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B-157469, Jan. 5, 1966, 45 Comp. Gen. 383

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B-157469, JAN. 5, 1966, 45 COMP. GEN. 383

COMPENSATION - DOUBLE - CIVILIAN RETIRED AND CIVILIAN SERVICE COMPENSATION - JUDGES AN ANNUITANT UNDER THE CIVIL SERVICE RETIREMENT ACT, 5 U.S.C. 2251 NOTE, UPON APPOINTMENT AS A UNITED STATES DISTRICT JUDGE ALTHOUGH NOT SUBJECT TO A DIMINUTION OF SALARY PURSUANT TO SECTION 1, ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES, NEVERTHELESS MAY NOT RECEIVE PAYMENT OF AN ANNUITY WHILE IN REGULAR ACTIVE SERVICE AS A JUDGE, AND EVEN THOUGH THERE IS NO STATUTORY PROHIBITION AGAINST THE CONCURRENT PAYMENT OF CIVILIAN RETIREMENT ANNUITY AND SALARY FROM THE FEDERAL GOVERNMENT, SUCH PAYMENT WOULD BE INCONSISTENT WITH THE BASIC POLICIES REGARDING DUAL PAYMENT EXPRESSED IN CIVILIAN RETIREMENT LEGISLATION AND IS WITHOUT AUTHORITY OF LAW.

TO THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JANUARY 5, 1966:

ON AUGUST 12, 1965, THE ACTING DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS REQUESTED OUR DECISION WHETHER THE HONORABLE OLIVER GASCH, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA, IS ENTITLED TO RECEIVE THE SALARY OF THE OFFICE WITHOUT REDUCTION ON ACCOUNT OF THE ANNUITY HE IS RECEIVING.

JUDGE GASCH IS AN ANNUITANT UNDER THE CIVIL SERVICE RETIREMENT ACT, 5 U.S.C. 2251 NOTE, HAVING QUALIFIED FOR AN ANNUITY UPON BEING INVOLUNTARILY SEPARATED FROM THE POSITION OF UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA DUE TO A CHANGE IN ADMINISTRATION. HE WAS NOMINATED JULY 12, 1965, BY THE PRESIDENT OF THE UNITED STATES TO BE A UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA, AND WAS CONFIRMED BY THE SENATE ON AUGUST 11, 1965.

SECTION 135 OF TITLE 28, U.S. CODE, FIXES THE SALARY OF A UNITED STATES DISTRICT JUDGE AT $30,000 A YEAR. SECTION 1, ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES PROVIDES:

THE JUDGES, BOTH OF THE SUPREME AND INFERIOR COURTS, SHALL HOLD THEIR OFFICES DURING GOOD BEHAVIOR, AND SHALL, AT STATED TIMES, RECEIVE FOR THEIR SERVICES, A COMPENSATION, WHICH SHALL NOT BE DIMINISHED DURING THEIR CONTINUANCE IN OFFICE.

THE CONSTITUTIONAL PROHIBITION AGAINST DIMINUTION OF SALARY CLEARLY PRECLUDES DEDUCTING AMOUNTS EQUAL TO THE ANNUITY FROM JUDGE GASCH'S SALARY AS A DISTRICT JUDGE.

HOWEVER, WE HAVE LONG HELD THAT, ALTHOUGH THERE MAY BE NO SPECIFIC STATUTORY PROHIBITION IN A PARTICULAR CASE AGAINST THE PAYMENT OF RETIREMENT ANNUITY TO A

PERSON REEMPLOYED BY, AND RECEIVING SALARY FROM, THE FEDERAL GOVERNMENT, DUAL PAYMENT OF RETIREMENT ANNUITY AND SALARY IS INCONSISTENT WITH THE BASIC POLICIES REGARDING SUCH DUAL PAYMENT EXPRESSED IN CIVILIAN RETIREMENT LEGISLATION AND IS WITHOUT AUTHORITY OF LAW. SEE IN THAT REGARD THE DECISION REPORTED IN 16 COMP. GEN. 121, IN WHICH WE HELD THAT, ALTHOUGH THERE WAS NO STATUTORY PROHIBITION AGAINST THE REEMPLOYMENT IN THE EXECUTIVE CIVIL SERVICE OF A RETIRED FOREIGN SERVICE OFFICER THERE WAS NO AUTHORITY FOR THE CONCURRENT PAYMENT OF HIS RETIREMENT ANNUITY DURING THE PERIOD OF SUCH EMPLOYMENT. THE CLAIMANT INVOLVED IN THAT CASE OBTAINED JUDGMENT IN HIS FAVOR IN THE COURT OF CLAIMS. SEE BRUNSWICK V. UNITED STATES, 90 CT.CL. 285 (1940). IN THE DECISION REPORTED IN 32 COMP. GEN. 89 WE DECLINED TO FOLLOW THE BRUNSWICK DECISION AND AFFIRMED THE HOLDING IN 16 COMP. GEN. 121. (NOTE: THE AMOUNT OF SALARY AND ANNUITY ANY RETIRED FOREIGN SERVICE OFFICER OR EMPLOYEE MAY RECEIVE IF REEMPLOYED IN FEDERAL SERVICE IS NOW SPECIFIED IN SECTION 872 OF THE FOREIGN SERVICE ACT OF 1946, AS ADDED BY SECTION 44 OF THE FOREIGN SERVICE ACT AMENDMENTS OF 1960, 74 STAT. 846, 22 U.S.C. 1112.)

THEREFORE, WE ARE OF THE OPINION THAT WHILE PAYMENT OF THE ANNUITY TO JUDGE GASCH IS NOT AUTHORIZED WHILE IN REGULAR ACTIVE SERVICE AS A DISTRICT JUDGE HE IS ENTITLED TO FULL PAYMENT OF SALARY AS A DISTRICT JUDGE.

A COPY OF THIS DECISION IS TODAY BEING FURNISHED TO THE CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION.