



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Master Sergeant Henry W. Schuchardt, USAR (Retired)

File: B-274195

Date: October 8, 1996

DIGEST

1. A reservist, subject to 10 U.S.C. § 1331(c), who had reached age 60 and had been notified that he had completed 20 years of service, but who did not meet the wartime active duty requirement, was not required to be further notified by the service that he was eligible to retire when 10 U.S.C. § 1331(c) was later amended to include his active duty period as a qualifying wartime period. The statutory duty to notify under 10 U.S.C. § 1331(d) only pertains to the years of service requirement and cannot be extended to require notification of qualifying wartime service.

2. A reservist who had reached age 60 was notified at the time that he had completed the requisite 20 years of service for non-Regular retired pay. However, he was not fully eligible for retired pay then because he did not have the necessary wartime service required by 10 U.S.C. § 1331(c). He later first became fully qualified for retired pay when 10 U.S.C. § 1331(c) was later amended to include the period of active duty he performed. In these circumstances, the reservist's claim for retired pay accrued at that time, and therefore, his claim for retroactive retired pay is limited to the period beginning with the sixth antecedent anniversary of the date when he filed application for that pay. Cf. Captain James E. Finigan, 62 Comp. Gen. 227 (1983).

DECISION

This decision responds to a request from the Defense Finance and Accounting Service (DFAS).¹ The question asked is whether Master Sergeant Henry W. Schuchardt, USAR (Retired), is entitled to retired pay for any period before May 6, 1988, the sixth antecedent anniversary of the date he applied for non-Regular retired

¹This request has been assigned control number DFAS 96-4-M.

pay after he qualified for that pay.² As discussed below, Sergeant Schuchardt is not entitled to retired pay for any period before that date.

Sergeant Schuchardt applied to the Army both in 1970 and in 1978 for retired pay based on his service in the Army Reserve. Although Sergeant Schuchardt had been notified that he had completed the necessary 20-year service requirement mandated by 10 U.S.C. § 1331(a), and reached age 60 on October 1, 1970, the Army rejected his applications for retired pay benefits on November 17, 1970, and again on November 27, 1978. The reason was that he had been a member of a Reserve component before August 16, 1945, and did not perform active duty during World Wars I or II, or during the Korean Conflict, as required by 10 U.S.C. § 1331(c).

Effective October 1, 1983, 10 U.S.C. § 1331(c) was amended by section 924(a) of Title IX, Pub. L. No. 98-94, Sept. 24, 1983, 97 Stat. 644, to add two additional active service periods during which a member, such as Sergeant Schuchardt, could have performed active duty and qualified for non-Regular retired pay. They were the periods of the Berlin crisis and the Vietnam era. Since Sergeant Schuchardt performed active duty during the Vietnam era, he first became fully eligible for non-Regular retired pay on October 1, 1983. However, he did not reapply to the Army for that pay until May 6, 1994. Following a further review of his service record to insure that he had performed active duty during the Vietnam era the Army advised him on February 27, 1995, that he was entitled to retired pay. As a result, he received retired pay for the period beginning on May 6, 1988, the sixth antecedent anniversary of the date he applied for retired pay after he became fully eligible for that pay.

Sergeant Schuchardt believes that he is entitled to retired pay for the period prior to May 6, 1988. The question raised by DFAS is whether the Army's determination is correct. Specifically, DFAS asks whether the Army's determination of February 27, 1995, that Sergeant Schuchardt is entitled to retired pay was a condition precedent to the accrual of Sergeant Schuchardt's entitlement to retroactive retired pay, as it was in the case of the 20-year service requirement at issue in our decision Captain James E. Finigan, USAR, 62 Comp. Gen. 227 (1983),

²The provisions governing non-Regular retired pay found in chapter 67 of title 10, United States Code (10 U.S.C. §§ 1331-1337, et seq.) and 10 U.S.C. § 1406 (amended and redesignated as 10 U.S.C. § 1338 by Title I, section 104(a) of Pub. L. No. 99-348, July 1, 1986, 100 Stat. 686), have been transferred to chapter 1223 of title 10, United States Code and renumbered as 10 U.S.C. §§ 12731-12738, by Div. A, Title XVI, section 1662(j)(1) of Pub. L. No. 103-337, Oct. 5, 1994, 108 Stat. 2998, 3005. Since all of the controlling events in the present case arose prior to enactment of Pub. L. No. 103-337, all references will be to the former U.S. Code provisions.

thus allowing payment of retired pay retroactively to October 1, 1983, without regard to the 6-year barring act at 31 U.S.C. § 3702(b) (1994).

OPINION

The age and service requirements applicable to retired pay for non-Regular service are contained in 10 U.S.C. § 1331. Subsection 1331(a) provides that, except as provided in subsection 1331(c) thereof, a person is entitled, on application, to retired pay if that person is: (1) at least 60 years of age; (2) has performed at least 20 years of service computed under 10 U.S.C. § 1332; (3) has performed at least 8 years of qualifying service as a member of any of the categories set forth in 10 U.S.C. § 1332(a)(1); and (4) is not entitled to retired pay under any other provision of law from an armed force. In addition, 10 U.S.C. § 1331(d) provides that the Secretary of the service concerned shall notify, in writing, each person who has completed the years of service required for eligibility for retired pay within 1 year after the person completes that service. Finally, 10 U.S.C. § 1338 provides that, absent fraud or misrepresentation by the reservist, a reservist's claim for retired pay cannot be denied or revoked based on an error in the calculation of years of service performed after the reservist has been notified of that eligibility according to 10 U.S.C. § 1331(d).

The legislative history of 10 U.S.C. § 1331(d) shows that the notice requirement was enacted due to concern that the complicated method of computing creditable years of service for non-Regular retirement had often left reservists in serious doubt about whether they had, in fact, passed the 20-year milestone. Rather than requiring each reservist to assume responsibility for that calculation, the provision, which was added by section 1 of Pub. L. No. 89-652, Oct. 14, 1966, 80 Stat. 902, placed the burden on the services to make that determination and notify reservists when they have met the years of service requirement.³

In Finigan, *supra*, we considered the effect of the barring act on a member's administrative claim for non-Regular retired pay following delayed notification by the service that he performed the requisite 20 years of service. We held that the notification by the service to the member of that fact constituted the accrual of the member's claim for retired pay.

Our holding in Finigan was based on Garcia v. United States, 617 F.2d 218 (Ct. Cl. 1980). In Garcia, the Court of Claims addressed the issue of whether an Army reservist's claim for non-Regular retired pay following delayed notification of satisfactory completion of his 20 years of service was limited by the court's 6-year statute of limitations (28 U.S.C. § 2501 (1994)), or whether his claim accrued only

³Captain James E. Finigan, USAR, 62 Comp. Gen. 227, *supra*, at 229.

when the Army notified him that he had completed the necessary 20 years of service. The court held that 10 U.S.C. § 1331(d), created a statutory condition precedent to the accrual of a cause of action. This condition, the court concluded, was satisfied by the Department of Defense determination and notification to the member that he had met the years of service requirement, and thus, the provisions of 28 U.S.C. § 2501 would not limit his recovery. *Id.* at 222. The same reasoning was applied in Finigan to decide the accrual of his administrative claim for retired pay for the purposes of the barring act.

Clearly, the only statutory duty imposed on the services under 10 U.S.C. § 1331(d) is to notify a member that he has completed the 20 years of service required for non-Regular retired pay eligibility. There is nothing in that provision or any other provision that imposes a similar duty regarding member compliance with the wartime active duty requirement of subsection 1331(c). Absent such a statutory duty, the years of service notification requirement cannot be extended to require notification of wartime active service. Therefore, neither the holding in Garcia, nor in Finigan, apply to his situation.

DFAS next asks whether a service's determination of wartime service, in effect, is a condition precedent to the accrual of a reservist's claim for retired pay, even though there is no statutory notice requirement. An agency determination is a condition precedent to the accrual of a claim only when it is required by statute. Finigan, *supra*, at 230. Other than the specific statutory duty imposed on the Army by 10 U.S.C. 1331(d), the burden of showing that the individual has met the other qualifying conditions entitling him to retired pay remains with the individual. Ordinarily, that evidence of entitlement or confirmation of that fact can be found in government records. Thus, when an individual, such as Sergeant Schuchardt, files an application for retired pay, the action by the service to review his records is done merely to confirm the individual's entitlement, or as it happened to Sergeant Schuchardt in 1970 and 1978, inform him that he was not entitled to retired pay. Since he had previously met all requirements other than wartime service, once his Vietnam era active duty qualified as wartime service on October 1, 1983, he immediately became eligible for retired pay, and could have applied for it, starting then.

Accordingly, Sergeant Schuchardt's claim for non-Regular retired pay based on his May 6, 1994, application is subject to the 6-year barring act. He is thus entitled to retired pay beginning May 6, 1988, the sixth antecedent anniversary of the date he applied for that pay, through the present.⁴

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

⁴Cf. Lieutenant Colonel Oran S. Emrich, USAFR, B-218902, Aug. 1, 1985.