October 28, 1997

In Re:

[Redacted]

Claimant

Claims Case No. 97040301

CLAIMS APPEALS BOARD DECISION

DIGEST

An Air Force officer was selected by a Selective Early Retirement Board (SERB) for retirement effective January 1, 1994. Retirement after January 2, 1994, would have entitled him to retired pay with over 26 years of service instead of over 24 years. In December 1993, he obtained a Temporary Restraining Order (TRO) in United States District Court to delay his retirement and was allowed to remain on active duty until February 19, 1994. In February, the TRO was dissolved as improperly issued, and the Air Force reinstated the January 1 retirement date. Under 10 U.S.C. § 638, once he was selected and the Secretary approved the SERB's action, his retirement was required as of January 1, 1994. Therefore, the active duty he performed in January and February cannot be counted toward retirement. For the period of his active duty in 1994, he is entitled to either the pay he received for that period or his retired pay, whichever is more beneficial to him. Subsequently, he is entitled to retired pay based on over 24 years of service.

DECISION

This is in response to an appeal of the General Accounting Office's (GAO) Settlement Certificate Z-2869438, May 28, 1996, which denied an Air Force officer's claim for active duty pay for the period between January 1, 1994, and February 18, 1994, and subsequently retired pay as a colonel with over 26 years of active service. Pursuant to Public Law No. 104-316, October 19, 1996, 31 U.S.C. § 3702, which provides for the settlement of claims against the United States, was amended to provide that the Secretary of Defense shall settle claims involving uniformed service members' pay, allowances, travel, transportation, retired pay, and survivor benefits. The Secretary further delegated the authority to this Office.

Background

The member entered active duty on January 2, 1968. He was selected for early retirement by a Selective Early Retirement Board (SERB). Under Special Orders No. AL-000050, dated October 12, 1993, his last day of active duty was December 31, 1993, with retirement effective January 1, 1994. Thus, he retired with 25 years, 11 months, and 29 days of active service--short of the time necessary for the over-26 year pay step. In order to delay his retirement, the member's attorney filed a petition in late December 1993 in United States District Court for a Temporary Restraining Order (TRO). At the same time, he filed a petition with the Air Force Board for Correction of Military Records (Correction Board) to reverse the SERB's action. On December 30, 1993, the court issued a TRO to prevent his immediate retirement. In response to the TRO, the Air Force allowed him to continue working. On February 3, 1994, under Special Orders No. AL-000378, his retirement orders were rescinded pending legal review. After a hearing, the District Court issued an order dated February 4, 1994, which dissolved the TRO as improperly issued because the member had not exhausted his administrative remedies. The court order stated that the member was retired effective January 1, 1994, although the member's retirement date was deleted from an amended court order dated February 8, 1994. Under Special Orders No. AL-000422, dated February 18, 1994, he was relieved from duty and retired effective January 1, 1994. The record indicates that he received casual and partial pay for the period from January 1, through February 18, 1994. Because of this service in 1994, he claims retired pay as a colonel with over 26 years of active duty.

One of the member's arguments before the Correction Board was that his record before the SERB indicated that he

would retire with 26 years, 00 months, and 00 days of service (instead of 25 years, 11 months, and 29 days) and that they selected him for retirement in the belief that he would receive the higher retired pay he now claims. In a document dated December 22, 1994, the Correction Board acted to clarify his record before the SERB to indicate that if he were retired as of December 31, 1993, he would have only 25 years, 11 months, and 29 days of service. The Correction Board directed that the SERB reconsider his retirement with that piece of information and report any change in its determination to the Correction Board. We have been informally advised that the SERB did not change its determination and that the Correction Board took no further corrective action.

Through his attorney, the member argues that he should receive credit for retirement purposes for the days of active duty he served in January and February of 1994 and that it was improper for the Air Force to retire him (in his view "retroactively") effective January 1, 1994, without such credit. He contends that the judge who dissolved the TRO did so in the belief that the additional days he served in 1994 entitled him to the higher rate of retired pay he sought.

Discussion

In 1980, Congress enacted 10 U.S.C. § 638 to allow, among others, colonels with over four years in that grade to be considered for early retirement if they were not selected for promotion. See Pub. L. No. 96-513, Title I, § 105, 94 Stat. 2864, *as amended*. In 1990, enhanced authority for selective early reirement was enacted as 10 U.S.C. § 638a, to include, among others, colonels with less than four years in grade but not less than two years. See Pub.L. No. 101-510, Div. A, Title V, § 521(a)(1), 104 Stat. 1559, *as amended.* A colonel selected for retirement under 10 U.S.C. §§ 638 or 638a is to be retired not later than the first day of the seventh month beginning after the month in which the Secretary approves the SERB's report. See 10 U.S.C. 638(b)(1)(A).

It is our view that the member was properly retired under a fully executed retirement order as a colonel with over 24 years of service. There is no indication that the order under which he was retired was not regular and valid, nor has there been a showing of fraud, mistake of law, mathematical miscalculation, or substantial new evidence of error. Therefore, the order is final and cannot be reopened. See Rear Admiral Grace M. Hopper, USNR, 65 Comp. Gen. 774, 776 (1986).[(1)] The Air Force's rescission of the order on February 3, 1994, pending legal review, was issued only to comply with the TRO. When the TRO was dissolved, the reinstatement of the December 31, 1993, retirement date was proper.[(2)] Furthermore, once he was selected by the SERB for early retirement, his retirement was required no later than the first day of the seventh month beginning after the month in which the Secretary of the Air Force approved the SERB results. She acted in June 1993, and his retirement was therefore required by January 1, 1994. See 10 U.S.C. § 638(b)(1)(A).[(3)]

The court order of February 4, 1994, states on its face that it was dissolved as improperly issued because the member had failed to exhaust his administrative remedies. In our view this reflected the fact that at the same time the member had sought the TRO, he had filed a petition before the Correction Board.[(4)] The Correction Board could have granted the relief the member sought administratively. The judge made no mention of a later retirement date, and it is likely that the court order was amended to delete the retirement date because the matter was still before the Correction Board.

As discussed above, it is our view that the member was properly retired as a colonel with over 24 years of service. We note, however, that the decision to retire a member and the timing of such an action are administrative matters within the discretion of his Service. This Office generally will not question a Service's actions in administrative matters within its discretion unless the Service violates a statute or regulation or acts in an arbitrary or capricious way. See Senior Chief Petty Officer John J. Chiumento, USN (Retired), B-244598, Oct. 2, 1991. See also Jamison v. Stetson, 471 F. Supp. 48 (N.D.N.Y. 1978). Moreover, in the situation before us, the member sought correction of his records by the Correction Board to indicate that he retired with over 26 years of service. While the Correction Board clarified his record and directed the SERB to reconsider its determination, the Correction Board declined to change his retirement date to give him credit for two extra years. Where the Correction Board has denied relief, its action is binding on this Office, and we cannot overturn it. See Lieutenant Commander George K. Huff, USN (Retired), 55 Comp. Gen. 961 (1976).

It is agreed that the member performed active duty from January 1, through February 18, 1994. However, that service cannot be counted toward retirement, since the member's retirement was required on January 1, 1994, once all of the

requirements of 10 U.S.C. § 638a(b)(2)(B) had been met.[(5)] See 44 Comp. Gen. 284 (1964). That decision involved a Reservist whose birth certificate was revised to indicate that he was four years older than was previously known. The correction was made when the member was already retired. As a result of the change, the member was found to have served after the mandatory retirement age of 60 for Reservists. The Comptroller General said that his service after age 60 was performed "at best in a *de facto* status" and that he was therefore entitled only to keep the money he had already been paid for that service. See also 43 Comp. Gen. 742 (1964).

We note, however, that the member's entitlement to retired pay began January 1, 1994. He cannot receive both active duty and retired pay for the period in question, but may retain the one which is the more advantageous for him.

Conclusion

The work the member performed after December 31, 1993, may not be counted toward his retirement, since his retirement as of January 1, 1994 was required. He may keep the pay he received for that period from January 1, through February 18, 1994, or his retired pay for the same period, whichever is more beneficial for him. After that period, he is entitled to retired pay as a colonel with over 24 years of service.

_/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_/s/_____

Christine M. Kopocis

Member, Claims Appeals Board

_/s/_____

Jean E. Smallin

Member, Claims Appeals Board

1. In that decision, a member who was retired was recalled to active duty. The Comptroller General allowed her retired pay to be recalculated under 10 U.S.C. § 1402(a) to reflect at least 19 years of further service. The decision states the rule against reopening a retirement order after the fact. In such a situation, the only way that service after retirement can increase retired pay is through recalculation to include the additional service. In the situation before us, the member is not entitled to such a recalculation because in our view he was not recalled to service, but rather was allowed to remain on duty in compliance with the TRO.

2. The case of Pauls v. Seamans, 468 F. 2d 361 (1st Cir. 1972), is analogous to the situation before us. A Reservist with less than 18 years of service was to be discharged after he was passed over for promotion. He obtained a TRO and a preliminary injunction which were later dissolved as improper; but by the time of the dissolution, the member had passed the 18-year mark and therefore claimed "sanctuary." (Reservists who have 18 years of service are generally allowed to remain in the Service until they have 20 years and can then retire). In Pauls the court did not allow the extra time which the member accumulated on account of the TRO to count toward "sanctuary," and the member was discharged. See also Fairbank v. Brown, 506 F. Supp. 336 (D.D.C. 1980).

3. We are not persuaded by the attorney's argument that the Air Force's enforcement of this required retirement date was arbitrary and capricious, since the enforcement was in accordance with the statute and apparently covered all those officers selected by the SERB in 1993 for retirement.

4. A TRO is an extraordinary remedy which is equitable in nature. It is generally not issued where the plaintiff has an

adequate remedy at law. The plaintiff generally must not only have initiated the prescribed administrative remedies, but must have pursued them to their final outcome before seeking an equitable remedy. See Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 (1947); Lennon v. Richardson, 378 F. Supp. 39 (S.D.N.Y. 1974).

5. While the member's attorney disputes that his retirement was required as of that date, 10 U.S.C. § 638(b)(1)(A) clearly states that he was to be retired no later than the first day of the seventh month beginning after the month in which the Secretary approved the SERB's report. The other statutes which the attorney mentions as providing other dates do not apply to the member.