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DECISION



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

FILE: B-164842

DATE: June 26, 1978

**MATTER OF: Military Pay and Allowance Committee
Action No. 539**

DIGEST: A Navy or Marine Corps officer who completes minimum service time requirements for voluntary retirement under 10 U. S. C. 6323(a) in a given month and who is subsequently retired for permanent disability (10 U. S. C. 1201 and 1204) in the same month, which date is set by Secretarial action under 10 U. S. C. 1221, may not compute his retired pay under 10 U. S. C. 6323(e) as an "any other provision of law" alternate method of computing retired pay authorized by 10 U. S. C. 1401. Since he was retired for disability before the earliest date authorized by 10 U. S. C. 6323(a) for voluntary retirement, he was not entitled to retired pay computed under 10 U. S. C. 6323(e) at the time he retired.

This action is in response to a letter dated March 2, 1978, from the Assistant Secretary of Defense (Comptroller) requesting an advance decision concerning the entitlement of a service member to compute retired pay under the provisions of 10 U. S. C. 6323(e) (1976), in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 539, enclosed with the request.

The question asked is:

"Is an officer entitled to retired pay computed under 10 U. S. C. 6323(e) in the following circumstances?"

"a. An officer completes 20 years of active service, of which at least 10 years was service as a commissioned officer, on 5 June 1977.

"b. On 15 June 1977, the above officer is retired for disability under 10 U. S. C. 1201 or 1204 with a 40% disability rating."

The submission states that the provisions governing computation of retired pay for members retired for disability are contained in 10 U. S. C. 1401(1976). It is noted that in addition to the computation formulas listed therein, that section authorizes the use of an "otherwise qualified" method of computing retired pay under other provisions of law, the most common of which for Navy officers is contained in 10 U. S. C. 6323. However, the submission speculates that during a month where an officer first meets the minimum time qualifications for voluntary retirement under 10 U. S. C. 6323(a), but is retired for disability on a subsequent day of that same month, that the retired pay computation provisions of 10 U. S. C. 6323(e) may not be available to him as an "otherwise qualified" method of computation under 10 U. S. C. 1401, since the retirement authority upon which such computation is predicated does not become effective until the first day of the following month.

The submission goes on to state that such analysis by the Military Pay and Allowance Committee members takes cognizance of the authority of the respective Service Secretaries under 10 U. S. C. 1221 (1976) to specify an effective date of disability retirement earlier than that specified by the Uniform Retirement Rate Act, 5 U. S. C. 2301 (1976), as well as several decisions of this Office (44 Comp. Gen. 584 (1965); 49 Comp. Gen. 80 (1969); and B-186334, November 17, 1976)), which may be controlling. However, doubt is expressed as to the correctness of that conclusion, inasmuch as the facts in the submission seem to be distinguishable from those in the cited cases.

Members of the Armed Forces permanently retired for disability under the provisions of 10 U. S. C. 1201 or 1204 (1976) are entitled to have their retired pay computed under Formula 1 of 10 U. S. C. 1401. That formula authorizes computation of retired pay based on the percentage of disability, or on 2-1/2 percent of the years of service computed under 10 U. S. C. 1208, multiplied by the monthly basic pay rate of his grade "* * * applicable on date of retirement* * *" See footnote 1 of 10 U. S. C. 1401. Additionally, the section provides in part:

"* * * if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or of any other provision of law, he is entitled to be paid under the applicable formula that is most favorable to him." (Underscoring supplied.)

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According to the Committee Action, the only other provisions which could possibly be applicable to the member described, are the voluntary retirement provisions contained in 10 U. S. C. 6323. That section authorizes in pertinent part:

"(u) An officer of the Navy or the Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President.

* * * * *

"(e) * * * an officer retired under this section is entitled to retired pay at the rate of 2-1/2 percent of the basic pay of the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title * * *."

Based on the foregoing, it is clearly evident that in order for a member to compute retired pay under 10 U. S. C. 6323(e), he must qualify for voluntary retirement under 10 U. S. C. 6323(a), and for the purpose of using such a computation method as an alternate under 10 U. S. C. 1401, he must be eligible to retire voluntarily at the time actually retired for disability. That is, he must "otherwise be entitled" to retired pay computed under 10 U. S. C. 6323(a) at the time of his disability retirement.

In conjunction with the foregoing, when a member is retired for disability without the Secretary concerned having designated an earlier date of retirement (10 U. S. C. 1221), such retirement is subject to the provisions of 5 U. S. C. 8301. Those provisions authorize that such retirements take effect on the first day of the month following the month in which the retirement would otherwise be effective, but require that the rate of retired pay must be computed as of the date retirement would have occurred if those provisions had not been enacted. In contrast, 10 U. S. C. 1221 provides that notwithstanding 5 U. S. C. 8301, the Secretary concerned may specify an effective date for retirement that is earlier than the date provided for in section 8301.

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In 44 Comp. Gen. 584 (1965), we considered the applicability of 5 U.S.C. 8301 to the retirement of Navy and Marine Corps officers under 10 U.S.C. 6323(a). We recognized therein that since the purpose of section 8301 was to make uniform all retirements that, but for its application, would not be uniform, the intent of those provisions was fulfilled when the first day of a month was the only date which could be designated by the President as the effective date of voluntary retirement. It was concluded that since 10 U.S.C. 6323(a) provides specifically for "first day of any month" retirements, the provisions of 5 U.S.C. 8301 would be inapplicable to voluntary retirements under those provisions.

In 49 Comp. Gen. 80 (1969), we considered in part whether a Navy officer who was to be retired for disability in June 1968, but whose date for disability retirement was deferred until July 1, 1968, by virtue of 5 U.S.C. 8301, could use 10 U.S.C. 6323(e) as the "other provision of law" most favorable to him, thereby permitting him to compute retired pay based on the higher pay rates which became effective on July 1, 1968. In that case the member in question was actually eligible to retire voluntarily before June 1968, the month in which disability retirement occurred. We concluded that since the member was fully qualified to voluntarily retire before the date actually retired for disability and even though such actual retirement date was extended only by virtue of 5 U.S.C. 8301, he would be permitted to use the computation of retired pay for voluntary retirements under 10 U.S.C. 6323(e) based on the July 1, 1968 rates, as the "other provision of law" computation for 10 U.S.C. 1401 purposes.

In decision B-186334, November 17, 1976 (56 Comp. Gen. 98), citing with approval the ruling in 49 Comp. Gen. 80, *supra*, we considered a situation where a Navy officer, by orders dated June 30, was retired for disability that date and whose name was placed on the Temporary Disability Retired List effective the following day. We held that since he was otherwise fully eligible for voluntary retirement at the time retired for disability, the 10 U.S.C. 6323(e) method of computing retired pay was available to him as an "other provision of law" for 10 U.S.C. 1401 purposes.

Each of the described cases differ factually from the present case in that those members were eligible to voluntarily retire before the month in which disability retirement would otherwise have occurred.

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However, at least one point of these rulings is for general application here. That is, if at the time a member becomes entitled to receive disability retired pay, he is entitled to voluntarily retire and receive retired pay based on the computation provisions for such retirement, he may use such computation method for 10 U. S. C. 1401 purposes, if it would produce a higher retired pay benefit. Compare 53 Comp. Gen. 610 (1974) and decisions and cases cited.

In the present case, under the provisions of 10 U. S. C. 6323(a), while an individual may satisfy the minimum time requirements during any given month, the first date he may retire and receive retired pay under subsection (e) is the first day of the next month since that is the earliest date that the President may designate for his retirement. Therefore, if during such a month, but subsequent to the date the member completes 20 years of service for 6323(a) purposes, he is retired for disability, and that retirement date is specifically set by Secretarial action pursuant to 10 U. S. C. 1221--rather than permitting the provisions of 5 U. S. C. 8301 to operate to establish his retirement date as the first day of the month following--such a member could not use the voluntary retirement method of computing retired pay (10 U. S. C. 6323(e)) as an alternate method under 10 U. S. C. 1401. That is because he had not achieved that "earliest date that the President may designate for his retirement," for voluntary retirement purposes and, therefore, would not be "otherwise entitled" to retired pay computed under section 6323(e) at that time.

That appears to be the situation in the question presented in the Committee Action, and on that basis the question is answered in the negative.

Deputy


Comptroller General
of the United States