO THE PLAINTIFFS IN THIS CASE, THE COMMISSION, IN THE ABSENCE OF A COURT DECISION TO THE CONTRARY, DOES NOT BELIEVE THE OBLIGATION TO PAY INTEREST EXTENDS WITH RESPECT TO THOSE INDIVIDUALS WHO DID NOT SUE.

THE QUESTION RAISED IN YOUR LETTER IS WHETHER THE FUNDS TO PAY THE INTEREST OWING TO HISS AND STRASBURGER SHOULD COME FROM THE RETIREMENT FUND OR FROM THE PREMANENT INDEFINITE APPROPRIATION FOR JUDGMENTS, 31 U.S.C. 724A. YOU STATE THAT THE COMMISSION'S VIEW IS THAT WHILE THE ACCRUED BUT UNPAID ANNUITIES SHOULD BE PAID FROM THE RETIREMENT FUND, THERE IS NO AUTHORITY TO EXPEND MONEY FROM THE FUND TO PAY INTEREST ON ANNUITIES. THE COMMISSION'S REASONING, AS DESCRIBED IN YOUR LETTER, IS AS FOLLOWS:

THE FUND IS APPROPRIATED FOR THE PAYMENT OF BENEFITS AS PROVIDED BY SUBCHAPTER III OF CHAPTER 83 OF TITLE 5, U.S.C. BY VIRTUE OF 5 U.S.C. SEC. 8348(A)(1)(A). THE BENEFITS AS PROVIDED BY THIS SUBCHAPTER INCLUDE ANNUITIES AND LUMP-SUM BENEFITS, WHICH MAY INCLUDE INTEREST UNDER CIRCUMSTANCES SUCH AS ARE SPECIFIED IN 5 U.S.C. SEC. 8331(8)(C). SINCE NO PROVISION EXISTS FOR THE PAYMENT OF INTEREST ON ANNUITIES, SUCH INTEREST IS NOT A BENEFIT PROVIDED BY SAID SUBCHAPTER AND THE FUND IS NOT APPROPRIATED FOR THE PAYMENT OF INTEREST ON ANNUITIES.

WE ARE PRESENTING THE COMMISSION'S INTERPRETATION OF THE RETIREMENT LAW FOR YOUR CONSIDERATION IN THE ISSUANCE OF A SETTLEMENT CERTIFICATE BY THE GENERAL ACCOUNTING OFFICE IN THE HISS AND STRASBURGER CASES.

IT IS OUR OPINION THAT THE INTEREST DUE IS PAYABLE UNDER 31 U.S.C. SEC. 724A, WHICH STATES IN PERTINENT PART:

"THERE ARE APPROPRIATED, OUT OF ANY MONEY IN THE TREASURY NOT OTHERWISE APPROPRIATED *** SUCH SUMS AS MAY *** BE NECESSARY FOR THE PAYMENT, NOT OTHERWISE PROVIDE FOR, AS CERTIFIED BY THE COMPTROLLER GENERAL, OF FINAL JUDGMENTS, *** WHICH ARE PAYABLE IN ACCORDANCE WITH THE TERMS OF SECTION 2414, 2517, 2672, OR 2677 OF TITLE 28, TOGETHER WITH SUCH INTEREST *** AS MAY BE SPECIFIED IN SUCH JUDGMENTS ***" (THE FIRST PROVISO TO SECTION 724A IS INAPPLICABLE HERE SINCE THE BASIS OF THE COURT'S JURISDICTION IN THIS CASE WAS 28 U.S.C. SEC. 1331(A).)

SINCE PAYMENT OF INTEREST FROM THE FUND IS "NOT OTHERWISE PROVIDED FOR" IN THIS CASE, WE THINK THE INTEREST SHOULD BE PAID FROM THE JUDGMENT FUND.

THE RETIREMENT FUND IS APPROPRIATED BY 5 U.S.C. 8348(A) FOR THE PAYMENT OF BENEFITS PROVIDED IN SUBCHAPTER 3 OF CHAPTER 83 OF TITLE 5, U.S. CODE, AND FOR THE ADMINISTRATIVE EXPENSES INCURRED BY THE CIVIL SERVICE COMMISSION IN PLACING IN EFFECT EACH ANNUITY ADJUSTMENT GRANTED UNDER 5 U.S.C. 8340, AND THE FUND IS MADE AVAILABLE, SUBJECT TO SUCH ANNUAL LIMITATION AS THE CONGRESS MAY PRESCRIBE, FOR ANY EXPENSES INCURRED BY THE COMMISSION IN CONNECTION WITH THE ADMINISTRATION OF THIS CHAPTER AND OTHER RETIREMENT AND ANNUITY STATUTES.

THE RETIREMENT FUND HAS BEEN HELD BY THIS OFFICE TO BE AVAILABLE FOR THE PAYMENT OF JUDGMENTS. THEREFORE, AS STATED IN YOUR LETTER, THE ACCRUED BUT UNPAID ANNUITIES DUE HISS, STRASBURGER, AND OTHERS SIMILARLY SITUATED SHOULD BE PAID FROM THE RETIREMENT FUND. MOREOVER, IT IS OUR OPINION THAT THE INTEREST DUE HISS AND STRASBURGER FROM WHAT THE COURT HAS DETERMINED TO BE A WRONGFUL WITHHOLDING OF THEIR ANNUITY IS A PART OF THE DAMAGES AWARDED IN THE JUDGMENT AND, AS SUCH, SHOULD ALSO BE PAID OUT OF THE RETIREMENT FUND. WE MIGHT POINT OUT THAT THIS RESULT WOULD APPEAR TO BE EQUITABLE SINCE PRESUMABLY THE RETIREMENT FUND EARNED INTEREST THROUGH INVESTMENTS UNDER 5 U.S.C. 8348(C) ON THE ANNUITIES WITHHELD FROM HISS AND STRASBURGER. OF COURSE, SINCE IT IS WELL ESTABLISHED THAT INTEREST IS PAYABLE BY THE GOVERNMENT ONLY WHERE PROVIDED FOR IN STATUTES AND CONTRACTS,

WE AGREE WITH THE COMMISSION THAT, IN THE ABSENCE OF A COURT DECISION TO THE CONTRARY, THE OBLIGATION TO PAY INTEREST DOES NOT EXTEND TO THOSE INDIVIDUALS HERE INVOLVED WHO DID NOT SUE.

ACCORDINGLY, IT IS OUR OPINION THAT THE COURT ORDERED INTEREST DUE HISS AND STRASBURGER, COMPUTED FROM THE DATE WHEN EACH BECAME ELIGIBLE FOR CIVIL SERVICE ANNUITIES UNTIL THE DATE OF THE JUDGMENT, SHOULD BE PAID FROM THE RETIREMENT FUND AND NOT FROM THE FUND AUTHORIZED IN 31 U.S.C. 724A FOR THE PAYMENT OF JUDGMENTS NOT OTHERWISE PROVIDED FOR.