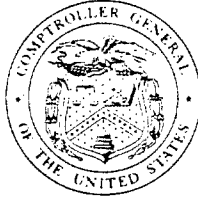


**DECISION**



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

10,238

FILE: B-193181

(20) DATE: May 22, 1979

MATTER OF: Lieutenant Colonel Donald E. Keen, USAR  
Retired

DIGEST: An Army member was erroneously paid retired pay based upon the grade of major rather than the appropriate grade of lieutenant colonel from the date of retirement in 1966, until the error was discovered in 1977. Upon presentation of his claim for the additional amount due, he was paid the additional amount for the 6-year period prior to the date of his claim's receipt in the General Accounting Office. His claim for the amount accrued prior to the 6-year period is barred from consideration by 31 U.S.C. § 71a, since it was not received in GAO within 6 years from the date it first accrued.

We have for consideration the letter of Samuel E. Gabriel, Esq., appealing our Claims Division's January 27, 1978 denial of the claim of his client, Lieutenant Colonel Donald E. Keen, USAR, Retired, for additional retired pay for the period November 30, 1966, through September 25, 1971. The denial of the claim is sustained because it is barred from consideration since it accrued more than 6 years before it was received in the General Accounting Office.

AGC  
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The record shows that Colonel Keen was placed on the retired list on November 30, 1966, and was paid retired pay based upon retirement in the grade of major rather than the appropriate grade of lieutenant colonel. His claim for the difference in the amounts of retired pay paid and the appropriate amounts was first received in the United States General Accounting Office on September 26, 1977. He has been paid the portion of his claim for the 6 years prior to its receipt in the General Accounting Office, that is, retroactive to September 26, 1971. His claim for the amount accrued prior to September 26, 1971, was returned to him by our Claims Division as barred by the express provisions of the act of October 9, 1940, ch. 788, 54 Stat. 1061, as amended by section 801 of Public Law 93-604, approved January 2, 1975, 88 Stat. 1965, now codified at 31 U.S.C. § 71a (1976).

Additional  
[Claim for Retired Pay]

005965

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Colonel Keen's attorney contends that the amounts claimed are not a dispute between Colonel Keen and the United States, but an obligation entered into upon retirement and that failure to pay accrued benefits amounts to a breach of contractual relationship entered into by both parties. Further, he states that since Colonel Keen was not informed of the requirement to file a claim, he should have been notified in writing prior to the running of the 6-year period.

The rule is well established that a service member's entitlement to pay is dependent upon a statutory right, and that equitable considerations and the common law governing private employment contracts have no place in the determination of entitlement to military pay. See Bell v. United States, 366 U.S. 393, 401 (1961); United States v. Williams, 302 U.S. 46 (1937); and, 52 Comp. Gen. 506 (1973).

Colonel Keen was retired by reason of physical disability under 10 U.S.C. 1201 and 1372 (1964). Section 1372 provides the basis for the grade to which he was entitled on such retirement. Paragraph 161, Special Orders No. 240, Department of the Army (DA), dated November 28, 1966, amended prior DA Special Orders No. 235, to transfer him to the United States Army Reserve (Retired Reserve) in the grade of lieutenant colonel, rather than his active duty rank of major.

Chapter 71 of title 10, United States Code (1964), entitled Computation of Retired Pay, provides in section 1401, Formula No. 1, the method of computation of retired pay under section 1201. Formula No. 1 provides for using the basic pay of the grade to which the member is entitled under section 1372 or to which he was entitled on the day before retirement, "whichever is higher." Therefore, it appears upon his entitlement to retired pay in November 1966, he was entitled to that pay at the higher grade of lieutenant colonel rather than the grade of major at which he was paid.

Section 71a of title 31, United States Code, provides in pertinent part:

"(1) Every claim or demand \* \* \* against the United States cognizable by the General Accounting Office \* \* \* shall be forever barred unless such

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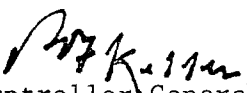
claim \* \* \* shall be received in said office within  
6 years after the date such claim first accrued:  
\* \* \*'' (Emphasis supplied.)

Under that provision of law, as a condition precedent to a claimant's right to have his claim considered by the General Accounting Office, his claim must be "received in said office" within 6 years after it "first accrued."

Colonel Keen's claim for retired pay first accrued in November 1966, when he became entitled to that pay, and accrued in additional amounts as he became entitled to them over the years. Since his claim was first received in the General Accounting Office on September 26, 1977, the amount accrued more than 6 years prior to that date is barred from consideration by the express provisions of 31 U.S.C. 71a. See B-191650, May 18, 1978, and B-176359, August 10, 1972.

While it is unfortunate that Colonel Keen may not have been aware of his entitlement to retired pay at the higher rate sooner, if he felt at any time during the period claimed that he was entitled to additional retired pay, the burden was upon him to initiate such a claim. Also, while we regret that Colonel Keen was unaware of the provisions of 31 U.S.C. 71a, we have no authority to waive those statutory provisions in these or any other circumstances; and, therefore, Colonel Keen's claim is barred by law.

Accordingly, the determination made by our Claims Division is sustained.

  
Deputy Comptroller General  
of the United States