



The Comptroller General
of the United States

Washington, D.C. 20548

Form 9
PMT

Decision

Matter of: Major General Francis R. Gerard, USAFR

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DIGEST

Under 10 U.S.C. § 1331 members of the Reserve who reach age 60 and have the requisite years of creditable service may apply for and receive retired pay. Once a member has been granted retired pay under 10 U.S.C. § 1331, however, he or she may not be retained on active duty or in active service under 10 U.S.C. § 676.

DECISION

We have been asked to decide whether Major General Francis R. Gerard, a Reserve officer in the New Jersey Air National Guard, may receive retired pay under 10 U.S.C. § 1331 and still maintain an active status by virtue of being retained in an active status under 10 U.S.C. § 676. For the following reasons we conclude that a member who is retained in active service under 10 U.S.C. § 676 may not simultaneously receive retired pay under 10 U.S.C. § 1331.

BACKGROUND

Before reaching age 60 and thereby qualifying for retired pay under 10 U.S.C. § 1331, General Gerard was retained in active service by the Secretary of the Air Force under 10 U.S.C. § 676. General Gerard is of the view that, except for those periods when he performs active or inactive duty for which he receives pay, he is entitled to receive retired pay commencing when he attained age 60 and simultaneously continue to remain in active service. This view is based on our decisions which hold that a member's entitlement to retired pay under 10 U.S.C. § 1331 is not contingent on the member maintaining a Reserve status. It is argued that since a member need not maintain any status in order to receive retired pay for which he has qualified under 10 U.S.C. § 1331, the fact that he is retained in active service under 10 U.S.C. § 676 and continues to receive credit toward the computation of his retired pay should not preclude him from receiving retired pay at the same time. As additional support for this view it

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is noted that no specific provision of law precludes a member from receiving retired pay under 10 U.S.C. § 1331 and remaining in active service.

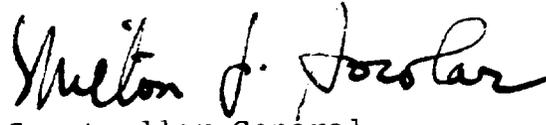
ANALYSIS

As a general rule once a member of the Reserve qualifies for retired pay by virtue of reaching age 60 and having at least 20 years of Federal service, any additional service he performs is not creditable, nor may such service be used in the computation of his retired pay under 10 U.S.C. § 1331. See B-149907, October 20, 1960. An exception to this general rule is provided by section 676 of title 10, which provides that a Reserve member who has qualified for retired pay may be retained with his consent on active duty or in active service and receive credit for his service for all purposes.

As noted above, we have held that once an individual qualifies for retired pay under 10 U.S.C. § 1331, he need not maintain a Reserve status to receive retired pay under that statute and its predecessor laws. See 48 Comp. Gen. 699 (1969). The rationale behind this holding is based on the congressional intent that a member of the Reserves who has performed the requisite years of service and is discharged from his Reserve component is still entitled to retired pay on attaining 60 years of age. 28 Comp. Gen. 510 (1949). Additionally, a Reserve member's entitlement to retired pay is not contingent on the member maintaining a specific status such as that required for members of the Regular components, since retired pay under 10 U.S.C. § 1331 is in the nature of a pension. See 48 Comp. Gen. 699, supra.

Thus, while a Reserve member may be in a retired status or no longer have any status and receive retired pay under 10 U.S.C. § 1331, it does not follow that a member receiving such retired pay may be retained in an active status and continue to receive credit for service performed subsequent to receiving retired pay. Without specific statutory authority, being in a status to receive retired pay and in an active status would be inherently contradictory. In this regard, 10 U.S.C. § 676, which authorizes members who have achieved the qualifications for retired pay under 10 U.S.C. § 1331 to remain in an active status, contemplates that they not leave active status, since it provides that they be "* * * retained on active duty or in service in a reserve component * * *." Grahl v. United States, 336 F.2d 199 (Ct. Cl. 1964); Navarro v. United States, 155 Ct. Cl. 717 (1961). As the court in Navarro observed, 10 U.S.C. § 676 "in effect distinguishes the concept of retention 'on duty' in service, implying a continuing relationship, to that of retirement from service, implying severance * * *." 155 Ct. Cl. at 720. Therefore, once an individual elects to receive retired pay under 10 U.S.C. § 1331, he no longer has an active status in which he can be retained.

In view of the foregoing, it is our view that once a reservist qualifies for and elects to receive retired pay under 10 U.S.C. § 1331, the authority of 10 U.S.C. § 676 would no longer operate. Accordingly, General Gerard may be retained in active service as a Reserve officer under the authority of 10 U.S.C. § 676, and service performed during this retention period is creditable for all purposes. However, if he chooses to receive retired pay, he may no longer hold "retained" status as provided for in 10 U.S.C. § 676.

for 
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