

DECISION

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

FILE: B-208353

DATE: March 1, 1983

MATTER OF: Captain James E. Finigan, USAR

DIGEST:

A service member filed an application for non-regular retired pay under 10 U.S.C. § 1331 almost 6 years after meeting the age requirement, but retired pay was not granted because records did not show he had sufficient years of service. Upon his submission of additional proof, it was determined that he had sufficient service. Although more than 6 years elapsed between his meeting the age requirement and the determination that he was eligible for retired pay none of his retroactive retired pay is barred by 31 U.S.C. § 71a, in view of Garcia v. United States, 617 F.2d 218 (Ct. Cl. 1980), since such claims will now be deemed to accrue only after the service's determination that the claimant has the required service.

This action is in response to a request for a decision whether the provisions of the barring act, 31 U.S.C. § 71a (now 31 U.S.C. § 3702(b)), are applicable to the entitlement of Captain James E. Finigan, USAR, to receive retired pay under the provisions of 10 U.S.C. §§ 1331-1337, for the period September 2, 1971, through October 16, 1973. The answer to that question, depends on whether notification to a service member under 10 U.S.C. § 1331(d) that he has completed all required service is a condition precedent to the running of the barring act. We have determined that notification by the service that the required service has been complete is necessary before the barring act begins to run.

This matter was submitted by the Disbursing Officer, Army Finance and Accounting Center, and has been assigned submission No. DO-A-1403 by the Department of Defense Military Pay and Allowance Committee.

The facts are not in dispute. Captain James E. Finigan became 60 years of age on September 2, 1971, and apparently became eligible to receive retired pay for

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non-regular service under the provisions of 10 U.S.C. §§ 1331-1337 at that time. However, he did not file the required application with the Army for such pay until June 23, 1977.

In response to his application, he was advised by the Retired Activities Directorate, Reserve Components Personnel and Administrative Center, St. Louis, that they could not substantiate that he performed the minimum number of qualifying years of service. They could only account for 17 years, 7 months and 12 days of service and advised him that, if he had performed additional service, the records to support such service were probably among those which had been destroyed by the fire which occurred in the Administrative Center several years before.

Apparently in 1978 Captain Finigan submitted copies of documents to support his entitlement. By correspondence from the Army Finance and Accounting Center, dated October 9, 1979, he was advised that an examination of his retired pay account had been made, that he would be paid monthly retired pay, and that he was due retired pay retroactively to September 1971 when he became age 60. But, since more than 6 years had elapsed since he first became eligible to receive retired pay, he was advised that certification for payment of the retroactive amount would have to be made by the General Accounting Office, and he was provided the appropriate information for filing his claim.

His claim was first received in the General Accounting Office on October 17, 1979, and by correspondence dated October 25, 1979, our Claims Division notified the Army Finance and Accounting Center that payment of retired pay to Captain Finigan for the period prior to October 17, 1973, was barred by 31 U.S.C. § 71a, which bars claims not received in the General Accounting Office within 6 years of the date they first accrue. The Army now requests review of that ruling.

It is noted in the submission that 10 U.S.C. § 1331(d), provides that a member is to be notified upon completion of 20 years of service that he has completed the minimum years of service required for eligibility. It is pointed out that due to administrative error, Captain Finigan was never given that notification. Had such notice been timely sent, his 1977 application would have been accepted without question.

Where a right of action is dependent on the occurrence of an event or contingency, the right does not accrue and the statute of limitations does not begin to run until the event or contingency occurs. 20 Comp. Gen. 734, 738 (1941). This rule has been applied, for example, to circumstances where by statute a claim is not payable until its validity has been determined by a designated Government agency. In such situations, we have held that, for the purpose of 31 U.S.C. § 71a, the claim does not accrue until the required determination has been made. 34 Comp. Gen. 605 (1955), and 50 Comp. Gen. 607 (1971). With regard to the similar application by the Court of Claims of their statute of limitations (28 U.S.C. § 2501), see Friedman v. United States, 159 Ct. Cl. 1 (1962).

As the foregoing relates to the case of Captain Finigan, 10 U.S.C. § 1331, which authorizes non-regular retirement, provides in part in subsection (a) that:

"(a) * * * a person is entitled, upon application, to retired pay * * * if--

"(1) he is at least 60 years of age;

"(2) he has performed at least 20 years of service * * *;

"(3) he performed the last eight years of qualifying service * * * not while a member of a regular component, the Fleet Reserve, or Fleet Marine Corps Reserve; and

"(4) he is not entitled, under any other provision of law, to retired pay from an armed force * * *."

Subsection (d) of 10 U.S.C. § 1331 was added by section 1 of the act of October 14, 1966, Public Law 89-652, 80 Stat. 902. Subsection (d) reads as follows:

"(d) The Secretary concerned shall provide for notifying each person who has completed the years of service required for

eligibility for retired pay under this chapter. The notice must be sent, in writing, to the person concerned within one year after he has completed that service."

Public Law 89-652 also added 10 U.S.C. § 1406 which provides that once a person has been notified of his eligibility for retired pay, in accordance with 10 U.S.C. § 1331(d), the eligibility may not be denied or revoked due to any error, miscalculation, misinformation or administrative determination of years of service performed.

The Navy Department in its report of June 6, 1966, on the need for H.R. 5297, which became Public Law 89-652, stated that the complicated method of computing creditable service for non-regular retirement under chapter 67 (10 U.S.C. § 1331)--

"* * * usually leaves the reservist in serious doubt as to whether he has in fact passed the 20-year milestone. The services, by a variety of administrative procedures, have attempted to keep the reservist informed of his progress and his completion of the years of service required. In some cases, however, reservists have received erroneous information or have miscalculated their years of service and in reliance thereon have reduced their Reserve participation only to find upon reaching retirement age that they have not in fact met the 20 years of service requirement. When the errors are not discovered until at or near retirement age the reservists no longer have time to renew their participation and acquire the necessary additional service." Page 3 of H. Rept. No. 1689, and page 2 of S. Rept. No. 1693, 89th Cong., 2nd. Sess.

The primary purpose of Public Law 89-652, was to place the burden on the services to notify reservists when they have met the years of service requirement.

In paying retired pay under 10 U.S.C. §§ 1331-1337, we have applied the barring act on the basis that such pay accrues when the individual meets the statutory requirements

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of age and service. See 38 Comp. Gen. 146 (1958); 37 Comp. Gen. 653 (1958); and 35 Comp. Gen. 646, 647 (1956). However, we have also recognized that such entitlement is dependent upon approval by the service concerned of the person's application, and upon such approval payment is to be made retroactively to the date of eligibility. 38 Comp. Gen. 146, 149.

A situation somewhat similar to that of Captain Finigan was recently considered by the Court of Claims in the case of Garcia v. United States, 617 F.2d 218 (Ct. Cl. 1980).

The stipulated facts in that case were that in October 1967 the service member became 60 years of age and, but for the filing of his application for non-regular retired pay, was fully qualified for that pay under 10 U.S.C. §§ 1331-1337. In May 1974 he finally made application for retired pay. In August 1974, he was advised that his application was rejected because a review of his records failed to show that he had performed sufficient satisfactory service. He was further advised that if he believed the Army's records of his service were incorrect, he should furnish additional proof of eligibility, and that he could appeal the administrative denial to the Army Board for the Correction of Military Records. In September 1974 he filed a petition with the Correction Board. In October 1976, without the Board having taken any formal action, the Army informed the plaintiff that his records had been further reviewed and that it had been determined that he had in fact performed the requisite 20 years of satisfactory service and, thus, was eligible to receive retired pay.

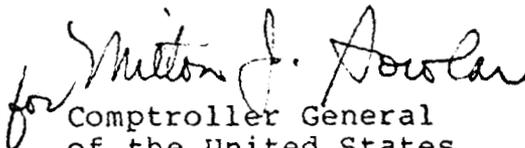
The matter of that entitlement was submitted to our Office for certification and was received here on October 18, 1976. Our Claims Division concluded that because his record was adjusted administratively due to the discovery of error, and not by formal correction action by the Correction Board, no new cause of action or claim arose. Therefore, since the entitlement to retired pay arose in 1967, based on the provisions of 31 U.S.C. § 71a, payment of retired pay for the period before October 18, 1970, 6 years prior to receipt of the claim in our Office, was not authorized.

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One of the issues considered by the Court of Claims in Garcia was the applicability of the statutory bar contained in 28 U.S.C. § 2501 to actions filed in that court. The court took the position that, in view of the requirements of 10 U.S.C. § 1331(d) and 10 U.S.C. § 1406, a determination of eligibility by the service is a condition precedent to the receipt of retired pay under 10 U.S.C. §§ 1331-1337. Thus, the court held that the plaintiff's cause of action did not accrue until the service made the determination that he was eligible for retired pay and advised him of that determination in October 1976. Since he had filed action in the court within 6 years of that date, the court granted him judgment for all retired pay otherwise due him subsequent to his 60th birthday.

In view of the Garcia case and in view of our position that, where a claim is dependent upon an agency determination required by statute, such determination is a condition precedent to the accrual of the claim for the purposes of the barring act, we will consider the claim not to have accrued until the service's determination that the person has the qualifying service for retired pay under 10 U.S.C. § 1331. In Captain Finigan's case the final condition was not met until October 1979 when the determination was made that Captain Finigan had the required service. Since his claim was received in our Office within 6 years of that time, no part of his retired pay entitlement is barred.

Accordingly, payment may be made to Captain Finigan for the retired pay found due for the period September 2, 1971, through October 16, 1973, if otherwise correct.

for 
Comptroller General
of the United States