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DECISION



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

FILE: B-189029

DATE: September 2, 1980

MATTER OF: Department of Defense Military Pay
and Allowance Committee Action No. 544

- 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 calculating retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement.
2. In computing retired pay under 10 U.S.C. 1401a(f), the date immediately preceding an active duty basic pay rate change should generally be used as the earlier date of voluntary retirement eligibility, since this will normally result in a computation most favorable to the service member concerned. Under the Uniform Retirement Date Act, 5 U.S.C. 8301, the hypothetical earlier retirement would have become effective on the first day of the following month, but retired pay could be computed on the basis of retirement eligibility on the date immediately preceding the active duty pay rate change.
3. Since the Uniform Retirement Date Act, 5 U.S.C. 8301, generally provides for retirements to become effective on the first day of a month, language contained in certain provisions of law authorizing the voluntary retirement of Navy, Marine

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[Protest CONCERNING MILITARY
Retired Pay]

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Corps, and Public Health Service officers also providing for retirement on the first day of a month may be regarded as a surplusage insofar as retired pay computations under 10 U.S.C. 1401a(f) are concerned. Hence, those officers may have their retired pay computed under 10 U.S.C. 1401a(f) in the same manner as other service members, i.e., on the basis of retirement eligibility on the date immediately preceding an active duty pay rate change.

4. Where an Army or Air Force officer is retired in the grade of lieutenant general or general under 10 U.S.C. 3962 or 8962, the time-in-grade restrictions in 10 U.S.C. 3963 or 8963 do not apply in selecting an earlier hypothetical retirement date for retired pay computation pursuant to 10 U.S.C. 1401a(f).

This action is in response to a request from the Assistant Secretary of Defense (Comptroller) for a decision concerning the computation of retired pay of members of the Armed Forces under subsection 1401a(f) of title 10, United States Code (1976), in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 544, enclosed with the submission. The discussion in the Committee Action indicates that certain questions have arisen with respect to the date of retirement eligibility to be used as the basis for computing military retired pay under that provision of law as the result of the decision rendered by our Office in Matter of Lieutenant General William B. Fulton, USA, Retired, B-189029, November 2, 1977.

Background

Section 1401a of title 10, United States Code, in general directs that military retired pay be adjusted

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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 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 retirement pay. The amendment adding subsection 1401a(f) was intended to provide an alternate method of calculating

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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 56 Comp. Gen. 740 (1977).

The decision mentioned in the Committee Action, Matter of Lieutenant General William B. Fulton, USA, Retired, B-189029, supra, concerned the computation of the retired pay of an Army officer who was retired upon his request on April 1, 1977, under 10 U.S.C. 3918 (1976) on the basis of his having completed more than 34 years of creditable service. He was retired in the grade of lieutenant general (O-9) under the authority of 10 U.S.C. 3962(a) (1976). That statutory provision authorizes certain general officers of the Army who have served in a position of importance and responsibility to be retired in the highest grade held "at any time" on the active list, in the discretion of the President and with the advice and consent of the Senate.

General Fulton's retired pay entitlement computed on the basis of his actual retirement as a lieutenant general (O-9) on April 1, 1977, was less than the monthly retired pay to which he would have been entitled if he had retired at an earlier date, due to the effects of the "retired pay inversion" problem previously described. He had been promoted from the grade of major general (O-8) to that of lieutenant general (O-9) on September 1, 1975, and his maximum retired pay under 10 U.S.C. 1401a(f) resulted from a computation based on his retirement eligibility as a lieutenant general (O-9) on or after September 1, 1975, but before October 1, 1975 (the date of the 1975 military active duty basic pay rate change). In the alternative, if that computation could not have been used, his maximum retired pay rate under 10 U.S.C. 1401a(f) would have to have been computed on the basis of his retirement as a major general (O-8) on September 1, 1974. We were asked to render a decision on the question of whether General Fulton could have been eligible to retire as a lieutenant

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general (O-9) on or after September 1, 1975, but before October 1, 1975, for purposes of computing his retired pay under 10 U.S.C. 1401a(f) at the higher of the two rates.

In our November 2, 1977 decision in the matter, we expressed the view that General Fulton could not have been retired as a lieutenant general (O-9) on September 1, 1975, the same day that he was promoted to that grade on the active list. However, we also expressed the view that he could have been eligible for retirement at some later time during the month of September 1975 in that grade. In that case, we said, the Uniform Retirement Date Act, 5 U.S.C. 8301 (1976), would be applicable. That act provides:

"(a) Except as otherwise specifically provided by this title or other statute, retirement authorized by statute is effective on the first day of the month following the month in which retirement would otherwise be effective.

"(b) Notwithstanding subsection (a) of this section, the rate of active or retired pay or allowance is computed as of the date retirement would have occurred but for subsection (a) of this section."

We said that if General Fulton had been retired during September 1975, under subsection (a) of the Uniform Retirement Date Act his effective retirement date would have been October 1, 1975. We concluded, however, that under subsection (b) of the act retired pay could be computed on the basis of his eligibility for retirement sometime during the period September 2 - September 30, 1975, if the resulting computation under 10 U.S.C. 1401a(f) would be most favorable to him.

As indicated, our decision in General Fulton's case has given rise to questions concerning the date of retirement eligibility to be used generally under 10 U.S.C. 1401a(f). In the Committee Action, three

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specific questions have been presented regarding the application of the decision.

I. The Day Before the Date of an Active Duty Basic Pay Rate Change Should Generally be Used as the Earlier Day of Voluntary Retirement Eligibility in Computing Retired Pay Under 10 U.S.C. 1401a(f)

Since October 1, 1972, military active duty basic pay rate increases have in each year occurred only on the first day of October. In the submission it is stated that because subsection (a) of the Uniform Retirement Date Act specifically provides for retirement on the first day of the month following the month in which retirement would be effective, except as provided by other statute, September 1 is generally now being used as the hypothetical earlier voluntary retirement date for members affected by 10 U.S.C. 1401a(f), since it is the latest effective retirement date a member may have prior to an active duty pay increase on October 1. Thus, currently retired pay computation under 10 U.S.C. 1401a(f) is usually based on the member's grade and length of service on the first day of September in any given year the member would have been eligible to retire prior to the year of his actual retirement.

In the submission it is further stated, however, that in light of the decision in Fulton, supra, it appears that September 30 should generally be used for the earlier time of voluntary retirement eligibility in computing retired pay under 10 U.S.C. 1401a(f). Use of September 30 would be based on subsection (b) of the Uniform Retirement Date Act, which specifies the rate allowed when qualification for retirement is met, rather than subsection (a) of that act, which sets the effective retirement date. It is observed that if determination of the time of the hypothetical earlier retirement under 10 U.S.C. 1401a(f) should be based on the date qualifications for retirement are met for retirement as provided by each retirement statute, then

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the earlier date for computation purposes should be at the end of September to cover any member who had a change of status during September of any year subsequent to 1971.

Based on the foregoing, the first question presented in the submission is:

"1. Does Comptroller General Decision B-189029, dated 2 November 1977, apply to all military retirees affected by 10 USC 1401a(f) with regard to the computation of pay on an earlier retirement date? If so, what date should be used for computation purposes without regard to 5 USC 8301(a)?"

The principles of the November 2, 1977 decision pertaining to retired pay computation based on earlier retirement eligibility under 10 U.S.C. 1401a(f) in the case of General Fulton should be for application to other service members affected by the "retired pay inversion" problem. That is, if a member's retired pay based on his actual retirement is less than his entitlements based on some hypothetical earlier voluntary retirement, determination of the time of the earlier retirement eligibility for pay computation purposes under 10 U.S.C. 1401a(f) may be based on the date qualifications for retirement were met for retirement as provided by each retirement statute, notwithstanding that the earliest effective date of such hypothetical retirement would have been the first day of the following month, if the resulting computation is most favorable to the member concerned.

It follows that September 30 (rather than September 1) should generally be used as the hypothetical earlier time of voluntary retirement in computing retired pay under 10 U.S.C. 1401a(f), for the reason stated in the submission, i.e., to cover retired personnel who, like General Fulton, may have had a change of status during September of any year subsequent to 1971. It appears that the retirees affected would be those who during the month of September in any year after 1971

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received either (1) a promotion, (2) a pay increase based on longevity of service, or (3) a 2-1/2 percent increase in their retired pay multiplied by completing more than 6 months of an additional year of creditable service.

The use of September 30 as the earlier voluntary retirement eligibility date for years prior to the time of actual retirement in computing retired pay under 10 U.S.C. 1401a(f) would not, of course, be most favorable in the case of every member affected by the "retired pay inversion" problem. For example, if a member was not promoted but instead reduced in grade during the month of September, it would appear that the use of a retirement eligibility date earlier than September 30 would be more favorable to the member in computing his retired pay under 10 U.S.C. 1401a(f). See 56 Comp. Gen. 740, 741-743, supra.

Moreover, it is to be noted that while there have been active duty military basic pay increases on October 1, 1972, and on the first day of October in every year since then, prior to October 1, 1972, active duty basic pay increases had occurred on the first day of other months. Also, in the future, changes in active duty basic pay rates may not all necessarily fall on the first of October. Thus, while September 30 should ordinarily be used under 10 U.S.C. 1401a(f) as the hypothetical earlier time of voluntary retirement for years in which an active duty basic pay increase occurred on the first day of October, the more general rule for application is that the day before the date of an active duty basic pay rate change is ordinarily to be used as the earlier day of voluntary retirement eligibility in computing retired pay under 10 U.S.C. 1401a(f).

In conclusion the principles of our decision B-189029, November 2, 1977, are for general application to retired personnel affected by 10 U.S.C. 1401a(f). Hence, the day before the date of an active duty basic pay rate change should be used as the earlier day of

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voluntary retirement eligibility in computing retired pay under 10 U.S.C. 1401a(f), if the resulting computation is most favorable to the member concerned. The first question is answered accordingly.

II. Army and Air Force Generals
and Lieutenant Generals

In the submission it is further noted that 10 U.S.C. 3961 (1976) and 10 U.S.C. 8961 (1976), governing the retired grade of Army and Air Force members, impose a general requirement that a regular member (unless retired for disability, or unless entitled to a higher grade under another provision of law) must retire in the regular grade that is held on the retirement date. The highest regular grade for Army and Air Force members is major general (O-8), as prescribed in 10 U.S.C. 3281 (1976) and 10 U.S.C. 8281 (1976). It is also noted that 10 U.S.C. 3963 (1976) and 10 U.S.C. 8963 (1976) stipulate that regular Army and Air Force commissioned officers may retire in the highest temporary grade in which they served on active duty satisfactorily provided it was held for a minimum of 6 months.

It is said that a question has arisen as to whether the 6-month time-in-grade requirement of 10 U.S.C. 3963 and 8963 is negated for all three- and four-star Army and Air Force general officers (i.e., lieutenant general (O-9) and general (O-10)) by our earlier decision concerning General Fulton, or whether the situation of General Fulton was unique and not equally applicable to the retirement of all three- and four-star general officers of the Army and Air Force.

Based on the foregoing, the second question presented in the submission is:

"2. Do the provisions of B-189029 apply to all three and four star General Officers without regard to the requirements in 10 USC 3961, 10 USC 8961, and 10 USC 3963, 10 USC 8963?"

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As previously indicated, General Fulton was retired in the three-star grade of lieutenant general (O-9) pursuant to 10 U.S.C. 3962, which authorizes certain general officers of the Army who have served in a position of importance and responsibility to be retired in the highest grade held "at any time" on the active list, in the discretion of the President and with the advice and consent of the Senate. Hence, we concluded that a hypothetical time of retirement eligibiltiy in the grade of lieutenant general (O-9) could be established for him, for purposes of computing his retired pay under 10 U.S.C. 1401a(f), "at any time" after his September 1, 1975 promotion from major general to lieutenant general on the active list.

It is our view that in computing retired pay pursuant to 10 U.S.C. 1401a(f) for those officers retired in grades O-9 and O-10 upon recommendation by the President and with the advice and consent of the Senate, the time-in-grade requirements of 10 U.S.C. 3963 and 8963 do not apply. Therefore, as was held in the Fulton case, when a member is retired in the O-9 or O-10 grade, in selecting an earlier more advantageous date for computing his retired pay under section 1401a(f), the O-9 or O-10 grade may be used in the computation, provided of course, that the member was serving in that grade at the earlier date selected.

Question 2 is answered accordingly.

III. The Date to be Used as the Earlier
Time of Voluntary Retirement
Eligibility in the Computation of
Retired Pay Under 10 U.S.C. 1401a(f)

Provisions of law authorizing the voluntary retirement of members of the uniformed services generally do not contain specific language providing that the effective date of retirement will occur on the first day of a month or at any other particular time. This includes the voluntary retirement of commissioned officers of the Army, Air Force, Coast Guard, and National Oceanic and Atmospheric Administration on the

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basis of their having completed 20 years of active service. See 10 U.S.C. 3911, 8911 (1976); 14 U.S.C. 291 (1976); and 33 U.S.C. 853-1 (1976). In our answer to the first question presented in the submission, we indicated that in computing retired pay under 10 U.S.C. 1401a(f) it is permissible to use the day before the time of an active duty basic pay increase, as the date of voluntary earlier retirement eligibility for such service members. As was mentioned, under subsection (a) of the Uniform Retirement Date Act, 5 U.S.C. 8301, the effective date of such hypothetical earlier retirement would be the first day of the following month, but under subsection (b) of that act the retired pay could be computed on the basis of retirement eligibility on the date before the new active duty pay rates became effective, if the resulting computation would be most beneficial to the member concerned.

The third question presented in the submission is:

"3. Would the same date apply for those members eligible to retire only under a law which specifically provides for retirement on the first day of a month?"

We understand that this question concerns a provision of law authorizing the voluntary retirement of Navy and Marine Corps officers who apply for retirement after completing more than 20 years active service, 10 U.S.C. 6323 (1976). Subsection 6323(a) provides as follows:

"(a) 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."

This statutory language is derived from the act of February 21, 1946, Public Law 305 of the 79th Congress,

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60 Stat. 26, which for the first time generally authorized all commissioned officers of the Navy, Marine Corps, and Coast Guard who applied for voluntary retirement after completing 20 years of active service to be "placed on the retired list on the first day of such month as the President may designate." This act superseded several earlier retirement laws, none of which contained specific language providing for retirements to become effective on the first day of a month. See Senate Report No. 701, November 8, 1945, and House Report No. 1441, December 14, 1945. We have found no explanation in the legislative history of the act of February 21, 1946, as to why language was included to specifically provide for retirement on the first day of a month. Moreover, as has been noted, that language has been deleted from 14 U.S.C. 291, the current codification of the law authorizing Coast Guard officers to be voluntarily retired after 20 years of active service.

By 10 U.S.C. 1404 (1976) the retired pay computation provisions of 10 U.S.C. 1401a(f) are made subject to the Uniform Retirement Date Act which, as has been mentioned, directs that retirements are to be effective on the first day of a month except as specifically provided by statute. Thus, in our view, that language of 10 U.S.C. 6323(a) which also provides for voluntary retirements on the first day of a month may be regarded as a surplusage insofar as retired pay computations under 10 U.S.C. 1401a(f) are concerned. Furthermore, it is our view that the beneficial and remedial purposes of 10 U.S.C. 1401a(f) would be best served if hypothetical earlier voluntary retirements under its provisions were to be set in a manner that is as uniform, equitable, and simple as possible. Hence, we conclude that Navy and Marine Corps members whose retired pay is computed under the provisions of 10 U.S.C. 1401a(f) and whose hypothetical earlier voluntary retirement is governed by the provisions of 10 U.S.C. 6323, may also have the day before the date of an active duty basic pay rate change used as the time of their earlier retirement eligibility, if the resulting computation is most favorable to them.

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We note that the provision of law authorizing the voluntary retirement of members of the Commissioned Corps of the Public Health Service, 42 U.S.C. 212 (1976), also contains language making retirements effective "on the first day of any month." In accordance with the provisions of 42 U.S.C. 213a (1976), Public Health Service officers may be eligible to have their retired pay computed under 10 U.S.C. 1401a(f). Our comments concerning the computation of the retired pay of Navy and Marine Corps officers under 10 U.S.C. 1401a(f) are equally for application to Public Health Service officers whose retired pay is so computed on the basis of a hypothetical earlier voluntary retirement under the provisions of 42 U.S.C. 212.

The third and last question presented in the submission is accordingly answered in the affirmative.

Harry R. Van Cleave

For the Comptroller General
of the United States