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

IN REPLY REFER TO B-170098

April 20, 1979

The Honorable Daniel K. Inouye
United States Senate

Dear Senator Inouye:

Further reference is made to your letter dated December 13, 1978, enclosing for our consideration and report, a letter dated December 7, 1978, to you, from Mr. Abraham Tabakman, 91-569 Pupu Street, Ewa Beach, Hawaii 96700, concerning the reduction in his Civil Service annuity he will experience at age 62. In this regard he refers to our decision B-170098, August 11, 1970 (50 Comp. Gen. 80).

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According to his letter, Mr. Tabakman retired from the United States Air Force effective September 30, 1964, after 20 years of active service. He was thereafter employed in a civilian position in the Federal Government for 10 years and then retired from the Civil Service system at age 55. As stated by Mr. Tabakman, in order for him to achieve a Civil Service retirement status, he had to waive receipt of military retired pay and combine his military service time with his civilian time in order to meet the minimum statutory time required for immediate retirement at age 55--30 years. 5 U.S.C. 8336(a)(1976).

Mr. Tabakman states that subsequent to his retirement from the Civil Service, he has been informed that when he reaches age 62, he will become eligible for Social Security because of certain of his years of military service (1957-1964), which years would be subtracted from the total creditable years used for Civil Service retirement and his annuity recomputed based on 22 years rather than 30 years of creditable service. He contends that his Social Security entitlement for those 8 years would be $97 a month. However, he points out that on recomputation, his Civil Service annuity will be reduced by $303, for a net monthly loss of $206. He further points out that since his spouse's Civil Service survivor annuity is based on his annuity, it would also suffer a diminution.

Mr. Tabakman expresses the view that the reason that he will suffer that financial loss is due to our decision 50 Comp. Gen. 80, supra, which he believes should be "updated". In order to insure that he will neither receive a double benefit nor suffer a financial loss, he suggests generally, (1) that all retired military members

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be permitted to revoke their military retired pay waiver and recompute their Civil Service annuity on one of the other bases authorized in law when they meet the other age and service requirements, or (2) that all retired military members be permitted to exercise the option of applying or not applying for Social Security at age 62. He suggests that if they choose not to apply for Social Security, their Civil Service annuity should continue without diminishment, pointing out that at present the reduction is mandatory regardless as to whether Social Security is received.

In decision 50 Comp. Gen. 80, supra, copy enclosed, we considered the legal effect of the action by an individual, entitled to military retired pay, who waives that pay in order to use his military service time for Civil Service retirement purposes. A distinction was made between an individual who had the minimum age and civilian service for Civil Service retirement without using his military service, and an individual who had to use his military service time in order to establish basic eligibility for a Civil Service annuity.

We concluded that where an individual waives miltiary retired pay in order to simply increase the amount of his Civil Service annuity after he has independently established his right to the annuity, he may later withdraw that military retired pay waiver, reestablish his military retired pay payments, and receive a reduced Civil Service annuity based on his actual civilian service. In contrast, we held that where an individual waives military retired pay for the purpose of establishing basic eligibility for a Civil Service annuity prior to his attainment of the otherwise requisite civilian years of service for his age, waiver of his military retired pay may not be withdrawn, since such action, if permitted, would allow him to receive military retired pay and the continuation of a Civil Service annuity on a basis upon which he is no longer qualified.

In decision 52 Comp. Gen. 429 (1973), copy enclosed, we considered the ruling in 50 Comp. Gen. 80, in the context of the question whether a Civil Service annuitant who waived military retired pay to use that time to qualify for an immediate annuity, and who with the passage of time attains an age which when combined with his civilian service, could possibily qualify for an annuity on a different basis. We held in that case that once an individual acquires the status of a Civil Service annuitant on a particular basis, e.g., age 55 and 30 years of service,

such status remains on that basis. We found no basis for concluding that Congress intended that the military service which was to be excluded for Social Security purposes in recomputing an annuity at age 62 may be used to reinstate an annuitant's military retired pay.

It is our view that those decisions are in accord with the law and are correct.

Under existing law as interpreted in our decisions, individuals who must use their military service to qualify for an immediate Civil Service annuity may not later, upon reaching an age at which they could qualify for a Civil Service annuity with less civilian service, revoke their waiver and receive both a civilian annuity and military retired pay. In certain cases, such as Mr. Tabakman's, this has the effect of reducing their total monthly payments when they become age 62. This is so because upon reaching that age their years of military service under Social Security after December 1956 are excluded from the computation of their Civil Service annuity which, although they are then entitled to Social Security, results in a net reduction of income.

The provision of law requiring that recomputation at age 62, which has been characterized as "Catch-62", is contained in 5 U.S.C. 8332(j), and provides in pertinent part:

> "(j) Notwithstanding any other provision of this section, military service * * * performed by an individual after December 1956 * * * shall be excluded in determining the aggregate period of service on which an annuity payable under this subchapter to the individual or to his widow or child is based, if the individual, widow, or child is entitled, or would on proper application be entitled, at the time of that determination, to monthly old-age or survivors benefits under section 402 of title 42 based on the individual's wages and self-employment income. If the military service * * * is not excluded by the preceding sentence, but on becoming 62 years of age, the individual or widow becomes entitled, or would on proper application be entitled, to the described benefits, the Civil Service Commission [now the Office of Personnel Management] shall redetermine the aggregate period of service on which the annuity is based, effective as of the first day of the month in which he or she becomes 62 years of age, so as to exclude that service. * * *"

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It is to be observed that those provisions mandate that regardless of whether the individual at age 62 receives Social Security, any Social Security years of military service are to be excluded from his years of service for Civil Service retirement purposes and his annuity is to be recomputed.

As the foregoing relates to Mr. Tabakman's situation, when he chose to retire from his civilian position at age 55, he had but 10 years of civilian service. Under the provisions of 5 U.S.C. 8336(a), in order for him to receive an immediate annuity at that age, he had to have 30 years of service. Under the provisions of 5 U.S.C. 8332(c) an individual may add his years of military service to his years of civilian service for the purpose of establishing eligibility for an annuity, but not if he is receiving retired pay for that military service. If, however, such individual waives receipt of military retired pay, then those years of service may be used. Mr. Tabakman chose to so do and according to his letter the combination of his military and civilian years of service was just enough to qualify him for an immediate annuity at age 55. Since there was no other basis upon which he could have retired from the Civil Service, his situation falls squarely within the provisions of 5 U.S.C. 8332(j).

In an effort to eliminate the financial impact of 5 U.S.C. 8332(j) Senate Bill No. 245 was introduced in the 95th Congress. If enacted, it would have permitted military service performed by a Federal employee or Member of Congress after 1956 to be credited under the Civil Service retirement program, even though such an individual was eligible for Social Security benefits. However, it would have required the Civil Service annuity to be offset by the amount of Social Security benefit attributable to that military service. In our report B-93671/B-94946, March 2, 1977, addressed to the Chairman, Committee on Governmental Affairs, United States Senate, we recommended disapproval of that bill. We stated in that report:

> "* * * When persons are in the military they contribute to social security, not to civil service retirement. If, through military service and other covered employment, an individual becomes eligible for social security benefits, we can see no reason why a portion of this employment should be used to earn civil service retirement benefits."

We note that a similar bill, S. 92, was introduced in the 96th Congress, on January 18, 1979. We have not been asked to report on that bill.

We trust this will serve the purpose of your inquiry and regret a more favorable reply cannot be made.

Sincerely youre,

R. F. Keller

Deputy Comptroller General
of the United States

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