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

B-165038

August 16, 1973

The Honorable
The Secretary of Transportation

Dear Mr. Secretary:

Reference is made to United States Coast Guard letter dated November 17, 1972, file reference 7500, to our Transportation and Claims Division concerning the application of the ruling in the case of Edward P. Chester, Jr., et al. v. United States, Court of Claims No. 169-70, October 13, 1972, in the computation of retired pay of other Coast Guard officers. Specifically, that letter asks the following questions:

> "(1) As to future payments to claimants under the referenced decision, will we be able to apply the principle of Res Judicata, and pay the increased rates of pay to the officer claimants for periods subsequent to the date of the Court of Claims Decision?
>
> "(2) Will this decision be followed for other claimants, retroactively or prospectively? That is, will the Comptroller General permit us to follow the decision for all purposes?
>
> "(3) We assume that costs for RSFPP must be recomputed (for participants) based on the higher rates of pay. Is this correct?"

We have also received a letter dated June 1, 1973, file reference 7500, from the Commandant of the Coast Guard elaborating on and presenting further the Coast Guard's views regarding question (3).

The plaintiffs in the Chester case were 18 Regular Coast Guard captains retired in 1968 or 1969 who had each completed 30 years of active commissioned service in the Coast Guard in the year of their retirement. Each was qualified for voluntary retirement under either 14 U.S.C. 291 or 292 at the time of his retirement and each was within the purview of the mandatory retirement provisions of 14 U.S.C. 288(a).

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Thirteen of the plaintiffs were voluntarily retired pursuant to 14 U.S.C. 291 or 292 on July 1, 1968, or July 1, 1969. The remaining five plaintiffs were retained on active duty to varying dates in 1968 or 1969 after July 1, for medical evaluation. Of this group, four were placed on the temporary disability retired list after July 1 of the year in which retired and the last one was voluntarily retired under 14 U.S.C. 292 (nondisability) on September 30, 1968.

The plaintiffs fell into two general classes, those who were purportedly voluntarily retired under 14 U.S.C. 291 or 292 on July 1, and those who were retained on active duty beyond July 1 for medical reasons and subsequently voluntarily retired. As indicated previously, all plaintiffs in that case were subject to mandatory retirement pursuant to 14 U.S.C. 288(a) on June 30 of the year in which retired, and were also qualified for voluntary retirement pursuant to 14 U.S.C. 291 or 292.

Subsection 288(a) of title 14, United States Code, provides as follows:

> "(a) Each officer of the Regular Coast Guard serving in the grade of captain whose name is not carried on an approved list of officers selected for promotion to the grade of rear admiral shall, if not earlier retired, be retired on June 30 of the fiscal year in which he, or any captain junior to him on the active duty promotion list who has not lost numbers or precedence, completes thirty years of active commissioned service in the Coast Guard. (Emphasis added.)

In our decisions, B-165038, January 6, 1969, and B-165038(1) and (2), June 2, 1969, we held that an officer subject to the mandatory retirement provisions of 14 U.S.C. 288(a) may not retire voluntarily under some other provisions of law (for example 14 U.S.C. 291 or 292), when such voluntary retirement becomes effective on the same date that the mandatory retirement is required under section 288(a); that an officer retired under 14 U.S.C. 288(a) must have his retired pay computed on the basis of the active duty pay to which he was entitled in June, not the rates of pay in effect on the following July 1; and that the fact that a Coast Guard captain subject to 14 U.S.C. 288(a) is retained on active duty beyond his mandatory retirement date does not add to his rights in any way in computing the amount of retired pay to which he is entitled.

The court in the Chester case declined to follow our construction of 14 U.S.C. 288(a). Instead, the court took the position that the words "shall, if not earlier retired, be retired on June 30 * * *" are reasonably to be interpreted to mean that such an officer's retirement must occur no later than June 30, if earlier retirement, for whatever cause, has not obviated the necessity for retirement on June 30, and does not absolutely forbid voluntary retirement pursuant to 14 U.S.C. 291 or 292 on that terminal date. Therefore, the court held that officers in that situation were entitled to compute their retired pay on the higher rates in effect on July 1. The court also held that those officers held on active duty beyond the mandatory retirement date and retired after June 30 are entitled to no less than the other officers and were, therefore, also entitled to compute their retired pay on the July 1 pay rates.

Since it appears that the court was fully aware of the reasons for the decisions of this Office to the contrary and since the court's interpretation of the statutes here involved is not unreasonable, we will now follow that interpretation and our decisions B-165038, January 6, 1969, and B-165033(1) and (2), June 2, 1969, and other similar decisions to the contrary will no longer be followed.

Therefore, question (1) of the letter of November 17, 1972, is answered in the affirmative.

Regarding question (2), since this decision is a changed construction of the law based on an original construction of the law by the court, it should be applied retroactively as well as prospectively for other members in similar circumstances. Compare 39 Comp. Gen. 321 (1959). However, it may not be applied retroactively beyond the period (10 years in most cases) provided by the barring act of October 9, 1940, 54 Stat. 1061, 31 U.S.C. 71a. See the answer to question 2b in 41 Comp. Gen. 812, 818 (1962). Doubtful cases should be submitted to this Office for determination.

In regard to question (3), the Coast Guard, in letter of June 1, 1973, says that after further consideration of that question, they have concluded that their interest requires elaboration of that issue, in effect asking the supplemental question whether certain of the claimants in the Chester case should be permitted to retroactively exercise their option to either reduce the amount of their participation in, or withdraw from the Retired Serviceman's Family Protection Plan. In this regard, the Coast Guard has expressed the view that the claimants in the Chester case should be offered the opportunity to choose to have their annuities under the Retired Serviceman's

Family Protection Plan (RSFPP, 10 U.S.C. 1431 et seq.) remain at the amount which they had elected prior to the Court of Claims decision or to have it computed on the basis of the retired pay to which the Court of Claims decided they were entitled.

In support of that position there is cited 10 U.S.C. 1436(b) which was amended by section 1, clause (6) of the act of August 13, 1968, Public Law 90-485, 82 Stat. 753, to, among other things, authorize the Secretary concerned, upon application by the retired member, to allow the member to reduce the amount of the annuity specified by him under 10 U.S.C. 1434(a) and (b) but to not less than the prescribed minimum. The law requires that a retired member may not so reduce an annuity earlier than the first day of the seventh calendar month beginning after he applies for reduction.

In that letter, it was explained that eight of the captain/plaintiffs in the Chester case elected to participate in the Retired Serviceman's Family Protection Plan prior to the enactment of Public Law 90-485, and subsequent to the 1968 amendments to the act, they chose to come within the purview of the amended provisions. However, after having made that choice and prior to the court's decision in the Chester case it is stated that certain of the plaintiffs had seen no necessity to exercise their right under 10 U.S.C. 1436(b) to reduce the annuities they had elected. It is indicated that because of the court's ruling, they are now faced with the prospect of an involuntary retroactive increase in the amount of the annuity they elected and the cost of their contribution to the Retired Serviceman's Family Protection Plan. Further, that such increases could be viewed by these members as a penalty in that they are being treated differently than they would have been on retirement due to an error by the Coast Guard in computing their retired pay. The Coast Guard, therefore, proposes that the eight retired captains, who have the right to reduce their annuity under 10 U.S.C. 1436(b), be permitted to exercise that right retroactively, effective the first day of the seventh calendar month from the date of retirement.

It is further stated that since all the issues in this case are being settled retroactively, a request for retroactive reduction of an annuity under 10 U.S.C. 1436(b) presents no particular problem.

Retroactive reduction of annuities under the Retired Serviceman's Family Protection Plan was not an issue in the Chester case and the court did not refer to it. That ruling established only that a higher active duty pay rate was required to be used in computing the plaintiffs' retired pay entitlement. Neither the ruling in the Chester case nor the applicable provisions of law governing voluntary reduction

of annuities (10 U.S.C. 1436(b)) make any provision for retroactive reductions in annuities under these circumstances. There is also for noting that 10 U.S.C. 1436(b) specifically provides that no amounts by which a member's retired or retainer pay is reduced prior to the effective date of a reduction of annuity, withdrawal, change of election or election under that subsection may be refunded to or credited on behalf of the member by virtue of an application made by him under that subsection.

We have held that under the Uniformed Services Contingency Option Act of 1953 (renamed the Retired Serviceman's Family Protection Plan) only one computation of the amount of reduction in retired pay is contemplated, and that the amount of the annuity to be paid to the designated dependents of the member making the election is to be based on the retired pay at the time such computation is made. See 33 Comp. Gen. 491 (1954). And, we have held that when the computation of a member's reduction in retired pay for the annuity he has elected is erroneously computed because it is based on a rate of retired pay which he is receiving but which is not the rate to which he is legally entitled, the reduction is to be recomputed based on the correct rate of retired pay. See 34 Comp. Gen. 151 (1954).

It is our view, therefore, that the computations of reduction in retired pay for annuities for the plaintiffs in the Chester case must be recomputed on the basis of the rates of retired pay to which they are entitled under the court's decision and we may not authorize a retroactive change in the annuity elected other than such recomputation on the basis of the changed pay rates. Accordingly, question (3) of the November 17 letter is answered in the affirmative and the supplemental question indicated in the June 1 letter is answered in the negative.

Of course, pursuant to 10 U.S.C. 1436(b) any retired member may now apply prospectively for a reduction in his annuity if he so chooses. And, should an error or injustice result from these members' changed rates of retired pay, under 10 U.S.C. 1552 the Secretary of Transportation has ample authority, acting through boards of civilians, to correct any military record of the Coast Guard when he considers it necessary to correct such error or remove such injustice. A correction of an election under the Retired Serviceman's Family Protection Plan pursuant to 10 U.S.C. 1552 would be retroactive. See 32 Comp.

Gen. 247 (1952), 34 Comp. Gen. 7 (1954), 43 Comp. Gen. 245 (1963), and 44 Comp. Gen. 143 (1964). Also, compare McDonald v. United States, 193 Ct. Cl. 795 (1971).

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States