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DECISION



21212
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

Kidder

FILE: B-201424

DATE: March 19, 1982

MATTER OF: Chief Master Sergeant Alfred B. Arnold, USAFR, Retired

DIGEST: Section 9 of Public Law 96-343 amended the 20-year retirement statutes applicable to Regular Army and Air Force enlisted members (10 U.S.C. §§ 3914, 8914) to authorize reservists serving on active duty to retire under those provisions on the same basis as Regular enlisted members. An Air Force reservist who became eligible for retirement under the new provisions before he reached age 60, although not actually retired until after age 60, is prohibited from receiving greater retired pay under the statutes authorizing retired pay for non-Regulars upon reaching age 60, 10 U.S.C. §§ 1331-1337. Since the member was eligible for retirement under 10 U.S.C. § 8914, he could not qualify under the non-Regular retirement provisions which only apply if the member is not entitled to retired pay under any other provision of law.

This action is in response to a request from an Accounting and Finance Officer, Air Force Accounting and Finance Center, regarding the propriety of making payment on a voucher to Chief Master Sergeant Alfred B. Arnold, USAFR, Retired, for additional retired pay. The matter has been assigned submission number DO-AF-1378, by the Department of Defense Military Pay and Allowance Committee.

The question asked is whether an Air Force Reserve member who became entitled to retired pay under 10 U.S.C. § 8914 by virtue of a change in the law, may defer retirement until age 60 in order to receive greater retirement benefits under the non-Regular retirement provisions contained in chapter 67 of title 10, United States Code, 10 U.S.C. §§ 1331-1337. For the reasons stated below, we have determined that the member may not receive the greater benefits provided for non-Regular retirement.

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The basis upon which individuals may be retired from one of the Armed Forces and receive retired pay are matters strictly governed by law.

The purpose of 10 U.S.C. §§ 1331-1337, which was derived from Title III of the act of June 29, 1948, ch. 708, 62 Stat. 1087-1091, was to establish a new basis for payment of retired pay to members and former members of Reserve components who, while active in the Reserves over a long period of time, were otherwise ineligible for years of service retirement under other provisions of law. See 41 Comp. Gen. 458, 459 (1962). For a member of a Reserve component to become eligible to receive retired pay under these provisions, four conditions listed in 10 U.S.C. § 1331(a) must be met. First, the member must be age 60; second, he must have performed a minimum of 20 years of qualifying service, active and inactive; third, the last 8 years of his qualifying service must be service in specified components, other than as a member of a Regular component, the Fleet Reserve or the Fleet Marine Corps Reserve; and fourth, he must not be entitled, "under any other provision of law, to retired pay from an armed force * * *."

From 1948 until September 8, 1980, other than disability retirements or retirements under 10 U.S.C. §§ 1331-1337, enlisted members of Army and Air Force Reserve components were generally ineligible to retire under any other provision of law, regardless of the number of years of active service which they performed.

On September 8, 1980, Public Law 96-343, 94 Stat. 1123, was enacted. Section 9 of that act amended the provisions of 10 U.S.C. §§ 3914 and 8914, to permit Reserve enlisted members of the Army and Air Force serving on active duty on and after that date, who have at least 20, but less than 30, years of active service, to retire on the same basis as Regular enlisted members of those services. While the apparent purpose of the amendments to 10 U.S.C. §§ 3914 and 8914 was to permit Reserve enlisted members with at least 20 years of active service to receive retired pay beginning earlier than age 60, it seems that

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enactment of those amendments operated to Sergeant Arnold's disadvantage.

On September 8, 1980, Sergeant Arnold was on active duty in the Air Force, and had 22 years and 7 days of active service to his credit and, thus, became entitled to retire under 10 U.S.C. § 8914, as amended. On the day before enactment of the amendments, his only retirement rights were under 10 U.S.C. §§ 1331-1337, and it is understood that, except for reaching age 60, all of the statutory conditions were currently being met by him. On October 7, 1980, he became age 60, and but for the restrictive language contained in 10 U.S.C. 1331(a)(4) (entitlement to retired pay under another provision of law), he would have been entitled to retire under 10 U.S.C. §§ 1331-1337.

On October 31, 1980, Sergeant Arnold was retired under the provisions of 10 U.S.C. § 8914, with retired pay computed under Formula C of 10 U.S.C. § 8991. Based on that computation formula, his monthly retired pay effective November 1, 1980, was \$1,041.25, based on his 22 years of active service. In contrast, since he was then over age 60, if he could have retired under 10 U.S.C. §§ 1331-1337 and computed his retired pay under Formula 3 of 10 U.S.C. § 1401, his monthly retired pay, effective November 1, 1980, would be \$1,151.77, based on 24.44 years of service including certain creditable inactive service.

The language of 10 U.S.C. § 1331 has been construed to mean that the retirement benefits it authorizes are intended only for non-Regular members who are not covered by another retirement law before those benefits are fully vested. Such provisions were not intended to provide an alternate method of computing retired pay. See 41 Comp. Gen. 458 (1962) and 44 Comp. Gen. 124 (1964). See also 51 Comp. Gen. 91 (1971).

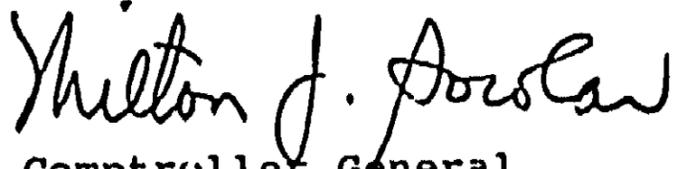
In Sergeant Arnold's case, on the day of enactment of Public Law 96-343, he apparently had not satisfied all the conditions for retirement stated in 10 U.S.C. § 1331(a) since he had not yet become age 60. Upon enactment of Public Law 96-343, he immediately became entitled to be

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retired under 10 U.S.C. § 8914. Therefore, by the time he reached age 60 the prohibition in 10 U.S.C. § 1331(a)(4) prevented him from qualifying for retired pay for non-Regular service under 10 U.S.C. § 1331 since he was then entitled to retired pay under another provision of law, 10 U.S.C. § 8914.

The fact that he was not actually retired until October 31, 1980, a date after he became age 60, would not alter this conclusion. Section 9(c) of Public Law 96-343, provides that the amendments made to 10 U.S.C. §§ 3914 and 8914 "shall apply with respect to retired pay payable for months beginning after the date of the enactment of this Act." No savings provision was included to cover someone in Sergeant Arnold's position.

Accordingly, payment may not be made on the voucher presented and it will be retained here.

for 
Comptroller General
of the United States