



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

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February 19, 1985

The Honorable Daniel K. Akaka
Member, United States
House of Representatives
Post Office Box 50144
Honolulu, Hawaii 96850

Dear Mr. Akaka:

We refer to your letter dated November 21, 1984, with enclosures, concerning Mr. [REDACTED], who asks whether he will be eligible to receive a "discontinued service" retirement with an immediate Civil Service annuity in the event he is separated from the National Guard on grounds that he is overweight. Mr. [REDACTED]'s rights under the Civil Service retirement laws are matters reserved by statute for adjudication primarily by the Office of Personnel Management rather than by us, but we are providing information that may be of use in this matter.

Background

Mr. [REDACTED] indicates that he holds full-time Federal civilian employment as a National Guard technician. He is also an enlisted member of the Hawaii Army National Guard, and he recognizes that he must maintain his military membership in the Guard as a condition of his continued civilian employment in the technician's position. He is over 50 years old and has completed more than 20 years of service as a technician.

The National Guard Bureau has advised Mr. [REDACTED] that technicians who do not meet prescribed military weight standards may be discharged from military Guard membership for that reason. The Bureau has further advised him that if he loses his military membership in the Guard for failing to comply with the weight standards, the Bureau would consider his subsequent termination from technician employment as voluntary since it would be considered within his control to lose weight and meet the prescribed standards. The Bureau has expressed the view that such voluntary failure on his part to comply with the weight standards would make him ineligible for a discontinued service retirement with an immediate annuity.

Mr. [REDACTED] questions the correctness of this advice received from the National Guard Bureau. He refers to cur

August 23, 1983 decision in the case of [REDACTED], in which severance pay was awarded to a National Guard technician determined to have been involuntarily terminated, and in effect he questions whether, in line with the rationale of that decision, he could qualify for a discontinued service retirement based on involuntary termination if he is unable to lose sufficient weight to meet the prescribed standards. Apparently, the inquiry was prompted by an article appearing in a magazine published by the National Guard Association, a private organization. The article suggested that our decision in Mr. [REDACTED]'s case applied to National Guard technicians separated as overweight.

Severance Pay

Under 5 U.S.C. § 5595, a Federal employee who has been currently employed for at least 1 year, who is not eligible for immediate retirement, and who is involuntarily separated except for cause on charges of misconduct, delinquency, or inefficiency, is generally entitled to prescribed severance pay in regular pay periods for up to a year's time, depending upon the length of previous service.

In the decision referred to, [REDACTED], 62 Comp. Gen. 625 (1983), copy enclosed, we held that a National Guard technician who was removed from his position as the result of his refusal to attend military drills on Saturdays, on grounds of religious beliefs, was entitled to severance pay since in the particular circumstances presented we found his termination neither voluntary nor the result of delinquency. This decision was issued on the basis of our broad statutory responsibilities to settle claims against the United States, and to decide questions concerning the propriety of proposed expenditures of public funds, in matters not otherwise specifically provided for by law. See 31 U.S.C. §§ 3526, 3529, 3702. We have not had occasion to consider a case involving a claim for severance pay presented by a National Guard technician who had been terminated as a result of being overweight.

Discontinued Service Retirement

The "discontinued service" retirement is authorized by 5 U.S.C. § 8336(d), which provides that an employee over 50 years of age with 20 years of service who is separated involuntarily, except by removal for cause on charges of

misconduct or delinquency, is entitled to an immediate Civil Service retirement annuity.

By specific provision of law, the Office of Personnel Management is vested with exclusive authority to adjudicate Civil Service retirement annuity claims, subject only to administrative appeal to the Merit Systems Protection Board and further judicial review by the United States Court of Appeals for the Federal Circuit. See 5 U.S.C. § 8347(b) and (d). Under implementing regulations issued by the Office of Personnel Management, an agency may apply to that Office for an advance decision where doubt exists as to whether a proposed separation would qualify an employee for a discontinued service retirement. See paragraph S11-3, subchapter S11 of Federal Personnel Manual Supplement 831-1, copy enclosed. In addition, separated employees who have reason to believe that they are entitled to a discontinued service annuity may file a claim for the annuity directly with the Office of Personnel Management. See 5 C.F.R. § 831.501(b), copy enclosed.

Analysis and Conclusion

The severance pay provisions of 5 U.S.C. § 5595 and the discontinued service retirement provisions of 5 U.S.C. § 8336(d) contain similar standards, in that both laws authorize payments to Federal employees separated from their positions involuntarily, except by removal for cause on charges of misconduct or delinquency. As indicated, however, while we have a responsibility for issuing authoritative decisions on questions relating to severance pay, the adjudication of claims for discontinued service retirement annuities is reserved by law to the Office of Personnel Management.

The Office of Personnel Management officials we contacted indicated they essentially concurred in the position stated by the National Guard Bureau. That is, a discontinued service retirement may not properly be predicated upon an employee's removal from a technician's position based on his discharge from Guard membership as the result of a voluntary failure to comply with military weight standards. They indicated that they had recently received a number of retirement claims from former technicians separated as overweight, and that the claims were being resolved individually on that basis. That is, a discontinued service retirement, or a disability

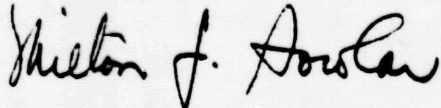
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retirement if appropriate, will be granted to a former technician who establishes that the failure to meet the prescribed weight standard was actually involuntary and was caused by a medical condition.

It therefore appears that Mr. [REDACTED] will not be eligible for an immediate Civil Service retirement annuity if he is separated from the National Guard on grounds that he is overweight, unless he is able to show that he cannot voluntarily meet the weight standard because of a medical problem. If action is initiated to separate him he may personally file a retirement claim directly with the the Office of Personnel Management.

We trust this will serve the purpose of your inquiry.

Sincerely yours,

for 
Comptroller General
of the United States

Enclosures