

# LAW REVIEW 1104

## The Federal Government Is Not Bound by Incorrect Advice

By Captain Samuel F. Wright, JAGC, USN (Ret.)

### 9.0—Miscellaneous

#### 10.2—Other Supreme Court Cases

##### ***Office of Personnel Management v. Richmond, 496 U.S. 414 (1990).***

This important Supreme Court case establishes an important lesson. When dealing with a Federal Government official or employee, military or civilian, you *cannot rely* on the information or advice that the official or employee provides you. Even if your reliance was reasonable under the circumstances, and even if you suffer adverse consequences from your reliance on the incorrect information, the Federal Government will not compensate you financially for the adverse effects of your detrimental reliance on the incorrect information.

Charles Richmond was a civilian welder for the Navy Public Works Center in San Diego, California. He left his position in 1981 when the Office of Personnel Management (OPM) approved his application for disability retirement. OPM determined that Richmond's impaired eyesight prevented him from performing his federal job and made him eligible for a disability annuity under title 5, United States Code, section 8337(a) [5 U.S.C. 8337(a)].

Section 8337(a) provides this benefit to a federal employee who has completed at least five years of federal employment. The statute directs, however, that the benefit will end if the retired employee is "restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement." 5 U.S.C. 8337(d).

The statute specifies precisely how it is to be determined that the retiree's earning capacity has been restored such that the disability annuity is to cease, and Congress amended that formula in 1982. That amendment and a federal employee's unawareness of the amendment are crucial to this case.

Prior to the 1982 amendment, the disability retiree's annuity was to be terminated if he or she received (as salary or wages from non-federal employment) more than 80% of the current rate of pay of the position occupied immediately before retirement *in each of two succeeding calendar years*. The Omnibus Budget Reconciliation Act of 1982 amended this provision. As amended, the disability retiree is to lose the annuity if *in a single year* the retiree receives more than 80% of the current rate of pay of the position the retiree occupied immediately before retirement.

After taking disability retirement for his vision impairment, Richmond undertook part-time employment as a school bus driver.<sup>[1]</sup> From 1982 to 1985, Richmond earned an average of \$12,494 per year for the part-time driver job, and that left him under the 80% threshold for each year. In 1986, the school district gave Richmond the opportunity to work overtime and earn additional money. He consulted with an employee relations specialist of the Civilian Personnel Department of the Navy Public Works Center where he had been employed.

Richmond needed to know exactly how much he could earn from the bus driver job without exceeding the 80% limit for continued entitlement to the annuity payments. The employee relations specialist was not aware of the 1982 statutory amendment and advised Richmond that he could continue receiving his annuity payments so long as his earnings did not exceed the 80% threshold *in two consecutive years*.

The employee relations specialist also gave Richmond a copy of a 1981 OPM pamphlet that was correct as written in 1981 but out-of-date and incorrect after the 1982 amendment. Richmond returned to the Navy personnel office in January 1987 and was again advised in error that his eligibility for the annuity would be determined under the old two-year rule.

Richmond relied on the incorrect advice that he had been given, and he worked overtime in 1986 and earned more than 80% of the 1986 pay of the welder job from which he had retired for disability. As a result, OPM cut off his disability payments for six months and he lost \$3,993.

Richmond appealed the denial of benefits to the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency created by the Civil Service Reform Act of 1978.<sup>[2]</sup> Richmond argued that the erroneous advice given him by Navy personnel officials should estop OPM and bar its finding him ineligible for benefits under the statute. The MSPB denied Richmond relief, holding that "OPM cannot be estopped from enforcing a statutorily imposed requirement for retirement eligibility." The MSPB denied Richmond's petition for review, and he then appealed to the United States Court of Appeals for the Federal Circuit. A divided panel of the Federal Circuit reversed, accepting Richmond's contention that misinformation from Navy personnel estopped the government and that estoppel required payment of the disability benefits despite the statutory provision to the contrary.

*Black's Law Dictionary* defines "estoppel" as follows: "Estoppel is a bar or impediment which precludes allegation or denial of a certain fact or state of facts, in consequence of previous allegation or denial or conduct or admission ... Elements or essentials of estoppel include change of position of parties so that party against whom estoppel is invoked has received a profit or benefit or party invoking estoppel has changed his position to his detriment." *Black's Law Dictionary, Revised Fourth Edition*, page 648.

The ancient and venerable equitable doctrine of estoppel is routinely applied in litigation involving private parties. The Supreme Court has repeatedly held that the doctrine of estoppel cannot be applied to order a federal agency to make payments from the public treasury in derogation of the requirements of a federal statute. Such a court order violates the Constitution's "Appropriations Clause" which reads as follows: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." United States Constitution, Article I, section 7. Yes, it is capitalized just that way, in the style of the late 18<sup>th</sup> Century.

The Supreme Court's majority decision cites, relies upon, and reaffirms *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). I discuss that case in detail in Law Review 1008. In *Merrill*, the Supreme Court held that "not even the temptations of a hard case" will provide a basis for ordering monetary recovery contrary to the terms of the regulation for to do so would disregard "the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Merrill*, 332 U.S. at 385-386.

In his presentation to the Supreme Court in *Richmond*, the Solicitor General of the United States asked the Court to adopt a sweeping rule that *under no circumstances* could estoppel run against the Federal Government. The Court did not go quite that far, but almost. The concluding paragraph of the majority decision is as follows: "Respondent [Richmond] points to no authority in precedent or history for the type of claim he advances today. Whether there are any extreme circumstances that might support estoppel *in a case not involving payment from the Treasury* is a matter we need not address. As for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds. In this context there can be no estoppel, for courts cannot estop the Constitution. The judgment of the Court of Appeals is Reversed." *Richmond*, 496 U.S. at 434 (emphasis supplied).

The Supreme Court majority decision also addresses the question of whether its "no estoppel" holding will hurt or harm members of the public who need information and advice from Federal Government employees: "Also questionable is the suggestion [by Richmond] that if the Government is not bound by its agents' statements, the citizens will not trust them and will instead seek private advice from lawyers, accountants, and others, creating wasteful expenses. Although mistakes occur, we may assume with confidence that Government agents attempt conscientious performance of their duties and in most cases provide free and valuable information to those who seek advice about Government programs. A rule of estoppel might create not more reliable advice, but less advice. ... The natural consequence of a rule that made the Government liable for statements of its agents would be a decision to cut back and impose strict controls upon Government provision of information in order to limit liability. Not only would valuable information programs be lost to the public, but the greatest impact of this loss would fall on those of limited means, who can least afford the alternative of private advice." *Richmond*, 496 U.S. at 433.

Let me take the opportunity to reiterate the advice I offered in Law Review 1008 and that William Aramony and I offered in Law Review 1099. In both your military and civilian careers, it is important that you

understand the laws and regulations that apply and that you take timely action to protect your legal rights. You cannot depend upon a military or civilian personnel office to understand all these laws and regulations, to explain them to you, and to protect your legal rights. You should consider consulting, and if necessary retaining, an attorney who is familiar with this specialized area of law.

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[\[1\]](#) The Supreme Court decision does not attempt to explain how a man whose impaired vision precludes him from working as a welder can safely drive a school bus.

[\[2\]](#) For information about the MSPB and appellate review of MSPB decisions, please see Law Review 189.