

DECISION



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

FILE: B-182153

DATE: JUL 8 1975

MATTER OF: Department of Defense Military Pay and
Allowance Committee Action No. 515 - Payment
to JROTC Instructors

- DIGEST:
1. Where retired members are employed as administrators or instructors in the JROTC program under 10 U.S.C. 203(d) at DOD operated schools on U.S. military bases in foreign countries and occupy Government owned or controlled quarters which are determined by such installation commander to be adequate for the member and dependents for his grade or rating if called to active duty at that location, such retired member may not be credited with BAQ in the computation of the "additional amount" payable to him under 10 U.S.C. 2031(d)(1).
 2. While the "additional amount" to which a retired member employed as a JROTC instructor becomes entitled under 10 U.S.C. 2031(d)(1) is the difference between retired or retainer pay and active duty pay and allowances to which entitled if called or ordered to active duty, such amount is neither retired pay nor active duty pay, rather, is compensation paid to such member in a civilian capacity. As such, recovery by the United States of any erroneous payments of that "additional amount" may only be waived, if at all, under 5 U.S.C. 5584.

This action is in response to a request for advance decision from the Assistant Secretary of Defense (Comptroller) concerning the crediting of basic allowance for quarters (BAQ) to Junior Reserve Officer Training Corps (JROTC) instructors in the circumstances discussed in Department of Defense Military Pay and Allowance Committee Action No. 515, which was enclosed with the request.

The questions presented in the Committee Action are:

- "1. In establishing the rate payable to Junior Reserve Officer Training Corps (JROTC) instructors in overseas areas, may credit for basic allowance

PUBLISHED DECISION
55 Comp. Gen.

B-182153

for quarters (BAQ) be allowed if adequate Government quarters (single or family-type as appropriate) are furnished without cost to the individual?

"2. If the answer to Question 1 is in the negative, may overpayments heretofore made to such instructors, representing that portion of the payment based on BAQ, be forgiven under the provisions of 10 U.S.C. 2774?"

The discussion in the Committee Action states that, pursuant to the provisions of 10 U.S.C. 2031(d), the Secretary of the military department concerned may authorize qualified instructors to employ as administrators and instructors in the JROTC program retired officers and noncommissioned officers, as well as members of the Fleet Reserve and Fleet Marine Corps Reserve, whose qualifications are approved by the Secretary and the institution concerned. Included in the JROTC program are Department of Defense operated schools located on United States military bases in foreign countries. In this connection, the Committee Action states that the Department of Defense publishes a brochure entitled "Overseas Employment Opportunities for Educators," which apparently outlines the conditions of employment to the prospective job applicant, including the position of JROTC instructor, and contains detailed information regarding housing, living and working conditions.

It is indicated that the current edition of this publication for the 1974/1975 school year informs prospective employees that:

"* * * In most overseas areas, living quarters are provided by the United States Government. These quarters may be in dormitories, apartments, old hotels, converted office buildings, or new and modern quarters. Single employees may be required to share living quarters. In other areas, it may be necessary to share bath and kitchen facilities. Quarters are adequate, but do not compare to housing to which most Americans are accustomed. In some areas, the employee must locate and rent his own living quarters.

Furnishings, heating and plumbing often do not meet United States' standards. If living quarters must be rented, a living quarters allowance which usually covers expenses, is paid by the United States Government."

The Committee Action goes on to state that, pursuant to 10 U.S.C. 2031(d)(1), retired members employed as JROTC instructors are entitled to receive their retired or retainer pay and an additional amount of not more than the difference between their retired pay and the active duty pay and allowances which they would be entitled to receive if ordered to active duty. In this regard, the Committee Action points out that if, in the situation contemplated, a retired member were called to active duty and provided adequate Government quarters at his duty station, entitlement to BAQ would not accrue. However, if the same individual were to revert to a retired status and accept employment as a JROTC instructor, the compensation to which he would be entitled for such employment would, under the interpretation of 10 U.S.C. 2031(d)(1) presently being employed, have BAQ included as an integral part of the computation formula irrespective of whether or not Government quarters are occupied. It is further pointed out that, if BAQ were so included in the computation of JROTC instructors pay with no appropriate deduction because of occupancy of Government quarters, the total amount payable would be more than such retired individual would be entitled to receive if called or ordered to active duty.

The Committee Action suggests that if the above interpretation of 10 U.S.C. 2031(d)(1) is incorrect and it becomes necessary to recover overpayments arising out of the fact that the individual involved occupied Government quarters, difficulty is anticipated in situations where the Government quarters involved are considered to be inadequate. Further, the establishing of a fair rental value under these circumstances could be a problem, since the quarters in question may be considered adequate by foreign standards but not by United States standards.

In connection with the above, it is pointed out in the Committee Action that the Internal Revenue Service has expressed the view that the reference to active duty pay and allowances in 10 U.S.C. 2031(d)(1) merely provides a formula for computing the amount of compensation. As a result, no part of the

B-182153

compensation paid by an educational institution to a retired member of an armed force engaged in the JROTC program under the above-cited provisions may be considered as an "allowance" subject to the exclusion provision of section 1.62-2(b) of the Income Tax Regulations.

Section 2031 of title 10, United States Code, provides in pertinent part:

"(c) The Secretary of the military department concerned shall, to support the Junior Reserve Officers' Training Corps program—

"(1) detail officers and noncommissioned officers of an armed force under his jurisdiction to institutions having units of the Corps as administrators and instructors;

* * * * *

"(d) Instead of, or in addition to, detailing officers and noncommissioned officers on active duty under subsection (c)(1), the Secretary * * * may authorize qualified institutions to employ * * * retired officers and noncommissioned officers * * * subject to the following:

"(1) Retired members so employed are entitled to receive their retired or retainer pay and an additional amount of not more than the difference between their retired pay and the active duty pay and allowance which they would receive if ordered to active duty, and one-half of that additional amount shall be paid to the institution concerned by the Secretary of the military department concerned from funds appropriated for that purpose."

Under the above-cited provisions, retired members employed by the institutions as administrators and instructors in the program are entitled to receive their retired or retainer pay and "an additional amount" of "not more than" the difference between their retired or retainer pay and the "active duty pay and allowances which they would receive if ordered to active duty."

The phrase "active duty pay and allowances" is neither defined in the law nor in the legislative history of that law. However, it is noted that the prior history of the program and the proposed legislative changes in the program which were introduced between 1950 and the introduction of H.R. 9124 in 1963 (which eventually became Public Law 88-647), reference was continually being made to the detailing of active duty personnel to the various educational institutions where JROTC units were maintained. While section 2031(c) carries forward this concept, the legislative history of H.R. 9124, indicates that considerable opposition to a continuation of a JROTC program existed. One of the objections apparently raised was the cost of the program in terms of the active duty personnel who were to be detailed as administrators and instructors. It appears that in response to such objections, the language presently contained in 10 U.S.C. 2031(d)(1) was introduced and in H. Rep. No. 925, 88th Cong., 1st Sess. 24 (1963), the following explanation appears:

"* * *The committee was of the opinion that the military departments should be permitted to utilize retired personnel * * * so as to minimize the drain of these programs on their active duty military personnel and also reduce the budgetary implications of these programs. Retired military personnel receive between 50 to 75 percent of their basic pay while on the retired rolls. The Government receives no particular benefit from this payment. Therefore, the committee believes that many retired officers would be desirous of volunteering for duty in connection with the ROTC program and, thus, permit the military departments to operate these programs with such retired personnel with consequent savings in both dollars and manpower."

While subsection (d)(1) provides that the upper limit of the "difference between" that an employing institution may pay to a retired member is "the active duty pay and allowances which * * * he would receive if ordered to active duty," when considering the legislative history of Public Law 88-647, supra, we do not believe that it was congressionally intended that such upper limit automatically was to include credit for

B-182153

a basic allowance for quarters for computation purposes. To do so automatically in every instance would ignore the fact that numerous active duty members do occupy Government owned or controlled quarters at their duty station adequate for themselves and their dependents, and are ineligible to receive a quarters allowance.

It is our view, that the provisions of 10 U.S.C. 2031(d) must be read in conjunction with subsection (c) and represents a compromise whereby a retired military member may be substituted for a member serving on active duty who would otherwise be detailed to the particular institution in question. Therefore, in order to determine that which a retired member would be entitled to receive as "an additional amount" in such circumstances, it is necessary to determine his entitlements as though he were called or ordered to active duty for the purpose of serving at that institution.

As stated in the Committee Action, the schools in question are located on United States military bases and we presume that the Government owned or controlled quarters previously referred to are either located on or controlled by the military installation. In such circumstances, the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), provides that the installation commander is authorized to determine the adequacy of such assigned or occupied quarters (paragraph 30222, DODPM), and established the fair rental value of quarters designated as inadequate (paragraph 30223, DODPM). Thus, where a retired member occupies Government quarters, which would be administratively determined to be adequate for himself and his dependents, if with dependents, for his grade, rank or rating, if called to active duty at that location, then BAQ entitlement would not exist and would, therefore, not be a proper item of "active duty pay and allowances" for the purpose of computation under 10 U.S.C. 2031(d)(1). Accordingly, the first question is answered in the negative.

With regard to the second question, 10 U.S.C. 2774 provides authority whereby recovery by the United States of erroneous payments of pay and allowances, including retired pay, may be waived.

The "additional amount" paid by an employing institution under 10 U.S.C. 2031(d)(1) is neither retired pay nor does it

B-182153

constitute a portion of "active duty pay and allowances" since the individuals in question are not serving on active duty. While a retired member of an armed force is authorized to be employed by an institution as a JROTC instructor because he is an otherwise qualified retired member, such employment is to be considered as being in a civilian capacity. Therefore, any erroneous payment made as a result of computing the "additional amount" authorized by 10 U.S.C. 2031(d)(1), may only be forgiven under the provisions of 5 U.S.C. 5584, if it is to be forgiven at all. The second question is answered accordingly. See in this connection B-179186, October 24, 1973.

R.F. KELLER

[Deputy]

Comptroller General
of the United States