

DOCUMENT RESUME

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Department of Defense Military Pay and Allowance Committee  
Action No. 532. B-187683. June 23, 1977. 7 pp.

Decision re: Department of Defense; by Robert F. Keller, Deputy  
Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation  
(305).

Contact: Office of the General Counsel: Military Personnel.

Budget Function: General Government: Central Personnel  
Management (905).

Organization Concerned: Department of Defense: Military Pay and  
Allowance Committee.

Authority: Department of Defense Appropriation Authorization Act  
of 1976, sec. 806 (P.L. 94-106; 89 Stat. 538-539; 10 U.S.C.  
1401a(f)). 26 U.S.C. 104(a)(4). 10 U.S.C. 6330. 10 U.S.C.  
1201. 121 Cong. Rec. S9928-S9933. 46 Comp. Gen. 392. 41  
Comp. Gen. 337. 41 Comp. Gen. 339. 40 Comp. Gen. 367. 40  
Comp. Gen. 39.

The Assistant Secretary of Defense (Comptroller) requested a decision on three questions concerning the computation of retired or retainer pay in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 532. The retainer pay of a former Navy or Marine Corps member who initially became entitled to that pay on or after January 1, 1971, may not be less than the retainer pay to which he would be entitled if transferred to the Fleet Reserve or Fleet Marine Corps Reserve at an earlier date. The pay of a Navy or Marine Corps enlisted member eligible for retired pay by reason of disability may be computed on the retainer pay formula pursuant 10 U.S.C. 6330. (Author/SC)

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**DECISION**



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

**FILE: B-187683**

**DATE: June 23, 1977**

**MATTER OF: Department of Defense Military Pay and Allowance Committee Action No. 532**

- DIGEST:**
- 1. Under 10 U. S. C. 1401a(f) (Supp. V, 1975) the retainer pay of a former Navy or Marine Corps member who initially became entitled to that pay on or after January 1, 1971, may not be less than the retainer pay to which he would be entitled if transferred to the Fleet Reserve or Fleet Marine Corps Reserve at an earlier date, adjusted to reflect applicable increases in such pay under that section even though transferred to Fleet Reserve or Fleet Marine Corps Reserve at a lower pay grade because of unsatisfactory performance of duty or as result of disciplinary action.**
  - 2. Where a Navy or Marine Corps enlisted member is eligible for retired pay by reason of disability, his pay may be computed on the retainer pay formula pursuant to 10 U. S. C. 6330 (1970), adjusted to reflect any applicable changes authorized by 10 U. S. C. 1401a (1970), if he was qualified for transfer to the Fleet Reserve or Fleet Marine Corps Reserve on a date earlier than his disability retirement the terms, "retired pay" and "retainer pay" being interchangeable for purposes of the computation authorized by 10 U. S. C. 1401a(f) (Supp. V, 1975).**
  - 3. Proper pay rate to be used in computing the amount of retired pay which, as compensation for injury or sickness, is not includable in gross income for tax purposes under**

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26 U. S. C. 104(a)(4) (1970) when a member is retired for disability but is entitled to compute retired pay on a nondisability formula pursuant to 10 U. S. C. 1401a(f) (Supp. V, 1975) is a matter for consideration by the Internal Revenue Service. However, it is the Comptroller General's view that although a disability retired member may compute his retired pay on some other formula pursuant to 10 U. S. C. 1401a(f), he still receives his retired pay by virtue of his disability retirement.

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller) requesting a decision on three questions concerning the computation of retired or retainer pay in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 532, enclosed with the letter. All three questions are asked in connection with computing retired or retainer pay under the provisions of 10 U. S. C. 1401a(f) (Supp. V, 1975).

The first question is:

"What pay grade is to be used in the computation of retainer pay in the case of a member who (a) was reduced prior to October 31, 1974, from the grade of E-8 to the grade of E-7 because of unsatisfactory performance of duty, or as a result of disciplinary action, and (b) was transferred pursuant to 10 U. S. C. 6330 to the Fleet or the Fleet Marine Corps Reserve on October 31, 1974, with entitlement to retainer pay from November 1, 1974, computed on the E-7 pay scale?"

In responding to this question we are presuming that the member was eligible for transfer to the Fleet Reserve prior to being reduced in grade from E-8 to E-7.

The discussion in the Committee Action suggests that a literal interpretation of 10 U. S. C. 1401a(f) would appear to permit such

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member to have his retainer pay computed on the basis of pay grade E-8, a grade he held while eligible for transfer to the Fleet Reserve. However, the Committee questions whether Congress intended to reward such a member by allowing him to compute his retainer pay based on the higher grade.

Subsection (f) was added as an amendment to 10 U.S.C. 1401a by section 806 of the Department of Defense Appropriation Authorization Act, 1976, Public Law 94-106, October 7, 1975, 89 Stat. 538-539. That subsection reads as follows:

"(f) Notwithstanding any other provision of law, the monthly retired or retainer pay of a member or a former member of an armed force who initially became entitled to that pay on or after January 1, 1971, may not be less than the monthly retired or retainer pay to which he would be entitled if he had become entitled to retired or retainer pay at an earlier date, adjusted to reflect any applicable increases in such pay under this section. In computing the amount of retired or retainer pay to which such a member would have been entitled on that earlier date, the computation shall, subject to subsection (e) of this section, be based on his grade, length of service, and the rate of basic pay applicable to him at that time. This subsection does not authorize any increase in the monthly retired or retainer pay to which a member was entitled for any period prior to the effective date of this subsection."

This provision was added as amendment No. 534 to S. 920, 94th Congress, during the floor debate when that bill was being considered by the full Senate. Its provisions were incorporated in H.R. 6674, 94th Congress, which became Public Law 94-106. There were no hearings and no committee reports on the proposal other than brief statements in the conference reports on H.R. 6674 which indicate that its adoption was to correct the so-called "retired pay inversion." The colloquy that took place in the Senate at the time of its adoption also indicates that this amendment had as its purpose the correction of the retired pay inversion problem created by the fact that for several years prior to the enactment of this provision upward adjustments of retired pay and retainer pay under 10 U.S.C. 1401a were occurring in greater amounts and at greater frequency than were increases in active military basic pay. The

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result being that many of those who remained on active duty after becoming eligible for retirement were losing considerable retirement pay. See 121 Cong. Rec. S9928-S9933 (daily ed. June 6, 1975). It appears that the provision was intended to provide an alternative method of calculating retired pay or retainer pay and not to change the basis upon which a member becomes entitled to such pay.

We have long followed the rule that in construing a statute, its words and phrases should be given their plain, ordinary and usual meaning unless a different purpose is clearly manifested in the statute or its legislative history. See 46 Comp. Gen. 392 (1966). Section 1401a(f) of title 10, United States Code, clearly states that the retired or retainer pay of a member who initially became entitled to that pay on or after January 1, 1971, may not be less than the monthly retired or retainer pay to which he would be entitled if he had become entitled to retired or retainer pay at an earlier date. It also specifically provides that in computing the amount of retired or retainer pay to which he would have been entitled on that earlier date, the computation shall, among other things, be based on his "grade" applicable to him at that time. No exception to this rule is expressed in the language of the statute and none can be found in the legislative history.

Therefore, concerning the first question, the monthly retainer pay of a former member of the Navy or Marine Corps who initially became entitled to that pay on or after January 1, 1971, may not be less than the monthly retainer pay to which he would be entitled if he had transferred to the Fleet Reserve or Fleet Marine Corps Reserve at an earlier date, adjusted to reflect any applicable increases in such pay under 10 U. S. C. 1401a. This is so even though he may actually be transferred to the Fleet Reserve or Fleet Marine Corps Reserve at a lower pay grade because of unsatisfactory performance of duty or as a result of disciplinary action than the pay grade he held when he became eligible for transfer to the Fleet Reserve or Fleet Marine Corps Reserve. Accordingly, the grade of E-8 may be used in computing the member's retainer pay in the situation described in the first question.

The second question asked is:

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**"Is an enlisted member who has been placed on the disability retired list entitled to a recomputation of pay using the provisions of 10 U. S. C. 6330 if (a) he was qualified for transfer to the Fleet or Fleet Marine Corps Reserve on a date prior to the date of his disability retirement and (b) the amount of retainer pay which he would have been entitled to receive had he been so transferred is greater than his present retired pay entitlement?"**

**An enlisted member of the Navy or Marine Corps who has completed 20 or more years of active service in the Armed Forces may be transferred, at his request, to the Fleet Reserve or Fleet Marine Corps Reserve and be paid retainer pay pursuant to 10 U. S. C. 6330 (1970). Such members are not retired or entitled to retired pay until they have completed 30 years of service either by combining years of active service and service while a member of the Fleet Reserve or Fleet Marine Corps Reserve or a total of 30 years' active service or is retired pursuant to the provisions of chapter 61 of title 10, United States Code, by reason of physical disability.**

**The discussion in the Committee Action points out that in 41 Comp. Gen. 337, 339 (1961), we held that "retainer pay" granted under 10 U. S. C. 6330 may not be considered as "retired pay" as that term is used in 10 U. S. C. 1401. Therefore, it was held that a member could not receive retainer pay so long as he remains on the temporary disability retired list by virtue of the provision in 10 U. S. C. 1401 which gives members entitled to disability retired pay the benefit of the most favorable method of computation of "retired pay."**

**The Committee Action discussion indicates that while the language of 10 U. S. C. 1401a(f) is not clear in this regard, if the reasoning applied in 41 Comp. Gen. 337 were applied to section 1401a(f) to prevent a member on a permanent retired list by reason of disability from computing his retired pay based on retainer pay entitlement, the purpose of section 1401a(f) as to such member would be defeated.**

**In the passage of 10 U. S. C. 1401a(f) it is considered that Congress did not intend to make a distinction between retired pay and retainer pay since to do so would defeat the intended purpose**

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of permitting a recalculation to prevent a member from suffering a reduction in retired or retainer pay by remaining on active duty after becoming eligible for retired or retainer pay. This view is supported by the language of section 1401a(f) which consistently uses the terms "retired or retainer pay." That is not the case in section 1401 to which 41 Comp. Gen. 337 applies. Therefore, it is our view that for the purposes of 10 U.S.C. 1401a(f) the terms "retired pay" and "retainer pay" are interchangeable. To hold otherwise would also mean that a member of the Army or Air Force or an officer of the Navy or Marine Corps under circumstances described in the submission who may be eligible for retired pay after 20 years' active service, would receive greater benefits than an enlisted member of the Navy or Marine Corps. It is not considered that Congress intended such an interpretation of the law.

Therefore in applying 10 U.S.C. 1401a(f) to an enlisted member of the Navy or Marine Corps who is eligible for retired pay by reason of disability, it is our view that he may compute his pay pursuant to the provisions of 10 U.S.C. 6330, if he was qualified for transfer to the Fleet Reserve or Fleet Marine Corps Reserve on a date earlier than his disability retirement and he otherwise meets the requirements of section 1401a(f). Assuming that to be the situation in question two, that question is answered in the affirmative.

The third question asked is:

"What is the proper rate of basic pay, if any, to be used in determining the amount of retired or retainer pay which is considered to be a pension, annuity, or similar allowance for personal injury, or sickness resulting from active service in the armed forces and therefore not included in the member's gross income under the provisions of 26 U.S.C. 104(a)(4)?"

The authority for the administration and enforcement of the Internal Revenue Code rests primarily with the Secretary of the Treasury; therefore, questions concerning the proper application of 26 U.S.C. 104(a)(4) (1970) such as set forth in the third question should be addressed to the Treasury Department, Internal Revenue Service. Compare 40 Comp. Gen. 387, 391 (1960). However, as we indicated above, it is our view that by the enactment of 10 U.S.C. 1401a(f) Congress did not intend to change the basis upon which a

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member becomes entitled to retired or retainer pay; it merely provided an alternative method of computation of such pay. Thus, it is our view that a member retired for disability, for example under 10 U. S. C. 1201 whose retired pay ordinarily would be computed under 10 U. S. C. 1401, but who is entitled to compute his pay on some other formula pursuant to 10 U. S. C. 1401a(f), still receives such retired pay by virtue of his disability retirement under section 1201.

*R. J. K. 1/14*  
Deputy Comptroller General  
of the United States