

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

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FILE: B-153784

DATE: JUN 26 1975

MATTER OF:

Retired grade of rear admirals
retired under 10 U.S.C. 6394

DIGEST:

Several rear admirals, both upper and lower half, are to be mandatorily retired under provisions of 10 U.S.C. 6394 on July 1, 1975, and as a result of retirement of rear admirals (upper half) on that date, some retiring rear admirals (lower half) would be entitled to basic pay as a rear admiral (upper half) in accordance with 37 U.S.C. 202, if considered to be serving on active list subsequent to the retirement of the rear admirals (upper half). These rear admirals are not entitled to compute retired pay on basis of rear admiral (upper half) since they also are to be mandatorily retired on July 1, 1975, and as a result will not be serving in that grade on the active list on that date.

This action is in response to letter dated June 13, 1975, from the Secretary of the Navy, requesting an advance decision concerning the proper rate of pay to be used in computing the retired pay of certain rear admirals (lower half) who are to be mandatorily retired effective July 1, 1975.

The Secretary states that a board which convened in November 1974 under the provisions of 10 U.S.C. 6394, recommended that several officers in the grade of rear admiral be retired and that this recommendation was approved on December 4, 1974. The Secretary also indicates that the date of mandatory retirement for these officers is July 1, 1975, in accordance with 10 U.S.C. 6394(f). It is noted that four of these officers are rear admirals (lower half) who, if deemed to be on the active list on July 1, 1975, would be entitled to be advanced to the pay grade of rear admiral (upper half), before actual retirement as a result of the other retirement actions effective on that date.

It is indicated that prior administrative procedure for retirements under 10 U.S.C. 6394 has been accomplished in a

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manner similar to the holding in 9 Comp. Gen. 512 (1930), construing the application of the Uniform Retirement Date Act, 5 U.S.C. 8301; that is, removal of the officer from the active list at 2400 hours, June 30, 1975, and retiring him effective at 0000 hours on July 1, 1975. The Secretary suggests that the four officers referred to above could be advanced to the higher pay grade of O-8, rear admiral (upper half), immediately after 0000 hours, July 1, 1975, and precisely at 0001 hours that day, be retired.

The Secretary also indicates that if prior procedures are followed these officers will be denied advancement to the higher pay grade because they will no longer be on the active list, and further, that it could be considered unfair and inequitable if they should be denied because of an instant in time, advancements which they have earned and which are substantial in value. The Secretary notes that an exception for such unique cases appears recognized in law, citing 2 Am. Jur. 2d, Administrative Law, 193 (1962) as having possible application.

The Secretary states that it is understood that retaining these four officers on the active list for a few moments or hours past 0000 hours, July 1, 1975, would not entitle them to active duty pay for July 1, 1975, based upon this decision in 9 Comp. Gen. 512 (1930), however, it is believed that such action would entitle them to be advanced to the pay grade of rear admiral (upper half) and would appear to authorize their retired pay to be computed on the basis of that higher pay grade.

On the assumption that the foregoing proposed action is to be taken, a decision is requested as to whether the retired pay of the four officers may be computed on the basis of the basic pay of rear admiral (upper half) O-8.

Under the provisions of 10 U.S.C. 6394(f), an officer recommended for retirement under the provisions of 10 U.S.C. 6394 and where such recommendation is approved by the President, shall be retired on the first day of any month set by the Secretary, but not later than the first day of the seventh month after the date of approval by the President.

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On the basis of the facts stated in the Secretary's letter, it appears that July 1, 1975, is the first day of the seventh month following the date of approval by the President. As a result, no later month may be designated by the Secretary.

The retired pay of officers retired under the provisions of 10 U.S.C. 6394 is computed in accordance with 10 U.S.C. 6394(h), which provides in part as follows:

"(h) Unless otherwise entitled to higher pay, an officer retired under this section is entitled to retired pay at the rate of 2-1/2 percent of the basic pay of the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title
* * *."

Thus, it will be seen that an officer retired under the above-cited provisions must have his retired pay computed on the basis of basic pay of the grade in which he was retired.

The rate of basic pay of officers of the Navy serving in the rank of rear admiral is determined under the provisions of 37 U.S.C. 202. Generally, the rank of rear admiral includes all officers serving in that rank, but there are two divisions in the rank of rear admiral for pay purposes, entitlement to the pay of the lower half (0-7) or upper half (0-8) being contingent on the numerical position of the individual on the list of rear admirals on the active list of the line of the Navy. Under the provisions of 37 U.S.C. 202(a) in order for an officer to become entitled to basic pay as a rear admiral (upper half), he must be serving on the active list.

It appears from the Secretary's letter that the positions of the four officers on the list would be changed so as to give rise to entitlement to basic pay of a rear admiral (upper half) on July 1, 1975, as the result of the retirement of other officers serving in grade of rear admiral (upper half), effective that date.

In this regard, we do not agree with the position taken that the officers may be continued on the active list for a

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short period on July 1, 1975, in order to be considered serving in the grade of rear admiral (upper half) for the purposes of establishing a basis for increased retired pay. Under the provisions of 10 U.S.C. 6394(f) as viewed in light of the facts presented in the Secretary's letter, it is required that officers involved must be retired effective July 1, 1975. That is, their retirements are effective on that date and they become entitled to retired pay commencing that date and no entitlement to active duty pay and allowances exists at that time.

In this connection, this Office has held that the retirement of a military or naval officer effects a complete severance from active service and his rights, benefits, and privileges as an officer on the active list terminate upon the effective date of his retirement. 24 Comp. Gen. 291 (1944). It is our view that 10 U.S.C. 6394(f) as applied to the officers concerned in the present case mandates their retirement on July 1, 1975, and that effective that date they will not be entitled to the rights, benefits, and privileges as officers on the active list. We find no basis under which we could hold that an officer may be on active duty for part of a day and in a retired status for the remainder of that day.

Furthermore, it is our view that 2 Am. Jur. 2d, Administrative Law, 193 (1962), is not for application here. That section discusses the necessity of equality of treatment among all those affected where discretionary administrative action is permitted or authorized. While 10 U.S.C. 6394 does permit the exercise of discretion on the part of the Secretary as to when affected members are to be retired, such authority is limited by the mandate that the latest date retirement shall occur is the "first day of the seventh month", which in this case would be July 1, 1975. Therefore, since no administrative action was taken on or before May 31, 1975 (the last date that the Uniform Retirement Date Act, supra, could be used to effect a retirement prior to July 1, 1975), then by operation of law the members in question are retired effective July 1, 1975.

Accordingly, the secretarial action proposed in this case is not authorized and the question presented is answered in the negative.

(SIGNED) HERMAN B. STAATS

Comptroller General
of the United States