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DECISION



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

FILE: B-204120

DATE: March 25, 1982

MATTER OF: Brigadier General
, USMC, Retired

- 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, United States Code, was adopted to alleviate that problem, and it authorizes an alternate method of computing retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement.
 2. A Marine Corps colonel began serving in the position of Assistant Judge Advocate General of the Navy on August 1, 1978. Under 10 U.S.C. 5149(c) he thereby became eligible for immediate voluntary retirement in the higher commissioned grade of brigadier general, and he was ultimately retired in that grade in 1981. His retired pay is payable in accordance with the computation most favorable to him under 10 U.S.C. 1401a(f) based on his eligibility for retirement as a brigadier general on any date after August 1, 1978, up to the date he actually retired in that grade in 1981.

This action is in response to a request from a Disbursing Officer of the Marine Corps Finance Center for an advance decision concerning the retirement eligibility date to be used under 10 U.S.C. 1401a in computing the retired pay of Brigadier General , USMC, Retired, . The request was forwarded here by Headquarters United States Marine

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Corps under Control Number DO-MC-1366 allocated by the Department of Defense Military Pay and Allowance Committee.

In light of the facts presented and the applicable provisions of law, we conclude that the retired pay of General is payable in accordance with the computation most favorable to him under 10 U.S.C. 1401a(f) premised on his eligibility for retirement as a brigadier general on any date after August 1, 1978, up to the date he actually retired, May 1, 1981.

General was retired under provisions of 10 U.S.C. 6323 authorizing an officer of the Navy or Marine Corps to be retired voluntarily upon his application after his completion of more than 20 years of active service. When General retired on May 1, 1981, he had in fact 26 years, 5 months, and 16 days of active service. Thus, he had been eligible for voluntary retirement under 10 U.S.C. 6323 for more than 6 years prior to the time he actually retired.

General served in the position of Assistant Judge Advocate General of the Navy (Military Law) from August 1, 1978, until his May 1, 1981 retirement. While so serving he held the commissioned grade of colonel, but he was retired in the higher grade of brigadier general under the authority of 10 U.S.C. 5149(c), which provides in pertinent part that:

"* * * An officer who is retired while serving as Assistant Judge Advocate General of the Navy * * * may, in the discretion of the President, be retired with the rank and grade of brigadier general. If he is retired as a brigadier general, he is entitled to the retired pay of that grade, unless entitled to higher pay under another provision of law."

In requesting an advance decision in this matter, the Disbursing Officer indicates that General retired pay is currently being computed on the premise that May 1, 1981, was the earliest possible date that he was eligible for retired pay as a brigadier general. The Disbursing

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Officer indicates further that a more favorable computation would result if an earlier date of retirement eligibility in that grade could be established for him under 10 U.S.C. 1401a(f) but doubt has arisen concerning the propriety of using that alternate computation because General [redacted] was not promoted to the grade of brigadier general while serving on active duty. The Disbursing Officer therefore asks whether:

"a. I am authorized to compute Brigadier General [redacted] retired pay from 1 May 1981 under the provisions of 10 U.S.C. 1401a(f)?"

and

"b. If the answer to question a is in the affirmative, from what date may I apply the provisions of 10 U.S.C. 1401a(f)?"

Section 1401a of title 10, United States Code, in general directs that military retired pay be adjusted to reflect changes in the Consumer Price Index rather than changes in active duty basic pay rates. Subsection 1401a(f) was added as an amendment to 10 U.S.C. 1401a by section 806 of the Department of Defense Appropriation Authorization Act, 1976, Public Law 94-106, October 7, 1975, 89 Stat. 538-539, commonly referred to as the "Tower Amendment." That subsection reads as follows:

"(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. In computing the amount of retired or retainer pay to which such a

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member would have been entitled on that earlier date, the computation shall, subject to subsection (e) of this section, be based on his grade, length of service, and the rate of basic pay applicable to him at that time. This subsection does not authorize any increase in the monthly retired or retainer pay to which a member was entitled for any period prior to the effective date of this subsection."

Subsection 1401a(f) was adopted in order 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 under 10 U.S.C. 1401a had occurred in greater amounts and at greater frequency than increases in active duty military basic pay. The result of this was that many of those who remained on active duty after becoming eligible for retirement were losing considerable amounts in retirement pay. The amendment adding subsection 1401a(f) was intended to provide an alternate method of calculating retired pay or retainer pay. The computation of a member's retired pay under the alternate method provided by 10 U.S.C. 1401a(f) is necessarily somewhat complex; it essentially involves calculating the maximum amount of retired pay based not on the member's actual retirement but rather on his earlier eligibility for retirement. See generally 56 Comp. Gen. 740 (1977). Thus, a member voluntarily retired on the basis of his longevity of service is entitled under 10 U.S.C. 1401a(f) to the maximum amount of retired pay to which he would have been entitled if he had entered retirement voluntarily and upon his request at some time prior to his actual retirement date. See Matter of _____, B-189029, November 2, 1977.

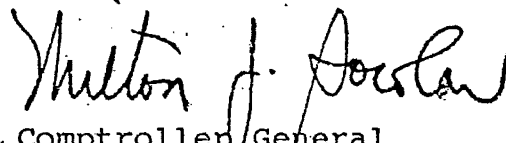
In the present case, General _____ began serving in the position of Assistant Judge Advocate General of the Navy on August 1, 1978. Under the provisions of 10 U.S.C. 5149(c), quoted above, it is hypothetically possible that he could have been voluntarily retired the following day in the commissioned grade of brigadier general with entitlement to the

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retired pay of that grade, notwithstanding that his active duty grade was colonel. While a service member does not normally enter voluntary retirement immediately on the date he becomes eligible for retirement in a higher grade, we have held that a retired pay computation under 10 U.S.C. 1401a(f) may properly be premised upon such a hypothetical earlier retirement. See 59 Comp. Gen. 691 (1980); and , B-189029 supra. Hence, since General became eligible to retire as a brigadier general immediately after he began serving as Assistant Judge Advocate General of the Navy on August 1, 1978, and he was ultimately retired in that grade, his retired pay may properly be computed under the alternate method authorized by 10 U.S.C. 1401a(f) premised on his eligibility for retirement as a brigadier general prior to the date of his actual retirement in 1981. Question "a" is therefore answered yes.

As to question "b," since we have concluded that General became eligible for voluntary retirement as a brigadier general immediately after he began serving as Assistant Judge Advocate General of the Navy on August 1, 1978, it is our view that his retired pay is payable under the most favorable computation for him authorized by 10 U.S.C. 1401a(f) premised on his hypothetical retirement as a brigadier general on any date after August 1, 1978, up to the date he actually retired on May 1, 1981. If, as is indicated in enclosures accompanying the submission, the most favorable computation is produced premised on his hypothetical retirement on any date after August 1, 1978, and before the active duty basic pay increase of October 1, 1978, then that computation should be used. Compare 59 Comp. Gen. 691, supra. Question "b" is so answered.

Accordingly, General retired pay should be recomputed for periods from and after May 1, 1981, at the highest rate authorized by 10 U.S.C. 1401a(f).

for 
Comptroller General
of the United States.