

DECISION

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

FILE: B-206107**DATE:** February 1, 1983**MATTER OF:** Airman First Class Edward H. Gallaher, USAF
Retired**DIGEST:**

1. Erroneous payments of basic pay should not be included in the computation of a service member's retired pay base for purposes of computing his retired pay entitlement under 10 U.S.C. 1407. Although that statute provides that retired pay base will be computed on basic pay "received" over a period of months of active duty, that is construed to mean only basic pay the member was legally entitled to receive.
2. A service member's retired pay base, upon which his retired pay is computed, is an average of basic pay he "received" on active duty over a period of months. Reductions in the basic pay received because of forfeitures and demotions must be included in computing the pay "received" to determine the retired pay base.
3. A period of unauthorized absence, for which a service member forfeits pay, generally should not be included in computing the member's retired pay base unless such period may also be included in the member's years of service and thus the percentage multiplier (2-1/2 percent per year) used in computing retired pay.
4. Cost-of-living adjustments to military retired pay under 10 U.S.C. 1401a(b) which are based on the periodic cost-of-living adjustments made in Civil Service annuities also apply to military retired pay computed on the new retired pay base system provided for by 10 U.S.C. 1407.
5. Partial cost-of-living adjustments under 10 U.S.C. 1401a(c) and (d) made in

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military retired pay when the member first becomes entitled to retired pay should be applied to military retired pay based on averaging of pay received under 10 U.S.C. 1407 as long as it is reasonably possible to do so. The partial cost-of-living adjustment provisions were enacted to apply to retired pay computed under the old system in which retired pay is based on a single specific rate of basic pay; however, there is no indication of legislative intent that they should not also be applied to retired pay computed under the new retired pay base system.

6. The provisions of 10 U.S.C. 1401a(e), applicable to computation of retired pay, allow the use of basic pay rates in effect on the day before the effective date of the rates of basic pay on which the member's retired pay would otherwise be based plus appropriate cost-of-living increases. This provision was enacted at a time when retired pay was computed only under the old system where it is based on a single specific rate of basic pay. However, there is no indication of legislative intent that it should not also apply to the new system of basing retired pay on average of pay received over a period of months. Therefore, as long as it may reasonably be applied under the new system, it should be applied when advantageous to the retired member.

This action is in response to a request for decision from the Accounting and Finance Officer, Headquarters Air Force Accounting and Finance Center, Denver, Colorado, on several questions regarding the proper method of computing retired pay using the retired pay base required by the new provisions of 10 U.S.C. 1407. Particular reference is made to the proper retired pay entitlement of Airman First Class Edward H. Gallaher, USAF, Retired. This matter has been assigned submission number DO-AF-1382 by the Department of Defense Military Pay and Allowance Committee.

Background

Airman Gallaher entered active duty in the Air Force as a staff sergeant (E-5) on November 21, 1980. On January 20, 1981, he was demoted to Airman First Class (E-3). On April 20, 1981, he was relieved from active duty in grade E-3 and placed on the Temporary Disability Retired List under the provisions of 10 U.S.C. 1202, with a disability rating of 50 percent. At the time of his placement on that list, he was credited with a total of 5 months of active service. His retired pay is to be computed under 10 U.S.C. 1401, Formula number 2.

Under 10 U.S.C. 1401, if Airman Gallaher had entered active duty on or before September 7, 1980, his retired pay would have been computed based on 50 percent of the rate of the monthly basic pay of an E-3, the pay to which he was entitled on the day before he was placed on the Temporary Disability Retired List. However, because he entered active duty after September 7, 1980, his retired pay is to be computed based on 50 percent of his retired pay base established under the new provisions of 10 U.S.C. 1407. Section 1407 was added, and various other retirement computation statutes were amended, in 1980 to authorize a new method of computing retired pay for members of the uniformed services by basing such pay on a percentage of a retired pay base. The retired pay base is the average basic pay the member received over 36 months, or in certain cases a lesser period of time. See Pub. Law 96-342, sec. 813, 94 Stat. 1100-1110.

Under 10 U.S.C. 1407(b)(1)(B), the retired pay base for a member such as Airman Gallaher who retired under 10 U.S.C. 1202 with less than 36 months' active duty is established by totaling the amount of basic pay he received while on active duty and dividing it by the number of months (including any fraction thereof), which the member served on active duty. In Airman Gallaher's case, such a computation method permitted him to include the pay he received as a Staff Sergeant (E-5) for part of the computation period. As a result, his retired pay rate was higher than it would have been had he retired prior to the change in method of computation since under the old method his retired pay would have been computed based solely on the pay of the grade he held at the time of retirement (E-3).

Effect of Erroneous Basic Pay Payments

Because 10 U.S.C. 1407 provides for the use of the total amount of basic pay which the member "received", in computing the retired pay base, the finance officer questions whether an otherwise erroneous payment of basic pay the member "received" should be included. We hold that a member should not be credited with erroneous payments of basic pay for purpose of computing his retired pay base.

Section 1407 of title 10, United States Code, provides in part:

"(a)(1) The retired pay or retainer pay of any person who first became a member of a uniformed service after September 7, 1980, is determined using the monthly retired pay base or monthly retainer pay base computed under this section. * * *

"(b)(1) In the case of a member who is retired under section 1201 or 1202 of this title, the monthly retired pay base is--

"(A) one thirty-sixth of the total amount of monthly basic pay which the member received for any 36 months (whether or not consecutive) of active duty as a member of a uniformed service; or

"(B) in the case of a member who served on active duty for less than 36 months, the amount equal to the total amount of basic pay which the member received during the period he served on active duty * * * divided by the number of months (including any fraction thereof) which he served on active duty."

As indicated, for computing the retired pay of service members who began their military careers on or prior to September 7, 1980, the monthly rate of basic pay to which they were entitled on the date of retirement generally is used. For those who began their military careers after September 7, 1980, the method was changed to use an average

of the monthly basic pay "received" for the high 36 months the member served or in the case of a member whose period of service is less than 36 months, the average is based on the basic pay he "received" for the period actually served. This is somewhat similar to the high-three average used in computing annuities under the Civil Service retirement system. Cf. 5 U.S.C. 8331, definition (4).

No specific explanation is given in the House and Senate reports regarding the use of the word "received" as it relates to retired pay base computations. However, we do not think that Congress intended that erroneous amounts of basic pay received would be included in the computation. It is our view that the intention in enacting 10 U.S.C. 1407 is to change from the use of the basic pay rate in effect at retirement to an average of the basic pay the member was legally entitled to receive during the 36 months or lesser period, as applicable. Accordingly, only amounts which the member was legally entitled to receive should be included in the computation of the retired pay base.

Effect of Unauthorized Absences, Forfeitures and Demotions

The question is asked whether a service member's retired pay base is affected by such things as unauthorized absences, forfeitures or demotions which result in the member receiving less basic pay. In cases of forfeitures and demotions the reductions must be taken into account, but in cases of absences the reduction in pay received would not affect the retired pay base unless the period of absence is includable for retired pay computation.

A member serving on active duty is entitled to the basic pay authorized under 37 U.S.C. 203 and 1009, at the rate applicable to his grade and years of service at any one time. 37 U.S.C. 204. A demotion, like a promotion, entitles the member to a new rate of basic pay which must be taken into account when a member's total amount of basic pay is computed for retired pay base purposes. Likewise, diminutions of pay a member receives as a result of forfeitures imposed under the Uniform Code of Military Justice, 10 U.S.C. 801-940, should also be taken into account in establishing a member's total amount of basic pay for retired pay base purposes. Such a forfeiture of pay is a

lawfully imposed reduction in the member's pay for the period covered by the penalty. Thus, the reduced pay becomes the basic pay which he received during that period.

As to unauthorized absences, under 37 U.S.C. 503 a member forfeits all pay for periods he is absent without leave unless the absence is excused as unavoidable. Enlisted members are generally required to make up lost time due to unauthorized absences to complete the term for which they were enlisted. 10 U.S.C. 972. Although there may be exceptions, generally members do not receive pay for periods of lost time nor are such periods generally creditable for percentage multiplier purposes in computing retired pay. See, for example, 39 Comp. Gen. 844 (1960). In cases where lost time may not be included in the member's retired pay multiplier computation, it should not be included in the retired pay base computation.

We note that unauthorized absence and resulting lost time was apparently not a factor in Airman Gallaher's case. Should a case arise which does not clearly fall within the general explanation above, it should be submitted here for decision on its particular facts.

Cost-of-Living Adjustments

The question also is asked, how cost-of-living adjustments under 10 U.S.C. 1401a are to be applied to retired pay which is computed based on a retired pay base under 10 U.S.C. 1407. We find that the cost-of-living adjustments authorized by 10 U.S.C. 1401a(b), (c), and (d) apply.

The basic provisions of 10 U.S.C. 1401a were enacted several years prior to the enactment of Public Law 96-342, which added 10 U.S.C. 1407, establishing the retired pay base system. As a result they were worded to be compatible with the system of computing retired pay on a specific single basic pay rate, the only system then in existence. The question now is whether and how do the provisions of 10 U.S.C. 1401a apply to retired pay computed on the new retired pay base.

Subsection (b) of 10 U.S.C. 1401a provides:

"(b) Each time that an increase is made under section 8340(b) of title 5 in annuities paid under subchapter III of chapter 83 of such title, the Secretary of Defense shall at the same time increase the retired and retainer pay of members and former members of the armed forces by the same percent as the percentage by which annuities are increased under such section."

Under these provisions each time Civil Service annuities are increased under 5 U.S.C. 8340(b) based on increases in the Consumer Price Index, the Secretary of Defense is to increase retired and retainer pay by the same percentage as the Civil Service annuities are increased. The language of this provision can be applied without complication to retired pay computed on a retired pay base. Also, we find nothing in the language of 10 U.S.C. 1407 or its legislative history to indicate that the cost-of-living increases authorized by section 1401a(b) were not meant to apply to retired pay computed on a retired pay base. Therefore, we find that these provisions apply to retired pay computed on a retired pay base under 10 U.S.C. 1407 just as they apply to retired pay computed based on the rate of basic pay to which the member was entitled on the day before retirement.

Subsections (c) and (d) of 10 U.S.C. 1401a provides:

"(c) Notwithstanding subsection (b), if a member or former member of an armed force becomes entitled to retired pay or retainer pay based on rates of monthly basic pay prescribed by section 203 of title 37 that became effective after the last day of the month of the base index, his retired pay or retainer pay shall be increased on the effective date of the next adjustment of retired pay and retainer pay under subsection (b) only by the percent (adjusted to the nearest one-tenth of 1 percent) that the new base index exceeds the index for the calendar month immediately before that in which the rates of monthly basic pay on which his retired pay or retainer pay is based became effective.

"(d) If a member or former member of an armed force becomes entitled to retired pay or retainer pay on or after the effective date of an adjustment of retired pay and retainer pay under subsection (b) but before the effective date of the next increase in the rates of monthly basic pay prescribed by section 203 of title 37, his retired pay or retainer pay shall be increased, effective on the date he becomes entitled to that pay, by the percent (adjusted to the nearest one-tenth of 1 percent) that the base index exceeds the index for the calendar month immediately before that in which the rates of monthly basic pay on which his retired pay or retainer pay is based became effective."

Under section 1401a(c) only a partial cost-of-living increase in retired pay is granted when a member first becomes entitled to retired pay "based on rates of monthly basic pay" that became effective after the last day of the month of the base index used in computing the cost-of-living increase under 10 U.S.C. 1401a(b). The partial increase is to be based on the percent that the new base index exceeds the index for the calendar month immediately before that in which the "rates of monthly basic pay on which his retired pay" is based became effective.

Under section 1401a(d) a partial cost-of-living increase is granted when a member becomes entitled to retired pay on or after the effective date of a cost-of-living increase under 10 U.S.C. 1401a(b) but before the effective date of the next increase in monthly basic pay. The partial increase is the percent that the base index exceeds the index for the calendar month immediately before that in which "the rates of monthly basic pay on which his retired pay" is based became effective.

The purpose of sections 1401a(c) and (d) is to limit the cost-of-living increase in retired pay to that portion of the increase which occurred since the last statutory increase in basic pay on which the member's retired pay is based. B-166335, June 4, 1969. That is, under section 1401a(c), if he retires after a basic pay increase but before the next retired pay cost-of-living increase, he

receives only a partial increase when the next cost-of-living increase occurs rather than the full increase. Under section 1401a(d), if he retires after the retired pay cost-of-living increase but before the next basic pay increase, he receives an immediate partial cost-of-living increase rather than no increase until the next cost-of-living increase.

The language of sections 1401a(c) and (d) was designed for the system of basing retired pay on a single specific basic pay rate rather than retired pay based on the new retired pay base which is an average of pay received and may include numerous different sets of basic pay rates. However, we find no intent in the enactment of the retired pay base system to repeal or eliminate the partial increases under sections 1401a(c) and (d). Further, those sections were designed to apply in conjunction with the provisions of section 1401a(b) which clearly applies to retired pay computed on a retired pay base. Therefore, it is our view that sections 1401a(c) and (d) should also be applied to retired pay computed on a retired pay base if reasonably possible.

It appears that these provisions can reasonably be applied by disregarding the prior basic pay rates which were used in determining the retired pay base. Instead, in applying sections 1401a(c) and (d) the most recent basic pay rates should be used and the partial increase percentage determined in the same manner as used with respect to members retiring under the old system. This partial increase should then be applied at the appropriate time (depending upon whether (c) or (d) applies) to the member's actual retired pay base.

"Saved Pay" Rates

The submission also asks whether the so-called "saved pay rate" provisions of 10 U.S.C. 1401a(e) apply to the computation of retired pay computed on a retired pay base provided for by 10 U.S.C. 1407.

Section 1401a(e) provides:

"(e) Notwithstanding subsections (c) and (d), the adjusted retired pay or retainer pay of a member or former member of an armed

force retired on or after October 1, 1967, may not be less than it would have been had he become entitled to retired pay or retainer pay based on the same pay grade, years of service for pay, years of service for retired or retainer pay purposes, and percent of disability, if any, on the day before the effective date of the rates of monthly basic pay on which his retired pay or retainer pay is based."

When it is to the member's advantage in the computation of retired pay, 10 U.S.C. 1401a(e) authorizes the use of basic pay rates in effect on the day before the effective date of the rates of monthly basic pay on which the member's retired pay would otherwise be based, plus appropriate cost-of-living increases. 53 Comp. Gen. 698 and 701 (1974). This provision was directed to retired pay based on a specific basic pay rate and not an average of basic pay received over a period of time. However, like sections 1401a(c) and (d), we find no clear indication that in enacting the retired pay base system, Congress intended that section 1401a(e) would not be applied. Thus, we find that when it is possible to do so and it results in a benefit to the retiree, section 1401a(e) should be applied to the computation of retired pay based on a retired pay base under 10 U.S.C. 1407. In Airman Gallaher's case, section 1401a(e) may be applied to allow the use of the pay rates in effect immediately prior to the rates in effect at the time he retired.


Conclusion

As the foregoing relates to Airman Gallaher, his initial retired pay base is obtained by totaling the basic pay he was legally entitled to receive while on active duty. This should reflect the change in his basic pay due to his January 20, 1981 demotion. That total is to be divided by the number of months of his total active duty time to arrive at his retired pay base. The 50 percent disability rating should then be applied to the retired pay base to determine his initial retired pay. However, from the computation furnished us by the Air Force it appears that it would be to Airman Gallaher's advantage to use the October 1979 pay rates (as authorized by section 1401a(e))

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rather than the October 1980 pay rates. Therefore, his retired pay base should be computed using the 1979 rates, and all applicable cost-of-living increases authorized under 10 U.S.C. 1401a. The voucher submitted is being returned for payment, if otherwise correct.

Should the application of any of the provisions of subsections (c) through (e) of 10 U.S.C. 1401a to retired pay computed on a retired pay base be too cumbersome to implement or should their implementation be otherwise undesirable, we suggest the services seek clarifying legislation.

for 
Comptroller General
of the United States