

DECISION

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

FILE: B-222860

DATE: August 4, 1986

MATTER OF: Rear Admiral Grace M. Hopper, USNR
(Retired) (Recalled)

DIGEST:

1. A statute authorizing military and naval reservists who are "qualified" for retirement to be "retained" in an active status and to receive credit "for all purposes" for their subsequent service does not apply to reservists who have in fact been retired, since retirement orders are not subject to cancellation, and while retirees may be recalled to active service from retirement they cannot be retired and "retained" on active duty simultaneously. Hence, that statute provides no authority to permit a retired Navy Reserve officer who was recalled to duty and who then performed 19 years' active service to be "re-retired" anew on the basis of that additional service. 10 U.S.C. § 676.
2. The Congress has enacted legislation to delete a statutory directive which previously prohibited retired military and naval reservists from receiving additional retirement benefits for active service performed upon a recall to duty, so that a retired Navy Reserve officer who was recalled to active duty for an extended period may now elect to have her retired pay recomputed, with credit for the added service she performed, under the same statutory retired pay recomputation formulas generally applicable to all retired service members who perform periods of active duty following their retirement. 10 U.S.C. § 1402.

The question presented in this matter is whether Rear Admiral Grace M. Hopper, USNR (Retired) (Recalled), is entitled to have her Navy Reserve retired pay recomputed on the basis of the 19 years she has served on active duty with the Navy since the time of her retirement and subsequent recall to active service in 1976.^{1/} We conclude that she is entitled to a recomputation of her retired pay under the same statutory retired pay recomputation formulas generally applicable to all service members who perform periods of active duty following their retirement.

Background

On July 31, 1967, Admiral Hopper (then Commander Hopper) was recalled from retirement to active duty in the Navy, and she has been in active service continuously since then. Six months prior to her recall to duty she had been retired as a member of the Navy Reserve, and she had been receiving retired pay for non-regular service under the provisions of 10 U.S.C. §§ 1331-1337.

The concerned Navy officials indicate that Admiral Hopper plans to leave active duty in the near future, and that uncertainty has arisen concerning the recomputation of her retired pay. The officials note that 10 U.S.C. § 676 authorizes reservists who are "retained" on active duty after becoming qualified for retired pay under 10 U.S.C. §§ 1331-1337 to be "credited with that service for all purposes." They also note that 10 U.S.C. § 1402(a) generally authorizes the recomputation of the retired pay of service members who are retired and are then recalled to active duty (other than for training) for a period of 6 months or more. The officials further note that in decisions rendered in 1958 and 1961 we nevertheless expressed the view that reservists who had been placed in a retired status under the provisions of 10 U.S.C. §§ 1331-1337 were not eligible on the basis of either 10 U.S.C. § 676 or 10 U.S.C. § 1402(a) for a recomputation of their retired pay to account for any subsequent active duty they performed.^{2/}

^{1/} This action is in response to a request for an advance decision received from the Comptroller of the Department of the Navy.

^{2/} The officials refer specifically to 38 Comp. Gen. 159 (1958); 41 Comp. Gen. 118 (1961); and B-147232, October 6, 1961.

The officials point out that there have been several amendments to the applicable statutes governing the retirement of reservists since the time those decisions were issued, however, and they question whether those amendments will operate to allow Admiral Hopper to receive retired pay credit for the active service she has performed since July 31, 1967.

Service Credit under 10 U.S.C. § 676

As indicated, 10 U.S.C. § 676 authorizes reservists who have "qualified" for retired pay for non-regular service under 10 U.S.C. §§ 1331-1337 to be "retained" on active duty or in service in a reserve component, and provides that a reservist "so retained shall be credited with that service for all purposes."

We have held that this provision applies only to reservists who have met the qualifications for retirement under 10 U.S.C. §§ 1331-1337 but have not actually been retired, since a reservist following retirement cannot be "retained" on duty but can only be recalled to duty.^{3/} This is consistent with the fundamental rule that a fully executed military retirement order, if regular and valid, is final and can be reopened only upon a showing of fraud, mistake of law, mathematical miscalculation, or substantial new evidence of error.^{4/} Service members recalled to an active duty status following retirement cannot, for the purpose of obtaining retirement benefits for the additional active duty, have their original retirement orders superseded or cancelled by new "re-retirement" orders. Rather, if they are recalled to active duty following retirement they simply become eligible to elect recomputation of their retired pay under the appropriate formula prescribed by 10 U.S.C. § 1402.^{5/}

^{3/} See B-147232, October 6, 1961.

^{4/} See, e.g., 44 Comp. Gen. 258, 260 (1964); and 31 Comp. Gen. 296 (1952).

^{5/} See, e.g., 48 Comp. Gen. 99 and 398 (1968); 43 Comp. Gen. 442 (1963); B-204055, May 17, 1982.

In the present case, there is no suggestion of irregularity in Admiral Hopper's original retirement, and there consequently appears no proper basis for canceling her original retirement orders on account of her subsequent recall to active duty or for any other reason. Also, she cannot properly be considered to have been "retained" in an active status during her retirement and the period when she was receiving retired pay, so that she may not be allowed retirement credit for her later active duty under the provisions of 10 U.S.C. § 676 as a reservist "retained" in active service. It is therefore our view that any retired pay benefits due to her based on that later active duty would be available to her, if at all, only through a recomputation of her retired pay under 10 U.S.C. § 1402.

Recomputation of Retired Pay under 10 U.S.C. § 1402(a)

Provisions of law governing the recomputation of retired pay to reflect active duty performed after retirement are contained in 10 U.S.C. § 1402.^{6/} Subsection 1402(a) prescribes a recomputation formula applicable to service members who retire and who thereafter serve on active duty (other than for training) for 6 months or more without incurring a physical disability during the later period of active duty. That formula provides for the recomputation of the service member's retired pay based on the monthly basic pay of the grade in which the member would be eligible to retire if he or she were retiring upon release from the later period of active duty. In the recomputation of their retired pay, that amount is multiplied by 2-1/2 percent of the member's years of creditable service performed prior to retirement, plus the years of active service after retirement.^{7/}

^{6/} 10 U.S.C. § 1402 applies to individuals who first became members of the uniformed services before September 8, 1980. Alternate computation formulas applicable to those who have become service members since that date are contained in 10 U.S.C. § 1402a.

^{7/} Navy officials indicate that Admiral Hopper plans to apply for a recomputation of her retired pay under subsection 1402(a), if she is eligible to do so, rather than under any of the alternate formulas provided by section 1402.

The terms of 10 U.S.C. § 1402(a) do not exclude retired reservists from coverage, and the formula it contains is amenable for use in recomputing a reservist's years of service under the method prescribed by 10 U.S.C. § 1333. Nevertheless, in the decisions rendered in 1961 to which the Navy officials refer, we expressed the view that reservists could accrue no retired pay benefits based on active service they performed following their retirement.^{8/} This conclusion was not predicated on the terms of 10 U.S.C. § 1402(a), however, but was instead required by the language of 10 U.S.C. § 1334(b) then in effect which specifically directed that time spent after retirement or transfer to the retired reserve may not be credited in any computation of years of service under 10 U.S.C. §§ 1331-1337.

In 1962 the Congress deleted the prohibition contained in 10 U.S.C. § 1334(b) against reservists receiving retirement benefits for active service performed upon a recall to duty after their retirement.^{9/} The legislative history of the 1962 amendment reflects that it was "designed to compensate for the failure in the original military codification act to conform section 1334(b) of title 10 to its source law. This has resulted in the denial to members of the reserve components of credit in computing retired pay * * * for time spent on active duty after they have been granted retired pay * * *."^{10/}

The Congress thus amended 10 U.S.C. § 1334(b) in 1962 for the specific purpose of making reservists eligible for a recomputation of their retired pay if they are recalled to active service after being retired. The amending legislation removed the statutory basis for the conclusion reached in our 1961 decisions that reservists could receive no retired pay credits for active duty performed subsequent to their retirement. It follows that Admiral Hopper will be

^{8/} See 41 Comp. Gen. 118, supra; and B-147232, supra.

^{9/} Public Law 87-651, § 108, September 7, 1962, 76 Stat. 506, 509.

^{10/} See S. Rep. No. 1876, 87th Cong., 2d Sess. 6, reprinted in part in 1962 U.S. Code Cong. & Ad. News 2456 (quoted material not included).

B-222860

entitled to have her retired pay recomputed under the provisions of 10 U.S.C. § 1402(a) when she leaves active duty, and in the recomputation she will be eligible to receive credit for the years of service she performed and the promotions she received following her retirement.

The question presented is answered accordingly.

Sheldon F. Jordan
for Comptroller General
of the United States