

DECISION

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

FILE: B-168691

DATE: JUL 14 1975

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MATTER OF: Pay of Assistant Judge Advocates General
of the Navy

DIGEST: Court of Claims in Selman v. United States, 204 Ct. Cl. 675 (1974) held that naval officers ordered to serve in positions of Assistant Judge Advocates General are entitled to at least the pay of a rear admiral (lower half) while serving in such positions whether they were "detailed" or "assigned" to such positions. Our decision at 50 Comp. Gen. 22 (1970) which determined that such officers were not entitled to pay of rear admiral (lower half) will no longer be followed. Consequently, the successors to the plaintiffs in Selman in the statutorily-created positions are also entitled to receive the pay of rear admiral (lower half).

This action is in response to a letter dated April 4, 1975, from the Secretary of the Navy, requesting an advance decision concerning the entitlement of certain naval officers serving in the positions of Assistant Judge Advocates General of the Navy to receive the pay of a rear admiral (lower half). This request was cleared through the Department of Defense Military Pay and Allowance Committee and assigned submission No. SS-N-1231.

The Secretary states that the question of the entitlement of Assistant Judge Advocates General of the Navy to receive the pay of a rear admiral (lower half) was previously presented here for determination of entitlement and by our decision, 50 Comp. Gen. 22 (1970), we concluded that entitlement did not exist. The Secretary also states that the question was then taken to the United States Court of Claims and in the case of Selman v. United States, 204 Ct. Cl. 675 (1974), the Court determined, with respect to the plaintiffs named in that action and who were the claimants in 50 Comp. Gen. 22, supra, that they were entitled to the pay of a rear admiral (lower half) while serving in the statutorily-created positions.

The Secretary further states that the Judge Advocate General of the Navy is of the opinion that the successors to the named plaintiffs in the statutorily-created positions of Assistant

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Judge Advocates General are also entitled to the pay of a rear admiral (lower half). As a result, we have been requested to reconsider our position with regard to such entitlement.

In our decision at 50 Comp. Gen. 22, supra, we considered the situation where two Navy captains were ordered to report for duty as Assistant Judge Advocates General, but where the Chief of Naval Personnel specifically intended not to "detail" the officers so as to create entitlement to flag rank within the meaning of 10 U.S.C. § 5149(b) and indicated that the Secretary of the Navy would have to approve such a detail. Paragraph 10214b(2) of the Department of Defense Military Pay and Allowance Entitlements Manual, then in effect, provided that an officer is entitled to the basic pay of rear admiral (lower half) when "detailed" as Assistant Judge Advocate General, but 37 U.S.C. § 202(1) provided (and now provides) that unless appointed to a higher grade under another provision of law, an officer of the Navy serving as Assistant Judge Advocate General of the Navy is entitled to the basic pay of a rear admiral (lower half).

Section 202(1) of title 37, United States Code, provides as follows:

"Unless appointed to a higher grade under another provision of law, an officer of the Navy or Marine Corps serving as Assistant Judge Advocate General of the Navy is entitled to the basic pay of a rear admiral (lower half) or brigadier general, as appropriate."

From our analysis of the legislative history of sections 202(1) of title 37 and 5149(b) of title 10, which sections originated in the act of December 8, 1967, Public Law 91-179, 81 Stat. 548, we stated in that decision that we were unable to ascertain an intent that any captain or officer of lesser rank should be paid the pay of a rear admiral (lower half). In that decision we held that the matter was entirely too doubtful for our Office to conclude that Congress intended that the pay provisions of 37 U.S.C. § 202(1) should apply to officers so administratively assigned, but at the same time intended to deny them the benefits specifically provided by 10 U.S.C. § 5149(b) as to the rank and grade for an officer "detailed" to so serve.

In Selman v. United States, supra, the Court of Claims, considering that same situation, stated that the captains were ordered to report for duty as Assistant Judge Advocates General and they served in this capacity but because of a nonstatutory limit on the number of naval flag officers, imposed by the Senate Armed Forces Committee (the Stennis Ceiling), neither was advanced to the rank of rear admiral, "which the role of Assistant Judge Advocate General normally calls for."

In the court's view the Government offered a three-pronged defense: (1) that section 202(1) of title 37, United States Code, must be read in conjunction with section 5149(b) of title 10, since both provisions were contained in the same public law; (2) that proper discernment of the meaning of section 202(1) requires consideration of the legislative history; and (3) that acceptance of plaintiffs' construction of section 202(1) would effectively constitute "judicial promotion." The court found none of these arguments to have merit.

The basis for the court's decision is as follows:

"At the outset, we conclude this case can be decided on a simple, fundamental principle of statutory construction: a clear and unambiguous statute speaks for itself. * * *

"Section 202 obviously directs that an officer of the Navy, while serving as Assistant Judge Advocate General, is entitled to the pay of a rear admiral (lower half). Contrary to defendant's contention, nothing could be more clearly stated. Because plaintiffs during the relevant periods were Navy officers who undisputedly 'served' as Assistant Judge Advocates General, regardless of the means by which they were named to such positions, they are entitled to judgment on their claims for back pay as a matter of law." 204 Ct. Cl. at 680.

The Court of Claims has now clearly held that an officer, who is "detailed" or "assigned" to the position of Assistant Judge Advocate General and who serves in that position, is entitled to the pay of a rear admiral (lower half) under the

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provisions of section 202(1) of title 37, United States Code. In view of that judicial precedent we will no longer follow the decision 50 Comp. Gen. 22, supra, to the extent that it is inconsistent with the Court's holding in the Selman case.

Accordingly, the successors to the plaintiffs in Selman in the statutorily-created positions are entitled to the pay of rear admiral (lower half) and our decision 50 Comp. Gen. 22, supra, will no longer be followed.

PAUL W. Dembling

For the

Comptroller General
of the United States