

PL II

DECISION



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

~~10,832~~
10,837

FILE: B-192975

DATE: July 25, 1979

MATTER OF: Air Force Reserve Major Generals *Abc01163*

DIGEST:

3 Air Force Reserve major generals who have not been eliminated for years of service under ~~10 U.S.C. 8852~~, prior to reaching age 60 may receive retirement point credit for service performed after they have attained retirement eligibility under ~~Chapter 67 of title 10, U.S. Code~~, only if their retention in active status thereafter is approved by *credible* the Secretary under ~~10 U.S.C. 676~~. *approval*
of the matter

This action concerns the entitlement of Reserve major generals ~~not on extended active duty~~ to receive credit for service actually performed after they reach age 60 for the purpose of computing their Reserve retirement benefits under Chapter 67, title 10, United States Code.

The matter was presented in a letter dated September 20, 1978, from the Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations), requesting an advance decision (DOD MPAC Control No. SS-AF-1307).

The following specific question is asked:

"Is Secretary of the Air Force approval required (under 10 U.S.C. 676) for the award of creditable retirement points to Reserve major generals for service between ages 60 and 62?"

Although most Air Force Reserve officers must retire at age 60, under the provisions of 10 U.S.C. 8844, commissioned officers of the Air Force in the Reserve grade of major general may remain in an active status under certain conditions until age 62. Age 60 is also the time when a Reserve otherwise eligible may qualify for retired pay under Chapter 67. However, it is suggested that Sections 8844 and 8852 may permit credit for all

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service of Reserve major generals between ages 60 and 62 for chapter 67 retirement computation purposes.

On the other hand it is pointed out that when those provisions are considered in connection with the provisions of 10 U.S.C. 676 and 1331, the same conclusion is not necessarily reached. Section 676 authorized the Secretary of the service concerned to retain on active duty any person who has qualified for retired pay under Chapter 67 and provides that "a member so retained shall be credited with that service for all purposes." Section 1331 of title 10--a part of Chapter 67--provides that the date of entitlement to such retired pay is the date upon which the individual has satisfied all the conditions for such retired pay, among which is that the individual has attained age 60.

The Air Force has taken the position that Reserve major generals may not be authorized additional retirement credit for service beyond age 60 unless it is approved by the Secretary under 10 U.S.C. 676. The Air Force position is apparently based in part on certain language contained in several decisions of this Office, and reportedly is also supported by an opinion of the Office of the Army Judge Advocate General.

The crux of the matter is whether a Reserve major general, having qualified for retired pay, must be retained by the Secretary under 10 U.S.C. 676 after he reaches age 60 in order to qualify for further award of creditable service for retirement, or whether he has an independent right under 10 U.S.C. 8844 to credit for service until he reaches age 62.

The basic provisions regarding the retention of Air Force Reserve major generals are those in 10 U.S.C. 8844 and 8852. Those provisions were derived from sections 523(b) and 524(a) of the Reserve Officer Personnel Act of 1954, September 3, 1954, ch. 1257, 68 Stat. 1147, 1181-1182. Section 8844 provides for the elimination, by retirement if possible, of major generals

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at age 62; however, section 8852 requires the elimination (retirement) of major generals who have 35 years of service and 5 years in grade without regard to age. Exceptions to section 8852 have been authorized for State adjutant generals and assistant adjutant generals; also, 10 additional Reserve major generals may be retained by the Secretary of the Air Force, but not beyond the age of 62. Thus, a major general remains on active status until age 62 only if not sooner required to be removed under section 8852.

Regarding major generals who are not required to be removed prior to reaching age 62, the question is whether 10 U.S.C. 676 prevents crediting service after age 60 for retired pay computation under Chapter 67, in the absence of the Secretary's approval as required in that section.

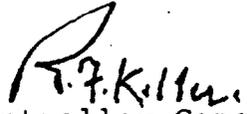
Section 676, although not a part of Chapter 67 as codified, was enacted as section 302(e) of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, approved June 29, 1948, ch. 708, 62 Stat. 1081, 1088. As such it was an integral part of the law which established Reserve retirement. We have consistently interpreted section 676 in that light and have held that credit for Reserve duty performed after qualification for Reserve retired pay at age 60 (assuming the individual is otherwise qualified) may not be given in the absence of approval by the Secretary concerned as provided for in that section. See 38 Comp. Gen. 647 (1959); 50 *id.* 428 (1970). Compare Grahl v. United States, 167 Ct. Cl. 80 (1964). Further an individual is considered to have qualified for retired pay by meeting all requirements including attaining age 60 even though application for retired pay has not been made. 38 Comp. Gen. 159 (1958).

Therefore, major generals not retired prior to reaching age 60 and who are otherwise qualified for Chapter 67 retirement upon reaching age 60 are not entitled to credit for service performed after they reach that age for purposes of retirement pay computation unless they are retained in the service by the

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Secretary as provided in 10 U.S.C. 676. In that connection an individual specifically retained in service as one of the 10 major generals authorized to be retained until age 62 under 10 U.S.C. 8852(b), would also qualify as retained in service for purposes of 10 U.S.C. 676. See 38 Comp. Gen. 146, 152, 38 id. 647, 652.

The submission is answered accordingly.


Deputy Comptroller General
of the United States