

**STATE OF WISCONSIN**  
**TAX APPEALS COMMISSION**

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**MARLIN E. AND RONDA J. HENSLER**  
239 W. Park Drive  
Marshall, WI 53559,

**DOCKET NO. 95-I-93**

Petitioners,

vs.

**RULING AND ORDER**

**WISCONSIN DEPARTMENT OF REVENUE**  
P.O. Box 8907  
Madison, WI 53708-8907,

Respondent.

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**JENNIFER E. NASHOLD, CHAIRPERSON:**

This matter comes before the Commission for a ruling on the motion for summary judgment filed by the respondent, Wisconsin Department of Revenue (Department), and the parties' Stipulation of Fact and Admission of Exhibits.

Petitioners represent themselves and have not filed a response to the Department's motion. The Department is represented by Attorney Robert C. Stellick, Jr.

Having considered the motion and the entire record herein, the Commission finds, rules, and orders as follows:

**STIPULATED FACTS**

1. Petitioner Marlin E. Hensler was in the Marine Corps of the U. S. armed forces from 1960 to 1964.
2. During his 1960-1964 period of military service, Mr. Hensler was a

member of the federal military retirement system; however, Mr. Hensler never qualified for a federal military pension and has never received a federal military pension.

3. During the last two years of his military service, Mr. Hensler was assigned by the Marine Corps to temporary duty assignment with the Federal Aviation Administration (FAA), performing essentially the same functions he would later perform after being hired by the FAA.

4. Due to a hiring freeze imposed by President Johnson, Mr. Hensler was not hired by the FAA until 1966.

5. Mr. Hensler first became a member of the federal Civil Service Retirement System (CSRS) in 1966, when he was hired by the FAA.

6. Before retiring, Mr. Hensler paid the CSRS an amount to cover his years of military time pension, which purchase entitled him to count his military service in the computation of his CSRS pension.

7. Mr. Hensler retired from the FAA on March 3, 1993, after serving approximately 28 years in the FAA; however, his CSRS pension was based on 30 years, 3 months, and 3 days of creditable service, due to his purchase of military service time.

8. Mr. Hensler's EOD<sup>1</sup> for computation of his CSRS pension began in November of 1962.

9. Petitioners subtracted Mr. Hensler's federal civil service pension of \$22,241.10 on Schedule 2 when they filed their 1993 Wisconsin income tax return.

10. The Department issued a Notice of Amount Due and office audit

worksheet dated June 13, 1994, adding back Mr. Hensler's CSRS pension and assessing

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<sup>1</sup> According to a printout from the FAA website submitted by the Department, EOD stands for Entrance on Duty.

income tax and interest on the additional income. As noted on the Notice of Amount Due, petitioners made a deposit of the amount assessed on June 14, 1994.

11. Petitioners filed a petition for redetermination of the Department's assessment by letter personally delivered to the Department on June 15, 1994.

12. By letter dated November 23, 1994, the Department denied the petition for redetermination.

#### OTHER MATERIAL FACTS

13. On January 11, 1995, Mr. Hensler filed petitioners' timely petition for review with the Commission, asserting that he had 30 years, 3 months, and 3 days in the federal CSRS, "[t]hus establishing [his] entry date before Dec. 31, 1963."

14. This case was held in abeyance with thousands of other dockets awaiting final determinations in related litigation, including the case of *Hafner v. Dep't of Revenue*, 2000 WI App. 216, 239 Wis. 2d 218 (2000).

15. By letter dated November 25, 2003, the Department's attorney contacted petitioners informing them that *Hafner* had been decided in the Department's favor, requesting that petitioners withdraw their appeal, and informing them that if they did so, no additional costs or charges would be assessed.

16. By letter filed on May 4, 2004, the Department's attorney informed the Commission that he had not heard from petitioners and requested a telephone status conference.

17. A telephone status conference was held on July 12, 2004, with Mr. Hensler and the Department's attorney appearing, at which the Commission ordered

the parties to endeavor to file a signed stipulation of facts.

18. On July 26, 2004, the Department filed a motion for summary judgment and signed stipulation of facts.

19. At a status conference held on November 3, 2004, Mr. Hensler represented that he would not be filing any response to the motion and requested that the matter be decided on the documentation previously submitted by the parties.

### **CONCLUSION OF LAW**

Mr. Hensler's federal civil service pension does not qualify for exemption under Wis. Stat. § 71.05(1)(a) because he was not a member of, nor had any account with, the federal Civil Service Retirement System until after December 31, 1963.

### **RULING**

Petitioners did not submit any response to the Department's motion for summary judgment. Therefore, the Commission must glean their arguments from the petition for review and the Department's representations of petitioners' arguments.

Wisconsin Statutes § 71.05(1)(a) exempts from taxation "[a]ll payments received from the U. S. civil service retirement system [or] the U. S. military employee retirement system . . . which are paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963 . . ." Section 71.05(1)(a) is a tax exemption statute. As such, it must be strictly construed against petitioners, and they bear the burden of establishing their entitlement to the exemption. *Hafner*, 239 Wis. 2d 218, ¶ 11.

The payments at issue in this case are those received from the CSRS which

Mr. Hensler received as a result of his employment with the FAA. Pursuant to Wis. Stat. § 71.05(1)(a), the pension payments are only exempt if Mr. Hensler "was a member of the paying or predecessor system . . . as of December 31, 1963." It is undisputed that Mr. Hensler became employed by the FAA in 1966, three years after the 1963 cut-off for qualifying membership. Nonetheless, according to the petition filed with the Commission, Mr. Hensler believes he was a qualified member of the CSRS as of the December 31, 1963 cut-off date because he purchased credit for his pre-1966 military service, thereby giving him an EOD of November of 1962 for purposes of computing his federal CSRS pension.

This assertion has been rejected by the Commission and the courts, which have held that the statutory language requires "membership as a historical fact, not membership that is constructive or purchased at a later date." *Hafner v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-395 (1998); *see also Hafner*, 239 Wis. 2d 218, ¶ 13 ("There is, we believe, a patent distinction between being a 'member' of a **retirement** plan on a specific date, and later being given credit for employment prior to that date for the purpose of calculating the eventual pension benefit.") (Emphasis in original); *Kamps v. Dep't of Revenue*, 2003 WI App 106, 264 Wis. 2d 794. Thus, because Mr. Hensler's purchase of his pre-1966 military service credit did not make him an actual member of the CSRS as of December 31, 1963, his CSRS pension benefits are not excludable from income for Wisconsin tax purposes.

According to the Department, Mr. Hensler has repeatedly asserted that, but for a hiring freeze imposed by President Johnson, he would have been hired by the

FAA earlier than 1966. For purposes of the statutory exemption language, however, this assertion - assuming it to be true - is immaterial.

Also according to the Department, petitioners have argued that Mr. Hensler's CSRS pension payments for the 1993 tax year are exempt because Mr. Hensler performed essentially the same work for the FAA in 1963 and 1964 while in the U. S. Marine Corps as he would later do for the FAA when he became employed there in 1966. Exemption under § 71.05(1)(a) is not premised on the specific work or duties performed, but on whether the individual receiving the retirement payments was a member of the paying or predecessor system as of December 31, 1963. The parties have stipulated that Mr. Hensler first became a member of the federal CSRS in 1966, when he was hired by the FAA. Therefore, he was not a "member of the paying or predecessor system . . . as of December 31, 1963." Wis. Stat. § 71.05(1)(a).

**ORDER**

The Department's motion for summary judgment is granted, and its Notice of Action is affirmed.

Dated at Madison, Wisconsin, this 2nd day of May, 2005.

**WISCONSIN TAX APPEALS COMMISSION**

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Jennifer E. Nashold, Chairperson

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Diane E. Norman, Commissioner

**ATTACHMENT: "NOTICE OF APPEAL INFORMATION"**