

DECISION

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

FILE: B-131119

DATE: APR 6 1976

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MATTER OF: Judge Guthrie F. Crowe - United States District Court for the Canal Zone - Judicial Survivors' Annuity System

- DIGEST:
1. In order to be covered under Judicial Survivors' Annuity System, a Federal judge must make a written election pursuant to 28 U. S. C. § 376(a). Where judge of the United States District Court for the Canal Zone did not elect coverage within 6 months after taking office or becoming married, as required by the statute, he is precluded from doing so now.
 2. Judge of the United States District Court for the Canal Zone could have elected in 1962 to be covered by the Judicial Survivors' Annuity System under 28 U. S. C. § 376. His survivors' rights would have vested upon his completing 10 years of judicial service, even if he had not been re-appointed thereafter. The refund provisions of 28 U. S. C. § 376(f) only apply to a territorial judge when he is removed or fails of reappointment after less than 10 years of judicial service.

The Director, Administrative Office of the United States Courts, has requested a decision concerning certain provisions of the Judicial Survivors' Annuity System (JSAS) with respect to the Honorable Guthrie F. Crowe, United States District Court Judge in the Canal Zone.

Judge Crowe initially took office on August 4, 1952. He was appointed by the President, with the advice and consent of the Senate for an 8-year term. 3 CZC § 5 (1963). He has served continuously since then, having been reappointed on August 21, 1961, and he now has an aggregate total of over 23 years of service. He is presently serving without appointment pursuant to 3 CZC § 5a (1963).

In 1957, Judge Crowe elected to come under the Civil Service Retirement Act. Although the Judicial Survivors' Annuity System was enacted into law on August 3, 1956, there is no evidence that Judge Crowe was aware at that time of that option for providing a survivor's annuity to his wife.

After he was reappointed in August 1961, Judge Crowe learned that he had a right to elect coverage under the Judicial Survivors'

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Annuity System within 6 months after his reappointment. In order to help decide whether to so elect, Judge Crowe, on January 11, 1962, requested the Director to answer a number of questions concerning the relative benefits of the Civil Service Retirement Act as opposed to the Judicial Survivors' Annuity System. By letter of February 16, 1962, the former Director advised Judge Crowe that if he were to elect coverage under the JSAS and if he failed to be reappointed in 1969, he could not continue under JSAS and that his contributions to the fund, plus interest, would be returned to him upon leaving office.

The current Director states that recent discussions concerning proposed amendments to the Judicial Survivors' Annuity System have led him to question the correctness of the 1962 advice to Judge Crowe. He has reexamined the statutory provisions in question and now believes that the determination may have been in error and requests our advice.

The Director also requests that, in the event we agree that the prior determination was erroneous, we advise him whether Judge Crowe may now be permitted to elect under the JSAS. We will initially address ourself to that question.

Whether or not the advice given in 1962 was correct, Judge Crowe, although still on the bench, is precluded from electing at the present time to be covered by the Judicial Survivors' Annuity System. The provision for electing coverage under the JSAS is explicit and leaves no room for administrative waiver of any of its provisions. Under 28 U. S. C. § 376(a) (Supp. III, 1973), a judge must elect coverage within 6 months after the date of his marriage or of taking office. As Judge Crowe chose not to elect coverage during any of the eligibility periods following his 1952 and 1961 appointments (it appears that he was married at the time of his first appointment to the bench), he is precluded by the statute from now electing coverage. In this connection, the Act of August 8, 1968, Public Law 90-466, 82 Stat. 662, allowed sitting judges to elect to be covered if they did so within 6 months of its enactment. However, Judge Crowe failed to elect coverage at that time. Thus, unless legislation--such as is provided in subsection (a)1 of S. 12, 94th Cong., 1st Sess.--is enacted into law (allowing a further election within 6 months from its enactment), Judge Crowe is precluded from electing survivor coverage under the Judicial Survivors' Annuity System.

Concerning the advice given to Judge Crowe in 1962, subsection (f) of section 376, title 28, United States Code (1970), read in conjunction

with subsection (q) thereof (the operative provision for judges of the Canal Zone), provides that the contributions to the annuity fund of a judge electing to be covered by that section shall be returned to him only if he is removed, resigns, or fails to be reappointed after less than 10 years of judicial service. Therefore, Judge Crowe, upon serving 10 years, qualified for exclusion from the refund provision of section 376(f). If he had not been reappointed in 1969 he would have had over 16 years of aggregate judicial service.

In order to insure that his survivors received the annuity, Judge Crowe also would have had to meet the requirements of 28 U. S. C. § 376(g). Subsection (g) of section 376, read in conjunction with subsection (q) thereof provides, in pertinent part, that a judge's survivors have vested annuity rights if the judge dies while in office, resigns pursuant to 28 U. S. C. § 373, or is removed or fails of reappointment after at least 10 years of judicial service.

Thus, even if Judge Crowe had failed of reappointment in 1969, he would have had 17 years of judicial service and the survivor's annuity rights would have vested immediately upon his relinquishing office. In addition, under 28 U. S. C. § 373, he would have been entitled, upon reaching age 65, for the remainder of his life, to the full salary he received upon relinquishing office. The "gap" between his leaving office in 1969 at age 59 and his receipt of full salary upon attaining age 65 would not have been fatal to the annuity rights of his survivors. His contributions would not have been returned to him, as the survivors' rights would have vested at the time of his leaving office by reason of failure to be reappointed after serving more than 10 years, if Judge Crowe had satisfied the other provisions of the Act in regards to contributions. Since during the gap there would have been no salary from which to deduct contributions to the Fund, coverage would have continued without such contributions. However, upon reaching age 65 and receiving salary once again, we believe that deductions for contributions to the fund would then be appropriate.

Therefore, we believe that the Director's interpretation of section 376(f) and section 376(g) of title 28, United States Code, rendered in 1962 to Judge Crowe, was erroneous.

R. F. KELLER

~~W. F. KELLER~~ Comptroller General
of the United States