PKM-11

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

10,098

FILE: B-194278 DATE: May 25, 1979 per. name

MATTER OF: Lieutenant Colonel Thomas E. Snyder, USA Retired

DIGEST:

1. A retired Regular Army officer residing in Israel acquired Israeli citizenship by operation of Israeli law, but also remains a United States citizen. While the loss of United States citizenship is inconsistent with status as a retired Regular officer and thus results in loss of status as an officer and loss of entitlement to retired pay, dual Israeli/United States citizenship alone, does not require loss of entitlement to retired pay.

2. A retired Regular Army officer residing in Israel who has dual Israeli/United States citizenship is subject to service in the Israel Defense Forces, the Israeli armed force. Such service in a foreign armed force by a retired Regular officer appears inherently inconsistent with his position as a Regular Army officer, as well as being prohibited (without congressional consent) by Article I, section 9, clause 8 of the Constitution of the United States. Thus, service in the foreign armed force would make his status as a retired Army officer very doubtful. Retired pay may not be paid to him without authorizing legislation.

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The issue presented by this case is the effect on a retired Regular Army officer's retired pay when he lives in a foreign country, acquires dual citizenship by operation of the foreign country's laws, and serves in the armed forces of the foreign country. We conclude that while dual citizenship would not affect retired pay, service in a military force of the foreign country is incompatible with Regular retired status as well as contrary to a provision of the Constitution. Thus, retired pay must be discontinued when a retired officer becomes a member of the foreign military force.

[Retired Pay and Dual Citizenship]

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The matter was presented for decision by the Assistant Secretary of the Army (Installations, Logistics and Financial Matters) and was assigned submission number SS-A-1313 by the Department of Defense Military Pay and Allowance Committee.

Background

The reported facts of the matter are that Lieutenant Colonel Thomas E. Snyder, USA, was retired under 10 U.S.C. 3911 (1976) with over 20 years' service and is residing in Israel. He is a citizen of the United States but automatically acquired Israeli citizenship because of his Jewish heritage and residence in that country. The United States Department of State and Embassy in Israel consider Colonel Snyder to have dual citizenship. Colonel Snyder states that he has not relinquished his United States citizenship but acquired foreign citizenship with no action on his part. He states, however, that as a citizen of Israel he is required to serve in the Israel Defense Forces for a period of 3 or 4 weeks each year. It is not known whether he will receive pay for the time he serves.

Because of our decisions holding in certain cases that loss of United States citizenship is inconsistent with continued military status, which then entails loss of entitlement to retired pay, the Assistant Secretary questions Colonel Snyder's entitlement. He also asks , if loss of entitlement to retired pay is not required because of dual citizenship, what is the proper application of Article I, section 9, clause 8 of the Constitution of the United States if he serves in the Israel Defense Forces.

The Assistant Secretary presents the following specific questions:

> "1. Would Colonel Snyder, an officer of a Regular component, who retired under 10 USC 3911, and who is a citizen of the United States, forfeit his retired pay if he automatically becomes a citizen of Israel by reason of his Jewish heritage and residence in that country?

"2. If the answer to question 1 is in the negative, does he forfeit payment of retired pay because of mandatory service in the defense forces of that country for 3 to 4 weeks each year?

"3. If the answer to question 2 is in the affirmative, is the forfeiture of pay only during the period of military service or a total forfeiture.?"

Status of retired Regular officers

Retired Regular officers are members of the military service of the United States and are considered as holding an office of profit of trust. See 10 U.S.C. 3075 (1976) and Puglisi v. United States, 564 F. 2d 403, 410 (Ct. Cl. 1977), cert. denied, 435 U.S. 968 (1978); Hooper v. United States, 164 Ct. Cl. 151 (1964); and United States v. Tyler, 105 U.S. 244 (1881).

Regular officers retired for years of service, such as those retired under 10 U.S.C. 3911, receive retired pay by virtue of their continuing status as military officers, and loss of that status would entail loss of entitlement to retired pay. 41 Comp. Gen. 715 (1962); 37 Comp. Gen. 207, 209 (1957) (question 3); and 23 Comp. Gen. 284, 286 (1943).

Loss of United States citizenship effect

It has long been our view that retired military officers who receive retired pay by virtue of their continuing military status lose their entitlement to retired pay upon tne loss of their United States citizenship. The theory in those cases is that acceptance of foreign citizenship which results in loss of United States citizenship is repugnant to their oath of office and inconsistent with the continuation of their status as officers of the United States. See 37 Comp. Gen. 207, 209 (1957); 41 Comp. Gen. 715 (1962), and 10 U.S.C. 3285 (1976). See also 44 Comp. Gen. 51 (1964), and 44 Comp. Gen. 227 (1964), to the same effect concerning certain retired enlisted members and members of the Fleet Reserve.

Since apparently Colonel Sndyer has not lost his United States citizenship merely by residing in Israel and receiving Israeli citizenship, he would not lose his entitlement to retired pay on that basis. Question 1 is, therefore, answered, no.

We also note, however, that section 349 of the Immigration Nationality Act, June 27, 1952, ch. 477, 66 Stat. 163, 267-268, as amended 8 U.S.C. 1481 (1976) provides in subsection (a)(3) that a United States national shall lose his nationality by--

> "entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense * * *"

However, the continued vitality of that provision, at least as it relates to a case such as this, appears questionable in view of the Supreme Court's decision in Afroyim v. Rusk, 387 U.S. 253 (1967). In that case the court found unconstitutional another provision of the Immigration and Nationality Act (8 U.S.C. 1481(a)(5)) under which a United States national would lose his citizenship by voting in a political election in a foreign state. In doing so the court held that Congress cannot forcibly take away the citizenship of a United States citizen and that the constitution insures the right of an individual to remain a citizen unless he "voluntarily relinquishes" it.

Apparently Colonel Snyder does not wish to relinquish his United States citizenship and, based on the bare facts presented to us, it appears doubtful that his service in the Israel Defense Forces would be considered tantamount to a voluntary relinquishment of his citizenship. See Baker v. Rusk, 296 F. Supp. 1244 (C.D. Calif. 1969), and In re Balsamo, 306 F. Supp. 1028 (N.D. Ill. 1969). In any event determinations and rulings of law under the Immigration and Nationality Act are matters primarily within the jurisdiction of the Attorney General. 8 U.S.C. 1103(a)

(1976). Colonel Snyder would be well advised to seek an authoritative ruling as to the effect on his citizenship of 8 U.S.C. 1481(a)(3) should he serve in the Israel Defense Forces so that he may seek the necessary authorization, if necessary.

Should it be determined that such service would result in loss of his citizenship, our decisions cited previously would apply and he would not be entitled to retired pay on that basis.

Incompatibility of service in foreign armed force

In addition, whether or not his United States citizenship is affected, there must be considered the obvious inherent incompatibility of a Regular United States military officer serving in a foreign armed force, as well as the explicit prohibition contained in Article I, section 9, clause 8 of the Constitution.

As we understand it the Israel Defense Forces is the integrated land, sea, and air military organization of Israel. Service in the reserve of the Israel Defense Forces appears similar to service in our Army Reserve. That is, members serve regular periods of active duty or active duty for training and are subject to call to active duty at any time during periods of war or national emergency.

By entering into such service Colonel Snyder obviously would become subject to the orders and requirements of the foreign armed force which he would be bound to follow and from which he could not voluntarily withdraw. Thus, he would be placed in a position clearly incompatible with his position as an officer of the United States subject to the laws, regulations and orders of the United States Army, including the Uniform Code of Military Justice (10 U.S.C. 802), recall to active duty (10 U.S.C. 3504), and the requirements of his oath of office (5 U.S.C. 3331).

Also, Article I, section 9, clause 8 of the Constitution of the United States provides that--

> "* * * no Person holding any Office of Profit or Trust under them [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

The language of that provision is particularly directed against every kind of influence by foreign governments upon officers of the United States. 24 Op. Atty. Gen. 116 (1902).

We have considered cases involving retired members engaging in civil employment with foreign government controlled corporations or instrumentalities without congressional consent. In those cases we have not concluded that the retired members lost their military status by the unauthorized acceptance of the emoluments incident to the civil employment. However, we have held that the emoluments received are deemed accepted on behalf of the United States and, therefore, the members' retired pay is to be withheld in an amount equal to such emoluments. 44 Comp. Gen. 130 (1964) and B-178538, October 13, 1977. Unlike this case, however, those cases involved civil employment and the acceptance of a foreign office or title, in addition to emoluments, was not an issue.

Congress has granted conditional consent for retired members of the uniformed services to accept foreign government "civil employment." See Section 509, Foreign Relations Authorization Act, Fiscal Year 1978, Public Law 95-105, August 17, 1977, 91 Stat. 844, 859-860. However, that consent does not apply to foreign military service and would have no application to this case.

Therefore, since Colonel Snyder does not have congressional consent to the proposed service, in view of the broad language of the constitutional prohibition against accepting a foreign office or title "of any kind whatever" without congressional consent, and the obvious inherent incompatibility involved in a retired Regular officer serving in a foreign armed force, should Colonel Snyder

serve in the Israel Defense Forces his continued status as a United States officer would be very doubtful. In those circumstances, without authorizing legislation, we could not approve any further payments of retired pay to Colonel Snyder. Questions 2 and 3 are answered accordingly.

R. F. Keller

Deputy Comptroller General
of the United States