



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Lieutenant Colonel Merland Bersch, USAF, Retired

**File:** B-236258

**Date:** March 14, 1990

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### DIGEST

The reduction in a member's retired or retainer pay that is allocable to a pay period required by 5 U.S.C. § 5532(c) when the combined annual rate of retired pay and annual rate of basic pay for a civilian position with government exceeds level V of the Executive Schedule should be accomplished by converting all factors to a biweekly pay period basis for the purpose of determining whether the pay cap was exceeded and if it is exceeded the deduction should be implemented converting the excess to a yearly then a monthly rate.

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### DECISION

Lieutenant Colonel Merland B. Bersch, USAF, retired, appeals a settlement of our Claims Group which denied his claim for retired pay withheld under the provisions of 5 U.S.C. § 5532(c). For the following reasons his claim may be allowed.

This case involves the method used to compute the reduction in retired pay required by 5 U.S.C. § 5532(c). That section provides in part as follows:

"(c)(1) If any member or former member of a uniformed service is receiving retired or retainer pay and is employed in a position the annual rate of basic pay for which, when combined with the member's annual rate of retired or retainer pay . . . exceeds the rate of basic pay then currently paid for level V of the Executive Schedule, such member's retired or retainer pay shall be reduced by an amount computed under paragraph (2) of this subsection. . . .

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"(2) The amount of each reduction under paragraph (1) of this subsection allocable for any pay period in connection with employment in a position shall be equal to the retired or retainer pay allocable to the pay period . . . ."

We have held that the term pay period used in the law refers to the pay periods applicable to civilian employees of the government. Lieutenant General Ernest Graves, Jr., USA (Ret.) 61 Comp. Gen. 604 (1982).

Colonel Bersch contends that the reduction in retired pay should be uniform for every month he receives retired pay. The Air Force in implementing the law contends that 5 U.S.C. § 5532(c)(2) requires a computation that results in amounts being deducted which vary from month to month and results in considerably larger amounts being withheld than the difference between his combined annual retired pay and annual civilian salary and level V of the Executive Schedule.

The Air Force method for computing the reduction results from the fact that retired pay is computed on a monthly cycle of 30 days, the 31st day of a month being disregarded. The daily rate of retired pay is 1/30 of the monthly rate. Civilian pay is computed on a biweekly pay period basis. Hence, when calculating retired pay "allocable to the pay period" the number of days that retired pay is received in a month allocable to a pay period varies. To compute the amount of retired pay allocable to a specific payroll cycle, the formula includes: (1) 14 days of retired pay if the payroll cycle includes 14 days of the month in which retired pay is due; or (2) 13 days of retired pay if the 31st day of a month is within the payroll cycle; or (3) 16 days of retired pay if the 28th day of February is within the payroll cycle. This method is supported by regulations in effect at the time the reductions at issue in this case were made. Department of Defense Retired Pay Manual, table 2-1-9, approved May 10, 1984.

These regulations were apparently promulgated as a result of our above cited decision. It appears that the regulations were a good faith attempt to implement the law by incorporating provisions dealing with legislative direction that the retired pay reduction be applied to retired pay allocable to a pay period. It is our view, however, that the strict application of these regulations can result in reductions in excess of the reduction intended by the Congress.

As can be seen from the quoted provisions of the law, Congress intended to cap the combination of annual retired pay and annual basic pay of a civilian position at level V of the Executive Schedule. The cap is implemented by reducing retired pay on a civilian pay period basis. The pay cap is the biweekly rate of pay for level V of the Executive Schedule. Thus, when a member's civilian salary for the biweekly pay period and his retired pay attributable to that pay period exceed the amount that would be paid to a level V employee for a biweekly pay period, a reduction in retired pay to the level V rate is required.

The question then arises as to what method should be used to allocate retired pay paid on a monthly basis to the 14-day civilian pay period. The method used by the Air Force in applying the regulations results in Colonel Bersch's retired pay being reduced in a greater amount than the amount by which his combined annual retired pay and annual civilian pay exceeds level V. That Congress did not intend such a result is demonstrated by the use of the term "annual rate" in referring to both retired pay and civilian pay in 5 U.S.C. § 5532(c)(1). The phrase "retired pay allocable to the pay period" in 5 U.S.C. § 5532(c)(2) merely refers to the amount of annual retired pay converted to a civilian pay period of which there are 26 in a year. If the amount as derived when combined with civilian pay received in a pay period exceeds level V biweekly pay, the difference provides the amount to be deducted from retired pay on a biweekly basis. Because retired pay is paid monthly, this biweekly reduction should then be converted to an annual amount and deducted from retired pay in equal monthly installments. Under this method the maximum reduction over a year should not exceed the difference between the annual rate of pay for level V of the Executive Schedule and the combined annual rates of retired pay and pay for the civilian position, as contemplated by 5 U.S.C. § 5532(c)(2).

It is our understanding that a proposed Department of Defense regulation is in accord with the above views and in our opinion should be adopted.

Accordingly, Colonel Bersch's claim for any amounts deducted from his retired pay in excess of those amounts computed in accordance with the foregoing should be refunded to him.

*Milton J. Astor*  
for Comptroller General  
of the United States