

DECISION



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

9757

[Entitlement of Reserve Member to Non-Regular Retired Pay]

FILE: B-193561

DATE: April 9, 1979

MATTER OF: Lieutenant Colonel William P. Cassidy, USAFR *per name*

DIGEST:

1. The written communication required by 10 U. S. C. 1331(d) as notice to a member of a Reserve component of an armed force advising that he has completed the years of service requirement for retired pay at age 60, need not be in any specific format. So long as the notice is from an authorized activity of his military service and uses appropriate words advising him that he has completed the service requirements for such retired pay at age 60, such notice satisfies the requirements of 10 U. S. C. 1331(d) so as to invoke 10 U. S. C. 1406, thereby preventing denial of retired pay due to administrative error.

2. The exceptions to the invocation of 10 U. S. C. 1406 preventing denial of retired pay entitlement due to erroneous written notice of entitlement, are limited to cases of direct fraud or misrepresentation on the part of the person to whom the notice is sent. Where the evidence fails to show that the member caused his service record to be altered or induced the erroneous notice to be sent, the statutory exceptions have not been met. A showing that the member possibly should have had reasonable doubt as to the propriety of the notice is insufficient to serve as a basis to deny entitlement to retired pay at age 60, if he is otherwise qualified.

This action is in response to a letter dated November 17, 1978, with enclosures, from the Principal Deputy Assistant Secretary of the Air Force (Financial Management), requesting an advance decision concerning the entitlement of Lieutenant Colonel William P. Cassidy, USAFR, FV793065/578-50-6260, to receive non-Regular retired pay under the provisions of chapter 67 of title 10, United States Code. The request has been assigned Air Force submission No. SS-AF-1308 by the Department of Defense Military Pay and Allowance Committee.

The submission indicates that under the provisions of 10 U. S. C. 1406 (1976), a person who receives notification as provided for in 10 U. S. C. 1331(d) (1976) of entitlement to non-Regular retired pay from the service

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B-193561

concerned is entitled to that pay even though he does not in fact have sufficient service (20 years) for such retirement. Apparently, Colonel Cassedy received correspondence from the Air Force which purportedly advised him that he had fulfilled the service requirement for eligibility to receive retired pay at age 60. As a result, he is asserting his right to retired pay.

The submission expresses doubt as to whether the correspondence in question constituted official notification since it was not in the form provided in Department of Defense Directive 1340.7, and the record indicated that Colonel Cassedy had reason to believe that such correspondence was in error. Therefore, we are asked to resolve the following questions:

"a. Where the Secretary of Defense has provided for format and procedure for notifications under 10 U.S.C. 1331(d) in DOD Directive 1340.7, may a notification which does not meet the requirements of * * * [that directive] be considered official under 1331(d) so as to invoke the provisions of 10 U.S.C. 1406? *yes*

"b. If the answer to a, above, is affirmative, in the instant case, is the letter dated August 11, 1969 from Headquarters, Air Reserve Personnel Center, to Lieutenant Colonel William P. Cassedy, USAFR Retired, an official notification under 10 U.S.C. 1331(d) which invokes the provisions of 10 U.S.C. 1406? *yes*

"c. If the answer to b, above, is affirmative, is Lieutenant Colonel William P. Cassedy entitled to retired pay under Sections 1331 and 1401 of Title 10, as a result of the invocation of the provisions of Section 1406, notwithstanding the fact that he has only 14 years, 2 months and 3 days of satisfactory service under Section 1331. * * * *yes*

Section 1331(a) of title 10--which was derived from Title III of the act of June 29, 1948, ch. 708, 62 Stat. 1087-1091--provides in pertinent part:

"(a) * * * a person is entitled, upon application, to retired pay computed under section 1401 of this title, if--

B-193561

"(1) he is at least 60 years of age;

"(2) he has performed at least 20 years of service computed under section 1332 of this title;

"(3) he performed the last eight years of qualifying service while a member of any category named in section 1332(a)(1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve; and

"(4) he is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve."

In 1966, subsection (d) was added to section 1331 of title 10, by section 1 of the act of October 14, 1966, Public Law 89-652, 80 Stat. 902, which reads as follows:

"(d) The Secretary concerned shall provide for notifying each person who has completed the years of service required for eligibility for retired pay under this chapter. The notice must be sent, in writing, to the person concerned within one year after he has completed that service."

The same law also added a new section 1406 to chapter 71 of title 10, which provides in pertinent part:

"§ 1406. Limitations on revocation of retired pay
After a person * * * has been notified in accordance with section 1331(d) of this title that he has completed the years of service required for eligibility for retired pay under chapter 67 of this title, the person's eligibility for retired pay may not be denied or revoked on the basis of any error, miscalculation, misinformation, or administrative determination of years of service performed as required by section 1331(a)(2) of this title, unless it resulted directly from the fraud or misrepresentation of the person. The number of years of creditable service upon which retired pay is computed may be

B-193561

adjusted to correct any error, miscalculation, mis-information, or administrative determination and when such a correction is made the person is entitled to retired pay in accordance with the number of years of creditable service, as corrected, from the date he is granted retired pay."

The Navy Department in its report of June 6, 1966, on the need for H. R. 5297, which became Public Law 89-652/stated that the complicated method of computation of service creditable for retirement under chapter 67:

"* * * usually leaves the reservist in serious doubt as to whether he has in fact passed the 20-year milestone. The services, by a variety of administrative procedures, have attempted to keep the reservist informed of his progress and his completion of the years of service required. In some cases, however, reservists have received erroneous information or have miscomputed their years of service and in reliance thereon have reduced their Reserve participation only to find upon reaching retirement age that they have not in fact met the 20 years of service requirement. When the errors are not discovered until at or near retirement age the reservists no longer have time to renew their participation and acquire the necessary additional service." Page 3 of H. Rept. No. 1689, and page 2 of S. Rept. No. 1693, 89th Cong., 2nd. Sess.

The primary purpose of Public Law 89-652, supra, as shown by its legislative history, was to mandate that every person who has completed 20 years of creditable service be notified in writing of that fact as provided for by the Secretary concerned, within 1 year following completion of such service. And, if administrative error is made, in the absence of fraud or misrepresentation on his part, he may not be denied chapter 67 retirement benefits at age 60, if all other conditions for qualification have been met.

Based on the Secretarial notice requirement in 10 U. S. C. 1331(d), Department of Defense Directive 1340.7 (March 29, 1967) was issued setting forth the notification policy to be followed by the services.

B-193561

Basically, that directive reiterated the provisions of 10 U. S. C. 1331, as amended, and the newly enacted 10 U. S. C. 1406. Additionally, it makes provision for the format of the notification, and makes the following statements regarding the purpose for its use:

- "F. In view of the restrictions on denial or revocation of eligibility for retired pay * * * suitable controls and procedures shall be established to avoid errors, miscalculations, misinformation, and erroneous administrative determinations.
- "G. The notification shall be issued in the name of an official having general responsibility for administering the controls and procedures referred to in F. , above, and shall be authenticated by the handwritten signature of the officer or employee immediately responsible for the determination of the eligibility of the member being notified."

The reported facts show that Colonel Cassedy, by orders dated August 1, 1969, was transferred from the Ready Reserve to the Retired Reserve in the grade of lieutenant colonel, effective that date. He did not receive a letter in the format prescribed in Directive 1340.7, but by letter dated August 11, 1969, from Headquarters Air Reserve Personnel Center, signed by the Director, Personnel Actions, enclosing those orders, he was advised in part as follows:

"You have fulfilled the service requirements for eligibility to receive retirement pay when you reach 60 years of age. Approximately six months before your 60th birthday we will furnish you further information and forms in order that you may apply for this pay benefit."

The pertinent language of 10 U. S. C. 1331(d) is that the Secretary "shall provide for notifying each person" and the "notice must be sent, in writing * * * within one year." Section 1406 provides that after a person "has been notified in accordance with section 1331(d) * * * the person's eligibility for retired pay may not be denied or revoked on the basis of any error."

B-193561

It is evident that the law requires that the member be notified. However, it contains nothing which requires the notice to be in any specific form, only that the notice inform the member of the fact of completion of years of service for chapter 67 retirement purposes. Implicit in that requirement is that the words used in the notice are such that a reasonable person would understand their import. Considering the purpose for the law, it is our view that if an individual receives a written communication from one who has apparent responsibility for the issuance of such notice and the notice uses words advising the recipient that he has completed the service requirements for eligibility for retired pay at age 60, such written notice satisfies the requirements of 10 U.S.C. 1331(d), so as to invoke the provisions of 10 U.S.C. 1406. The August 11, 1969 letter to Colonel Cassedy meets these criteria. Accordingly, questions a. and b. are answered in the affirmative.

Air Force correspondence with Colonel Cassedy, before the erroneous letter of August 11, 1969, apparently advised him that he would not be able to qualify for retirement under chapter 67 of title 10. In effect, question c. asks whether such prior knowledge on his part would negate the August 11, 1969 letter and preclude him from receiving benefits at age 60.

The file shows generally that Colonel Cassedy performed creditable service as an enlisted member with the Mississippi National Guard in 1934. In 1942 he enlisted in the United States Army and served on active duty in that capacity and as a Reserve officer until 1945, when he was released. He remained assigned to the Officer Reserve Corps until 1949 when he was transferred to the Inactive Air Reserve and was ineligible to earn service retirement points. In 1953, he was returned to an active status, and while he did participate between then and 1956, he apparently did not earn enough points on an annual basis to be credited with any years of satisfactory service. It further appears that between 1956 and 1962 he did not participate in the Reserve program even though he was in an active status. On April 20, 1962, he was again assigned to an inactive status.

During the period from 1962 to 1968, Colonel Cassedy and the Air Reserve Personnel Center corresponded regarding his Reserve status and qualification for retirement pay. By letter dated July 25, 1962, he was apparently notified that he had a mandatory separation

B-193561

date of November 7, 1970, and even if he succeeded in qualifying for satisfactory years of service from April 20, 1962, to November 7, 1970, the maximum number of creditable years of service he could achieve would be 16 years, 8 months and 2 days.

In April 1962, the member, having previously received notification of assignment to the inactive Reserve, was granted a waiver for the purpose of assignment to the Judge Advocate General's Department of the Army and served in that organization from April 20, 1962, until April 19, 1965. It is reported that at the completion of that service he had to his credit, 11 years, 2 months and 3 days of satisfactory service for retirement qualification purposes.

By letter dated May 9, 1966, the member was again notified of his inability to complete the service requirements prior to his mandatory separation date in 1970 to make him eligible for retired pay at age 60. In letters to him dated September 17 and October 7, 1968, which apparently were in response to an earlier inquiry by him concerning the possibility of his promotion to the grade of colonel, he was advised that he would be ineligible for such a promotion when the colonel selection board next convened in 1970, because that board would only consider those with a promotion service date prior to June 30, 1966, and his service date was July 30, 1966. He was also advised that the unit vacancy board would be convened in November 1970, but not until after he was mandatorily separated on November 6, 1970. He was also apparently told in the same correspondence that on that date he would have a choice of either assignment to the Retired Reserve or complete separation from his Reserve status. On July 17, 1969, the Air Reserve Personnel Center received an application from him for transfer to the Retired Reserve "without pay" to be effective August 1, 1969. It is indicated that Colonel Cassidy's annotations on that application show that he was fully aware of the fact that the assignment to the Retired Reserve was without eligibility for retired pay at age 60. At that point, he had only completed 14 years, 2 months and 3 days of satisfactory service.

→Based on the foregoing, it is contended that in spite of the fact that the member received the letter of August 11, 1969, containing erroneous retirement information, he was well aware that he was not eligible for retired pay at age 60.

B-193561

In rejoinder, the member made two principle assertions. First, when he received the August 11, 1969 letter, he thought that there had been a correction of an earlier mistake regarding the creditability of certain of the years of service already performed. Second, under the law and regulations in effect in 1969 he could have secured additional years of service in grade with the Selective Service after transfer to the Retired Reserve until his 60th birthday; that there was sufficient time between August 1969 and December 20, 1975 (his 60th birthday), to acquire all of the additional years of creditable service needed for retirement eligibility even though it would have inconvenienced him, but he refrained from doing so because of the August 11, 1969 letter.

The pertinent language in 10 U.S.C. 1406 permitting denial or revocation of an erroneous notification of eligibility, is when "it resulted directly from the fraud or misrepresentation of the person." The term "fraud" is defined as the "intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right" and "misrepresentation" is defined as giving "a false or misleading representation of". Webster's Seventh New Collegiate Dictionary (1963).

The clear connotation of those terms are that they require a positive act on the part of an individual with intent to achieve an improper end or gain unjust enrichment. The points raised concerning the information provided Colonel Cassedy over several years' time suggest that he may have had reasonable grounds to believe that he did not have sufficient time to qualify for retirement pay as of the date he was placed in the Retired Reserve and possibly should have had doubts as to the propriety of the August 11, 1969 notice. However, such arguments fall far short of the criteria stated in the law. There is no evidence of record to show that the member in any way induced or caused his record of creditable service, which record was maintained by the Air Force, to be altered or confused or the erroneous statement concerning retirement eligibility to be introduced into the letter sent to him. That is, there is no showing of "fraud or misrepresentation" on his part. Therefore, it is our view that the error made was purely administrative and the resulting situation in this case was of the type which the Congress sought to prevent by enactment of 10 U.S.C. 1406. Accordingly, question c. is

B-193561

answered in the affirmative, subject, of course, to the adjustment limitation authorized in the last sentence of 10 U. S. C. 1406.


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of the United States