DCCUMENT RESUME

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Department of Defense Military Pay and Allowance Committee Action No. 534. B-188344. October 13, 1977. 6 pp.

Decision re: Department of Defense; by Paul G. Dembling, Acting Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).
Contact: Office of the General Counsel: Military Personnel.
Budget Function: General Government: Central Personnel Management (805); National Defense: Department of Defense - Military (except procurement & contracts) (051).
Authority: Department of Defense Authorization Act (P.L. 94-106, sec. 806; 86 Stat. 531; 88 Stat. 538). 10 U.S.C. 1210. 10 U.S.C. 1401a(f). 10 U.S.C. 1202. 10 U.S.C. 1205. 121 Cong. Rec. S9928-33. 31 Comp. Gen. 213. 31 Comp. Gen. 215. 38 Comp. Gen. 268. 38 Comp. Gen. 276. DOD Military Pay and Allowance Committee Action No. 534.

The Assistant Secretary of Defense (Comptroller) requested an advance decision concerning the application of the provisions of 10 U.S.C. 1401a(f) to members returned to active duty from the Temporary Disability Retired List (TDRL) and later retired for years of service or transferred to the Fleet Reserve. Retired pay received by a member by virtue of the placement in a TDRL status is not retired pay as contemplated by 10 U.S.C. 1401a(f). A member may use a date when he was on the TDRL as a hypothetical retirement date in computing his retired pay under that provision. (Author/SC)

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

FILE: B-188344 DATE: October 13, 1977

MATTER OF: Department of Defense Military Pay and Allowance Committee Action No. 534

DIGEST: 1. The circumstance of placement of a member's name on the Temporary Disability Retired List (TDRL) is not one which can be chosen by the member nor is such a status final since under the provisions of 10 U.S.C. 1210 the Secretary concerned is required to take additional action to finalize the affected individual's status as a member of the service. As such, considering the legislative purpose of 10 U.S.C. 1401a(f) retired pay received by a member by virtue of the placement in a TDRL status is not retired pay as contemplated by 10 U.S.C. 1401a(f).

2. The provisions of 10 U.S.C. 1401a(f), authorize a retired member to recompute his retired pay on a hypothetical basis at the pay rate and years of service applicable to him at an earlier date when he could have otherwise retired, as though he had retired then. In view of the purpose of that statute and the hypothetical nature of computations under it, a member may use a date when he was on the temporary disability retired list as a hypothetical retirement date in computing his retired pay under that provision.

This action is in response to a letter dated February 2, 1977, from the Assistant Secretary of Defense (Comptroller) requesting an advance decision concerning the application of the provisions of 10 U.S.C. 1401a(f) to members returned to active duty from the Temporary Disability Retired List (TDRL) and subsequently retired for years of service or transferred to the Fleet Reserve in the circumstances discussed in

Department of Defense Military Pay and Allowance Committee Action No. 534, enclosed with the request.

By letter dated August 5, 1977, that Committee Action was revised to ask the following questions:

> "1. Does the fact that the members, in the situations described below, were on the Temporary Disability Retired List (TDRL) preclude such members from having their pay computed in accordance with the provisions of 10 U.S.C. 1401a(f)?
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> "2. If the answer to question 1 is negative, may the members in situations 1.a. and b. have their pay computed in accordance with the provisions of 10 U.S.C. 1401a(f) as if 30 September 1974 was the actual date of transfer to the Fleet Reserve or the date of retirement as the case may be?"

The situation in 1.a., which is not quoted, involves a Regular enlisted member of the Navy who was transferred to the TDRL on April 28, 1970, with a 100 percent disability rating. On April 27, 1975, he completed 5 years on that list and on June 8, 1975, was found fit for duty and discharged from that list. On July 3, 1975, he was transferred to the Fleet Reserve with 31 years, 8 months, and 14 days service for basic pay purposes and 26 years, 8 months and 7 days service for percentage multiple purposes.

The situation in 1.b., also not quoted, involves a Regular enlisted member of the Navy who was transferred to the TDRL on September 14, 1972, with 30 percent disability rating with over 30 years of active service. On October 24, 1975, he was found fit for duty and discharged from that list. On October 25, 1976, he was reenlisted and returned to active duty and on November 1, 1976, was retired for years of

service under the provisions of 10 U.S.C. 6326, with 20 years, 2 months and 22 days for percentage multiple purposes.

In the discussion relating to the first situation, the Committee Action questions whether the phrase "initially became entitled" to retired or retainer pay on or after January 1, 1971, as used in 10 U.S.C. 1401a(f), would preclude such member, who was on the TDRL prior to that date, from such recomputation upon transfer to the Fleet Reserve in 1975.

In the second situation, the Committee Action expresses the view that since the member was not placed on the TDRL until after January 1, 1971, he would clearly be eligible to receive the advantage of 10 U.S.C. 1401a(f) recomputation. The question then raised is whether such member would be limited to recomputations based on periods of active duty, or whether he could also use dates during the period of time spent on the TDRL for the purposes of selecting a hypothetical retirement date for such recomputation. In this connection, we understand that the significance of selecting the date September 30, 1974, for 10 U.S.C. 1401a(f) recomputation purposes, is that, if the members described in situations 1.a. and 1.b. are permitted to use such date, they would receive the greatest amount of retired or retainer pay due to the fact that there were two Consumer Price Index adjustments in retired or retainer pay in the 12-month period immediately prior to the active duty pay rate change on October 1, 1974.

Subsection 1401a(f) of title 10, United States Code, provides:

> "(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."

That provision was introduced in the 94th Congress, 1st Session, by Senator John Tower on June 4, 1975, as Amendment No. 534, to the Department of Defense Authorization Act (S. 920), and incorporated in House of Representatives bill, H.R. 6674, and became section 806 of Public Law 94-106, approved October 7, 1975, 88 Stat. 531, 538.

There were no hearings and no committee reports on the proposal other than brief statements in the conference reports on H.R. 6674 which indicate that its adoption was to correct the so-called "retired pay inversion." A more detailed statement of the purpose of the provision is included in the remarks of Senator Tower and others during floor discussion of the amendment shortly before it was approved by the Senate. Senator Tower stated at that time that introduction of the amendment was to correct the wasteful early retirement of military personnel and to encourage service members "to stay on [active duty] through the most productive part of their careers." In explanation, it was stated that a retired pay inversion had developed because retired pay increases--which are tied to the Consumer Price Index--had exceeded active duty pay raises in recent years, particularly among higher ranking personnel. As a result, many members who retire after active duty pay raises, would receive less retired pay than if they retired before the raises. Therefore, the stated purpose was to insure that career members, by remaining in the service, would not suffer permanent and possibly increasing losses of retired pay. See 121

Cong. Rec. S. 9928 - S. 9933 (daily ed., June 6, 1975) (Remarks of Senator Tower). It is noted that in addition to this prospective effect the amendment provided for increased retired pay for members already retired if they had been adversely affected by the "retired pay inversion." For that purpose the members covered were those who were "initially entitled to that pay [retired pay] on or after January 1, 1971."

When the language of 10 U.S.C. 1401a(f) is considered in terms of that explanation of purpose, it is evident that the legislation is for a beneficial purpose and that the members to whom the benefit is directed are those who are eligible to retire voluntarily at any time, and wish to continue on active duty, but because of probable financial losses in retired pay which they would suffer should they remain on active duty and retire later, terminate their active military careers by exercising their retirement option at the earlier date. The benefits of the amendment are also provided for retired members who retired after January 1, 1971, and were adversely affected by the "retired pay inversion." In view of the beneficial nature of the amendment it is our view that the phrase "initially became entitled to that pay" as it relates to the phrase "monthly retired or retainer pay" as used in 10 U.S.C. 1401a(f) should be narrowly construed to relate only to retired pay entitlements accruing on final-type retirements.

The purpose for establishing the TDRL (10 U.S.C. 1202 and 1205) was to authorize a limited retirement status for members of the Armed Forces called or ordered to active duty and who while serving on that duty are determined to have become unfit to perform such duty because of physical disability which may be permanent, but where it cannot be determined that disability is in fact of a permanent nature. Under the provisions of 10 U.S.C. 1210, as it relates to the Committee Action questions, upon the completion of 5 years on that list, the Secretary of the service concerned is required to make a final determination in the member's case (subsection (b)), and under subsections (c), (d) and (f), is required to place the member on the permanent disability

retired list, or return him to active duty. Further, under subsection (h), unless a member's name is sooner removed from the TDRL, such retired pay to which he is entitled by virtue of placement on that list is terminated.

From the foregoing, it is clearly evident that a TDRL status is one which can neither be chosen by the member nor is it final. Additional action must be taken by the Secretary concerned to finalize the affected individual's status as a member of the service. The general term "retired pay" used in 10 U.S.C. 1401a(f), standing alone, would appear to include retired pay received while on the TDRL. Compare 31 Comp. Gen. 213, 215 (1951) and 38 Comp. Gen. 268, 276 (1958). However, to so include TDRL retired pay would cause inequities to the limited class of members involved, which do not appear to have been comtemplated by the Congress, and appear contrary to the beneficial purpose of section 1401a(f). Therefore, it is our view that entitlement to retired pay by virtue of a member's placement on the TDRL is not the retired pay entitlement contemplated in 10 U.S.C. 1401a(f), and the first question is answered in the negative.

With regard to the second question, it is to be noted that computation of retired pay under 10 U.S.C. 1401a(f) is based on dates which are hypothetical and are couched in terms of that "to which he would be entitled if he had become entitled to retired or retainer pay at an earlier date." The phraseology, when considered in context of the before-stated purpose of these provisions, authorizes a retired member to recompute his retired pay at the pay rates and years of service applicable to him at an earlier date when he could have retired, as though he had retired then. Therefore, and in view of the answer to question 1, in the situations described in the Committee Action, the date, September 30, 1974, may be used in computing the members' retired pay under 10 U.S.C. 1401a(f), although they were on the TDRL on that date. Question 2 is answered in the affirmative.

Paul G. Dembling

Acting Comptroller General
of the United States