



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Temporary Early Retirement Authority and the National
Oceanic and Atmospheric Administration

File: B-260115

Date: July 17, 1995

DIGEST

Provisions of Pub. L. No. 102-484 (1992), which permits Secretary of Defense to offer early retirement to members with at least 15 years but less than 20 years of service, are not made applicable to the commissioned officer corps of the National Oceanic and Atmospheric Administration by 33 U.S.C. § 864.

DECISION

The Director of the National Oceanic and Atmospheric Administration (NOAA) Corps Operations, asks whether temporary early retirement authority granted to the armed services pursuant to Pub. L. No. 102-484, is applicable to NOAA's commissioned officers by virtue of section 864 of title 33 of the United States Code. It is our view that the early retirement authority is not applicable to NOAA's commissioned corp.

The National Defense Authorization Act for Fiscal Year 1993, enacted on October 23, 1992, contained section 4403, Temporary Early Retirement Authority.¹ That section provides the Secretary of Defense with the authority to offer early retirement to military members with at least 15 but less than 20 years of service. Sections 4403(b)(2) & (d) provide the Secretary of the Navy the authority to offer such early retirement to members of the Navy and Marine Corps.

Section 864 of title 33 of the United States Code states that "All laws relating to the retirement of commissioned officers of the Navy shall, after May 18, 1920, apply to commissioned officers of the National Atmospheric and Oceanic Administration". NOAA asks whether 33 U.S.C. § 864 makes § 4403 applicable to commissioned officers of the NOAA Corps.

¹Pub. L. No. 102-484, Div. D, Title XLIV, § 4403, Oct. 23, 1992, 106 Stat. 2702, 10 U.S.C. § 1293 note.

In his submission to our Office, the Director of NOAA cites our decision at 26 Comp. Gen. 178 (1946), in which we found that a provision of Public Law 305, approved February 21, 1946 (60 Stat. 26), was assimilated by § 864 so as to be applicable to officers of the Coast and Geodetic Survey (the predecessor of the NOAA Corps). The purpose of the 1946 act was to authorize the President to retire certain officers and enlisted men of the Navy, Marine Corps and Coast Guard in an effort to readjust the active list of the Navy to a postwar basis following World War II. While we concluded that a section allowing certain military officers to be placed on the retired list earlier than allowed previously was assimilated to the Coast and Geodetic Survey, we concluded that other retirement sections of the act were not so assimilated because they essentially conflicted with legislation directly related to the Coast and Geodetic Survey. In the case of the provision that was assimilated, there was no conflict with existing provisions of law applicable to the Coast and Geodetic Survey since the earlier provision applicable to the Coast and Geodetic Survey had likewise been assimilated. Id. at 187.

Thus, the assimilation provision of 33 U.S.C. § 864 does not apply when Congress has otherwise made specific provision for the retirement of commissioned officers of the Coast and Geodetic Survey (now the NOAA Corps). Congress has so provided in enacting the act of June 3, 1948 (62 Stat. 298), now codified at 33 U.S.C. § 853a et seq., which set forth the requirements and authority for the retirement of commissioned officers of NOAA. Moreover, there is no suggestion in the legislative history of Pub. L. No. 102-484, that Congress intended the temporary early retirement legislation to be used to reduce the duty strength of the quasi-military corps as well as the active military forces.

Accordingly, a congressional enactment is needed to extend the early retirement authority granted the armed services to the NOAA Corps.

NOAA also asks if temporary early retirement authority is made applicable to the NOAA Corps through legislative action, what effect would such authority have on commissioned officers who have twice in succession failed of selection for promotion?

NOAA Corps Regulations, Chapter 8, Termination of Active Service, Section 08310B, permits certain officers (who have twice in succession failed of selection for promotion) to remain on active duty until qualified for retirement, unless sooner retired or separated under another provision of law. For example, a lieutenant commander who has twice in succession failed of selection for promotion and has at least 16 years of service is currently being retained on active duty until he or she has 20 years of service and is then involuntarily retired. If NOAA obtains the temporary early retirement authority, NOAA asks if it could consider the officer qualified for retirement and offer him or her the opportunity to submit an

application for retirement under the temporary early retirement authority, and if he or she fails to submit such an application, then involuntarily separate the officer.

As noted above, we believe NOAA needs statutory authority to exercise temporary early retirement authority. While it could be argued that the phrase "unless sooner retired or separated under another provision of law" found in NOAA's current regulations would permit involuntary retirements for officers with between 15 and 20 years of service, NOAA would be prudent, we believe, to obtain for itself the same authority which the military services were granted under 10 U.S.C. §§ 638 and 638a. These sections give the secretaries concerned, the authority for modifying and enhancing the rules relating to continuation on active duty and selective early retirement regarding the officers retained on active duty after twice failing for selection for promotion. Comparable provisions in authority granted to NOAA under new legislation would enable it to address this and other particular issues that may arise.

/s/ Seymour Efros
for Robert P. Murphy
General Counsel