



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Captain Glenn L. Gaddis, USN (Retired)--  
**File:** Military Retired Pay--Tower Amendment  
 B-211159  
**Date:** February 19, 1988

## DIGEST

1. Military retired pay is adjusted to reflect changes in the Consumer Price Index rather than changes in active duty pay rates, and as a result a "retired pay inversion" problem arose: service members who remained on active duty after becoming eligible for retirement were receiving less retired pay when they eventually retired than they would have received if they had retired earlier. Subsection 1401a(f), title 10, U.S. Code, commonly referred to as the "Tower amendment," was adopted to alleviate that problem, and it authorizes an alternate method of calculating retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement.

2. A provision included in the appropriation acts applicable to the Department of Defense in effect between January 1, 1982, and December 18, 1985, prohibited any service member "who, on or after January 1, 1982, becomes entitled to retired pay" from rounding 6 months or more of service to a full year for purposes of computing retired pay. The Department determined that this prohibition applied to retired pay computations under the Tower amendment, 10 U.S.C. § 1401a(f), in the case of service members who retired after January 1, 1982, but who had their retired pay computed on the basis of their eligibility to retire on an earlier date when that prohibition was not in effect. The Comptroller General sustains the Department's determination, in view of the wording of the provision, but notes that reductions in retired pay under the provision should have ceased after it expired in December 1985.

## DECISION

Captain Glenn L. Gaddis, USN (Retired), claims that the Navy has improperly imposed a reduction in his military retired

pay.1/ We conclude that while the reduction in question may have been required under a provision of an appropriation act which was in effect at the time of his retirement on March 1, 1985, that reduction should have been terminated after the provision expired on December 18, 1985.

#### BACKGROUND

Captain Gaddis retired from the Navy on March 1, 1985, under the provisions of 10 U.S.C. § 6321 after completing more than 40 years' active service. Although his actual date of retirement occurred in 1985, it was to his advantage to have his retired pay calculated on the basis of his eligibility to retire at an earlier date under the computation authorized by 10 U.S.C. § 1401a(f)--commonly referred to as the "Tower amendment"--which provides:

"(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 . . . ."

This provision was adopted by the Congress to alleviate the so-called "retired pay inversion" problem, which was created by the fact that for several years upward cost-of-living adjustments of retired and retainer pay had occurred in greater amounts and at greater frequency than increases in active duty basic pay. The result was that many of those who remained on active duty after becoming eligible for retirement were losing considerable amounts of retired pay. The computation of retired pay under the alternate method provided by 10 U.S.C. § 1401a(f) involves calculating the maximum amount of retired pay based not on a service member's actual retirement date but rather on his earlier eligibility for retirement. See 59 Comp. Gen. 691 (1980); 56 Comp. Gen. 740 (1977).

In Captain Gaddis' case both he and the accountable Navy officials agree that the most favorable computation under

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1/ This action is in response to correspondence received from the Commander of the Navy Finance Center, forwarding Captain Gaddis' claim.

10 U.S.C. § 1401a(f) is premised on his eligibility to have voluntarily retired as a Navy captain, pay grade O-6, on September 30, 1974. The controversy here involves the amount of service with which he should be credited on that date for retirement purposes under 10 U.S.C. § 1401a(f). On September 30, 1974, he had completed 29 years and 8 months of active service, but if he had actually retired on that date he would have been credited with 30 years' service due to the operation of 10 U.S.C. § 6328 (1970 ed.), which provided:

"In determining the total number of years of service to be used as a multiplier in computing the retired pay of officers retired under this chapter, a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded."

With the application of this provision Captain Gaddis would have received retired pay computed on the basis of 30 years multiplied by 2.5 percent, or 75 percent of the applicable rate of basic pay, with cost-of-living adjustments. He suggests that this is the proper method to be used in the computation of his retired pay under 10 U.S.C. § 1401a(f).

The Navy, however, has taken the position that 10 U.S.C. § 6328 (1970 ed.) may not be used in computing the amount payable to Captain Gaddis, and that his retired pay under 10 U.S.C. § 1401a(f) should instead be computed on the basis of the 29 years and 8 months of active service he had actually completed on September 30, 1974. This results in his retired pay being computed on the basis of 29.67 years multiplied by 2.5 percent, or 74.18 percent of the applicable rate of basic pay, with cost-of-living adjustments. Because of this difference the gross monthly retired pay for the month of March 1985 claimed by Captain Gaddis, \$3,858, exceeds by \$42 the amount credited to him by the Navy, \$3,816.

Captain Gaddis points out that if he had actually retired in 1974, his retired pay for March 1985 would have been payable at the higher rate claimed. In effect, he suggests that he is being penalized for electing to remain on active duty beyond his optimum retirement date in 1974, and that this is contrary to the terms and the congressional purpose of the Tower amendment, 10 U.S.C. § 1401a(f).

In their administrative report, the accountable Navy officials base their position on guidance they received from the Department of Defense concerning laws enacted in 1981 and

1983. The first of these was section 772 of the Department of Defense Appropriation Act, 1982, Public Law 97-114, December 29, 1981, 95 Stat. 1565, 1590, which placed the following limitation on the expenditure of funds under that act in the creditability of active service for part of a year:

"SEC. 772. Effective January 1, 1982, none of the funds appropriated by this Act shall be available to pay the retired or retainer pay of a member of the Armed Forces for any month who, on or after January 1, 1982, becomes entitled to retired or retainer pay, in an amount that is greater than the amount otherwise determined to be payable after such reductions as may be necessary to reflect adjusting the computation of retired pay or retainer pay that includes credit for a part of a year of service to permit credit for a part of a year of service only for such month or months actually served . . . ."

Although this provision applied only to funds appropriated for fiscal year 1982, it was reenacted in legislation providing appropriations for the Department of Defense in succeeding years.

In addition, section 923 of the Department of Defense Authorization Act, 1984, Public Law 98-94, September 24, 1983, 97 Stat. 614, 643, amended 10 U.S.C. § 6328 effective October 1, 1983, to read as follows:

"In determining the total number of years of service to be used as a multiplier in computing the retired pay of officers retiring under this chapter, each full month of service that is in addition to the number of full years of service creditable to an officer is counted as one-twelfth of a year and any remaining fractional part of a month is disregarded."

The Navy officials say that they base their position in Captain Gaddis' case on two memoranda issued by the Department of Defense about these legislative enactments. The first memorandum is dated September 29, 1983, and is from the Office of the Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics. It is concerned primarily with the application of Public Law 98-94 and states that notwithstanding the amendment of 10 U.S.C. § 6328 to eliminate the "6-month rounding rule" effective October 1, 1983--

"A member who uses the Tower amendment to compute his retired or retainer pay as though he had retired on a date prior to October 1, 1983, may round six months or more of service credit to a full year to effectuate the language of the Tower amendment, which provides that his retired or retainer pay shall not be less than it would have been had he retired on an earlier date."

The second memorandum is dated February 1, 1984, and was issued by the Department of Defense's Office of General Counsel. It concurs with the earlier memorandum with respect to the application of Public Law 98-94 and states that even though the "6-month rounding rule" had been deleted from 10 U.S.C. § 6328 effective October 1, 1983--

"With respect to a member who retires after [September 30, 1983], the Tower amendment would permit such member to compute his retired pay using the six-month rounding rule if that rule were in effect on the date of his earlier retirement eligibility."

This memorandum states it is the further opinion of the Office of General Counsel, however, that under the provision of the Department of Defense annual appropriation act which was first enacted as section 772 of Public Law 97-114--

". . . a member may not be paid that portion of retired pay resulting from application of the 'six-month rounding rule' to the extent that it exceeds what he would be entitled to based on the full months in excess of a whole year actually served.

"It is important to note that the [provision] did not by its terms amend the entitlement provisions of the law. It is, however, an absolute prohibition on the use of funds to satisfy that entitlement and, therefore, 'supersedes' the entitlement provisions, including those contained in the Tower amendment.

"The prohibition . . . applies to all members who become entitled to retired or retainer pay on or

after January 1, 1982 . . . . There is no distinction between members using the Tower amendment and others. Thus, it is the opinion of this office that the [provision] acts as a restriction, not on the entitlement to, but on the payment of, certain portions of retired or retainer pay, even to members who have used the Tower amendment to compute retired pay. . . . If the [provision] should fail to be enacted during a subsequent fiscal year, . . . [a member using the Tower amendment] would begin to receive the full amount of retired pay to which he is entitled." (Underscoring in original.)

The opinion of the Office of General Counsel refers to the memorandum issued earlier by the Assistant Secretary of Defense and concludes, "The discussion in that memorandum on the six-month rounding rule is consistent with this memorandum, although it did not specifically address the effect of the [appropriation act limitation] on Tower amendment computations."

#### ANALYSIS AND CONCLUSION

The legislative histories of Public Laws 97-114 and 98-94 do not reflect that Congress specifically considered the question presented here, which concerns the effect of those enactments on the computation of military retired pay under the Tower amendment.<sup>2/</sup> We recognize that as a general rule, however, the construction of a statute by those charged with its execution is to be sustained in the absence of a showing of plain error, particularly when that construction has been consistently applied with congressional assent.<sup>3/</sup> Here we

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2/ Concerning Public Law 97-114, § 772, see H.R. Rep. No. 333, 97th Cong., 1st Sess. 12, 287 (1981); S. Rep. No. 273, 97th Cong., 1st Sess. 127 (1981), and H.R. Rep. No. 410 (Conference), 97th Cong., 1st Sess. 53 (1981). Concerning Public Law 98-94, § 923, see H.R. Rep. No. 352, 98th Cong., 1st Sess. 227, reprinted in 1983 U.S. Code Cong. & Ad. News 1160, 1164.

3/ See Howe v. Smith, 452 U.S. 473, 485 (1981); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); Colonel William N. Jackomis, USAF (Retired), 58 Comp. Gen. 635, 638 (1979).

find the effect given by the Department of Defense to the enactments at issue to be consistent with the terms of the statutory language, and we also note that the Congress did not act to overrule the Department's interpretation but instead reenacted without change the limitation of Public Law 97-114 in subsequent appropriation acts.<sup>4/</sup> Hence, we have no basis to disturb the Department's determination in the matter.

Nevertheless, we note that under the Department's interpretation, the reduction in Captain Gaddis' retired pay is predicated solely on the provisions of section 772 of Public Law 97-114, as reenacted in subsequent appropriation acts. That provision was last reenacted as section 8054 of the Department of Defense Appropriation Act, 1985, Public Law 98-473, October 2, 1984, 98 Stat. 1837, 1904, 1933, and was in effect at the time of Captain Gaddis' retirement on March 1, 1985. The provision continued in effect after the end of fiscal year 1985 on September 30, 1985, until December 18, 1985, due to the operation of a series of continuing appropriations resolutions.<sup>5/</sup> It was not, however, included in the Department of Defense Appropriation Act, 1986, Public Law 99-190, December 19, 1985, 99 Stat. 1185, or in appropriation laws enacted since then. Hence, we conclude that while it was appropriate to impose a reduction in Captain Gaddis' retired pay under section 8054 of Public Law 98-473, as in effect from March 1 through December 18, 1985, there is no basis for the reduction for the period from and after December 19, 1985.

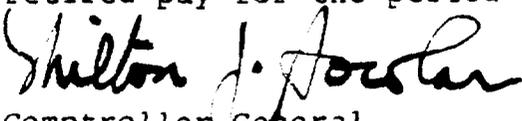
Accordingly, we deny Captain Gaddis' claim for additional retired pay believed due for the period from March 1 through

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<sup>4/</sup> See Pub. L. No. 97-377, § 768, Dec. 21, 1982, 96 Stat. 1830, 1862; Pub. L. No. 98-212, § 762, Dec. 8, 1983, 97 Stat. 1421, 1450; and Pub. L. No. 98-473, § 8054, Oct. 12, 1984, 98 Stat. 1837, 1904, 1933.

<sup>5/</sup> Pub. L. No. 99-103, Sept. 30, 1985, 99 Stat. 471; Pub. L. No. 99-154, Nov. 14, 1985, 99 Stat. 813; Pub. L. No. 99-179, Dec. 13, 1985, 99 Stat. 1135; and Pub. L. No. 99-184, Dec. 17, 1985, 99 Stat. 1176.

December 18, 1985, but we allow his claim for the additional retired pay for the period from and after December 19, 1985.

*for*   
Comptroller General  
of the United States