

DECISION



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

975

FILE: B-186070

DATE: OCT 23 1976

MATTER OF: Lieutenant Colonel
: , USAF, Retired

DIGEST: Air Force officer mandatorily retired under 10 U.S.C. 8916, with retired pay computed as of April 11, 1970, may not have retired pay adjusted and increased to reflect higher pay rates effective April 15, 1970, on the basis of administratively issued "corrected" retirement orders (issued over 4-1/2 years after original retirement orders) purporting to retroactively retire officer voluntarily at a later date under authority of 10 U.S.C. 8911, in the absence of valid Air Force correction action under 10 U.S.C. 1552. See Comp. Gen. decisions cited, and particularly 50 Comp. Gen. 258 (1970).

This action is in response to a letter dated January 22, 1975 (file reference RPTT), with enclosures, from the Comptroller, Accounting and Finance Division, Headquarters Air Force Accounting and Finance Center, requesting an advance decision as to the propriety of making payment on a voucher for \$1,852.05 in favor of Lieutenant Colonel USAF, Retired, representing additional retired pay for the period May 1, 1970, through December 31, 1974. The request was forwarded to this Office by the Chief, Finance Group, Directorate of Accounting and Finance, Department of the Air Force, and has been assigned Air Force Request No. DO-AF-1230 by the Department of Defense Military Pay and Allowance Committee.

The submission states that the member was mandatorily retired under the provisions of 10 U.S.C. 8916 on April 11, 1970, having completed 28 years and 29 days of service computed under 10 U.S.C. 8888 and 8927 and 28 years and 16 days of creditable service for basic pay purposes. In this respect, the member's Retirement Order--Special Order No. AC-31278, dated December 4, 1969--makes reference in the remarks item to our decision 38 Comp. Gen. 5 (1958) as the basis for his retirement. Based on that retirement order and in compliance with the Uniform Retirement Date Act, 5 U.S.C. 8301, he was retained on active duty until April 30, 1970, and became entitled to retired pay effective May 1, 1970.

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It is stated in the submission that under those retirement orders the member was not entitled to receive the benefits of the pay raise which went into effect on April 15, 1970, in the computation of his retired pay, rather, the computation was based on the pay rates which became effective July 1, 1969.

The submission goes on to state that the member's record was changed on September 11, 1974, by amendment to his retirement orders to show that he was not mandatorily retired on April 11, 1970, under 10 U.S.C. 8916, but was, instead, voluntarily retired under the provisions of 10 U.S.C. 8911, with 28 years 1 month and 5 days' service for both basic pay purposes and for creditable service under 10 U.S.C. 1405, and that while it is not clear, it is assumed that the effective date of retirement under the amended orders is also May 1, 1970. In addition to those amendments, the remarks item was amended as follows:

"AFAPC: 38 Comp. Gen. 5, 11 Apr 70 (Para 4-4, AFM 35-7)' is amended to read 'AFAPC: Comp. Gen. B-164842, 21 FEB 1974.'"

It is reported in the submission that based on the foregoing, the use of our decision B-164842, February 21, 1974 (53 Comp. Gen. 610), as a basis for the change in the member's retirement and the manner in which the change was effected, is considered to be a continuing application of the logic in the Court of Claims case of Chester v. United States, 199 Ct. Cl. 687 (1972), which our Office acceded to in B-165038, August 16 1973 (53 Comp. Gen. 94), as pertains to the Coast Guard and B-178054, B-174959, B-153784, August 31, 1973 (53 Comp. Gen. 135), relating to the Air Force. However, doubt is expressed as to the applicability to the present situation of the principle in the Chester case and decisions cited.

The submission goes on to state that it is clear that the member was not retained on active duty beyond his mandatory retirement date for the purpose of physical evaluation and was not voluntarily retired on or before his mandatory retirement date. As a result, since the active duty pay rates changed after the member's mandatory retirement date but before he became entitled to retired pay, there is a question as to the computation of retired pay.

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Section 8916⁺ of title 10, United States Code, provides in pertinent part:

"(e) Unless retired or separated on an earlier date, each promotion-list officer in the regular grade of lieutenant colonel shall be retired, except as provided by section 8301 of title 5, on the thirtieth day after he completes 28 years of service computed under 8927(a) of this title * * *."

The Uniform Retirement Date Act as codified in 5 U.S.C. 8301⁺ requires that every retirement (unless otherwise provided by statute) takes effect on the first day of the month following the month in which the retirement would otherwise be effective, but that the rate of retired pay must be computed as of the date retirement would have occurred if that act had not been enacted.

In 38 Comp. Gen. 5⁺ (1958) involving mandatory retirements under 10 U.S.C. 8916⁺ we held that the time spent by a member on the active list following his mandatory retirement date solely by virtue of the application of the Uniform Retirement Date Act, is not creditable for longevity pay purposes. In this connection, we held in 43 Comp. Gen. 742⁺ (1964) that such retention would not add to a member's rights with respect to the computation of retired pay. Compare 45 Comp. Gen. 233 (1965).

Thus, under the orders as originally issued in Colonel case, he was required to be mandatorily retired on April 11, 1970, under 10 U.S.C. 8916⁺ and while 5 U.S.C. 8301⁺ permitted him to remain on active duty until April 30, 1970, and fixed May 1, 1970, as the effective date of his retirement, it required that his retired pay be computed on the basis of the rates of active duty pay that were in effect on April 11, 1970. See 50 Comp. Gen. 258⁺, 261⁺-262 (1970) involving an almost identical situation under 10 U.S.C. 8916⁺

As to the validity of the amendatory retirement order of September 11, 1974, we do not agree with the administrative usage of the Chester case or of our decision 53 Comp. Gen. 610, supra, by the Department of the Air Force as authority for issuance of such order.

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It is our view that the Chester case stands for the proposition that where a member is to be mandatorily retired from the service, and there are other provisions of law which would permit him to be voluntarily retired on the same date, such a member will not be precluded from retiring under the retirement law which will provide the greater benefit. In 53 Comp. Gen. 610⁺ supra, we extended the applicability of the principle of the Chester case as enunciated in our decision 53 Comp. Gen. 135⁺ (1974), to a situation involving a Marine Corps member who sought to be retired voluntarily under the provisions of 10 U.S.C. 6323⁺, rather than be mandatorily retired pursuant to section 1(1) of the act of August 11, 1959, Public Law 86-155, 73 Stat. 335⁺. We said therein that in view of the similarity between the statutes in the Chester case and those involving mandatory retirement in the Marine Corps member's case, we would permit the member to compute his retired pay under the provisions of 10 U.S.C. 6323⁺ as though he was voluntarily retired on the date of his mandatory retirement (June 30, 1968). Under those provisions, his retired pay was to be computed based on the active duty pay rates in effect on July 1, 1968. Compare 34 Comp. Gen. 941⁺ (1975).

There is nothing in 53 Comp. Gen. 610⁺ which directed or authorized the services to issue "amending" retirement orders to allow a member, such as in the present case, to be voluntarily retired on a date later than his mandatory retirement date. Further, there is nothing therein or in any other decision of this Office which ~~overrules~~ or modifies the long-standing rule that where a member is to be mandatorily retired but is retained on active duty only by virtue of the authority contained in the Uniform Retirement Date Act, such member may not receive credit for service performed after the mandatory retirement date for longevity pay or retired pay computation purposes.

In view of the foregoing, the "amending" retirement order of September 11, 1974, must be considered on its own merits without sanction under 53 Comp. Gen. 610, supra. It has been held that under a statute vesting in the President the power to retire officers of the military service, such power is not a continuing power, rather it is performed to the extent of its existence by the one act of the President. The same rule is

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for application under a statute which vests in a subordinate officer of the Government the power to effect the retirement of a member. Therefore, once a member's retirement has become effective, any action taken to cancel the retirement or amend the order retiring the member (other than for disability) under another provision of law, would be legally ineffective. See 37 Comp. Gen. 19 (1957) and cases cited therein, as modified by 40 Comp. Gen. 419 (1961).

In this connection, we recognize that the Secretaries of the military departments concerned may perform or delegate the performance of certain ministerial duties with regard to a member's military records under authority inherent in their positions in order to correct certain administrative errors which arise from time to time regardless of the care taken to insure the accuracy of such records. However, we are unaware of any authority in law or regulation, nor has any been cited in the submission, whereby the Secretary of the Air Force acting through his Chief of Staff may make any changes in an individual's Air Force record that would result in a change of material fact or the creation of a new record in the absence of a proceeding before the Air Force Board for Correction of Military Records under the provisions of 10 U.S.C. 1552. See 52 Comp. Gen. 952 (1973).

Accordingly, it is our view that the "amending" retirement orders issued in Colonel case over 4-1/2 years after an accomplished mandatory retirement is without force or effect and he is only entitled to have his retired pay computed on the basis of the active duty pay rates in effect on April 11, 1970. The voucher submitted on the question will be retained here.

R. F. KILGORE

Deputy Comptroller General
of the United States

MILITARY PERSONNEL

Retirement

Effective date

Mandatory retirement

Retroactive amendment

ORDERS

Cancelled, revoked, or modified

Retirement orders

Military personnel

PAY

Retired

Increases

Entitlement

Authority lacking

PAY

Retired

Increases

Retirement prior to effective date
of increase