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February 24, 1994

DIGEST

Administrative Office of the United States Courts is advised legislation or congressional approval should be sought for retired military members to waive receipt of military retired pay to receive credit for military service in the calculation of an annuity under the Judicial Survivors' Annuities System, 28 U.S.C. § 376.



Office of the General Counsel

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February 24, 1994

Mr. William R. Burchill, Jr.
General Counsel
Administrative Office
Of the United States Courts
Washington, DC 20544

Dear Mr. Burchill:

This responds to your letter of March 22, 1993, asking our view on whether the Director of the Administrative Office of the United States Courts (AOUSC) may by regulation allow a federal judge to waive his right to military retired pay in order to receive credit for his military service in the calculation of an annuity under the Judicial Survivors' Annuities System (JSAS), 28 U.S.C. § 376. JSAS provides annuities for the surviving spouses and dependent children of judicial officials when certain requirements for participation in the program are met.

As explained below, while the AOUSC Director has broad authority to administer the JSAS program, in light of legislative authorization for other instances where military service is used to increase another federal entitlement, we recommend that AOUSC seek legislation in this area.

Currently, upon retirement a judge who is entitled to military retired pay would receive (1) a lifetime judicial annuity equal to the salary he was receiving at the time he retired (so long as prescribed age and tenure requirements were met), and (2) military retired pay. 28 U.S.C. § 371. According to section 376(k), when the judge dies the JSAS annuity payable to his survivor will be based on a calculation that considers time (1) as a judicial official, (2) in Congress, (3) as a federal employee, and (4) on military active duty.¹ The fourth item, however, is not included in the JSAS annuity calculation if it already was

¹The annuity ranges from 25 percent to 50 percent of the judge's average annual salary. The survivor of a judge with creditable service of up to 16 years and 8 months would be entitled to the minimum percentage; the survivor of a judge with creditable service of 33 years and 5 months or more would be entitled to the maximum.

credited to the judge for the purpose of retired pay.² The basis of that exclusion is the following provision in section 376(k)(3):

" . . . those years of such military service for which credit has been allowed for the purposes of retirement or retired pay under any other provision of law shall not be included as allowable years of such service under this section."

In your letter, you recognize that the laws governing the Civil Service Retirement System and the Federal Employees' Retirement System (FERS) similarly authorize the credit of military service for the purpose of retirement, and also generally preclude the credit of such service if the individual otherwise is entitled to retired pay based on the service. 5 U.S.C. §§ 8332(c) and 8411(c). You point out, however, that the Office of Personnel Management (OPM) has by regulation, without any express statutory basis, permitted those employees to waive receipt of the military retired pay in order to receive credit for the military service in computing their civil service and FERS pensions. See 5 C.F.R. §§ 831.301(c) and 842.306(c).

Your question to our Office concerns the propriety of the AOUSC Director, pursuant to his authority to administer the JSAS program,³ also providing by regulation the option for waiver, i.e., issuing regulations that would authorize a federal judge to waive receipt of military retired pay in order for his service time to be factored into the JSAS calculation. Included with your letter is a letter from the Defense Finance and Accounting Service (DFAS) in which DFAS concludes that such regulations would not be appropriate, based in large part on the fact that, other than as regards civil service and FERS employees, the authority to waive military retired pay has been granted only through congressional action.

²Thus, if the deceased was on active duty for 20 years, and consequently was entitled to military retired pay, those 20 years would not be included in the JSAS computation; if, however, he served for only 5 years, those 5 years would be included.

³The Director has broad duties as the administrative officer of the courts, which are set out in 28 U.S.C. § 604. These duties include "Regulate and pay annuities to widows and surviving dependent children of justices and judges. . . ." 28 U.S.C. § 604(a)(7).

We agree with DFAS. AOUSC cites only the Civil Service/FERS situation for the proposition that the option to waive receipt of military retired pay in order to increase another federal entitlement may be granted by regulation. Those regulations, however, were first issued in 1938, see 5 C.F.R. § 29.9 (1938), and, since that time, all other waivers have been authorized only by statute. For example, in 1958 the Congress authorized the waiver of retired pay in order to receive veterans' compensation (Pub. L. 85-857, 72 Stat. 1231, codified at 38 U.S.C. § 5305), and in 1980 the Congress authorized waiver of retired pay for credit towards Foreign Service retirement if it was waived for civil service retirement (Pub. L. 96-465, 94 Stat. 2118, codified at 22 U.S.C. § 4056(a)).

Moreover, the Congress has in effect ratified the 1938 regulatory provisions by referring to them in the laws about military survivor benefits. Section 1450 of title 10, United States Code, provides that a military survivor annuity is not payable to the survivor of a member who "had in effect a waiver of his retired pay for the purposes of subchapter III of chapter 83 of title 5 [the civil service retirement system]."

Thus, while Congress has effectively recognized the propriety of the regulatory waiver for providing credit for civil service retirement, it more recently has chosen to legislate other instances of this practice. In our view, this suggests that the Congress is unwilling to leave to regulatory authority the use of military service that entitles an individual to military retired pay for purposes of increasing another federal entitlement.

We recognize that the AOUSC Director has broad authority to administer the JSAS program. Nevertheless, in light of the above we think it would be appropriate for AOUSC to seek legislation to authorize the waiver of retired pay in order for military service to be credited under 28 U.S.C. § 376, rather than seeking to accomplish that end through regulation.



Robert P. Murphy
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