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Military Personnel Law Manual

Title III—Retired Pay, Separation Payments, and Death Payments

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Foreword

This is Title III of the Second Edition of the Military Personnel Law Manual. The Manual is prepared by the Office of General Counsel, U.S. General Accounting Office (GAO). The purpose of the Manual is to present the legal entitlements of members of the uniformed services including an overview of the statutes and regulations which give rise to those entitlements, in the following areas: Title I—Active Duty Pay and Allowances; Title II—Travel; Title III—Retired Pay, Separation Payments, and Death Benefits; and Title IV—Survivor Benefit Plan.

This edition of the Military Personnel Law Manual is being published in loose leaf style with the introduction and four titles separately wrapped. The Manual generally reflects decisions of this Office issued through September 30, 1992. The material in the Manual is, of course, subject to revision by statute or through the decision-making process. Accordingly, this Manual should be considered as a general guide only and should not be cited as an independent source of legal authority. This Manual supersedes the edition of the Military Personnel Law Manual which was published in June 1983 with revised pages issued May 1985, covering decisions through December 31, 1984.

We plan to issue regular supplements to be filed with this edition of the Military Personnel Law Manual. As always, we would welcome any comments that you may have regarding any aspect of the Manual.

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General Counsel

Contents

Abbreviations

ADT	active duty training
AF	Air Force
AUS	Army of the United States
AFR	Air Force Regulation

BAS	basic allowance for subsistence
BAQ	basic allowance for quarters
cf.	compare
C.F.R.	Code of Federal Regulations
ch.	chapter
CIA	Central Intelligence Agency
CMA	Court of Military Appeals
COC	Office of the Comptroller of the Currency
COLA	cost of living allowance
Comp. Gen.	Decisions of the Comptroller General of the United States (published volumes)
CONUS	the continental United States
Ct. Cl.	Court of Claims
DIC	Dependency and Indemnity Compensation
DITY	Do-It-Yourself
DLA	dislocation allowance
DOD	Department of Defense
FDIC	Federal Deposit Insurance Corporation
FSA	family separation allowance
GAO	General Accounting Office
GTR	government transportation request
HHE	household effects
HHG	household goods
HPSP	Health Profession's Scholarship Program
IHA	interim housing allowance
JFTR	Joint Federal Travel Regulations, Vol. 1 (formerly Joint Travel Regulations, Vol. 1)
1 JTR	Joint Travel Regulations, Vol 1 (now Joint Federal Travel Regulations, Vol. 1)
JROTC	Junior Reserve Officers' Training Corps
LWOP	leave without pay
MADCOP	Marine Corps Associate Degree Completion Program
MH	mobile home
MIA	missing in action
MOS	military occupational specialty
MPLM	Military Personnel Law Manual
MSC	military sea command
MVTA-2	multiple unit training assembly-two
NAAA	Naval Academy Athletic Association
NATO	North Atlantic Treaty Organization
NROTC	Navy Reserve Officers' Training Corps
OCS	Officer Candidate School

para.	paragraph
paras.	paragraphs
PCS	permanent change of station
PDTATAC	Per Diem Travel and Transportation Allowance Committee
PHS	Public Health Service
POV	privately owned vehicle
Pub. L. No.	Public Law Number
ROTC	Reserve Officers Training Corps
RSFPP	Retired Serviceman's Family Protection Plan
SBP	survivor Benefit Plan
SRB	selective reenlistment bonus
SROTC	senior Reserve Officers' Training Corps
Stat.	statutes at Large
TAD	temporary additional duty
"TAPER"	appointment temporary appointment pending establishment of a register
TDRL	Temporary Disability Retired List
TDY	temporary duty
TLA	temporary lodging allowance
UCMJ	Uniform Code of Military Justice
U.S.C.	United States Code
U.S.C.A.	United States Code Annotated
USMC	United States Marine Corps
USSDP	Uniform Service Savings Deposit Program
VA	Veterans Administration (now Department of Veterans Affairs)
VHA	variable housing allowance
vol.	volume
VIP	variable incentive pay
§	section
§§	sections

Retirement for Years of Service and for Non-Regular Service

A. Retired Grade

1. Grade at time of retirement

a. Time-in-grade restrictions

(1) Inapplicable in selecting retirement date—Where an Army or Air Force Officer is retired in the grade of lieutenant general or general under 10 U.S.C. §§ 3962 or 8962, the time-in-grade restrictions in 10 U.S.C. §§ 3963 or 8963 (both repealed in 1985) do not apply in selecting an earlier hypothetical retirement date for retired pay computation pursuant to 10 U.S.C. § 1401a(f). B-189029, Sept. 9, 1980.

(2) Failure to meet—Members of the Armed Services, whether officer or enlisted, who have not met the requirements prescribed by statute and regulation of time-in-grade for retirement in a certain grade may not have their retired pay computed on the basis of the higher grade through operation of 10 U.S.C. § 1401a(f) unless a waiver of that requirement has been granted pursuant to proper authority. Chief Master Sergeant E. Ohr, USAF, 68 Comp. Gen. 649 (1989).

b. Member reduced after becoming eligible for retirement

Under 10 U.S.C. § 1401a(f) the retainer pay of a former Navy or Marine Corps member who initially became entitled to that pay on or after January 1, 1971, may not be less than the retainer pay to which he would be entitled if transferred to the Fleet Reserve or Fleet Marine Corps Reserve at an earlier date, adjusted to reflect applicable increases in such pay under that section even though transferred to Fleet Reserve or Fleet Marine Corps Reserve at a lower pay grade because of unsatisfactory performance of duty or as result of disciplinary action. 56 Comp. Gen. 740 (1977).

c. Grade prior to terminal leave or at time of retirement

The Air Force (special pay grade) prior to entering terminal leave status, at which time his status reverted to Chief Master Sergeant (pay grade E-9), and who retired under 10 U.S.C. § 8917 effective November 1, 1981, may be computed based on the special rate for Chief Master Sergeant of the Air Force in effect prior to his commencing terminal leave or on the basis of the grade in which he was serving at the time of his retirement as a Chief Master Sergeant. B-210789, July 6, 1983.

2. Advancement on retired list to highest grade satisfactorily held

a. In general

Where an existing statute authorizes computation of the retired pay of a member or former member on the basis of the pay of the grade in which the individual has served satisfactorily and which is higher than the pay of the grade on which he otherwise is entitled to compute his retired pay, we will authorize payment, or pass to credit in the disbursing officer's accounts, a payment of retired pay computed on the pay of the higher grade, without regard to whether that grade was a temporary or permanent grade, even though the armed service in which the individual held that higher grade is not the service in which he retired. However, such action in any particular case will depend upon an appropriate administrative determination as to satisfactory service where such determination is required by applicable statutes. 49 Comp. Gen. 618 (1970). See also 50 Comp. Gen. 607 (1971); 50 Comp. Gen. 586 (1971); 49 Comp. Gen. 113 (1969); and 48 Comp. Gen. 163 (1968).

b. Advancement in grade on retirement lists—pay not recalculated

Two retired officers of the Air Force were advanced from the grade of lieutenant general to general on the retirement lists. When retired service members are advanced in grade on the retirement lists, their retired pay may not be recalculated to reflect their advancement in the absence of statutory authority directing a recalculation. In this case, there does not appear to be an Act of Congress authorizing a recalculation of the officers retired pay, nor does it appear that an increase in their pay was ever intended to result from their advancement on the retirement lists. In these circumstances the Comptroller General is unable to conclude that they are eligible for an increase in the rate of their retired pay. B-224142, Nov. 28, 1986.

c. Determination of "satisfactory service" in higher grade

While no amount of service is specified in 10 U.S.C. § 6151 before the Secretary of the Navy can determine that a member has served satisfactorily in a higher grade or rank under a temporary appointment to be entitled to retired pay based on the higher grade, unless active service is actually performed in the temporary grade under conditions requiring duty comparable to that encountered during a normal tour of active duty, there would be no evidence upon which a determination of satisfactory service could be made. Therefore, 10 U.S.C. § 6151 must be construed as

contemplating that the determinations will be made on the basis of sufficient actual service in the temporary grade to permit a genuine appraisal of the quality of the service of the member in that grade. 41 Comp. Gen. 11 (1961).

Marine Corps board of inquiry recommended to the Secretary that a major be retired in the rank of captain and that the member had not served satisfactorily as a major. Even though the major first became eligible for voluntary retirement before the board's recommendation was approved by the Secretary, his retired pay should be calculated on the grade of captain, since it is evident that the Secretary would not have made the statutorily required determination of satisfactory service as a major on the eligibility date. Captain William G. Peters, U.S. Marine Corps (Retired), 70 Comp. Gen. 398 (1991).

d. Promotions while in missing status do not require 6-month in-grade requirements

Survivor Benefit Plan annuity for the surviving spouse of member who dies while on active duty when otherwise eligible to retire, is computed on grade and years of service as though member retired on the day he died. Computation includes limitations on grade for retirement purposes such as the 6-month in-grade requirement. However, where a member who was missing in action is determined to have been killed in action, the 6-month in-grade requirement does not apply since promotions received while in a missing status are "fully effective for all purposes," under 37 U.S.C. § 552(a). B-195625, Feb. 28, 1980.

e. Retired pay for extraordinary heroism award—effect of advancement to officer grade

A master sergeant who when retired under 10 U.S.C. § 3914 is awarded a 10-percent increase in retired pay by reason of extraordinary heroism performed in the line of duty, upon advancement to the officer rank of captain on the retired list pursuant to 10 U.S.C. § 3964, is not eligible to continue receiving the 10-percent additional retired pay authorized only for enlisted members, the entitlement to the increase not attaching by reason of his retirement, 10 U.S.C. § 3992, which prescribes the formula for the recomputation of retired pay for members advanced on the retired list, does not provide a 10-percent increase in retired pay for extraordinary heroism. Thus, the member's recomputed retired pay may not be increased

from the date of his advancement on the retired list to the rank of captain by 10 percent. 47 Comp. Gen. 397 (1968).

f. Advancement on retired list produces reduction of retired pay

A member received a lesser rate of retired pay in the recomputation of his retired pay, in accordance with 10 U.S.C. § 3992, upon advancement to warrant officer, W-1, on the retired list after completion of 30 years of service, pursuant to 10 U.S.C. § 3964, than that established under 10 U.S.C. § 3991 when originally retired under the authority of 10 U.S.C. §§ 3914 and 3961 in the grade of sergeant E-9, a higher enlisted pay grade prescribed by the Act of May 20, 1958, than that of warrant officer, W-1, the member should have been consulted before being advanced on the retired list, section 3964 not imposing an absolute requirement for advancement, and neither the most favorable payment formula authorized by section 3991, nor any other provision of law saved to the member the right to continue receiving retired pay under his original entitlement. Therefore, the action of advancement may be rescinded on the basis of a statement by the member that it was contrary to his wishes. 44 Comp. Gen. 510 (1965).

g. Correction of records to show retirement and subsequent advancement to officer grade

Upon correction of military records, to show retirement as a private E-1 with over 20 years of service, in lieu of discharge from the Regular Army, and advancement on the retired list to first lieutenant, the retired pay of the member for the period from date of initial retirement to date of record correction is not subject to recomputation under 10 U.S.C. § 3992 at the rates prescribed in section 511 of the Career Compensation Act of 1949. 49 Comp. Gen. 440 (1970). See also 41 Comp. Gen. 399 (1961), concerning effect of court-martial sentence.

h. Correction of records causing retired pay to be decreased

In 1974 Army Board for Correction of Military Records changed retired officer's records in manner which required the Army Finance and Accounting Center to recompute his retired pay entitlements and place him in debt for overpayments received prior to 1974 board action. His 1978 application for waiver of that debt cannot be considered since it was not timely filed within 3-year period prescribed by waiver law, 10 U.S.C. § 2774(b). B-197511, Apr. 7, 1980.

i. Computation effective date

Ordinarily, an original interpretation of a statute must be applied back to the time of enactment of the law. However, prospective application may be given to a decision which is inconsistent with a reasonable administrative determination which would result in collection action against retired members for erroneous payments of retired pay. The computation of retired pay for those members affected should be adjusted for future payments. Chief Master Sergeant Gerald E. Ohr, USAF, 68 Comp. Gen. 649 (1989).

j. Retired pay calculation after retirement following a reduction in grade

Under 10 U.S.C. § 1401a(f), a member of an armed force who retires after January 1, 1971, may have his retired pay calculated on the basis of the pay voted in effect and applicable to him at any point in time after he became eligible to retire. A member receives the benefit of this law even if he is reduced in grade, following his eligibility to retire, for disciplinary reasons including a reduction in grade pursuant to a court-martial sentence. See 56 Comp. Gen. 740 (1977). B-225150, May 4, 1987.

Note: By amendment to 10 U.S.C. § 1401a(f) in September 1988, the rule in this case was changed.

3. Debt collection—setoff

Collection of a debt under 37 U.S.C. § 1007(c), which provides that two-thirds of monthly pay may be deducted from members of the uniformed service to repay a debt, rather than 5 U.S.C. § 5514 which limits collection to 15 percent, is appropriate where legislation amending 37 U.S.C. § 1007(c) was enacted subsequent to legislation amending 5 U.S.C. § 5514. Lieutenant (JG) Garry L. Francis, USCG, Retired, 69 Comp. Gen. 226 (1990).

4. Recomputation—correction of records

Recomputation of retired pay is not required where Correction Board (a) relies on a statutory provision which is inapplicable and (b) merely states legal conclusion affecting member's retirement multiplier but changes no facts in member's record, and therefore does not satisfy the requirement of Haislip v. United States, 296 F.2d 469 (1961) that, in allowing a recomputation, Correction Board must make a change in facts that gives

rise to a right that did not previously exist. YN1 Leonard E. Hill, USN (Retired), 71 Comp. Gen. 439.

B. Service Credits—Years of Creditable Active Service

1. Lost time

a. Time lost due to misconduct

Time lost by an enlisted member by reason of sickness due to misconduct (SKMC time) which was required to be made good and which is not creditable for basic pay purposes, may not be regarded as service "while on the active list or on active duty" under section 511 of the Career Compensation Act of 1949, for credit in determining the percentage multiple factor for computation of retainer and retired pay under method (b) of section 511 of the act. 39 Comp. Gen. 844 (1960).

b. Excused absence without leave—erroneous retirement due to miscalculation of active service

An Army enlisted member who, incident to revocation of retirement orders due to a miscalculation of active service for retirement, had a year of retirement excused as an unavoidable absence when returned to active duty to qualify for retirement. He may not have the excused period regarded as "absence without" or "over" leave under 37 U.S.C. § 503(a), which are terms describing a situation in which the absent member is obligated to return to active duty but is prevented by a circumstance beyond his control or control of the government. The member's ineligibility for retirement does not change the fact that he was not obligated to perform any active duty so that the excuse of absence could make the absence "active duty." Therefore, the legality of crediting the excused period as active duty for retirement qualification is too doubtful to permit payment of retired pay. 44 Comp. Gen. 667 (1965). See also 44 Comp. Gen. 258 (1964), concerning de facto retired status resulting from miscalculation of active service and retention of retired pay.

2. Types of service creditable

a. Underage or minority enlistments

A minor's legal capacity to enter into a contract of enlistment must be determined on the basis of the law in effect at the time of his enlistment or attempted enlistment in the uniformed services, and a military status once

validly attained is not affected by a change in the minimum age for enlistment. Accordingly, if an enlistment contract was void due to enlistment while under the minimum age and that age was lowered or abolished before the member reached such age, the time served after the member reached the new minimum age or from the effective date of the statute effecting the change, if the member was over the new age on such date, may be counted for retirement purposes, provided that no action was taken by the government to avoid the enlistment contract of the member's parent or guardian. 40 Comp. Gen. 531 (1961). See also 43 Comp. Gen. 516 (1964); 41 Comp. Gen. 238 (1961); and 38 Comp. Gen. 110 (1958).

b. Active service as cadet or midshipman

Active service as a "non-Naval Academy" midshipman in the Regular Navy, by an officer retired under 10 U.S.C. § 6323, may be credited to establish the percentage multiple for computing the officer's retired pay. Section 1405 prescribing but not defining "years of service," the definitions in 10 U.S.C. § 101(22) and (24) are for application, the paragraphs containing no restriction as to status in which active service must have been performed in order to be creditable. 45 Comp. Gen. 363 (1965). Compare 50 Comp. Gen. 308 (1970), concerning inactive service.

Section 971 of title 10, U.S. Code, provides that the cadet or midshipman service at a service academy may not be included in the computation of length of service for any purpose as an officer. However, this does not preclude the crediting of such service for the purposes of determining the eligibility of an enlisted member to retire under 10 U.S.C. § 8914. Service as a cadet or midshipman at one of the academies are integral parts of those services. B-195448, Apr. 3, 1980.

c. Service as cadet—court judgment on merits is res judicata

The doctrine of res judicata constitutes an absolute bar to a subsequent action by the claimant on the same issues. The Comptroller General adheres to this doctrine and will therefore not consider the claim of a Coast Guard officer for an additional 4 years' credit in the computation of his retired pay based on his 4 years' credit in the computation of his retired pay based on his 4 years spent as an academy cadet, since he previously asserted this same claim before the federal courts and received an adverse final judgment on the merits. B-215253, Oct. 30, 1984.

d. Academy attendance—PHS retirement laws

In 1960 Congress amended the retirement laws applicable to Public Health Service (PHS) officers to permit them to receive credit for "all active service in any of the uniformed services" for retirement purposes. The amendment was intended to provide PHS officers with a retirement system parallel to the existing retirement systems of military and naval officers. Since military and naval officers were then prohibited from receiving retirement credit for academy attendance, the same prohibition was, by implication, necessarily intended to remain in effect for PHS officers. Hence, academy attendance may not be counted as "active service" under the PHS retirement laws. Dr. Robert F. Clarke, B-228663, Aug. 4, 1988.

e. Active service as participant in Uniformed Services University of Health Sciences

A member participating in the program at the Uniformed Services University of Health Sciences whose enrollment is terminated prior to graduation but who continues on active duty in another capacity is entitled to credit for that service in determining years of service for retired pay multiplier under 10 U.S.C. § 1405. B-195855, Apr. 1, 1980.

f. Active duty after termination of military status

The active military duty performed in good faith in a de facto status that is not prohibited by law is creditable service for basic and retired pay purposes and for determining retirement eligibility in all cases similar to that of an Air Force officer who, having been inadvertently retained on active duty for approximately 6 months after he should have been released from the temporary appointment he held when the underlying Reserve appointment on which his temporary appointment was based was terminated, is considered to have rendered service not prohibited by law in good faith and in a de facto status. 44 Comp. Gen. 277 (1964). Compare 44 Comp. Gen. 83 (1964).

g. Active duty service in Army Reserve

A military member retired in 1960. During 4 years in the Army Reserve, he received retired pay but waived it periodically to receive reserve pay. He is entitled to include the number of days of qualifying active duty he served in the Army Reserve from the date of his retirement until September 30, 1963, for computation of the multiplier factor in his retired pay. Chief

Warrant Officer Louis C. Morrison, USAF (Retired). B-239348.2, Nov. 18, 1991.

h. Inactive reserve service

Navy officer retired under 10 U.S.C. § 6323 may receive credit in the multiplier used in computing his retired pay for the full 57 inactive service points he earned in a year in which he also served on active duty. While on active duty he was in an active status, not an inactive status, and regulations governing the maximum number of points which may be earned require prorating of maximum allowable only on the basis of excluding periods of inactive status. 60 Comp. Gen. 537 (1981).

3. Fractional year

a. Less than 6 months—day of retirement

An officer retired effective September 1, 1963, with a combined total of 21 years, 5 months and 20 days creditable service under 10 U.S.C. § 1405, in the computation of his retired pay, may not have the date his active service was terminated, August 31, 1963 included as a day of creditable service to increase his total service to 21 years and 6 months, thereby counting his service as 22 years in determining the applicable percentage multiple. 45 Comp. Gen. 69 (1965).

b. Exception to prohibition of "rounding up" 6 months' service

Section 772 of the 1982 Department of Defense Appropriations Act restricted funds appropriated by that Act so that 6 months or more of service would no longer be "rounded up" to a full year in computing retired pay. An exception was provided for those "applying for retirement" prior to January 1, 1982. An Air Force officer did not have enough officer service to retire an officer. However, he had previous enlisted service and, under a procedure prescribed by Air Force regulations, he applied for separation as an officer, reenlistment, and then retirement as an enlisted member in April 1982. His filing of forms under the procedure on September 15, 1981, constituted an application for retirement within the meaning of the exception in section 772 of the 1982 Act. B-212034, Nov. 17, 1983.

c. Discrepancy in records

Discrepancies in a Navy officer's service records which make it unclear as to whether he is entitled to retirement credit for 11 days' additional active service is a matter for consideration by the Chief of Naval Personnel or the Board for the Correction of Naval Records. 60 Comp. Gen. 537 (1981).

d. More than 6 months—constructive service

The constructive service credit for minority and short term enlistments prescribed by 10 U.S.C. § 6330(d) may be counted for percentage multiple purposes in computing retired pay under 10 U.S.C. § 6151(c) for members advanced on the retired list under 10 U.S.C. § 6151(a) to the highest temporary officer grade satisfactorily held. 43 Comp. Gen. 826 (1964).

e. Awaiting call to active duty—constructive service

An individual was appointed a Reserve officer of the Public Health Service (PHS) in 1957 and subsequently recruited by the PHS for civilian employment with the contemplation of her eventual call to active duty for a long term career in the PHS Commissioned Corps. The call to active duty was delayed until 1964. In the particular circumstances presented, the last 5 years of employment prior to 1964 may be treated as "active service with the PHS" for establishing retirement eligibility under 42 U.S.C. § 212. B-191501, Mar. 8, 1979, modified. B-191501, Feb. 19, 1980.

C. Retirement Date

1. Uniform Retirement Date Act

a. Voluntary retirement—in general

Since voluntary retirements are not subject to the limitations of the Uniform Retirement Date Act, 5 U.S.C. § 8301, retired pay entitlements thereunder are based on the monthly pay rates in effect on the first day that a member is on the retired roll. 56 Comp. Gen. 98 (1976).

Since the Uniform Retirement Date Act, 5 U.S.C. § 8301, generally provides for retirements to become effective on the first day of a month, language contained in certain provisions of law authorizing the voluntary retirement of Navy, Marine Corps, and Public Health Service officials also providing for retirement on the first day of a month may be regarded as a surplusage insofar as retired pay computations under 10 U.S.C. § 1401a(f) in the same manner as other service members, i.e., on the basis of retirement eligibility

on the date immediately preceding an active duty pay rate change. 59 Comp. Gen. 691 (1980).

b. Voluntary vs. mandatory retirement

Retired members of the Navy who if they had been involuntarily retired on July 1, 1968, would have been subject to the Uniform Retirement Date Act, but who were retired voluntarily effective that date are entitled to have their retired pay computed at the higher rates of active duty basic pay effective July 1, 1968. 48 Comp. Gen. 239 (1968). See also 44 Comp. Gen. 584 (1965); 45 Comp. Gen. 233 (1965). Compare 54 Comp. Gen. 941 (1975).

c. Member eligible for voluntary retirement but does not apply for it

The fact that a member had not requested voluntary retirement based on years of service when qualifying for retirement prior to July 1, 1968, does not defeat his right to retired pay computed under any "other provision of law" most favorable to him as prescribed by 10 U.S.C. § 1401 when he retires on July 1, 1968. The member, therefore, is entitled to retired pay computed at the higher rate of pay made effective July 1, 1968. 49 Comp. Gen. 80 (1969).

2. Delivery of orders

a. Late delivery

To permit payment of active duty pay and allowances to members of the uniformed services after the first of the month in which their retirement is effective until the retirement orders are actually delivered to the member, it must be shown that the member did not receive notice of his retirement orders until they were delivered. However, in cases where advance notice of retirement orders was given but such orders were not delivered and an attempt was made to revoke them—after they became effective—and replace them with orders which direct retirement at a later date, the member would have had no notice or knowledge of the lack of legal authority. His active service even after notice would be under color of authority for application of the de facto rule to permit repayment of pay and allowances collected for such period. 39 Comp. Gen. 312 (1950). Compare 56 Comp. Gen. 98 (1976); and 49 Comp. Gen. 429 (1970).

b. More than one application for retirement

A Marine Corps enlisted man whose third application for transfer to the Fleet Marine Corps Reserve was approved October 27, 1965, authorizing transfer effective November 30, 1965, after the first authorization was revoked, and the second order directing reinstatement of the transfer effective August 31, 1965, failed because it was never received by the commanding officer or the member must be regarded as having been effectively transferred to the Fleet Marine Corps Reserve on November 30, 1965. Therefore, the higher rates of pay prescribed in the Pay Increase Act effective after September 1, 1965, are for use in the computation of the member's retainer pay rather than the lower rates which were in effect prior to September 1, 1965. 45 Comp. Gen. 548 (1966).

D. Retired Pay Computation

1. Methods of computation

a. Generally

Under 10 U.S.C. § 1401a(e) (1970), a member's retired pay may be computed by two methods: (1) based on the active duty pay rate in effect at the time of his retirement, and (2) based on the immediately prior active duty pay rate, plus any appropriate Consumer Price Index increases which became effective subsequent to the active duty pay rate and before the actual date of the member's retirement. The member may be paid whichever method produces the greater amount of retired pay under the formulas applicable to the statute authorizing the member's retirement. 53 Comp. Gen. 698 and 701 (1974); B-179191, July 15, 1975.

2. Correction of retired pay inversion—Consumer Price Index changes—"Tower Amendment"

a. Generally

Military retired pay is adjusted to reflect changes in the Consumer Price Index rather than changes in active duty rates, and as a result a "retired pay inversion" problem arose: service members who remained on active duty after becoming eligible for retirement were receiving less retired pay when they eventually retired than they would have received if they had retired earlier. Subsection 1401a(f), title 10, United States Code, was adopted in 1975 to alleviate that problem, and it authorizes an alternative method of calculating retired pay base not a service member's actual retirement but rather on his earlier eligibility for retirement. 56 Comp.

Gen. 740 (1977); 59 Comp. Gen. 691 (1980); B-204120, Mar. 25, 1982. B-211159, Feb. 19, 1988. See also 62 Comp. Gen. 406 (1983), concerning a retired officer's resignation and subsequent reinstatement.

Military retired pay is adjusted to reflect cost-of-living increases rather than changes in active duty pay rates, and as a result service members who remained on active duty after becoming eligible for retirement were receiving less retired pay when they eventually retired than they would have received if they had retired earlier. Subsection 1401a(f), title 10 United States Code, was adopted to alleviate that problem, and it authorizes an alternate method of calculating retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement. Chief Master Sergeant Jerold E. Ohr, USAF, 68 Comp. Gen. 649 (1989).

b. Retirement date—general rule

In computing retired pay under 10 U.S.C. § 1401a(f), the date immediately preceding an active duty basic pay rate change should generally be used as the earlier date of voluntary retirement eligibility, since this will normally result in computation most favorable to the service member concerned. Under the Uniform Retirement Date Act, 5 U.S.C. § 8301, the hypothetical earlier retirement would have become effective on the first day of the following month, but retired pay could be computed on the basis of retirement eligibility on the date immediately preceding the active duty pay rate change. 59 Comp. Gen. 691 (1980).

c. Retirement date—specific cases

An Army officer promoted to the grade of lieutenant general on September 1, 1975, and retired April 1, 1977, may, under 10 U.S.C. § 1401a(f), have his retired pay computed as if he had retired October 1, 1975; but if the active duty basic pay increase effective that day would adversely affect his retired pay, it may be computed on the premise that he retired during September as a lieutenant general. Under 5 U.S.C. § 8301, October 1, 1975, would be the retirement date, but retired pay would be computed on the basis of retirement during September 1975. B-189029, Nov. 2, 1977.

A Marine Corps colonel began serving in the position of Assistant Judge Advocate General of the Navy on August 1, 1978. Under 10 U.S.C. § 5149(c) he thereby became eligible for immediate voluntary retirement in the higher commissioned grade of Brigadier General, and he was ultimately

retired in that grade in 1981. His retired pay is payable in accordance with the computation most favorable to him under 10 U.S.C. § 1401a(f) based on his eligibility for retirement at a brigadier general on any date after August 1, 1978, up to the date he actually retired in that grade in 1981. B-204120, Mar. 25, 1982.

d. Demotions

Under 10 U.S.C. § 1401a(f) the retainer pay of a former Navy or Marine Corps member who initially became entitled to that pay on or after January 1, 1971, may not be less than the retainer pay to which he would be entitled if transferred to the Fleet Reserve or Fleet Marine Corps Reserve at an earlier date, adjusted to reflect applicable Consumer Price Index increases in such pay under the section even though transferred to Fleet Reserve because of unsatisfactory performance of duty or as result of disciplinary action. 56 Comp. Gen. 740 (1977).

e. Effective dates of calculation

Military retired pay is adjusted to reflect cost-of-living increases rather than changes in active duty pay rates, and as a result service members who remained on active duty after becoming eligible for retirement were receiving less retired pay when they eventually retired than they would have received if they had retired earlier. Subsection 1401a(f), title 10, United States Code, was adopted to alleviate that problem, and it authorizes an alternate method of calculating retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement. Chief Master Sergeant Gerald E. Ohr, USAF, 68 Comp. Gen. 649 (1989).

3. Retention beyond mandatory retirement date

Officers whose monthly basic pay increased while they were held on active duty beyond mandatory retirement for physical evaluation purposes are entitled to the computation of disability retired pay at the higher basic pay in effect on dates of retirement and to an adjustment for the underpayments that resulted because retired pay had been computed at the lower rates in effect on their mandatory retirement dates, and they also may have credit for the additional active duty for longevity purposes. 53 Comp. Gen. 135 (1973). See also 53 Comp. Gen. 610 (1974); and 53 Comp. Gen. 94 (1973).

E. Retirement for Non-Regular Service

1. Last 8 years of qualifying service not in reserve component

The notice to a Reservist under 10 U.S.C. § 1331(d) of his eligibility to retire pursuant to chapter 67 of title 10 U.S.C. upon discovery that although the member meets the 20 years service requirement of 1331(a)(2), he does not satisfy section 1331(a)(3) to the effect the last 8 years of qualifying service must have been as a member of a Reserve component or the war service requirement of section 1331(c), and that he is excluded from the chapter by section 1331(a)(4) because he is entitled to retired pay under "another provision of law," serves to validate only the service eligibility requirements of clauses (2) and (3) of 10 U.S.C. § 1331(a). For the purpose of 10 U.S.C. § 1406, limiting the revocation of retired pay because of error in determining years of service under section 1331(a)(2), both clauses must be read together, whereas section 1406 does not affect the prohibitions in sections 1331(a)(4) and 1331(c). 51 Comp. Gen. 91 (1971).

2. Service in regular component after completion of qualifying 20 years' service

For members of the Regular components who have 20 years of satisfactory federal service as defined in 10 U.S.C. § 1332, and would otherwise be qualified for retirement for physical disability except that their disability was less than 30 percent, to be eligible under 10 U.S.C. § 1209 for transfer to the inactive status list and to receive retired pay computed under Chapter 71 of title 10 U.S. Code becoming 60 years of age, such members must have met all the requirements, except age, imposed under the voluntary retirement provisions in Chapter 67, including completion of 20 years of satisfactory service as defined in 10 U.S.C. § 1332, the last 8 years of which were in a Reserve component, as required under 10 U.S.C. § 1331. However, Regular Army service which follows completion of all of the service requirements in 10 U.S.C. § 1331 would not deprive a Regular member of eligibility for Chapter 71 retirement benefits. 39 Comp. Gen. 801 (1960).

3. Not qualified for retirement under other law

a. Member eligible for disability retirement

An officer who prior to reaching 60 years of age and qualifying for retirement under 10 U.S.C. § 1331 was transferred to the Retired Reserve with over 30 years of service under 10 U.S.C. § 1333 and continued on active duty under a temporary appointment in the same grade until meeting the age requirement of section 1331, when he was retired for physical

disability pursuant to sections 1201 and 1372. The member is not entitled to increased retired pay under formula 3, 10 U.S.C. § 1401, based on section 1333 service credits, notwithstanding the officer was credited with the active service he performed after transfer to the Retired Reserve in accordance with section 1208(b). Section 1331(a)(4) imposes the additional requirement to age and service of not being entitled to retired pay "under any other provision of law," and the officer retired for physical disability is restricted to the computation of his retired pay to formula 1 or 2 of section 1401, based on percentage of disability. 44 Comp. Gen. 124 (1964).

b. Member retired for years of service

In view of the evidence of a congressional intent that the retirement benefits in 10 U.S.C. §§ 1331-1337 are applicable only to Reserve members and former members not covered by any other retirement law, a Retired Regular enlisted member of the Army in receipt of retired pay under 10 U.S.C. § 3914, on the basis of at least 20 years of service but less than 30 years of service, may not upon his own application for discharge from the retired list qualify for retirement under 10 U.S.C. § 1331. This results even though he may meet the age and service requirements of the statute and that by reason of the discharge from the retired list, upon his own application, he thereby loses his right to retired pay incident to military service. 41 Comp. Gen. 458 (1962).

4. Retired grade

a. Highest grade held

An Air Force master sergeant retired effective October 1, 1966, pursuant to 10 U.S.C. §§ 1331 and 1401, in the grade of major, the equivalent grade in the Air Force to that of lieutenant commander, the highest grade he satisfactorily held in the Naval Reserve where he served for 20 years, and who then on the basis of retirement under section 1331 is placed on the Air Force Reserve retired list as a major effective August 9, 1967, is entitled to have his retired pay computed on the basis of his lieutenant commander grade provided the Secretary of the Navy or his designee determines the officer satisfactorily held that grade. The member having qualified for retired pay under 10 U.S.C. § 1331 became entitled to retired pay computed under formula 3, section 1401, which prescribes the computation of retired pay on the basis of the highest grade satisfactorily

held "at any time in the Armed Forces." 48 Comp. Gen. 532 (1969). See also 30 Comp. Gen. 262 (1951).

b. Record correction—service at lower grade provides member more retired pay

The correction under 10 U.S.C. § 1552 of the records of a member of the Army of the United States who had attained the grade of chief warrant officer, W-4, prior to placement on the retired list in the grade of second lieutenant pursuant to formula 3 of 10 U.S.C. § 1401, to place him on the retired list in the grade of chief warrant officer, W-4, under 10 U.S.C. § 1331 in order to provide him with the greatest amount of retired pay, governs the rights of the member, even though there is lack of evidence of duty performance by the member in the chief warrant officer, W-4, grade. Therefore, on the basis that the record correction amounts to a rescission of the earlier finding of satisfactory service in the grade of second lieutenant and the substitution of the finding that the highest grade held satisfactorily by the member was chief warrant officer, W-4, the member is entitled to an adjustment payment in retired pay. 46 Comp. Gen. 437 (1966).

c. Saved pay

A retired warrant officer with prior enlisted service who was receiving the pay and allowances of an E-9 under the save pay provisions of 37 U.S.C. § 907, is entitled under 10 U.S.C. § 1406(b) to have her retired pay computed as an E-9. CWO Joan H. Bennett, USN (Retired)—Computation of Retired Pay, B-235924.3, Mar. 9, 1992.

5. Service credits and retired pay computation

a. Yearly point system

The omission of the language "other than active Federal service" for Reserve membership credit in 10 U.S.C. § 1332(a)(2)(C), when title 10 of the U.S. Code was enacted into positive law, represents a substantive change of phraseology from the derivative statute. In view of the clear intent as shown in the legislative history to adopt the views of the Judge Advocate General of the Army with respect to the creditable points for Reserve membership, it will no longer be necessary to make a deduction for periods of active federal service during the year in determining entitlement

to military retired pay for non-Regular service. 36 Comp. Gen. 498 (1957). Compare 34 Comp. Gen. 520 (1955).

b. Necessity of Secretary's approval

Air Force Reserve major generals who have not been eliminated for years of service under 10 U.S.C. § 8852, prior to reaching age 60 may receive retirement point credit for service performed after they have attained retirement eligibility under Chapter 67 of title 10, U.S. Code, only if their retention in active status thereafter is approved by the Secretary under 10 U.S.C. § 676. 58 Comp. Gen. 674 (1979).

c. Multiple drills in one day

Members of Reserve components of the uniformed services who are entitled to pay and allowances for two paid drills or equivalent periods of instruction performed in one calendar day of at least 8 hours duration, are entitled for retirement purposes to credit of one point for each drill under 10 U.S.C. §§ 1332 and 1333 which authorize a one point credit for each drill and 1 day credit for each point. 37 Comp. Gen. 618 (1958).

d. Hospitalization during 2-week training period

Although a reservist who, during a 2-week active duty training period, is injured and hospitalized may receive retirement point credit under 10 U.S.C. § 1332 for each day of active duty covered by the orders, even though he was hospitalized for a portion of the period, retirement point credit may not be given for a period of hospitalization subsequent to the duty period prescribed in the orders. 37 Comp. Gen. 403 (1957).

e. Service as cadet or midshipman

In the computation of retired pay authorized in 10 U.S.C. §§ 1331-1337 for non-Regular service, the full-time nonacademy service of a midshipman appointed under section 3 of the Act of August 13, 1946, 60 Stat. 1058, may be used to increase the multiplier factor in formula 3, 10 U.S.C. § 1401—2-1/2 percent of years of service credited under section 1333—absent a restriction as to the status in which active service must have been performed in order to be creditable service. However, in establishing the multiplier factor, credit for inactive midshipman service in a Naval Reserve prior to July 1, 1949, may only be included pursuant to that part of clause (4), section 1333, that does not refer to service covered

by section 1332(a)(1), the inactive service constituting "service (other than active service) in a Reserve component of an armed force" only within the meaning of that phrase in clause (4), section 1333. 47 Comp. Gen. 221 (1967). See also 54 Comp. Gen. 603 (1975); and 50 Comp. Gen. 308 (1970).

f. Dual benefits for the same service

A Reserve officer with more than 20 years of active service in the National Guard and the Army Reserve discharged to accept a commission with the Public Health Service (PHS), who when 60 years of age was granted military retired pay concurrently with active duty pay and allowances from the PHS, upon mandatory retirement from the PHS under 42 U.S.C. § 212(a)(1) was not entitled to credit for his Reserve duty in the computation of his PHS retired pay in the absence of a statute authorizing dual benefits for the same service. Since the officer is entitled to a greater benefit if his Reserve duty is used to increase his PHS retired pay, he is considered to have surrendered his Army Reserve retired status and he is indebted for the Army retired pay received concurrently with the PHS retired pay, notwithstanding the payments were made in error and received in good faith. 51 Comp. Gen. 298 (1971). See also 47 Comp. Gen. 713 (1968).

g. Retention beyond age 60

The retention beyond age 60 of an Air Force sergeant to permit him to complete 26 years of military service for pay purposes in recognition of "long and distinguished military service" would not satisfy the requirement that the Secretary concerned order a retention in service for the purpose of acquiring additional service credits only if the services are a military requirement. The sergeant was retired under 10 U.S.C. §§ 1331 and 1401, and authorized retired pay on the basis of "with over 22 but less than 26 years" of non-Regular service. Therefore, he is not eligible for retired pay computed at the pay rate of over 26 years of military service. 50 Comp. Gen. 428 (1970).

h. Member retained through administrative oversight

The effect of the mandatory elimination provisions in the Reserve Officer Personnel Act of 1954, which requires that each Reserve officer upon reaching the age or length of service stipulated shall be transferred to the Retired Reserve if he is qualified and applies therefor, or be discharged from the Reserve appointment if he is not qualified or does not apply

therefor, is to preclude service credits for retired pay after the date the officer is required to be transferred or discharged. Hence, service performed by a Reserve officer who is retained, through administrative oversight, in an active Reserve status beyond the time he should have been removed for age for length of service, may not be credited in determining the member's retirement eligibility under 10 U.S.C. § 1332. However, if the officer is retained under a specific statutory provision exempting officers from the mandatory elimination provisions of the 1954 Act, credit is not precluded. 41 Comp. Gen. 375 (1961).

i. *When erroneous notice of completed service is binding*

The written communication required by 10 U.S.C. § 1331(d) to a member of Reserve component of Armed Force advising that he has completed the years of service requirement for retired pay at age 60, need not be in any specific format. If the notice is from an authorized official of his military service and advises him that he has completed the service requirements for such retired pay at age 60, the notice satisfies the requirement of 10 U.S.C. § 1331(d) so as to invoke 10 U.S.C. § 1406, thereby preventing denial of retired pay due to administrative error. The exceptions to 10 U.S.C. § 1406 preventing denial of retired pay entitlement due to erroneous written notice of entitlement, are limited to cases of direct fraud or misrepresentation on the part of the person to whom the notice is sent. 58 Comp. Gen. 290 (1979).

j. When erroneous notice is ineffective

At various times between 1940 and 1959 an individual served on full-time active duty, and participated satisfactorily in part-time Reserve programs, with both the Army and the Navy. However, he completed a total of only 7 of the 20 years creditable service required to establish entitlement to Reserve retired pay at age 60. The individual is not entitled to retired pay on the basis of the erroneous advice, notwithstanding that by statute the Armed Forces are required to notify reservists when they have completed 10 years creditable service and that such notification is irrevocable, since the informal erroneous advice plainly did not constitute an official statutory notice of completed service. 63 Comp. Gen. 82 (1983).

k. De facto service

A lieutenant colonel of the Air Force who upon completion of 20 years of service and placement on the Reserve retired list as eligible for retired pay

under 10 U.S.C. § 1331, except for attainment of 60 years of age, alleges and proves his correct date of birth as February 3, 1903, instead of 1907 as established in his records, is entitled on the basis of reaching the age of 60 on February 3, 1963, to receive retired pay beginning March 1, 1963, computed on the basic pay of his grade, including credit for all periods during which he held membership in a Reserve component, multiplied by the years of authorized active Reserve service as provided in section 1331, but excluding authorized service, regarded as de facto service, in the Ready Reserve, an assignment the officer received on the basis of his erroneous date of birth. AFR 45-5, dated April 21, 1955, prescribing 52 years of age, in the absence of a waiver, as the maximum age-in-grade for appointment of a lieutenant colonel under the Armed Forces Reserve Act of 1952; however, the officer may retain the pay benefits received in the de facto status. 44 Comp. Gen. 284 (1964).

l. Regular Army Reserve service

Service prior to July 1, 1949, in the Regular Army Reserve, which is not one of the organizations included nor excluded for creditable service purposes in subsections (c) or (e) of section 306 of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, as amended, for qualifying members of the uniformed services for retired pay under 10 U.S.C. §§ 1331-1337, may be credited as Reserve service for eligibility for retirement pay under title III of the 1948 Act. The congressional intent indicates that the phrase "each year of service as a member of a Reserve component prior to July 1, 1949," in section 302(c) was not intended to be limited or restricted to the organizations listed in subsection 306(c). 44 Comp. Gen. 61 (1964).

m. Retention on active duty after transfer to retired reserve

A reservist who was not eligible for retired pay for non-Regular service because he had not attained the age of 60 was transferred to the Retired Reserve but retained on active duty under 10 U.S.C. §§ 672(d) and 265 (1970). Upon his qualification for retired pay when he became 60, he was entitled to credit for the active service he performed after his transfer to the Retired Reserve, in the computation of his retired pay. 10 U.S.C. § 1333(1) (1970). B-190830, Feb. 13, 1978.

6. Receipt of severance pay and subsequent retirement for non-Regular service

Where certain provisions of law governing separation from active list authorize severance pay, and require refund of such pay upon retirement, but where other provisions such as 10 U.S.C. §§ 3786 and 8786 (both repealed in 1980) do not state such requirement, in the absence of such a limiting statutory provision or a clear indication of congressional intent to the contrary refund of severance pay is not required as a condition precedent to the receipt of retired pay under 10 U.S.C. § 1331. 53 Comp. Gen. 921 (1974).

7. Date of accrual for retired pay

a. General

Where a member who is otherwise entitled to retired pay under 10 U.S.C. § 1331, but who does not file application for such pay until well after meeting age requirement such pay accrues from date of qualification or on first day of any subsequent month stipulated in application for such pay to begin, without regard to date such application is filed. 53 Comp. Gen. 921 (1974). See also 48 Comp. Gen. 652 (1969).

Five widows' annuity claims were submitted to us in light of Hart v. United States, 910 F.2d 815 (Fed. Cir. 1990), which prohibited use of the continuing claim theory as an exception to the 6-year Claims Court statute of limitations in a situation where all events necessary to establish the claim had occurred more than 4 years previously. We will henceforth follow Hart in similar situations. In light of this change in statutory interpretation, we will not disturb the services' prior establishment of annuities in three of the cases. Two other claims must be denied. Application of the Barring Act to Annuity Claims, 71 Comp. Gen. 398 (1992).

b. Claims accrue when service makes determination of required service

A service member filed an application for non-Regular retired pay under 10 U.S.C. § 1331 almost 6 years after meeting the age requirement, but retired pay was not granted because records did not show he had sufficient years of service. Upon his submission of additional proof, it was determined that he had sufficient service. Although more than 6 years elapsed between his meeting the age requirement and the determination that he was eligible for retired pay, none of his retroactive retired pay is

barred by 31 U.S.C. § 71a, (now 31 U.S.C. § 3702) in view of Garcia v. United States, 617 F.2d 218 (Ct. Cl. 1980), since such claims will now be deemed to accrue only after the Service's determination that claimant has the required service. 62 Comp. Gen. 227 (1983).

A Coast Guard member received less than the correct amount of retired pay from his retirement in 1975 until the error was discovered in 1990. He was then paid the additional amount for the 6 years prior to the discovery. His claim for the amount which accrued before that 6-year period is barred by 31 U.S.C. § 3702(b), which allows GAO to settle only claims which are presented within 6 years of accrual. QMCM Bennie S. Kearley, USCG (Retired), B-246871, June 4, 1992.

c. Trust funds

Settlement by the Claims Group that 31 U.S.C. § 3702(b) barred claim by son for arrears of military retired pay that were owed but never paid to his father, a retired Navy member living in China, and survivor's benefits, if any, owed his spouse is reversed. The claim is for moneys withheld in accordance with 31 U.S.C. § 3329 which authorizes the Secretary of the Treasury to hold moneys in trust if the Secretary determines that the payee lives in a country where it is unlikely that he or she will receive checks from the United States or be able to negotiate them for full value. Claims to recover money held in trust by the government are not barred under 31 U.S.C. § 3702(b). Xie Qianhao, 70 Comp. Gen. 612 (1991).

F. Waivers

1. Overpayments after death of member

The widow of a deceased retired Air Force officer is entitled to waiver of indebtedness for erroneous payments of retired pay she received from the Air Force after his death when the payments should have been terminated. Waiver is granted under 10 U.S.C. § 2774, since she was without fault in failing to notify the Air Force paying organization of the death. Bettie L. Palaio Carr, B-233390, July 6, 1989.

2. Overpayments to retired member

A retired member of the Coast Guard was informed that he was being paid erroneously and he repaid the amounts due to the Coast Guard; however, the erroneous payments continued following the notification and repayment. The member is not without fault since he should have

expected the monthly payments to change and he should have made inquiries of the proper officials when the payments were not reduced. In such circumstances waiver of his debt may not be granted under 10 U.S.C. § 2774. Lieutenant (JG) Garry L. Francis, USCG, Retired, 69 Comp. Gen. 226 (1990).

A retired Regular officer of the Navy who received erroneous payments of retired pay because of administrative error by government employees in not reporting his civilian employment to the Navy may be granted waiver of his debt under 10 U.S.C. § 2774, since he asked on at least two occasions and was assured that his employment had been reported and consistent with his understanding of the law had no reason to suspect he was being overpaid. Admiral James D. Watkins, USN (Retired), B-235501, June 23, 1989.

Although not entirely clear, it appears from the record that a corporation employing a retired Air Force officer was owned by a foreign government thereby triggering the requirement of 37 U.S.C. § 908 that Secretarial approval for employment be obtained. In view of the uncertainty concerning foreign ownership of the corporation when the retired officer was employed by the corporation and the good faith actions of the officer in seeking approval of the employment, any payments of retired pay which may have been erroneous under the terms of the statute may be waived under 10 U.S.C. § 2774. Major Gilbert S. Sanders, USAF, Retired, B-231498, June 21, 1989.

Although a retired Air Force officer held a position at a Veterans Administration hospital, no dual compensation deductions were made from his retired pay for almost 3 years. His waiver request is denied, since he did not personally notify the Air Force of his employment status. The Air Force's delay in initiating deductions does not provide grounds for waiver. Colonel Bruce R. Rauhe, USAF, Retired, B-244505, Jan. 14, 1992.

A retired Regular officer of the Air Force who accepted government civilian employment upon retirement received erroneous payments of retired pay in violation of dual compensation laws because of administrative errors by the Air Force Accounting and Finance Center. This debt may not be waived under 10 U.S.C. § 2774, since, under these circumstances, the officer reasonably could be expected to have recognized that he was being overpaid. Colonel Leon K. Pfeiffer, (Retired), B-236753, Feb. 24, 1992.

Retired Pay for Disability Retirement

A. Eligibility

1. Disability incurred while member entitled to basic pay

a. Preexisting disability

A member of the uniformed services who at the time of induction into the military service did not meet procurement or retention medical fitness standards and who incurred no aggravation of a preexisting medical condition during his active service has not met the requirement in 10 U.S.C. §§ 1201 and 1203 that a physical disability must be incurred while entitled to basic pay and he, therefore, is not entitled to disability severance or retired pay on separation from the service. 48 Comp. Gen. 377 (1968).

b. Member AWOL when disability incurred

A member who at the time of conviction for a crime by civil authorities was found sane but who subsequently was committed to a state hospital for the criminally insane followed by placement on the Temporary Disability Retired List, pursuant to 10 U.S.C. § 1202, has forfeited entitlement to pay and allowances under 37 U.S.C. § 503(a) for the period from date of apprehension by the civil authorities until his placement on the Temporary Disability Retired List. The member's commanding officer properly declined to excuse his absence from duty as unavoidable, and the disability of the member, having been incurred during a period of unauthorized absence, he was not in a pay status on the day preceding the date of his retirement, a prerequisite to physical disability retirement. Therefore, the member also is not entitled to retirement pay. 47 Comp. Gen. 214 (1967).

c. Member on excess leave

A member of the Regular Army who incurred a permanent and total physical disability while in an excess leave status is not eligible for disability retired pay. Under 10 U.S.C. § 1201, for the member to be eligible for disability retirement he must have incurred his disability while entitled to receive basic pay, and 37 U.S.C. § 502(b) and applicable regulations specifically prohibit entitlement to pay and allowances to members during excess leave. Since the member did not incur his disability while he was entitled to receive basic pay, disability retirement is precluded. B-205953, June 18, 1982.

d. De facto member

When an officer under a temporary appointment held no commission from April 1, 1953, the date his appointment in the Officers' Reserve Corps, was terminated and January 28, 1954, the date he accepted an indefinite appointment as an Army reservist, no legal basis existed for his placement on the temporary disability retired list on August 31, 1953, and subsequent permanent retirement with entitlement to retired pay benefits and the payments made are for recovery. The Career Compensation Act of 1949 only authorizes placement on the temporary disability list "while entitled to receive basic pay." Officer retained through oversight after his commission expired is a de facto officer and is not within the purview of the Armed Forces Reserve Act of 1952, providing pay and allowances for reservists continued on active duty after the expiration of their term of office. 44 Comp. Gen. 277 (1964).

e. Disability determination made after his release

Member of Coast Guard Reserve was placed on the Temporary Disability Retired List under 10 U.S.C. § 1205, based on a finding of physical disability as a result of a service connected injury which occurred 10-12 years previously while serving on a 2-week period of active duty for training. For purpose of computing retired pay under formula 2 of 10 U.S.C. § 1401, fact that member was not in basic pay status at time of disability determination or placement on that list, is not a computation requisite, since formula 2 merely calls for use of the pay rate for the "grade" to which member was entitled on that date. 47 Comp. Gen. 716 (1968) distinguished. 56 Comp. Gen. 807 (1977).

2. Change in administrative interpretation of law

Where a review by Army Board for the Correction of Military Records found a member entitled to disability retired pay under a new administrative interpretation of application of applicable law but made no correction in the member's records so that no new rights accrued, the member's claim to retired pay first accrued on the date he was retired for disability in 1944. Therefore, the Barring Act of October 9, 1940, as amended (31 U.S.C. §§ 71a, 237 (now 31 U.S.C. § 3702)) bars payment of that portion of the claim for retired pay which accrued more than 6 years before the claim was received in the GAO. B-191650, May 18, 1978. See 4 C.F.R. Part 31, effective June 15, 1989, for current Barring Act regulations.

3. Distinction between injury and disease—active duty for 30 days or less

A determination made while an Army Reserve member was on a 2-week period of active duty for training that the disease which made him unfit for military service had been aggravated by a prior 2-year period of military service meets the requirements of 10 U.S.C. §§ 1201 and 1202 which provide for physical disability retirement for Reserve members called to active duty for more than 30 days, the reference in those sections to the period of service of more than 30 days having application to the duty being performed at the time the physical disability is incurred rather than to the duration of the duty during which the physical disability determination is made. Therefore, the determination of disability having been made while the member was receiving basic pay permits placement of his name on the temporary disability retired list under 10 U.S.C. § 1202 and entitlement to retired pay. Distinction made between 10 U.S.C. § 1204, which provides for disability retirement for members on active duty for 30 days or less only for injury, and not for disease. 43 Comp. Gen. 155 (1963).

4. Active duty for 30 days or less extended due to hospitalization for injury

A member of the Army National Guard or Army Reserve, ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitalized due to an in-line-of-duty injury is not placed in a status of being on active duty for 30 days or more though the period of hospitalization is covered by an amendment to his orders or new orders issued to extend his period of active duty solely for the purpose of such hospitalization. Thus, the orders would not carry him beyond 30 days for active duty purposes and his rights to be retired for physical disability would remain determinable under 10 U.S.C. § 1204. 57 Comp. Gen. 305 (1978).

5. Requirement that disability be established

a. No showing of continuing disability

An enlisted man released from active duty for training on April 22, 1966, as not fit for full duty due to an ankle injury incurred on April 15 in line of duty who failed to report for follow-up medical treatment and performed regular inactive duty training drills prior to placement on the Temporary Disability Retired List on December 15, 1967, under 10 U.S.C. § 1202, may not be paid disability retired pay under 10 U.S. Code, Chapter 61. The right of the non-Regular member to pay and allowances not having been established by a showing of the continued existence of a disability, the

requisite of a basic pay status was absent at the time the disability determination was made. 47 Comp. Gen. 716 (1968). See also 56 Comp. Gen. 807 (1977).

b. Administrative determination

Determination as to whether disability incurred by member of Arizona Army National Guard is or is not proximate result of performing active duty or inactive duty training within meaning of 10 U.S.C. § 1204(a) is committed by that statute to sound discretion of Secretary concerned. B-201191, Mar. 17, 1981.

c. Member on temporary disability retired list—failure to report for periodic examination

Upon restoration to a member of the retired pay terminated prior to the automatic expiration of the 5 years on the temporary disability retired list, provided by 10 U.S.C. § 1210(h), the failure to report for periodic physical examination required by section 1210(a) having been administratively determined to be for just cause, the retroactive period for which payment of retired pay is authorized, limited to not more than 1 year, should be computed from and including the date the member's 5 years on the temporary disability retired list expired, notwithstanding the administrative action directing the reinstatement of the retired pay, was taken subsequent to the automatic termination date of the retired pay, such automatic termination date not restricting the basic authority to provide retroactive payments of retired pay. Therefore, although the appropriate determination to reinstate the disability retired pay was made after the expiration of the 5-year maximum period of entitlement, the period of retroactivity begins with the last day of the 5-year period. 42 Comp. Gen. 50 (1962).

B. Retired Grade

1. Disability retirement and promotion simultaneously effective

a. Disability discovered as a result of physical examination for promotion

An officer whose physical disability was not considered disqualifying prior to a physical evaluation board, upon his subsequent simultaneous transfer as a second lieutenant to the temporary disability retired list under 10 U.S.C. § 1202 and advancement to the grade of first lieutenant under clause (4) of 10 U.S.C. § 1371, is entitled to retired pay and disability severance pay

computed on the basis of the higher grade. Also, since the first determination of physical disability did not disqualify the officer for service, the disqualifying disability for which he was retired may be considered as having been discovered as a result of a physical examination for promotion within the purview of clause (4) of 10 U.S.C. § 1372. 50 Comp. Gen. 156 (1970). See also 42 Comp. Gen. 685 (1963); 41 Comp. Gen. 658 (1962); 41 Comp. Gen. 803 (1962); and 40 Comp. Gen. 256 (1960).

b. Disability discovered in connection with voluntary retirement examination

A major in the Air Force Reserves who, before his recommended promotion to the grade of lieutenant colonel could take effect, was retired under 10 U.S.C. § 1201, effective July 9, 1970, with 80 percent disability, and who had undergone two physical examinations, one in connection with his "projected voluntary retirement," the other incident to his disability retirement, is not entitled to retired pay computed at the higher grade. The disability for which the officer was retired was not found to exist as a result of a physical examination for promotion within the meaning of 10 U.S.C. § 1372(3), nor are the examinations within purview of Brandt v. United States, 155 Ct. Cl. 345, holding that where physical examinations in connection with promotion and retirement are given close together, the physical disability can be said to be the result of an examination for promotion. 50 Comp. Gen. 508 (1971). See also 50 Comp. Gen. 314 (1970); 42 Comp. Gen. 314 (1962); 41 Comp. Gen. 749 (1962); and 40 Comp. Gen. 240 (1960).

A service member passed a promotion physical examination and was ordered promoted to the grade of major effective at a later date. In a later physical examination prior to the promotion effective date a disability was found and he was retired for physical disability under 10 U.S.C. § 1201, in the grade of captain, as determined under 10 U.S.C. § 1372(1). His claim that he should be retired as a major under 10 U.S.C. § 1372(3) for retired pay purposes may not be allowed since that provision permits the higher grade only where the disability is found to exist as a result of a promotion physical, which was not the case. Under 10 U.S.C. § 1216, the Secretary of the Service concerned is vested with the powers, functions, and duties incident to determining fitness for duty of any member of that Service and percentage of disability, and not the GAO. B-195483, Nov. 14, 1979.

2. Member returned to active duty from permanent disability retired list in higher grade

A Regular Army enlisted member serving in grade E-5 was retired in 1971 due to permanent physical disability. While on the retired list he acquired civilian training as an anesthetist. In 1977 he was commissioned an officer in the Army Reserve and returned to active duty in the Medical Corps. He then became entitled to active duty pay of the officer grade he served in, and his entitlement to E-5 disability retired pay automatically terminated. He did not remain on active duty long enough to become eligible for retirement based on longevity of service, nor did he incur additional disabilities to establish a "new" disability retirement. His original retirement orders were still in effect, and he simply reverted to his original disability retirement status under those orders when released from active duty. B-204055, May 17, 1982. Compare 48 Comp. Gen. 99 (1968).

3. Member called to active duty from temporary disability retired list in higher grade

An officer who was placed on the temporary disability retired list in the grade of major effective June 1, 1968, recalled under 10 U.S.C. § 1211 to active duty in the temporary grade of lieutenant colonel for 1 day, June 30, 1970, with date of rank from July 19, 1968, and then retired for years of service under 10 U.S.C. § 8911 in the grade of lieutenant colonel effective July 1, 1970, is entitled to payment of the difference in retired pay between the grades of lieutenant colonel and major for the months of June and July 1970, since prior to July 1, 1970, the officer satisfied the requirements of 10 U.S.C. § 1211(a)(1). The officer's entitlement to retired pay at the higher grade for the 2 months involved is not under 10 U.S.C. § 8963(a), as he only "served" 1 day in the temporary grade, but under 10 U.S.C. § 8961, which authorizes an officer to retire in the grade he "holds" not the grade in which he "served" on date of retirement. 50 Comp. Gen. 677 (1971).

4. Advancement on retired list to highest permanent or temporary grade satisfactorily held

a. In general

The rule in Friestedt v. United States, 173 Ct. Cl. 447, that a member retired for physical disability, or whose name is placed on the temporary disability list, should be advanced to the highest grade or rank in which the member previously served satisfactorily, whether the grade or rank was temporary or permanent, is applicable retroactively not only to the

disability severance pay cases under 10 U.S.C. § 1212(a)(2)(B)(ii), but also to the cases within the purview of 10 U.S.C. § 1372(2), notwithstanding the section limits the advancement of a member retired for disability to the highest temporary grade or rank in which it is determined he served satisfactorily. 46 Comp. Gen. 727 (1967).

b. Grade in branch of service other than that from which retired

A payment of retired pay computed at the pay of the higher grade in which a member or former member had served satisfactorily, without regard to whether the higher grade was of a temporary or permanent status, may be authorized, or credit passed in the accounts of disbursing officers for payment made, in view of the judicial rulings so holding, even though the armed force in which the individual held the higher grade is not the Service from which he retired. This conclusion is subject to administrative approval that the service at the higher grade was satisfactorily performed, if such a determination is required by statute. 49 Comp. Gen. 618 (1970). See also 50 Comp. Gen. 607 (1971).

c. Determination of "Satisfactory Service" in higher grade

Although no minimum amount of service is specified in 10 U.S.C. § 1372 before a determination may be made by the Secretary of the armed force concerned that a member has served satisfactorily in a higher grade or rank under a temporary appointment to be entitled to retired pay based on the higher grade, the statute must be construed as contemplating that the determinations will be made on the basis of sufficient actual service in the temporary grade to permit a genuine appraisal of the quality of the service of the member in that grade. Unless active duty is actually performed in the temporary grade under conditions requiring duty comparable to that encountered during a normal tour of duty, there would be no evidence upon which a determination of satisfactory service could be made. 41 Comp. Gen. 110 (1961).

C. Temporary Disability Retired List

1. Five-year limitation

In the computation of the 5-year period the name of a member was carried on the temporary disability retired list for the purpose of terminating disability retired pay, in accordance with 10 U.S.C. § 1210(h). The date the name of the member was placed on the list is for inclusion in the 5-year period, the limitation on the payment of disability retired pay for 5 years

being an absolute one that was established in section 402(d) of the Career Compensation Act of 1949 from which section 1210(h) derives. The rule in 5 Comp. Gen. 362 that when an act is required to be done within a limited period from or after a particular time or event, the day designated should be excluded and the last day included in the computation, is not for application, 10 U.S.C. § 1210(h) limiting payment of temporary disability retired pay to a period not in excess of 5 years. 42 Comp. Gen. 52 (1962). Compare 44 Comp. Gen. 249 (1964).

2. Failure to report for examination

Upon restoration to a member of the retired pay terminated prior to the automatic expiration of the 5 years on the temporary disability retired list, provided by 10 U.S.C. § 1210(h), the failure to report for periodic physical examination required by section 1210(a) having been administratively determined to be for just cause, the retroactive period for which payment of retired pay is authorized, limited to not more than 1 year, should be computed from and including the date the member's 5 years on the temporary disability retired list expired. This applies notwithstanding the administrative action directing the reinstatement of the retired pay was taken subsequent to the automatic termination date of the retired pay, such automatic termination date not restricting the basic authority to provide retroactive payments of retired pay. Therefore, although the appropriate determination to reinstate the disability retired pay was made after the expiration of the 5-year maximum period of entitlement, the period of retroactivity begins with the last day of the 5-year period. 42 Comp. Gen. 50 (1962).

3. Erroneous payments

Former enlisted member who continued to receive retired pay after he received orders informing him of his removal from the temporary disability retired list and of his discharge from the Army should have been aware that he was receiving erroneous payments. Conflicting information he received from the Veterans Administration should not have been sufficient to justify his failure to inquire concerning his military pay status. Since he did not question the continued payments and made no effort to obtain a proper determination concerning his entitlements, he is not without fault in the matter of his overpayment and waiver of his resulting debt under 10 U.S.C. § 2774 is not authorized. B-208454, Oct. 4, 1982.

4. Service credit for retired pay purposes

The restriction in the Military Pay Increase Act of May 20, 1958, which changed the formula for computation of retired pay to prevent the accumulation after May 31, 1958, of further credit for inactive service (10 U.S.C. § 1405) should be applied prospectively only so that a Regular Army officer who, after 3 years on the temporary disability retired list from 1957 to 1960, is recalled to active duty and subsequently makes application for retirement on length of service under 10 U.S.C. § 3911, is not precluded from having the inactive service on the temporary disability retired list earned through May 31, 1958, included for percentage multiplier purposes in the computation of his retired pay. 42 Comp. Gen. 116 (1962).

D. Retirement Date

1. Application of Uniform Retirement Date Act

When a member is retired for disability without the Secretary concerned having designated an earlier date of retirement under the provisions of 10 U.S.C. § 1221, such retirement is subject to the provisions of the Uniform Retirement Act, 5 U.S.C. § 8301. Those provisions require that such retirements take effect on the first day of the month following the month in which the retirement would otherwise be effective, but that the rate of retired pay must be computed as of the date retirement would have occurred had that act not been enacted. 43 Comp. Gen. 425 (1963).

2. Where member is also eligible to retire voluntarily

A member who is eligible to retire July 1, 1968, the effective date of a basic pay increase, either for disability retirement under 10 U.S. Code, Chapter 61, by virtue of the Uniform Retirement Date Act, or voluntarily for years of service under 10 U.S.C. § 6323, is entitled to retired pay computed at the higher rates of active duty pay not on the basis of disability retirement—as the rate applicable to the disability retirement would be the rate in effect as if the retirement had not occurred under the act—but on the basis that section 6323, retirement is neither subject to the Uniform Retirement Date Act nor formula 4 of 10 U.S.C. § 1401, is the "other provision of law" most favorable to the member prescribed by section 1401. Therefore, he/she is entitled to retired pay computed at the higher rate of active duty basic pay in effect July 1, 1968. 49 Comp. Gen. 80 (1969).

3. Delivery of retirement orders is delayed beyond retirement date

Member retired for disability who has notice of such retirement on or before the designated retirement date, is considered retired on the designated date even though delivery of retirement orders is delayed beyond the retirement date. This is so even if he performs additional days of active duty subsequent to retirement date and received payment therefor. Such delay does not in any way add to member's retirement rights in absence of specific active duty order covering the additional period of service. 56 Comp. Gen. 98 (1976). Compare 49 Comp. Gen. 429 (1970).

E. Computation of Retired Pay

1. Options based on retirement date

a. Most favorable formula—election

A procedure to accelerate the establishment of disability retired pay accounts by assuming a retired member, whether placed on a temporary or permanent disability list or transferred from a temporary to a permanent disability list, would elect under 10 U.S.C. § 1401, the formula resulting in the greater amount of retired pay without considering taxable income is approved. However, the phrase "as member elects" in formulas 1 and 2 contemplating an election between a years-of-service computation or a computation based on percentage of disability, a member should be apprised by registered mail, delivery restricted to him, of his right to elect, and, the law contemplating only one election, that his failure to object to the election made for him within a specified time would constitute an election, and the requested return receipt would be placed in the member's military pay record or other appropriate place. 46 Comp. Gen. 820 (1967).

b. Methods of computation

Member, voluntarily retireable, but who is retired for disability with retired pay computed under 10 U.S.C. § 1401, has three retired pay computation methods available, two methods of which, in absence of Secretarial action under 10 U.S.C. § 1221, designating earlier retirement date, are subject to Uniform Retirement Date Act, 5 U.S.C. § 8301, which requires use of basic pay rates in effect on date member was retired. Third method authorizes computation as though member's retirement was voluntary (not subject to 5 U.S.C. § 8301), thereby permitting use of

increased basic pay rates, if in effect on date member's name is placed on retired rolls. 56 Comp. Gen. 98 (1976).

c. Use of hypothetical bases of computation

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. B-188344, Oct. 13, 1977.

d. Restrictions on pay computation method

A Regular chief warrant officer, W-4, relieved from active duty and retired as an Air Force reservist in the grade of lieutenant colonel under 10 U.S.C. § 1201 by reason of permanent physical disability who was also eligible to be retired under 10 U.S.C. § 1293, having had more than 20 years active service, properly is being paid retired pay computed under formula 1 of 10 U.S.C. § 1401, the formula "most favorable to him," his retired pay may not be computed under formula 4, based on his higher Reserve commissioned grade, to establish the "most favorable formula" for him under 10 U.S.C. § 1401, formula 4 pertaining exclusively to persons retired as warrant officers. Also, the member having been retired as a commissioned officer, formulas 1 and 4 may not be combined to provide a greater amount of retired pay, and the computation of the member's retired pay is restricted to formula 1, 10 U.S.C. § 1401. 47 Comp. Gen. 206 (1967).

2. Disability retirement

a. Before earliest date authorized for voluntary retirement

A Navy or Marine Corps officer who completes minimum service time requirements for voluntary retirement under 10 U.S.C. § 6323(a) in a given month and who is subsequently retired for permanent disability (10 U.S.C. §§ 1201 and 1204) in the same month which date is set by Secretarial action under 10 U.S.C. § 1221, may not compute his retired pay under 10 U.S.C. § 6323(e) as an "any other provision of law" alternate method of computing retired pay authorized by 10 U.S.C. § 1401. Since he was retired

for disability before the earliest date authorized by 10 U.S.C. § 6323(a) for voluntary retirement, he was not entitled to retired pay computed under 10 U.S.C. § 6323(e) at the time he retired. B-164842, June 26, 1978.

b. Enlisted member retired for disability—extraordinary heroism award

Enlisted member of Army who is eligible for voluntary retirement for over 20 years of service, and who would be entitled to 10 percent increase for act of extraordinary heroism in computation of retired pay, is entitled to such increase if he is retired for disability, since retired pay computation statute applicable to disability retirements authorizes computation of retired pay on basis of formula most favorable to member if he is otherwise entitled to compute retired pay under another provision of law. 55 Comp. Gen. 701 (1976). Compare 52 Comp. Gen. 599 (1973); and 47 Comp. Gen. 397 (1968).

3. Use of constructive retirement date

a. To avoid "retired pay inversion"

Where a Navy or Marine Corps enlisted member is eligible for retired pay by reason of disability, his pay may be computed on the retainer pay formula pursuant to 10 U.S.C. § 6330, adjusted to reflect any applicable changes authorized by 10 U.S.C. § 1401a, if he was qualified for transfer to the Fleet Reserve or Fleet Marine Corps Reserve on a date earlier than his disability retirement—the terms, "retired pay" and "retainer pay" being interchangeable for purposes of the computation authorized by 10 U.S.C. § 1401a(f). 56 Comp. Gen. 740 (1977).

b. Income tax consequences

Proper pay rate to be used in computing the amount of retired pay which, as compensation for injury or sickness, is not includable in gross income for tax purposes under 26 U.S.C. § 104(a)(4) when a member is retired for disability but is entitled to compute retired pay on a nondisability formula pursuant to 10 U.S.C. § 1401a(f) is a matter for consideration by the Internal Revenue Service. However, it is the Comptroller General's view that although a disability retired member may compute his retired pay on some other formula pursuant to 10 U.S.C. § 1401a(f), he still receives his retired pay by virtue of his disability retirement. 56 Comp. Gen. 740 (1977).

c. Recall after retirement for years of service—recomputation for disability

A member who when retired for length of service was found to be physically fit for military duty despite residual muscle damage from war wounds and who suffered a myocardial infarction when he voluntarily returned to active duty is entitled to combine the percentage of both disabilities in the recomputation of his retired pay under 10 U.S.C. § 1402(b), even though the section only provides for the member's return to his earlier retired status. For pursuant to Section 1402(d) his disability retired pay must be based upon the highest percentage of disability attained while on active duty after retirement. Therefore, the member's disability from war wounds continuing to exist upon his return to retired status is for inclusion in the "highest percentage" determination, notwithstanding the wounds did not render him unfit for active military service. 51 Comp. Gen. 178 (1971). See also 48 Comp. Gen. 204 (1968); and 47 Comp. Gen. 397 (1968).

F. Finality of Disability Determination—Correction of Records

1. In general—finality of findings

A naval officer who, due to physical disability, is placed on the permanent retired list as a result of the findings and recommendations of a Physical Evaluation Board and the approval of such findings and recommendations by the Assistant Secretary of the Navy for Air is legally retired and his status cannot thereafter be changed retrospectively because of a mistake of fact or poor judgment on the part of the retiring authorities. 31 Comp. Gen. 296 (1952). See also 55 Comp. Gen. 961 (1976), concerning finality of correction board action.

2. Effect of member's placement on temporary disability retired list

The placement of a member's name on the Temporary Disability Retired List (TDRL) is not an act which can be chosen by the member and this status is not final until under the provisions of 10 U.S.C. § 1201 the Secretary concerned takes additional action to finalize the affected individual's status as a member of the service. Thus, considering the legislative purpose of 10 U.S.C. § 1401a(f) retired pay received by a member because of placement in a TDRL status is not retired pay as contemplated by 10 U.S.C. § 1401a(f). B-188244, Oct. 13, 1977.

3. Finality of discharge

The discharge of a Marine Corps officer under 10 U.S.C. § 1203 by direction of the Secretary of the Navy because of a physical disability of less than 20 percent, subsequently determined to have been 30 percent, may not—under the well-established principle in Palen v. United States, 19 Ct. Cl. 389 (1884) that an executed discharge by competent authority may not be revoked even though it is subsequently determined that such discharge should not have been issued—be considered as having been based on a mistake of law or manifest error. Therefore, the officer having been discharged is regarded as a civilian and there is no authority for placement of the individual on the temporary disability retired list under 10 U.S.C. § 1202. 40 Comp. Gen. 249 (1960).

4. Substantial new evidence—revocation of orders

The use of the "substantial new evidence" rule which is available to revoke the retirement orders of the members in the absence of fraud, mistake of law, or mathematical miscalculation should be confined to actions taken either contemporaneously or a short period of time following the effective date of a member's retirement, the correction of military records remedy in 10 U.S.C. § 1552 being more appropriate to remove an injustice than extending the substantial new evidence rule. Therefore, the revocation of orders releasing members from active duty and placing them on the permanent retired list may not be approved either where knowledge of a member's hospitalization was known prior to the effective date of his retirement orders but action was delayed for 15 months, or where hospitalization information was not furnished until 6 months after the retirement of a member and within 1 month of his death. 46 Comp. Gen. 671 (1967). See also 52 Comp. Gen. 797 (1973); and 40 Comp. Gen. 419 (1961).

5. Disability determination subsequent to release—record correction action

The retired pay of an Air Force officer retired effective April 1, 1963, who by a correction of military records is placed on the temporary disability retired list as of March 31, 1963, with entitlement to disability retired pay effective April 1, 1963, from which list he is removed on March 11, 1968, properly was for computation under section 5(a)(1) and 5(a)(2) of the Uniformed Services Pay Act of 1963. The officer's entitlement to retired pay on April 1, 1963, did not occur by force of the Uniform Retirement Date Act, but by the action of the Secretary. The officer, therefore, was not

overpaid retired pay commencing October 1, 1963, computed at 75 percent of the monthly basic pay of his grade fixed by the 1963 pay act. 48 Comp. Gen. 329 (1968). See also 42 Comp. Gen. 317 (1962); and 41 Comp. Gen. 597 (1962).

6. Tax consequences of record correction action

A correction of military records under 10 U.S.C. § 1552 to show that a deceased officer had been retired for disability and not years of service pursuant to 10 U.S.C. § 8911, created entitlement to a refund of the income taxes withheld since section 104(a)(4) of the Internal Revenue Code of 1954, as amended provides that disability retired pay is not subject to federal income tax. The claim of the officer's widow for refund of taxes for the years denied by the Internal Revenue Service as barred by the applicable statute of limitations may be allowed as being a claim within the meaning of 10 U.S.C. § 1552(c) in view of Clyde A. Ray v. United States, decided January 21, 1972 (197 Ct. Cl. 1), in which the court held the plaintiff's claim was not for the refund of taxes but to effectuate the administrative remedy allowed under 10 U.S.C. § 1552, and that shelter of income from taxation is a "pecuniary benefit" flowing from the record correction. 52 Comp. Gen. 420 (1973).

7. Court order restraining discharge

A certificate purporting to discharge a member of the Naval Reserve on December 5, 1961, which was not delivered because of a court restraining order did not effect the member's discharge. The mere preparation of the instrument of discharge without delivery did not terminate the military status of the member who had been placed on the temporary disability retired list on January 1, 1957, and paid retired pay until December 1, 1961, when the payments were suspended. Therefore, upon transfer under orders dated January 8, 1964, from the temporary disability retired list to the permanent disability retired list with 40 percent disability, effective November 7, 1961, the discontinuance of retired pay as of November 30, 1961, not having terminated the member's status on the temporary disability retired list and his transfer to the permanent disability retired list being valid, he is entitled to disability retired pay on and after November 7, 1961, based on the disability rating of 40 percent. 43 Comp. Gen. 731 (1964).

Pay for Military Service Performed Subsequent to Retirement

A. General Rule

A fully executed 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 or error. Hence, a member generally may not have original retirement orders suspended by new "retirement" orders based on service performed subsequent to original retirement. Rather, if members are recalled to active duty after retirement they simply become eligible to elect recomputation of retired pay under the appropriate formula prescribed by 10 U.S.C. § 1402, unless they acquire a new retired pay status specifically authorized by provision of law. 48 Comp. Gen. 99 (1968); B-185138, Dec. 6, 1976; B-204055, May 17, 1982.

1. Active duty retirement

Under 10 U.S.C. § 1331 members of the Reserve who reach age 60 and have the requisite years of creditable service may apply for and receive retired pay. Once a member has been granted retired pay under 10 U.S.C. § 1331, however, he or she may not be retained on active duty or in active service under 10 U.S.C. § 676. B-222331, June 23, 1987.

2. Qualified for retirement but not retired

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. B-222860, Aug. 4, 1986.

B. Retired Grade

1. Active duty in higher grade after retirement

An Army sergeant retired in grade E-6 upon his own application under 10 U.S.C. § 3914 and under orders recalling him to active duty in grade E-7, with his consent, serves only 7 months, 6 days of a 2-year period because of hardship. The member is entitled to the recomputation of his retired pay on the basis of the higher grade, for had he been retired at grade E-7 rather than released from active duty, he would have been eligible under 10 U.S.C. § 3961 to retire in that grade. 10 U.S.C. § 1402(a) prescribes the computation

of retired pay on the monthly basic pay of the grade in which a member would be eligible to retire if retiring upon release from active duty performed subsequent to retirement. Therefore, the sergeant's retired pay properly may be recomputed effective the day following release from active duty on the monthly basic pay of grade E-7. 47 Comp. Gen. 289 (1967). Compare 43 Comp. Gen. 442 (1963).

2. Advancement on retired list—reduction in pay effect

The retired pay of enlisted members who serve on active duty after retirement under 10 U.S.C. § 3914, which brings their retired pay recomputation within the purview of 10 U.S.C. § 1402(a), and who then are advanced on the retired list pursuant to 10 U.S.C. § 3964, is not required to be recomputed under 10 U.S.C. § 3992 if a reduction of retired pay would result, unless the member consents to the advancement. Therefore, since a sergeant first class E-7 who is advanced on the retired list to the grade of warrant officer WO-1 would benefit by having his retired pay recomputed under section 1402(a) and not section 3992, his advancement may be rescinded on the basis the advancement was contrary to his wishes. However, where it would be to the advantage of a member, also re-retired as a sergeant first class E-7, but advanced to the grade of major, to accept the advancement, the recomputation of his retired pay should be in accordance with section 3992. 51 Comp. Gen. 137 (1971).

C. Recomputation

1. Recomputation of retired pay for service performed after retirement

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. Therefore, 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. B-222860, Aug. 4, 1986.

2. Active duty for less than 2 years

The retired pay of a service member who was immediately recalled to active duty without a break in service for less than 2 years is computed according to 10 U.S.C. § 1402 to reflect the additional service, and is based

on the pay rate as prescribed in that statute. Colonel Wayne R. Ulisnik, USA (Retired), 69 Comp. Gen. 141 (1989).

3. Consumer Price Index changes

a. On active duty for 2 years after retirement

In recomputing retired pay under 10 U.S.C. §§ 1401a and 1402(a) for a member who served on active duty for 2 years subsequent to retirement, the Consumer Price Index changes should be reflected by increasing retired pay by only the percent that the applicable base index exceeds the index for the calendar month immediately preceding the month in which the active duty pay rate upon which retired pay is based became effective. 50 Comp. Gen. 232 (1970). Compare 44 Comp. Gen. 74 (1964), concerning qualifying service.

b. Disabled while on active duty after retirement

An Army sergeant disabled during a period of service which commenced May 25, 1966, subsequent to retirement on July 1, 1962, under 10 U.S.C. § 3914 for length of service upon reversion to inactive status on the retired list effective March 15, 1968, elected retired pay pursuant to 10 U.S.C. § 1402(d), based on 60 percent disability computed at rates prescribed in 37 U.S.C. § 203(a), as amended by Pub. L. No. 90-207 (10 U.S.C. § 1401a) to provide a cost-of-living increase effective October 1, 1967. His retired pay status comes within the purview of 10 U.S.C. § 1401a(c) entitling the member to an increase in retired pay to reflect the increase of 3.9 percent in the Consumer Price Index effective April 1, 1968, adjusted pursuant to subsection (c) to the nearest one-tenth of 1 percent of the increase in the Consumer Price Index for January 1968 that exceeded the September 1967 Index, or a 1.3 percent increase. 48 Comp. Gen. 204 (1968). See also 51 Comp. Gen. 178 (1971).

4. Extraordinary heroism award

An enlisted member of the uniformed services who subsequent to retirement under 10 U.S.C. § 3914 was recalled to active duty, incurred a 60 percent disability and was awarded a 10 percent increase in retired pay based on the award of the Soldier's Medal, is entitled to recompute his retired pay under 10 U.S.C. § 1402. The member may not be paid the 10 percent increase upon re-retirement, even though under 10 U.S.C. § 3914 he would have been entitled pursuant to Formula C, 10 U.S.C. § 3991, to an

increase for extraordinary heroism in line of duty prior to retirement. The member's entitlement to retired pay upon re-retirement as under 10 U.S.C. § 1402, which permitted him to elect the most favorable formula for computing his retired pay (subsection (d)), but makes no provision whereby a member's recomputed retired pay may be increased for an act of heroism performed during a post-retirement period of active duty. 52 Comp. Gen. 599 (1973). Compare 55 Comp. Gen. 701 (1976); 47 Comp. Gen. 397 (1968).

D. Inactive Military Service Performed Subsequent to Retirement

1. Inactive service in another branch of Armed Forces

The holding of a dual status as a retired member of the Regular Marine Corps and as a member of a state Air National Guard is incompatible in view of the conflicting responsibilities of the two statutes, and an Air National Guard regulation which prohibits the enlistment in that organization of persons receiving retirement pay from any branch of the Armed Forces constitutes a complete bar to the valid Air National Guard enlistment of a retired Regular Marine Corps enlisted member. Therefore, the member's retired status was not terminated upon his purported enlistment in the Air National Guard, and he is entitled to retired pay except for those intervals when he received greater amounts in connection with the Air National Guard service which may be considered as having been rendered in a de facto status. 40 Comp. Gen. 51 (1960).

2. Resignation from retired status to qualify for non-Regular retirement

In view of the evidence of a congressional intent that the retirement benefits in 10 U.S.C. §§ 1331-1337 are applicable only to Reserve members and former members not covered by any other retirement law, a retired Regular enlisted member of the Army in receipt of retired pay under 10 U.S.C. § 3914, on the basis of at least 20 years of service but less than 30 years of service, may not upon his own application for discharge from the retired list qualify for retirement under *10 U.S.C. § 1331*, even though he may meet the age and service requirements of the statute and that by reason of the discharge from the retired list, upon his own application, he thereby loses his right to retired pay incident to military service. 41 Comp. Gen. 458 (1962).

3. Regular army officer service in higher grade with Army National Guard

To transfer retired Regular Army officers who have completed service as State Adjutants General or Assistant Adjutants General, and are federally recognized in their Reserve general officer grades, to the Retired Reserve would create the anomalous situation of having the officers on two separate retired lists, namely the Regular Army retired list and the Retired Reserve list, a situation not within the contemplation of 10 U.S.C. §§ 1374(b), 3352(a), and 3375. Therefore, absent statutory authority to transfer and fix the rights of the transferred officers so as to make one retired status compatible with the other, the officers may not hold two retired statuses simultaneously. 47 Comp. Gen. 654 (1968). See also 41 Comp. Gen. 118 (1961); B-163446, Mar. 8, 1977.

E. Characteristics of Retired Pay

1. Advance payment of retired pay

Retired pay is included within the definition of pay in 37 U.S.C. § 101(21). Therefore, authority in 37 U.S.C. § 1006(h) to make payments up to 3 days in advance of a regular payday, of pay and allowances to individuals under the jurisdiction of the Secretaries of the military departments includes payments of retired pay. B-193772, Jan. 22, 1980.

2. Waiver of retired pay

Writ of garnishment of member's retired pay, issued pursuant to 42 U.S.C. § 659, must be honored even though member has renounced his retired pay and it is not being sent to him by the government since he may not waive his right to such pay which continues to accrue even though it is not being sent to him by the government. B-196839, Apr. 24, 1980.

3. Member's death

A retired service member who disappeared and is believed drowned accrued no retired pay after the date he disappeared. Although his designated beneficiaries obtained a court decree declaring him dead, the decree did not establish the date of death. Since retired pay accrues only while the service member lives and the facts here indicate he drowned on or about the day he disappeared, the beneficiaries' claims for retired pay accrued subsequent to the date of his disappearance may not be allowed. B-207841, July 20, 1982. See also 62 Comp. Gen. 211 (1983); 66 Comp. Gen. 260 (1987); Chief Warrant Officer Glen N. Burbage, USCG (Retired), 71 Comp. Gen. 107 (1991).

4. Forfeiture—criminal offense

A retired Regular officer of the Marine Corps who is convicted of a criminal offense which requires forfeiture of office loses his office—in this case concealment, removal, or mutilation of records under 18 U.S.C. § 2071—since the courts have held that a retired Regular officer continues to hold office after retirement. Since it appears that he has forfeited his office, continued payment of retired pay for that office raises serious doubt as to his entitlement and should be discontinued. Lieutenant Colonel Oliver North, USMC (Retired), B-236084, July 31, 1989. However, Pub. L. No. 101-510, Nov. 5, 1990, amended 18 U.S.C. § 2071, effective January 1, 1989, to provide that no retired officer of the Armed Forces of the United States shall be considered as holding an "office" of the United States for the purposes of this section.

F. Persons Who Were Not Members Before September 1980

1. Statutory amendments

In 1980 Pub. L. No. 96-342 added section 1407 to title 10 of the United States Code, and amended several other retirement statutes, to authorize a new method of computing retired pay for persons who first became members of the uniformed services after September 7, 1980. The retired pay of those members is to be based on a percentage of a "retired pay base," which is the average monthly basic pay received by the member over 36 months, or in certain cases a lesser period of time. B-206107, Feb. 1, 1983.

2. Erroneous payments of basic pay not included

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. 62 Comp. Gen. 157 (1983).

3. Period of unauthorized absence

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. 62 Comp. Gen. 157 (1983).

4. Demotions

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. 62 Comp. Gen. 157 (1983).

5. Cost-of-living adjustment

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. Partial cost-of-living adjustment under 10 U.S.C. § 1401a(c) and (d) made in 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. 62 Comp. Gen. 157 (1983).

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. 62 Comp. Gen. 157 (1983).

G. Uniformed Services Former Spouses' Protection Act

1. Compliance with state court order for alimony or child support

Absent facial invalidity of the court order, the government is not liable with respect to any payments made in conformity with a state court order under authority of the Uniformed Services Former Spouses' Protection Act. Therefore, the Army is obligated to apportion the military retired pay of a retired officer in accordance with a Washington state court divorce decree. B-221190, Feb. 11, 1986.

Dual Compensation Restrictions

Subchapter I—Retirement Status

A. Exempt Status

1. Advanced to officer grade—pre-1964

Enlisted members of the uniformed services advanced on the retired list to an officer grade who did not hold an office within the meaning of the Dual Employment Act of 1894, upon repeal of that act by the Dual Compensation Act of 1964, do not become subject to the limitation of the 1964 act because they were retired as enlisted members. However, should they serve on active duty as officers after retirement and be retired as such they may not remain exempt from the limitation. 44 Comp. Gen. 297 (1964).

2. Retired pay on enlisted grade

A Navy enlisted man who was serving and retired in a chief warrant officer grade, but who receives retired pay on the basis of his enlisted status, does not by reason of the warrant officer grade have his rights or benefits as an enlisted man adversely affected so as to prevent him from coming within the exception in the Dual Employment Act of 1894 (5 U.S.C. § 62) and is entitled to hold a civilian position. 42 Comp. Gen. 556 (1963). Current law is 5 U.S.C. § 5532.

3. Enlisted status retention

Army and Air Force enlisted members who may not be given appointments as officers in the Regular service, upon retirement for disability in a higher temporary officers grade do not become retired officers of a Regular component and having retained their enlisted status, are not subject to the limitation in the Dual Compensation Act upon civilian employment in the federal government. 44 Comp. Gen. 297 (1964).

4. Warrant officer retired as enlisted

Temporary warrant officers retired with pay computed on basis of enlisted status are regarded as retaining their enlisted status and exempt from the dual compensation restrictions even though retired in a warrant officer grade. 42 Comp. Gen. 556 (1963).

B. Non-Exempt Status

1. Warrant officer service

Naval enlisted man who retired as warrant officer is a "retired officer" within meaning of 5 U.S.C. § 5532(b), and subject to dual compensation restrictions and his situation is different from that of an enlisted man who was retired and advanced on retired list to highest rank in which he served satisfactorily. B-159466, Aug. 8, 1966.

2. Temporary officer status

Navy and Marine Corps enlisted members given temporary appointments as officers of the Regular Navy and the Regular Marine Corps and retired for years of service or for non-combat incurred disability in their temporary officer status, are subject to the retired pay reduction provision of the Dual Compensation Act of 1964 while holding a civilian office in the federal government. 44 Comp. Gen. 297 (1964).

3. Advancement to commissioned grade on retired list

A retired enlisted man who is advanced on the retired list to the highest commissioned grade in which he served on active duty is subject to the dual compensation restrictions in effect at the time of his retirement. He is not entitled to the exemption from these restrictions granted to Reserve officers. B-136167, June 25, 1985.

4. Temporary coast guard officer status

Coast Guard enlisted members who at the time of retirement are serving on active duty under temporary officer appointments in the Regular service and retired as such are regarded as retired officers of a Regular component and when employed in a civilian position under the federal government are subject to the reduction in retired pay prescribed by the Dual Compensation Act of 1964. 44 Comp. Gen. 297 (1964).

5. Service-connected disability retirement—pre-1964

Regular officers retired for service connected, but non-combat or noninstrumentality of war disability and exempt under the Dual Employment Act of 1894, even though subject to the dual compensation restriction in the Economy Act of 1932, unless they are expressly exempt from the limitation in the Dual Compensation Act of 1964, are subject to a

reduction in retired pay while employed by the federal government in a civilian position. 44 Comp. Gen. 297 (1964). Current law is 5 U.S.C. § 5532.

6. Nonappropriated fund activity—pre-1964

Regular military officer who was in a terminal leave status until December 1, 1964, and holding a nonappropriated fund activity position on November 24, 1964, is considered to be in an active duty status through November 30, 1964, rather than in a retired status. Therefore, such officer is not entitled to the benefits of the savings provisions of the Dual Compensation Act of 1964, which permits continuation of exemptions for members who were retired on the day prior to the effective date of the 1964 Act. 45 Comp. Gen. 180 (1965).

C. Disability Exemption

1. Legislative history of exemption

The conclusion that the exemption from reduction of the retired pay of a Regular officer when employed as a civilian by the federal government, applies only if the retirement was based on a disability incurred as a direct result of armed conflict or was caused by an instrumentality of war in wartime, is justified on the basis of the legislative history of the provision. 50 Comp. Gen. 480 (1971).

2. Conclusiveness of service medical determination

For purposes of establishing exemption from reduction in retired pay in the case of a retired Regular officer, determinations as to whether his disability from injury or disease incurred as a direct result of armed conflict or an instrumentality of war during war can only be made by the service from which retired and neither the employing agency nor this Office has the authority to change that determination. 55 Comp. Gen. 961 (1976).

3. Disease from combat conditions

To apply the exemption from reduction in retired pay of a Regular officer retired for disease as a direct result of armed conflict in Vietnam, due to the nature of combat operations in Vietnam and the difficulty of establishing that the inception of disease occurred while engaged in armed conflict, and affirmative administrative finding of a direct causal relationship between the disability and the armed conflict will be accepted

unless unreasonable or insufficiently supported by the record. 48 Comp. Gen. 219 (1968).

4. "0" percent disability ratings

Despite Court of Claims decision in Mross v. United States, 186 Ct. Cl. 165 (1968), it is the view of this Office that a combat-related disability which is of a type that would otherwise qualify a retired Regular officer for exemption, but was rated as 0 percent disabling, does not qualify him for exemption from dual compensation restrictions since it was not a significant factor in officer's retirement. 50 Comp. Gen. 480 (1971). B-187230, Oct. 19, 1976.

Subchapter II—Nongovernment Employment Not Covered

A. Court-Appointed Attorneys

Private attorneys appointed by the courts to represent indigent defendants and who receive compensation for such service may not have such service regarded as establishing an employer-employee relationship with the government so as to bring the individuals within the concept of holding a civilian office with the contemplation of the dual compensation restrictions. 44 Comp. Gen. 605 (1965).

B. United States Marine Corps Association (USMCA)

A Regular Marine Corps officer employed as business manager of the United States Marine Corps Association while on the TDRL is not subject to the reduction in retired pay prescribed by the Dual Compensation Act of 1964, the Association, a voluntary one obtaining revenue from dues, investments and publications of a periodical, is not under the jurisdiction of the Marine Corps nor is it a "non-appropriated fund instrumentality" of the United States notwithstanding that the positions of leadership and authority in the organization are held by Marine Corps officers. 45 Comp. Gen. 289 (1965).

C. State Maritime Academies

Since state maritime academies are established and organized under the laws of the individual states, the instructors and employees of the

academies are neither appointed by, nor are their appointments approved by a federal official, retired Regular officers so employed would not hold an "office or position" within the meaning of the dual compensation and dual office limitations even though federal funds are allocated to the states for the operation of the academies, such funds when intermingled with state funds lose their identity as federal funds. 42 Comp. Gen. 208 (1962).

D. Federal Credit Union

The employment of a retired Regular officer as manager, treasurer, or loan processor in a Federal Credit Union, with a membership that need not be composed of federal employees, would not hold an "office or position" under the United States and would not be subject to the dual office and the dual compensation restrictions, for while organized under federal law and subject to federal supervision, a Federal Credit Union is not a government organization. 42 Comp. Gen. 208 (1962). Compare Captain Larry A. Fields, USAF (Retired), 67 Comp. Gen. 433 (1988), Subchapter III, C.6, of this chapter.

E. International Organizations

Employment of retired military officers by the United Nations and the World Health Organization, or other international organizations whose expenses are assessed against member nations, including the United States, and from which funds the salaries of the positions are paid, would not contravene the dual office restrictions nor require reduction in their retired pay, their employment not constituting employment by the federal government. 42 Comp. Gen. 208 (1962).

F. Naval Academy Athletic Association

The retired pay of a Regular naval officer employed by the Naval Academy Athletic Association (NAAA) is not subject to reduction under the Dual Compensation Act of 1964, since it appears that NAAA is a private voluntary association not established pursuant to any federal law or regulations and cannot be regarded as a nonappropriated fund instrumentality of the United States. 54 Comp. Gen. 518 (1974).

G. Retired Senior Volunteer Program

Retired Regular Army officer who accepted employment by community college to administer local Retired Senior Volunteer Program, which is funded by federal grant from ACTION, is not affected by dual compensation restrictions since such employment would not be in a "position" within meaning of that section. B-172318, Feb. 13, 1976.

H. Fee Basis Physicians

A retired Regular Army officer placed on a roster of fee basis physicians to examine Armed Forces personnel does not occupy a "civilian" office and his retired pay is not subject to reduction after the first 30-day period for which he received fees, such physicians are serving under contract and not by appointment to a civilian office or position and the fact that a limitation is placed upon the total fees any physician may receive for any day does not change the contractual relationship to that of employer-employee. 45 Comp. Gen. 81 (1965).

I. Contract Concessionaire

A retired Regular officer who is an active partner in enterprises which hold concession contracts with the government is not, as a contract concessionaire, regarded as an officer of the United States or as holding a civilian position under the government so as to be precluded by the 1894 dual office act, 5 U.S.C. § 62, or the 1932 dual compensation law, 5 U.S.C. § 59a, from receiving retired pay. 39 Comp. Gen. 751 (1960). Current law is 5 U.S.C. § 5532.

J. Dental Services on Contractual Basis

No proper basis exists for generally excluding federal retirees from obtaining government contracts, and a dentist was not barred by conflict of interest considerations from providing services under contract to the Coast Guard simply because he was a retired officer of the Public Health Service. B-215651, Mar. 15, 1985.

Subchapter III—Government Employment

A. Full-Time Employment

1. "TAPER" appointment

A retired Regular officer who was given a "TAPER" appointment (temporary appointment pending establishment of a register) to a full-time civilian position without time limit, under which he was eligible for within-grade increases and could be reassigned to any position to which his original appointment could have been made, is not a temporary employee so as to entitle him to the 30-day exemption from reduction in retired pay applicable to temporary employment. 46 Comp. Gen. 366 (1966).

2. Director, CIA

The compensation provisions applicable to a retired Regular officer, appointed Director of the Central Intelligence Agency under 50 U.S.C. § 403(b)(2), which permits the officer to receive both retired pay, and the provisions of 5 U.S.C. § 5532(b) requiring reduction in retired pay are clearly inconsistent. Therefore, under section 402(b) of the Dual Compensation Act, the provisions of 50 U.S.C. § 403(b)(2) are no longer in effect and the retired pay benefits for the Director are subject to the dual compensation restrictions. 44 Comp. Gen. 708 (1965).

B. Leave-Without-Pay Periods

1. No reduction of retired pay

When a retired Regular officer whose retired pay is subject to a reduction by reason of full-time civilian employment is in a leave-without-pay status from his civilian position, no reduction of his retired pay is required for any day he receives no pay. 44 Comp. Gen. 266 (1964).

2. Weekends within LWOP periods

A retired Regular officer employed as a civilian and subject to retired pay reduction, who is in a LWOP status is entitled to full military retired pay for the Saturday and Sundays occurring before and after the LWOP period for while they do not involve any loss of civilian compensation, they do fall within "the full calendar period" of civilian employment prescribed by 5 U.S.C. § 5532(b). 48 Comp. Gen. 152 (1968).

3. Several periods of LWOP

A retired Regular officer who is in a LWOP status on four separate occasions from the civilian position during a "full calendar period" within the phrase contained in 5 U.S.C. § 5532(a), is only entitled to full retired pay for the Saturday and Sunday that occurred within the LWOP periods, and no adjustment of retired pay is required before and after the other LWOP periods. 48 Comp. Gen. 152 (1968).

4. Part of day on LWOP

A retired Regular officer employed as a civilian for the "full calendar period" May 1966, to April 1967, during which time he is subject to a reduction in retired pay, who is in a LWOP status 1 hour on a Friday and all

of the following Monday, is not entitled to full retired pay for the intervening Saturday and Sunday, the officer having received 7 hours civilian compensation for Friday is considered to have been in receipt of civilian compensation for the day and since his LWOP status commenced the following Monday, the Saturday and Sunday do not fall within a LWOP period. 48 Comp. Gen. 152 (1968).

5. 31st day of month

A LWOP status on the 31st day of a month does not entitle a retired Regular officer, employed as a civilian and subject to a reduction in retired pay, to an additional amount of retired pay. Since military retired pay accrues on a monthly basis (computed as if each month had 30 days), no retired pay accrues on the 31st day of any month; therefore, the officer accrued a full month's retired pay for the month, whether or not he was on LWOP status on the 31st of the month. 48 Comp. Gen. 152 (1969).

C. Nonappropriated and Appropriated Fund Activities

1. Appropriated vs. office or position

Determination of the applicability of dual compensation restriction in 59 U.S.C. § 59a (now 5 U.S.C. § 5532) is not whether the compensation is paid for appropriated funds, per se, but whether the position is an office or position "under the United States Government." 42 Comp. Gen. 73 (1962).

2. Termination of pre-1964 election

A retired Regular officer who was employed as a civilian in a nonappropriated fund activity elected to remain in the status he occupied on November 30, 1964, that of an employee of a nonappropriated fund instrumentality entitled to full retired pay. Upon change of employer designation from a nonappropriated to an appropriated fund activity, the election ceased to operate on the date the civilian salary of the officer became payable from appropriated funds. 45 Comp. Gen. 194 (1965). Compare B-161277, July 7, 1967.

3. Federal Reserve—Board of Governors

In Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986), the Court of Appeals for the Federal Circuit held that military retirees were exempt from the restrictions of 5 U.S.C. §§ 5531 and 5532 when employed by the Board of Governors of the Federal Reserve System because the Board is a

nonappropriated fund activity. The Comptroller General will follow the court's judgment and overrules the prior contrary administrative decision in Lieutenant Colonel Robert E. Frazier, USA (Retired), 63 Comp. Gen. 123 (1983). Military retirees employed by the Federal Reserve Board who were not plaintiffs in the Denkler litigation may be allowed refunds of amounts previously deducted from their retired pay, subject to the 6-year limitation period prescribed by 31 U.S.C. § 3702(b). Lieutenant Colonel Ralph E. Marker Jr., USA (Retired), 67 Comp. Gen. 436 (1988).

4. Federal Deposit Insurance Corporation (FDIC)

A retired Army lieutenant colonel employed by the Federal Deposit Insurance Corporation (FDIC), whose compensation is derived from assessments on banks, is not thereby exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531, 5532. The FDIC is a government corporation owned or controlled by the United States and thus is one of the entities specifically enumerated in the definition of positions subject to dual compensation reductions in subsection (b) of 5 U.S.C. § 5532. Because the Federal Deposit Insurance Corporation is authorized to borrow from the Treasury and pledge the full faith and credit of the United States to the payment of its obligations it is not separated from general federal revenues so as to be a nonappropriated fund instrumentality as that term was used in Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986). Lieutenant Colonel Claude V. Hall, USA (Retired), B-236399; B-238303, May 29, 1991.

5. Office of the Comptroller of the Currency (COC)

A retired Air Force Colonel employed by the Office of the Comptroller of the Currency (COC), whose compensation is derived from assessments on banks, holds a position in the executive branch and is not thereby exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531, 5532. The COC is a bureau within the Department of Treasury and the Comptroller performs his duties under the general direction of the Secretary of the Treasury. Because the COC is within an agency funded by appropriated funds it is not separated from general federal revenues so as to be a nonappropriated fund instrumentality as that term was used in Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986), in exempting employees of certain nonappropriated fund instrumentalities from dual compensation reductions. Colonel Jimmy C. Hicks, USAF (Retired), B-236399; B-238303, May 29, 1991.

6. National Credit Union Administration

A retired Air Force officer employed in a civilian position with the National Credit Union Administration (NCUA) is not exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531, 5532, on the basis of the court's decision in Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986). There the court found that positions with the Federal Reserve Board are not covered by the dual compensation restrictions because the Federal Reserve Board is a "nonappropriated fund" instrumentality and the only such instrumentalities covered by the law are those of the Armed Forces. The National Credit Union Administration is an executive agency of the federal government which assesses member credit unions for funds which it uses to pay its expenses and its employees' salaries. Although these funds are collected as assessments from credit unions, they are required by law to be deposited in the Treasury and are spent by the Administration under statutory authority constituting a continuing appropriation; therefore, they are considered "appropriated funds," and the NCUA is not a nonappropriated fund instrumentality for purposes of the dual compensation restrictions. Captain Larry A. Fields, USAF (Retired), 67 Comp. Gen. 433 (1988).

7. Office of Civilian Radioactive Waste Management

A retired Army officer employed in a civilian position with the Office of Civilian Radioactive Waste Management, Department of Energy, is not exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531 and 5532 on the basis of the court's decision in Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986), to the effect that positions with the Federal Reserve Board are not covered by those restrictions because the Board is a "non-appropriated fund instrumentality." The Department of Energy collects fees from corporations which generate nuclear waste, and it uses those funds to pay the salaries of the employees of the Office of Civilian Radioactive Waste Management. However, the funds are required by law to be deposited in the Treasury and are spent by the Department of Energy under statutory authority constituting a continuing appropriation; therefore, they are considered "appropriated funds;" and the Office of Civilian Radioactive Waste Management is not a "non-appropriated fund instrumentality" for purpose of the dual compensation restrictions. Lieutenant Colonel Ralph E. Marker, USA (Retired), 67 Comp. Gen. 436 (1988).

D. JROTC Instructors

1. Exemption

The employment of retired military members as administrators of instructors in a JROTC program under 10 U.S.C. § 2031, by a secondary school that is an instrumentality of the unincorporated territory of the government of Guam, is not prohibited employment under the dual pay and dual employment provision, 10 U.S.C. § 2031(d) prescribing the basis for payment to the members as being an exception to the dual compensation restriction. 48 Comp. Gen. 796 (1969).

2. General schedule appointment limitation

Retired Regular officers employed as administrators and instructors in a JROTC program at an Indian high school funded by the federal government are required to be paid under 10 U.S.C. § 2031(d)(1). However, if employment in that capacity is under a General Schedule appointment with Civil Service approval, any payments made thereunder are subject to dual compensation reduction. 53 Comp. Gen. 377 (1973).

E. Intermittent Employment

1. Intermittent defined

The term "intermittent employment" refers to occasional employment as distinguished from regular continuous employment. 35 Comp. Gen. 90 (1955).

2. Intermittent vs. regular

Intermittent employment vs. regular employment is not dependent on whether the employee's job description is classified as part time. For purposes of 30-day exemption, intermittent employment ends when employee begins to perform a regular tour of duty. B-162225, Sept. 18, 1967.

3. Two government agencies—excepted appointment

A retired Regular officer employed by two government agencies as a civilian consultant under excepted appointment—intermittent, a 1-year appointment in fiscal year 1969, which was extended for a year, and another appointment in fiscal year 1970 with no time limitation, would, if only one appointment were involved, be entitled to be exempt from reduction of retired pay for not more than the first 30-day period for which

he received compensation regardless of the fiscal year in which the appointment was made or the services performed. 52 Comp. Gen. 189 (1971).

4. Two or more intermittent appointments

Where two or more intermittent appointments are involved, the exemption applies to the first 30 days of work in each fiscal year during which the retired Regular officer received civilian pay, but an officer who worked less than 30 days under both appointments in each fiscal year is not subject to a reduction of retired pay. 51 Comp. Gen. 189 (1971). Current law is 5 U.S.C. § 5532.

5. Reappointment to same position

Where a retired Regular officer consultant receives a second intermittent appointment, even though an entire fiscal year has intervened since the expiration of the consultant's previous intermittent appointment, he is not entitled to an additional 30-day exemption from reduction in retired pay if the second appointment appears to be only a renewal of the initial appointment. 55 Comp. Gen. 1305 (1976).

6. Excepted appointment conversion

Where a consultant appointment conversion for retired Regular officer is merely a continuation or an extension of a previous excepted appointment, it is not a "new appointment" for purposes of applying the multiple appointment rule of 5 U.S.C. § 5532(c)(2)(ii), but is, instead, a routine personnel action and he is not entitled to an additional 30-day exemption. 55 Comp. Gen. 1305 (1976).

F. Temporary Employment

1. Two temporary appointments—30-day exemption

A retired Regular officer is employed by a Member of Congress under two temporary appointments not in same fiscal year is entitled to an exemption from a reduction in retired pay for the first 30-day period for which he receives a salary under each temporary, part-time, or intermittent appointment, when the appointments are not made during the same fiscal year. 45 Comp. Gen. 559 (1966).

2. Work on 1990 census

Pub. L. No. 101-86, dated August 16, 1989, suspended for an aggregate period of 6 months the dual compensation laws for Regular retired officers who were given temporary appointments on or after that date to work on the 1990 census. Pub. L. No. 101-86 further provided, however, that if the appointee's retired pay was being reduced immediately before being placed in the temporary position the 6-month exemption would not apply. Thus, a retired officer who was originally appointed to a temporary position with the Census Bureau prior to August 16, 1989, and whose retired pay was subject to reduction prior to that date, is not entitled to the exemption even though his pay erroneously was not being reduced prior to that date and his position was changed after August 16, 1989. Major John E. Harris, USMC (Retired), 71 Comp. Gen. 409 (1992).

A retired member who held a temporary appointment with the Census Bureau before the effective date of Pub. L. No. 101-86, which provided for a 6-month exemption from the Dual Compensation Act for members appointed to temporary positions with the Bureau on or after the effective date of the law, does not qualify for the 6-month exemption. Colonel Amilcar Vazques, USMC (Retired), B-244417, July 1, 1992.

A retired member who was employed by the Census Bureau in a temporary position and, after resignation from that position, was appointed to another temporary position with recognizably different duties and responsibilities from the original position is entitled to the 30-day exemption from dual compensation restrictions under 5 U.S.C. § 5532(d)(2). Colonel Amilcar Vazques, USMC (Retired), B-244417, July 1, 1992.

Subchapter IV—Pay Reduction and Refunds

A. Dual Compensation Act of 1964

1. CPI base figure

Section 5532(b) of title 5, United States Code, which prescribes that the percentage increases to reflect changes in the Consumer Price Index shall apply to the $2,000 of retired pay not subject to reduction contemplates only one base figure for any given period to which cost of living

percentage increases will apply cumulatively. Thus, the 3.7 percent increase effective December 1, 1966, establishes the new basic figure of $2,074 as the amount of retired pay exempted from reduction. Therefore, 45 Comp. Gen. 164, is overruled. 46 Comp. Gen. 549 (1966).

2. VA compensation—pay reduction adjustment

A member whose retired pay is reduced while he is employed in a civilian government capacity, and who later becomes entitled to Veterans Administration compensation because of service-connected disability waives that portion of retired pay necessary to qualify for VA compensation since veterans' benefits are not subject to the dual compensation law. Adjustments must also be made in amounts computed for reduction purposes during the period between the date of waiver submission and the determination to allow the member the full monetary benefit of the waiver. 55 Comp. Gen. 1402 (1976). See also 63 Comp. Gen. 123 (1983), which however, was overruled by Lieutenant Colonel Ralph E. Marker, Jr., USA (Retired), and others, 67 Comp. Gen. 436 (1988).

3. VA compensation—amount of reduction

Retired members of the uniformed services are required by law to waive their military retired pay in an amount equal to any veterans disability compensation they receive. The waiver of military retired pay is to be based on the amount of disability compensation which the retiree is actually entitled, as determined and paid by the Veterans Administration. Hence, in the case of a retired Marine Corps sergeant who was paid veterans disability compensation at a reduced rate, as adjudicated by the Veterans Administration due to his concurrent receipt of civil service disability compensation, the waiver of military retired pay is to be based on the reduced rate of the veterans compensation actually paid rather than the full rate that might otherwise have been payable. B-222852, Apr. 28, 1987.

4. VA compensation—retroactive entitlement

A retired Regular Air Force officer employed in a federal civilian position whose retired pay was subject to reduction under the Dual Compensation Act, 5 U.S.C. § 5532, was advised by the VA on February 23, 1978, that he was entitled to VA disability compensation retroactive to June 26, 1977, filed a waiver of retired pay with the service department, pursuant to 38 U.S.C. § 3105, on March 3, 1978. Waiver of retired pay upon notification of

entitlement to VA compensation is effective from the earliest date of entitlement to VA compensation; but the additional amount due is payable as VA compensation, and not retired pay. 55 Comp. Gen. 1402 (1976), modified. 58 Comp. Gen. 622 (1979).

5. Civilian annual leave credit

A retired Regular officer subject to a retired pay reduction under 5 U.S.C. § 5532, and ineligible for the military leave granted reservists and National Guard members when ordered to 2 weeks of active duty, is entitled to receive a lump-sum payment for civilian annual leave or to elect to have the leave remain to his credit until his return from active duty since 5 U.S.C. § 5532, authorizes active duty in the Armed Forces for civilian employees without separation. 49 Comp. Gen. 444 (1970).

6. Leave credit limitation

If the retired officer elects a lump-sum leave payment, should he return to his civilian position prior to the expiration of the period covered by the payment, he will be subject to the same adjustment required in the case of reemployment following a separation—the refund of an amount equal to the unexpired period. 49 Comp. Gen. 444 (1970).

7. Retired pay reduction—1 hour civilian pay

Notwithstanding that a retired Regular officer is employed by a nonappropriated fund instrumentality only intermittently as a flight instructor on an hourly basis with no guaranteed minimum, he is subject to 5 U.S.C. § 5532, requiring the reduction of a full day's retired pay if the officer receives any compensation for that day, even as little as pay for 1 hour as a flight instructor. Absent recognition of fractional parts of a day's retired pay, such pay may not be equated with hours of work in a position for which an office is paid a salary for less than a full day or at an hourly rate. 47 Comp. Gen. 185 (1967).

8. Retired pay reduction—state community property law

The dual compensation provisions in 5 U.S.C. § 5532 reduce the retired pay entitlements of retired officers of Regular components who are employed in civilian positions with the federal government. The fact that under a state community property law the spouse of the retiree is considered to be entitled to part of the retired pay does not permit that part of the member's

retired pay to be excluded from dual compensation reduction since federal law controls payment of such pay. 59 Comp. Gen. 470 (1980).

9. Reduction not required

Although the civilian position held by a retired Regular officer in a nonappropriated fund activity is a position subject to the reduction of retired pay prescribed by 5 U.S.C. § 5532(b), a reduction is not required in the officer's retired pay where the reduction would exceed the amount the officer receives from his civilian employment. 50 Comp. Gen. 604 (1971).

B. Civil Service Reform Act of 1978

1. Relation to 1964 Act

The provisions of 5 U.S.C. § 5532(a) and (b), prescribing a formula for the reduction of the military retired pay of retired Regular officers employed in civilian capacity with the government, are derived from the Dual Compensation Act of 1964. The provisions of 5 U.S.C. § 5532(c), on the other hand, are derived from the Civil Service Reform Act of 1978, and impose a pay limitation on all retired military personnel, both Regular and Reserve, making them subject to an absolute maximum rate of combined civilian salary and military retired pay equal to the rate payable for Level V of the Executive Schedule. 61 Comp. Gen. 604 (1982).

2. Computation of reduction

The reduction of military retired pay required under the dual compensation restriction imposed by 5 U.S.C. § 5532(c) involves a determination of the amount by which the combined rate of retired pay plus federal civilian salary exceeds the rate of basic pay prescribed for Level V of the Executive Schedule. The retired pay is reduced by the amount, subject to a provision that the remainder must at least be equal to the cost of the retiree's participation in any survivors benefits program or veterans insurance program. 61 Comp. Gen. 221 (1982).

3. No refunds

Subsection 5532(c) of title 5, U.S. Code, requires that combined military retired pay plus federal civilian salary not exceed the rate of pay for Level V of the Executive Schedule for any "pay period." Hence, the amount of the retired pay reduction required for any given pay period may not be refunded to a retiree even though the retiree's combined retired pay and

civilian salary for the entire year may be less than the annual pay prescribed for Level V of the Executive Schedule. 61 Comp. Gen. 221 (1982).

4. Intermittent employment

Subsection 5532(c) of title 5, United States Code, requires that combined military retired pay plus federal civilian salary not exceed the rate of basic pay for Level V of the Executive Schedule for any "pay period." The term "pay period" means the biweekly pay period fixed under title 5 for civilian employees, whether employed full time or intermittently. Hence, the military retired pay of a retired Army officer employed intermittently as a civilian consultant is subject to reduction each biweekly pay period in which the amount of his combined retired pay and civilian salary exceeds the biweekly rate of pay prescribed for Level V of the Executive Schedule. 61 Comp. Gen. 604 (1982).

5. Bonuses—reemployed annuitants

A payment characterized as a bonus made to a retired member of a uniformed service employed by the government which is awarded by raising his rate of pay temporarily must be included in computing the reduction in retired pay required by 5 U.S.C. § 5532(c) where cognizant authorities have concluded that there is no statutory authority for the payment of bonuses and the payment is treated as basic pay for other purposes. 69 Comp. Gen. 388 (1990) is overruled. Captain Milton D. Beach, USN, (Retired), 70 Comp. Gen. 641 (1991).

Constitutional and Statutory Prohibition Against Payment of Retired Pay

Subchapter I—Constitutional Prohibition Against Foreign Employment

A. Direct Government Employment

1. Salary as an emolument

The payment of a salary for employment by a foreign government is an "emolument" from a "foreign state," the acceptance of which by one who holds an office of profit or trust under the United States is prohibited under the Constitution without the consent of Congress. B-154213, Dec. 28, 1964.

2. Retired pay to be withheld in amount equal to emoluments from foreign government

Retired Regular members prohibited under the Constitution from employment by a foreign government without congressional consent are subject to withholding of their retired pay in an amount equal to the amounts received from the foreign government. What constitutes amounts received in employment by the government must be given its broadest possible scope and application in determining the amount which is subject to withholding. When the retired pay exceeds the amount received from this employment, only the amount received from the foreign government should be withheld from the member's retired pay. B-178538, Oct. 13, 1977.

No specific sanction is authorized in section 509 of the Foreign Relations Authorization Act for Fiscal Year 1978 with respect to a retired member who accepts employment and compensation therefor from a foreign government without approval. However, substantial effect is given to the prohibition in Article I, section 9, clause 8 of the Constitution by withholding a member's retired pay in an amount equal to that received from the foreign government. This is based on the view that the emoluments received by the retired member are received on behalf of the United States. B-193562, Dec. 4, 1979. Current authority is 37 U.S.C. § 908.

3. "Emoluments" given broad interpretation

The prohibition against receipt of emoluments "of any kind whatsoever" from a foreign government by a retired member of the uniformed services includes forms of compensation other than salary, such as free transportation, household goods shipments, housing allowance, etc., which should be fairly valued considering the actual value of the emolument received. 58 Comp. Gen. 487 (1979).

4. Pub. L. No. 95-105 granting consent of Congress to foreign employment

Consent of Congress to acceptance of foreign civil employment by officers of the United States required by the Constitution cannot be retroactively applied to the retirement pay withheld from an officer for a period he was employed by a foreign state without such consent which occurred prior to the effective date of the Act. Such consent conditioned upon the approval of the Secretary of State and the Secretary of the service concerned is only effective prospectively from the date granted and may not be made retroactively to authorize employment and compensation received before the approval is granted. 58 Comp. Gen. 487 (1979). See also B-175166, Apr. 7, 1978.

Based upon the history of section 509 of the Foreign Relations Authorization Act for Fiscal Year 1978 (now 37 U.S.C. § 908) an individual who was employed by a foreign government when that provision was enacted is not required to refund amounts paid by the foreign government once approval to accept employment and compensation from the foreign government is given under that section. A member's monthly retired pay may be reinstated. This is the case even though amounts of retired pay previously withheld from the member do not equal that received from the foreign government, since Congress intended that retired pay of these retirees be resumed on approval. B-193562, Dec. 4, 1979.

Congressional consent required by Article I, section 9, clause 8 of the Constitution for a retired Regular officer of a uniformed service of the United States to accept employment and compensation therefor from a foreign government was granted by section 509, Pub. L. No. 95-105 (now 37 U.S.C. § 908) subject to approval of the employment by the Secretary concerned and the Secretary of State. This approval authority operates only prospectively. Thus, a retired Regular officer accepting employment with a foreign government prior to receiving approval of both Secretaries is subject, in accordance with 58 Comp. Gen. 487 (1979), to collection from his retired pay of amounts received from the foreign employment for

the period of employment prior to the approval being granted. B-198557, July 17, 1980.

5. Amount of retired pay to be withheld

When approval of the employment is obtained from both of the Secretaries concerned as provided by Pub. L. No. 95-105 (now 37 U.S.C. § 908) future employment and earnings are authorized and further collection of amounts due for unauthorized employment is not required. However, to the extent that retired pay was paid during the period of unauthorized employment it must be collected from the individual. The reason for that rule is that retired pay should not be paid during a period of unauthorized employment except to the extent that pay from employment by a foreign government is less than retired pay. If retired pay was erroneously paid during this period, it must be collected even though the foreign employment is subsequently approved because approval generally may not be retroactive. 61 Comp. Gen. 306 (1982). See also B-178538, Oct. 13, 1977.

6. Reserve members

The authority for Armed Forces Reserve members, active or retired, to be employed by foreign governments and instrumentalities of foreign governments when approved by the Secretary concerned is 10 U.S.C. § 1032, (repealed in 1977) enacted to overcome the constitutional prohibition against acceptance of foreign emoluments by persons holding offices under the United States. 41 Comp. Gen. 715 (1962). Current authority is 37 U.S.C. § 908.

7. Regular vs. reserve status

A Regular Air Force enlisted member, retired for years of service and who becomes a member of the United States Air Force Reserve (inactive) on retirement, does not lose his "Regular" status, since it is the law under which retired which determines a member's status on the retired list. Therefore, he holds an "office" within the meaning of the constitutional prohibition against employment by a foreign government. B-159945, Jan. 30, 1967.

8. Foreign government subdivision

A retired Regular enlisted member of the Coast Guard employed as a teacher by the state of Tasmania, Australia, is regarded as holding an

"office of profit and trust" after retirement as those terms are used in the United States Constitution, so that the acceptance of salary for employment with the state of Tasmania, which is considered a "foreign state" comes within the constitutional prohibition. 44 Comp. Gen. 130 (1964).

9. Fleet reserve

Since an enlisted member of the Navy who is transferred to the Fleet Reserve and receives retainer pay continues to be subject to call to active duty, a Fleet reservist who accepts employment with a foreign government, without the consent of Congress, must be regarded as holding an "office" within the meaning of Article I, section 9, clause 8 of the United States Constitution, prohibiting the acceptance of emoluments from a foreign state. 44 Comp. Gen. 227 (1964).

B. Indirect Government Employment

1. Instrumentality of foreign government

A retired Regular officer who claims to be employed by an American-based firm and receives a civilian salary from that firm, but where records shows that such firm is merely a conduit whereby he is detailed by that firm to work for an instrumentality of a foreign government, the acceptance of salary for such employment comes within the constitutional prohibition. While lacking penalty, such provision will be given effect by withholding from member's retired pay an amount equal to the foreign salary received in violation of the Constitution. 53 Comp. Gen. 753 (1974).

The prohibition against an officer of the United States accepting presents, emoluments, office, etc., from a foreign government without the consent of Congress in Article I, section 9, clause 8, of the United States Constitution, and 37 U.S.C. § 908, is applicable to a retired member of the U.S. Marine Corps, who, under an employment agreement with a domestic corporation, serves as an instructor for, and is subject to the supervision and control of the Royal Saudi Navy, which is the source of the funds for his salary and other emoluments. Since he has not received the required congressional consent, his military retired pay must be withheld. 65 Comp. Gen. 382 (1986). Affirmed by Major Stephen M. Hartnett, USMC (Retired), 69 Comp. Gen. 220 (1990).

2. Instrumentality vs. autonomy

Employment of a retired Regular officer as a professor of engineering in the Engineering School of the University of Sao Paulo in Brazil, would not be prohibited under the Constitution if his rights and benefits under a contract of employment would accrue solely by virtue of that contract and would not be subject to review or question by or on behalf of any Brazilian government official and the autonomy of the university was not terminated. B-152844, Dec. 12, 1963.

3. Employee of professional corporation

Retired Marine Corps officers who are attorneys either employed by or "of counsel" to a law firm incorporated in Virginia as a professional corporation may not serve as legal counsel for the Office of the Saudi Military Attache, an instrumentality of a foreign government, without obtaining the consent of Congress as required for officers of the United States. Article I, section 9, clause 8 of the U.S. Constitution and 37 U.S.C. § 908. Under Virginia law an attorney's professional relationship with his clients remains unchanged notwithstanding the existence of a professional corporation and does not exempt Virginia attorneys from obtaining the required consent. B-217096, Mar. 11, 1985.

4. Employer-employee test

In determining the existence of an employer-employee relationship between a retired member and a foreign government or instrumentality thereof, the common-law rules of agency will be applied in order to determine whether such instrumentality has the right to control and direct the employee in performance of his work and manner in which work is to be done. 53 Comp. Gen. 753 (1974).

C. Nonemployment Payments From Foreign Governments

1. Damages for injuries

Acceptance of annuity payments made by the German government to a United States employee as damages for injuries inflicted by the Nazi regime while he was a former citizen and public official of Germany does not violate Article I, section 9, clause 8 of the United States Constitution prohibiting the acceptance by government employees of any presents, emolument, etc., from a foreign state. 34 Comp. Gen. 331 (1955).

2. Rewards

The reward monies paid for contraband articles seized by the Republic of Columbia acting upon information furnished by an Air Force officer while temporarily attached to the Colombian Air Force are payable not to the officer but to the United States pursuant to the principle of law that the earnings of an employee in excess of his regular compensation gained in the course of, or in connection with, his service belong to the employer. Even if the United States were not entitled to the reward, its acceptance by the officer is precluded, absent congressional consent, by Article I, section 9, clause 8 of the United States Constitution, which prohibits acceptance by public officers of presents, emoluments, office, or title "of any kind whatever," from a foreign state. The reward constitutes an "emolument." 49 Comp. Gen. 819 (1970).

3. Pensions

An individual who is in receipt of a World War II pension from the British government and who is appointed as a court crier in a United States district court with regularly prescribed duties and compensation fixed by law and payable from appropriated funds is regarded as a person holding an office of profit or trust within the meaning of Article I, section 9, clause 8 of the United States Constitution, so as to preclude the payment of compensation concurrently with the receipt of an emolument from the British government without the consent of Congress. 37 Comp. Gen. 138 (1957).

D. Foreign Citizenship and Residence

1. Foreign citizenship

a. Fleet reservist

A member of the Fleet Reserve who becomes a citizen of a foreign country, either after transfer to the Fleet Reserve or transfer to the retired list, is regarded as having taken a voluntary action inconsistent with his oath of allegiance to the United States so as to warrant termination of retainer or retired pay. 44 Comp. Gen. 227 (1964).

b. Regular enlisted

A retired Regular enlisted member who loses his United States citizenship when he acquires citizenship in a foreign country has taken a voluntary action so inconsistent with his oath of allegiance to the United States and

status as a member of the Armed Forces to warrant termination of his retired pay. 44 Comp. Gen. 51 (1964).

c. Renunciation of United States citizenship

A retired member of the Armed Forces who becomes a citizen of a foreign country by naturalization and who voluntarily renounces his United States citizenship loses the right to retired pay since entitlement to retired pay depends upon continuation of the individual's status as a retired member of the military service available for service as required and that status is incompatible with renunciation of United States citizenship. However, such a person who elected to participate in the Survivor Benefit Plan and for whose retired pay the required deductions were being made for coverage under the Plan when he renounced his U.S. citizenship, may continue coverage under the Plan by making the required payments into the Treasury. B-212481, Feb. 2, 1984.

d. Reserve officer

A retired Reserve officer who is receiving retired pay for years of service ordinarily would be liable for involuntary recall to active duty in times of war or national emergency. Since the acquisition of foreign citizenship is inconsistent with the prescribed oath to support and defend the Constitution of the United States, in the absence of any law authorizing continuation of an officer's membership in a Reserve after he becomes a citizen of a foreign country, payment of retired pay may not be approved. 41 Comp. Gen. 715 (1962).

e. Public Health Service officer

A retired member of the Regular component of the Commission Corps of the Public Health Service (PHS) who notified the service of his intent to accept employment with the Canadian Department of Agriculture and inquired whether his retired pay would be affected if he became a Canadian citizen would not be eligible to receive retired pay unless his employment is approved by Congress by virtue of Article I, section 9, clause 8, of the United States Constitution and Executive Order No. 5221. B-151184, Aug. 2, 1945, overruled. 51 Comp. Gen. 780 (1972).

f. Non-regular retirees—10 U.S.C. § 1331

The retired pay benefit authorized for non-Regular members under 10 U.S.C. § 1331 is viewed as a pension, and is not dependent on the continuation of a military status. Therefore, such a person eligible for retired pay at age 60 prior to attaining age 60 acquires foreign citizenship and/or status in a foreign military service does not lose his entitlement to retired pay at age 60. Nor is such a person required to forfeit retired pay if he becomes a citizen of and/or enters the Armed Forces of the foreign country, thereafter, provided the foreign country is not one that is engaged in hostile military operations against the United States. 48 Comp. Gen. 699 (1969).

g. Dual citizenship—service in foreign armed force

Dual Israeli/United States citizenship alone does not require loss of entitlement to retired pay. But service in the Israel Defense Forces of a retired Regular Army officer residing in Israel would make his status so doubtful that retired pay may not be paid to him without authorizing legislation. 58 Comp. Gen. 566 (1979).

2. Foreign residence effect

a. Retention of foreign citizenship

A retired Regular enlisted member who retained his Canadian citizenship and returned to Canada to reside when he retired, is entitled to retired pay; the member, permitted to enlist as an alien and to be sworn in without restriction became a "regular enlisted member of the Air Force." Therefore, so long as his formal allegiance status remains unchanged, his Canadian residency does not constitute a bar to receipt of retired pay. 50 Comp. Gen. 269 (1970) and 44 Comp. Gen. 51 (1964).

b. Naturalized citizens

A retired Regular service member, who is a naturalized citizen of the *United States and who resides overseas in the country of his birth* following retirement has not lost his United States citizenship because of such residence and, therefore, the member is entitled to continue to receive retired pay. 43 Comp. Gen. 821 (1964); 44 Comp. Gen. 51 (1964).

Subchapter II—Selling to the Government

A. Prohibited Activities—Sales Activities

1. What constitutes selling

A retired Regular officer whose business activities included making calls on DOD agencies, as well as a National Oceanic Atmospheric Administration installation, to render technical assistance, update catalogue materials, providing information on the companies he represented, determining future markets, and contacting government purchasing agents, is considered as actively participating in the procurement business for his employer in violation of 37 U.S.C. § 801(c) (now 801(b)) and DOD Directive 5500.7, August 8, 1967. 53 Comp. Gen. 616 (1974).

2. Signing and submitting bids

Where retired Regular officer of the uniformed services signs and submits bids as part of employment with contractor doing business with Department of Defense agencies, the officer is "selling" within the meaning of 37 U.S.C. § 801(c) (now 801(b)) which prohibits such activity for 3 years after his name is placed on the retired list and is subject to loss of retired pay while so engaged. Ignorance of the law does not provide a legal basis for retention of retired pay during a period of employment prohibited by the statute. B-198751, Feb. 19, 1981, and Jan. 8, 1982.

3. Social functions sponsored by contractor

Where contractor doing business with Department of Defense agency sponsors and pays for social function at which retired Regular officers of the uniformed services employed by the contractor make contact with departmental personnel who are in a position to influence procurements by the Department, such contacts will be viewed as establishing a prima facie case that such officers are "selling" within the meaning of 37 U.S.C. § 801(c) (now 801(b)) and they will be subject to forfeiture of retired pay. 56 Comp. Gen. 898 (1977).

4. Frequent vs. infrequent contacts

A retired commissioned warrant officer employed by a chemical firm as a demonstrator of laundry chemicals to naval installations and later as operations manager, in which capacity he devoted most of his time to commercial sales activities, but continued to contact naval vessels for the ultimate purpose of selling his employer's products, must be regarded as selling supplies to the Navy Department within the meaning of 10 U.S.C. § 6112(b) which (now see 37 U.S.C. § 801(b)) does not differentiate between cases involving frequent and infrequent contracts with the military department. 41 Comp. Gen. 642 (1962).

5. Pre-contract contact

A retired Regular officer who makes precontract contacts with contracting officials of the Marine Corps in his capacity as a representative of a firm selling to the Marine Corps may be presumed to be engaged in selling within the meaning of 37 U.S.C. § 801(c) (now 801(b)) and DOD Directive 5500.7, dated August 8, 1967. B-181056, Feb. 10, 1975.

6. Demonstration of products

Visits by retired Regular officers to Army and Air Force Exchange Service stores for purposes of demonstrating employer's product and conducting seminars to induce procurement by the government are in violation of 37 U.S.C. § 801(c). However, stocking stores with employer's sales literature, taking sales inventory, and conducting product demonstrations and seminars to explain the use of previously procured products or to influence sales to store customers do not violate the statute, since these activities do not directly influence government procurement. B-203079, Mar. 22, 1982.

7. Integral part of agency

A sale to an integral part of the Navy would constitute a sale to an "agency of the Department of Defense" within the meaning and prohibition contained in 5 U.S.C. § 59(c) (now 37 U.S.C. § 801(b)) and would also include sales to post exchanges or ships stores and other organizations and clubs which are operated as integral parts of the service. 38 Comp. Gen. 470 (1959).

8. Tangible property

In the absence of a limitation with respect to the phrase "any supplies or war materials" and "naval supplies or war materials" used in 5 U.S.C. § 59(c) and 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)), those phrases are construed to include any article of tangible property purchased by the military departments. 38 Comp. Gen. 470 (1959).

9. Construction contracts

Although the terms "supplies" and "materials" ordinarily may be construed as having reference to tangible personal property, to construe the term "naval supplies or war materials" in the prohibition in 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)), as including only personal property would create a disparity and frustrate the purposes of the prohibition in every case involving other kinds of property; therefore, sales activities of a retired Regular officer in connection with contracts for constructing airport improvements come within the prohibition in 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)). 39 Comp. Gen. 366 (1959).

10. Nonappropriated fund activities

Retired Regular officer employed as salesman by jewelry firm to sell to military exchanges, notwithstanding fact that he did not deliver the merchandise for sale, all sales being made to exchange patrons through exchange special order departments and delivery made direct from factory, since "selling" includes all activities surrounding selling process, Defense definition includes "any other liaison activity" with view toward ultimate sale, claimant was engaged in selling to the government in contravention of 37 U.S.C. § 801(c). B-168735, Feb. 26, 1970.

11. Employed by DOD contractor

A retired Regular Navy officer who was employed by a Department of Defense contractor did not violate 37 U.S.C. § 801(b) and implementing regulations, which prohibit a retired Regular officer from negotiating changes in specifications of a contract with the Department of Defense, when that officer worked with non-contracting Defense personnel as a technical expert for the purpose of coordinating the correction of the malfunctioning of an item that had previously been procured and delivered. This is so even though the technical solution proposed by the officer ultimately led to a modification of the contract. Captain Lloyd K. Rice, USN (Retired), 68 Comp. Gen. 240 (1989).

B. Liaison Activities

1. Small business representatives

The activities of a retired Regular officer as a self-employed small business representative to secure information concerning the needs of the aerospace industry for companies manufacturing components used by the industry, are liaison activities with the view toward the ultimate consummation of a sale. Those activities coupled with contacts for the purpose of negotiating or discussing changes in specifications, prices, cost allowances, or other terms of a contract, and possibly settling disputes concerning the performance of a contract, constitute "selling" within the contemplation of Defense Department Directive 5500.7, dated August 8, 1967, and 37 U.S.C. § 801(c). 49 Comp. Gen. 85 (1969).

2. Pre-contract contacts—limitations

In determining whether a retired officer of the uniformed services comes within the provisions in 5 U.S.C. § 59c (now 37 U.S.C. § 801(b)) which requires forfeiture of retired pay of members engaged in selling and contracting activities with the military and other designated agencies, not every precontract contact with government personnel is viewed as a sales activity. However, such contacts generally, either direct or indirect, by retired officers representing companies that sell supplies of war materials to the agencies should be considered within the prohibition, unless it is clearly and adequately shown that the contact was for another purpose. 42 Comp. Gen. 236 (1962).

3. Public relations activities

Although public relations duties performed by retired Regular officers for corporations doing business with the Navy Department which duties result in the sale of the employer's products to the Navy are "selling" activities within the prohibition in 10 U.S.C. § 6112(b), there may be public relations duties which do not constitute selling. Therefore, in the determination of whether public relations duties are proscribed by the statute each case must be considered on an individual basis. 42 Comp. Gen. 87 (1962).

4. Good will

A retired officer whose private employment requires that he contact the trade to promote good will, which would result in sales to the Department of Defense, to be effected by other employees or agents of his employer is considered as "selling, contracting or negotiating to sell" as the term is

used in 5 U.S.C. § 59c and 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)), even though the actual purchasing officers are different from those with whom the retired officer deals. 38 Comp. Gen. 470 (1959).

5. Preliminary liaison activities

The contacts initiated by a retired Regular officer on behalf of his company with procurement and budget personnel of the government to discuss general trends in the military environment that do not contemplate the selling activities from which retired officers are restricted, 37 U.S.C. § 801(c) (now 801(b)). Nevertheless is considered employment within the prohibitory statutes, paragraph I.C. 2(d) of the Defense Department Directive 5500.7, May 17, 1963, defining selling as "any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract is subsequently negotiated by another person." 43 Comp. Gen. 408 (1963).

6. Official vs. other contacts

Contacts by retired officers of the uniformed services at places other than government facilities, including social gatherings, which are made for the purpose of selling to one of the agencies designated in 5 U.S.C. § 59c (now 37 U.S.C. § 801(b)) are contacts for which retired pay to the member is required to be forfeited. 42 Comp. Gen. 236 (1962).

C. Prohibition Period

1. Prohibition to be broadly construed

The prohibition in 5 U.S.C. § 59c and 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)) is directed toward the elimination of favoritism or undue influence in connection with selling to the government which is a possibility existing throughout an employment period. Therefore, the phrases "is engaged" and "while so engaged" may not be accorded a narrow construction which would limit the forfeiture of retired pay to only those days or parts thereof in which the officer actually engages in sales, but must be construed as precluding payments during the entire employment period. 38 Comp. Gen. 470 (1959); B-168735, Feb. 26, 1970.

2. Commencement date of prohibition

The phrase "for a period of two years after retirement" in 5 U.S.C. § 59c (now 3 years under 37 U.S.C. § 801(b)), which prohibits payment to retired officers engaged in the sale of supplies or war materials to the military departments, limits the period of prohibition as to retired officers to the 2 years commencing on the effective date of retirement except as to Navy and Marine Corps officers who come within the prohibition in 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)) which does not contain any time limit. 38 Comp. Gen. 470 (1959).

3. Active duty after retirement effect

A Navy officer transferred to the retired list effective July 1, 1967, but retained on active duty and released July 1, 1969, at which time he was employed by a subsidiary of a boat building company and involved in all aspects of government procurement, is subject to the prohibition in 37 U.S.C. § 801(c) (now 801(b)). However, the commencement of the 3-year limitation began to run from the date he was released from active duty, the retired pay forfeiture period terminating June 30, 1970. Since the officer was not involved in any serious procurement discussion prior to July 1, 1970, he is not prohibited from receiving retired pay subsequent to July 1, 1969. 52 Comp. Gen. 3 (1972).

D. Prohibition Affecting Entire Employment

1. Prohibition covers period of contract

A retired officer who, upon being alerted to the fact that his activities as assistant manager of a retail concern in signing bids, negotiating and discussing terms of contracts with the Navy Department would subject him to the sales activity prohibition in 10 U.S.C. § 6112(b) (now see 37 U.S.C. § 801(b)), removed himself from any connection with a bid which was then being considered by the Navy Department. The officer is still regarded as having engaged in sales activities so as to be precluded from receiving retired pay from the date of the contract until the date of final payment on a contract awarded prior to this separation from the Navy contract activities, even though during such period not all of his time was devoted to Navy sales activities and in some cases he had only infrequent contacts with the Navy. 42 Comp. Gen. 32 (1962).

2. Period of engagement in prohibited activity

When the activities of a retired Regular military officer in the employ of a corporation which does business with the military agencies are considered to be within the provisions of 5 U.S.C. § 59c and 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)), the prohibition against payment of retired pay continues during the entire period of the officer's engagement in such activities and thereafter during the period covered by any contract resulting from such activities. 42 Comp. Gen. 87 (1962).

3. Individual acts have continuing effect

Retired Navy officer who as vice president of construction firm signed bid proposals and contracts in effect with Department of Defense during prohibited period is not entitled to retired pay since he was engaged in "selling" supplies or war materials within contemplation of 37 U.S.C. § 801(c) (now 801(b)) and Department of Defense Directive 5500.7. B-160236, Dec. 2, 1966.

4. Good faith

The fact that the member acted in good faith, or was ignorant of the law, or that financial hardship will result, does not provide a legal basis for permitting retention of retired pay received during a period of prohibited employment and which may be recovered by deduction from future retired pay. 41 Comp. Gen. 642 (1962).

E. Nonprohibited Activities Types of Employment Interest

1. Marketing vice president

Retired Regular officer's action in contacting two Defense Department officials in his capacity as marketing vice president of technical services firm did not constitute liaison activities for sales purposes so as to require retired pay forfeiture under 37 U.S.C. § 801(c) (now 801(b)), because officer's firm never sold or attempted to sell anything to government, and the officer had no authority from any firm to sell supplies to Defense Department. Further, neither of the officials he contacted were authorized to purchase anything for the government, and the officer did not attempt to sell anything to Defense Department. B-169200, July 2, 1970.

2. President of company

A retired Army officer who, as president of an electronics firm which sells supplies to the military departments, will have overall responsibility for sales but will not engage in any sales activities or initiate any contracts involving any of the contracting activities enumerated in Department of Defense Directive No. 5500.7, would not, solely by virtue of his position, be considered as engaged in sales activities, within the purview of 5 U.S.C. § 59c (now 37 U.S.C. § 801(b)). 41 Comp. Gen. 784 (1962).

3. Management of sales department, etc.

Retired Regular officers who have administrative, supervisory or management responsibility over the sales department or salesmen of firms doing business with the government but who do not have any duties or any contacts in person, by correspondence or otherwise, involving the signing of bids, proposals or contracts with the military service are not engaged in selling activities within the meaning of 5 U.S.C. § 59c and 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)). 42 Comp. Gen. 87 (1962).

4. Assistance to government visitors

Duties performed by a retired Regular officer in the employ of a corporation that does business with the government, but whose duties consist of arranging for lodging and travel reservations, appointments, and general assistance to visitors to and from the corporation home office and Washington, D.C., are not sales activities within 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)). 42 Comp. Gen. 87 (1962).

5. Administrative assistant to president

A retired Regular officer employed by a private company as administrative assistant to president and vice president, made five visits to Army and Air Force Exchange Service, one to New York Navy Ship's Stores Office during the year immediately following retirement, and personally wrote friends advising them of his employment. No sales activities are shown within 2-year retirement period requiring forfeiture of retired pay under 37 U.S.C. § 801(c) (and § 801(b)) and Department of Defense Directive 5500.7. Statute does not encompass social contacts and responses to requests for assistance, information and advice, even though requests may be step toward procurement of some supply or material. B-165965, May 21, 1969.

6. Financial interest in corporation

Employment of retired officers in nonsales executive and administrative positions is outside purview of statute. An officer's continued financial interest in firm subsequent to resignation as vice president would not bring him within scope of statute in absence of showing he engaged in sales activities. B-160236, Dec. 2, 1966.

F. Liaison Activities

1. Consultation with operational and tactical government personnel

Retired Air Force officer under consideration by aerospace company for employment as technical consultant with noncontracting operational and tactical personnel of Armed Forces would not by such employment be engaged in selling within scope of 37 U.S.C. § 801(c) (now 801(b)) and Department of Defense Directive 5500.7. B-159825, Sept. 7, 1966.

2. Advising contractor vs. contacting government personnel

A contract for the employment of a retired regular Marine Corps officer as a consultant to advise his employer—a military supply company—concerning government needs and to assist in designing and manufacturing products for which the military departments have a current or future need would not itself bring the consultant activities within the restriction in the former 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)), so long as the officer does not contact the Navy or allow his name to be used for contracts resulting in sales. However, a provision in the contract which requires the officer to visit military installations and officials brings into existence the appearance of a requirement for possible sales activities within the conflict-of-interest statute and should be eliminated or modified to exclude contacts with installations and officials under the Department of the Navy. 40 Comp. Gen. 511 (1961).

3. Technical discussions vs. contract discussion

Contacts by retired officers of the uniformed services as technical consultants with noncontracting Defense Department personnel for the purpose of acquiring technical information rather than for any purpose involving a sales activity or attendance of retired officers as technical advisors at meetings in performance or purposes under awarded contracts are not contacts which would bring the officers within 5 U.S.C. § 59c (now 37 U.S.C. § 801(b)). However, meetings for the purpose of discussing any

supply procurement proposals or negotiating or discussing changes in existing contracts are contracts under the definition of selling in Department of Defense Directive 5500.7 and would require termination of retired pay. 42 Comp. Gen. 236 (1962).

4. Advice to government on request

A retired Regular officer performed analytical services for a manufacturing firm selling equipment to agencies of the Department of Defense and as an invitee or a member of technical, advisory or social organizations furnished the Department of Navy assistance, information and advice. The officer did not engage in any activities to induce the Navy Department to purchase the manufacturing firm's products. Such liaison activities are not to be viewed as sales activities so as to subject him to the prohibition in 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)). 41 Comp. Gen. 799 (1962).

5. Assistance on request

The management by a retired Regular officer of a local office of a company which does business with the Navy, while a form of liaison activity, would not of itself constitute selling activities as contemplated by 10 U.S.C. § 6112(b) (now see 37 U.S.C. § 801(b)). However, should the officer engage in any activity as defined as selling in Department of Defense Directive 5500.7 issued in implementation of 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)), or which otherwise may be viewed as sales activities, he would be subject to the statute. But merely replying to inquiries or to requests of Navy officials for assistance, information or advice is not regarded as engaging in sales activities under the statute. 42 Comp. Gen. 87 (1962).

6. Prohibited vs. other contracts

Retired Regular officers who are employees of corporations which do business with the Department of the Navy, maintain lines of communication between the corporations and the Navy but have no authority to negotiate or exercise sales contracts are not engaged in sales activities for the purpose of 10 U.S.C. § 6112(b) (now see 37 U.S.C. § 801(b)). However, should such officers initiate any contacts with the Navy for any to the sales activities enumerated in Department of Defense Directive 5500.7, implementing 10 U.S.C. § 6112(b), they would be subject to the statute. 42 Comp. Gen. 87 (1962).

7. Foreign government representation

Liaison activities of a retired Regular officer with representatives of foreign governments are not, in the absence of something further, selling activities within the prohibition in 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)), so as to preclude receipt of retired pay. 42 Comp. Gen. 87 (1962).

G. Goods vs. Services

1. Moving and hauling

A retired Regular officer who contracts to perform packing, crating, drayage, storage, unpacking, and transportation of household effects of Department of Defense personnel which does not involve transfer of the ownership of the property to the government is not a contract of sale but is a contract for the performance of services only. So the retired officer is not to be considered as engaged in selling or the sale of supplies or materials so as to be precluded from receiving retired pay by 5 U.S.C. § 59c and 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)). 41 Comp. Gen. 677 (1962).

2. Warranty repairs

Regular officers, employed by companies which sell supplies and war materials to the Department of Defense or its agencies, who visit Army and Air Force Exchange Service stores to perform warranty repairs on their employer's products purchased from store, perform their duties as noncontracting technical specialist, are not in violation of 37 U.S.C. § 801(c) (now 37 U.S.C. § 801(b)). B-203079, Mar. 22, 1982.

3. Preparation of manuscript

Contracts between retired Regular Army officer and War Department Historical Fund for preparation of manuscript based on analysis of volumes in U.S. Army in World War II historical series would not subject officer to prohibition of 5 U.S.C. § 59c (now 37 U.S.C. § 801(b)) since contract is for procurement of specialized services rather than for procurement of supplies or war materials, sale in usual sense being transfer of property for fixed sum of money or other valuable consideration. B-158148, Feb. 9, 1966.

4. Personal service

A retired military officer who is employed under a contract for personal services with a person who manufactures and/or sells supplies or war materials to military departments, but who has no personal connection with sales or the promotion of sales, is not engaged in selling, contracting or negotiating to sell to such agencies within the terms of 5 U.S.C. § 59c or 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)). 38 Comp. Gen. 470 (1959).

5. Services vs. sales

Retired Regular officers of the uniformed services who are employed by, represent, manage, or have an owner's interest in businesses involving the repair of television sets, sale of public utilities, and sale of meals in restaurants are regarded as engaged in activities of a service nature which do not constitute selling as contemplated by 5 U.S.C. § 59c and 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)). 42 Comp. Gen. 87 (1962).

6. Services for previously procured products

Visits by retired Regular officers to Army and Air Force Exchange Service stores for purposes of demonstrating employer's product and conducting seminars to induce procurement by the government are in violation of 37 U.S.C. § 801(c) (now 801(b)). However, stocking stores with employer's sales literature, taking sales inventory and conducting product demonstrations and seminars to explain the use of previously procured products or to influence sales to store customers do not violate the statute, since these activities do not directly influence government procurement. B-203079, Mar. 22, 1982.

7. Over-the-counter sales

Over-the-counter sales transactions to purchase items needed in the conduct of the government's business and which do not involve any bid, proposals, or contract, or any contract negotiations, by representative of a military agency with a business concern operated or represented by a retired Regular officer of the uniformed services as owner or employee do not constitute selling within the meaning of the proscription in 5 U.S.C. § 59c and 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)). 42 Comp. Gen. 87 (1962).

8. Sales by the government

In the absence of any prohibition against retired officers engaged in activities incident to sales by the government, a retired Regular officer who is an active partner in enterprises engaged in obtaining concessionaire privileges from the government does not come within the prohibition in 10 U.S.C. § 6112(b) (now 37 U.S.C. § 801(b)). 39 Comp. Gen. 751 (1960).

Separation Payments

Subchapter I—Accrued Leave Pay

A. When and How Payable

1. Combination of cash settlement and carryover of leave prohibited

The authority in 37 U.S.C. § 501(b) providing an option to an enlisted member of the uniformed services who reenlists in his armed force on the day after the date of discharge to receive either a lump-sum settlement for unused accrued leave to his credit at time of discharge, or to carry the leave forward into the new enlistment does not permit a member to elect a combination of cash settlement and carryover of unused leave. Neither the act of August 4, 1947, which prescribes two choices to an enlisted person to receive a full cash settlement of accrued leave at date of discharge, or to carry over unused leave to a new enlistment, nor its restatement in section 501(b) suggests any combination of cash payment and carryover of leave was contemplated. Therefore, the administrative interpretation and application adopted contemporaneously with the 1947 act and consistently followed thereafter may not be changed to permit the combination of a cash settlement and carryover of leave. 45 Comp. Gen. 580 (1966).

2. Carryover of minus leave balance prohibited

A minus leave balance in the account of a member of the United States Marine Corps on the day his enlistment expired and was extended for 2 years is excess leave which may not be carried forward but is for checkage against the member's final pay account under the expired enlistment in accordance with the Navy Comptroller Manual. Although the member would be entitled to a lump-sum leave payment pursuant to 37 U.S.C. § 501(b), or to carry any unused leave balance forward as though he had been regularly discharged and had immediately reenlisted, there is no authority for carrying a minus leave balance forward, and the member having been advanced leave in excess of accrual, the minus leave balance is excess leave for check against his pay account, since 37 U.S.C. § 502(b) limits pay and allowances to the number of leave days authorized by 10 U.S.C. § 701. 43 Comp. Gen. 539 (1964).

Marine Corps member who takes 19 more days of leave than he would accrue prior to the expiration of his first extension of enlistment had pay and allowance withheld from him upon return from leave for the 19 days pursuant to Department of Defense regulations. Although the member

subsequently entered into a second reextension of enlistment which would enable him to earn more leave than the excess he used, there is no authority to repay him the withheld pay and allowances. 58 Comp. Gen. 708 (1979).

3. Unused leave at time of retirement—use for longevity purposes prohibited

Section 4(c) of the Armed Forces Leave Act of 1946, (now 37 U.S.C. § 501), provides that any member of the Armed Forces discharged after August 31, 1946, having unused annual leave to his credit at time of discharge, shall be compensated for such leave in cash on the basis of the pay and allowances applicable on the date of discharge. Such leave shall not be considered as service for any purpose. Therefore, members of the Armed Forces who are about to be retired are not entitled to take their accrued annual leave in lieu of a lump-sum payment, since there is no indication in the act or its legislative history of an intent to confer on the member the right to elect to continue in an active duty status for the period of his accrued leave after an administrative decision has been made to effect his discharge or release from active duty. 40 Comp. Gen. 545 (1961).

4. Retired member retained on active duty without break in service

An officer who was placed on the retired list of the Navy but retained on active duty without break in service is not separated or released from active duty within the contemplation of the term "discharge" as used in the Armed Forces Leave Act of 1946, as amended. Therefore such officer is not entitled to cash settlement for unused leave upon being placed on the retired list; however, upon release from active duty the officer may be compensated, within statutory limitations, for unused leave then to his credit. 30 Comp. Gen. 328 (1951).

5. Commissioned officer reverting to warrant officer

An officer who, while serving on active duty as a lieutenant colonel in the Army of the United States, accepted an appointment as a Regular Army warrant officer but continued to serve for several months in the higher temporary grade is regarded as having continuous service, so that on release from active duty as lieutenant colonel, Army of the United States, and reversion to the permanent Regular Army warrant officer grade, he is

not entitled to a lump-sum payment for accrued unused leave. 35 Comp. Gen. 25 (1955).

6. Army reserve officer voluntarily relieved from active duty and then voluntarily recalled without a break in service

An Army Reserve officer on indefinite active duty assigned to the Selective Service System who is voluntarily relieved from active duty in the Army and immediately thereafter is voluntarily recalled to active duty in the same grade in the Army Reserve and assigned to the Army National Guard without any break in service is not entitled to payment for accrued leave or travel allowances. B-193799, July 13, 1979.

7. Public Health Service commissioned officers

Under a statutory proviso enacted in 1950 granting a Public Health Service (PHS) officer a final settlement for unused accrued annual leave upon his separation from active duty if "his application for (that) leave is approved by the Surgeon General," PHS has long required a PHS officer who breaches his active duty commitment to be divested of leave. Regulations so providing are clearly valid, since the statutory proviso plainly authorizes the Surgeon General to deny leave applications in appropriate circumstances and Congress had not modified that statutory authority. 37 U.S.C. § 501(g). 58 Comp. Gen. 77 (1978), affirmed. B-201706, Mar. 17, 1981.

8. Accrued leave at time of enlistment extension

Under the act of January 2, 1968 (10 U.S.C. § 509), which authorizes the extension and reextensions of a term of enlistment for not to exceed 4 years by members of all the services, and provides entitlement to the same pay and allowances as though the member had reenlisted, and considers that all extensions of an enlistment are one continuous extension, an accrued leave settlement is restricted to the first extension of an enlistment. In the absence of legislation prior to the 1968 act of any provision granting the same benefits upon the reextensions of an enlistment, the language of the 1968 act is construed as restricting an accrued leave settlement to the first extension of an enlistment. 48 Comp. Gen. 127 (1968).

9. Members in missing status

Although section 847 of the Department of Defense Appropriation Act, 1978, Pub. L. No. 95-111, 91 Stat. 886, 907 (1977), prohibits the use of funds appropriated by it for payment to any member of the uniformed service for unused accrued leave in excess of 60 days, this section does not operate to prevent payment to members in a missing status for unused accrued leave in excess of 60 days pursuant to 37 U.S.C. § 501(h) and 10 U.S.C. § 701(g) since the sole purpose of the appropriation restriction is to prevent the sale of unused accrued leave upon reenlistment. B-191457, Aug. 7, 1978.

10. Accrued leave in excess of 60 days at retirement or death

Under 37 U.S.C. § 501(f) and 1976 and 1977 appropriation acts payment for uniformed services members' accrued leave is limited to no more than 60 days' unused accrued leave during their military careers. No exceptions to that limit are provided which would authorize payment in excess of 60 days for an Air Force member who dies on active duty or retires on medical disability with more than 60 days' accrued leave. Also, claims for such leave do not contain such elements of legal liability or equity as would warrant submission to Congress under the Meritorious Claims Act, 31 U.S.C. § 236 (1976). B-199071, July 16, 1980.

B. Computation of Payment

1. Station allowances and variable housing allowance

The lump-sum payment for accrued leave, not to exceed 60 days, provided in 37 U.S.C. § 501(b) for all members of the uniformed services upon separation is authorized to be computed at regular military compensation consisting of basic pay and subsistence and quarters allowances. Therefore, an Army officer upon retirement entitled to payment pursuant to paragraph 40401 and Table 4-4-5 of the Department of Defense Military Pay and Allowances Entitlements Manual may not have his payment increased by including station housing and cost-of-living allowances in the computation of the 60 days' accrued leave to his credit as these allowances are not payable by virtue of membership in the uniformed services but accrue incident to particular duty assignments. 51 Comp. Gen. 312 (1971). See also B-201117, Feb. 18, 1981, to the same effect concerning the variable housing allowance.

2. Basic allowances for subsistence (BAS) and for quarters (BAQ)

An amendment to 37 U.S.C. § 501(b) deleted inclusion of allowances in lump-sum leave payments to military members upon discharge; however, a saving provision retained entitlement to include the allowances for leave accrued prior to the amendment. Although the claimant contends that the services' regulation determining when a member will be charged with use of preamendment leave frustrates congressional intent of the saving provision, in view of the services' authority to prescribe regulations for accrual and use of leave, the language and legislative history of the amendment, the regulation is proper. Although member had 60 days accrued leave at the time of his retirement, as the member used 6 days more leave than he had accrued in a post-amendment year which under regulation were charged to his 60-day carryover of preamendment accrued leave BAS and BAQ may not be included in computation for 6 days accrued leave. 58 Comp. Gen. 635 (1979).

3. Additional pay for retention on vessel in foreign waters

The 25 percent increase in basic pay received pursuant to 10 U.S.C. § 5540 by naval enlisted members who are retained on active duty on vessels in foreign water after expiration of enlistment, not being considered base and longevity pay or allowances within the meaning of section 4(c) of the Armed Forces Leave Act of 1946, is not for inclusion in the computation of payments for unused leave upon discharge or release from active duty. 38 Comp. Gen. 691 (1959).

4. Enhanced pay for members holding special positions

Under section 4(c) of the Armed Forces Leave Act of 1946 the compensation for unused leave is based on the pay and allowances received on the date of discharge rather than the commissioned or enlisted grade of the member. Therefore, an enlisted Marine Corps member who was serving as band leader and receiving the pay of an officer on date of discharge is entitled to payment for accrued unused leave computed on the basis of the pay of the commissioned grade. 35 Comp. Gen. 699 (1956).

5. Additional pay of permanent professors at United States Air Force Academy

Permanent professor at United States Air Force Academy with over 36 years of active service computed under 37 U.S.C. § 205, is entitled to $250 per month "additional pay" pursuant to 37 U.S.C. § 203(b). Such additional

pay is not an element of base (rank) and longevity (years of service) pay, but accrues to particular individuals incident to a particular duty assignment, and as such does not constitute "basic pay" for the purposes of computing lump-sum leave entitlements in accordance with 37 U.S.C. § 501(b)(1). B-192818, Feb. 9, 1979.

C. Erroneous Payment for Accrued Leave

1. Record correction—restored to active duty

Reservists who receive payments for unused accrued leave under 37 U.S.C. § 501 upon involuntary separation from active duty, but whose records are corrected to expunge the fact of such separation, are liable to repay amounts received for unused leave; however, they are entitled to be recredited for days of unused leave up to the 60-day maximum prescribed by 37 U.S.C. § 501(f). 56 Comp. Gen. 587 (1977).

2. Record correction—restored to active duty—waiver of erroneous payments

Requests for waiver of erroneous payments submitted by Army members retroactively restored to active duty through the correction of their military records, will ordinarily be favorably considered only to an extent which will prevent the individual members from having a net indebtedness upon his actual return to duty. However, waiver of further amounts may be granted for leave payments required to be collected but for which, as a result of the statutory limitation on leave accrual, leave cannot be restored. 57 Comp. Gen. 554 (1978).

3. Waiver

A former Navy member's failure to notice and seek corrective action regarding the Navy's erroneous calculations of his leave balances, resulting in overpayments to him, precludes the Comptroller General from waiving his indebtedness to the government under 10 U.S.C. § 2774 where the member reasonably should have recognized the errors. By regulation, however, interest on such indebtedness does not accrue while the waiver request is pending. Frederick N. Puglisi, B-231476, July 12, 1988.

A former Navy member was erroneously overpaid for 42 days lump sum leave upon separation from the service. The member is not entitled to a waiver of the overpayment because he should have been aware of his approximate leave balance and therefore should have questioned the

accuracy of the separation payment. Mark O'Brien, B-247744, Mar. 16, 1992.

Indebtedness resulting from erroneous payments of accrued leave caused by improper separation may be waived pursuant to 10 U.S.C. § 2774 to the extent payments may not be set off against later accrued leave. Request for waiver must be received within 3 years of discovery of overpayment. Major Terrence W. Alligood, USAR, B-239275.3, Apr. 1, 1992.

A former Air Force member was erroneously overpaid for 26 days of leave upon separation from the service. The member is not entitled to waiver of the overpayment because he should have been aware of his approximate leave balance and therefore should have questioned the accuracy of the separation payment. Donald J.D. Hays, Sr., B-247943, June 4, 1992.

Where Air Force officer was overpaid basic pay totaling $20,089 over 23 months because of error in computing service, waiver of government's claim is denied for all but $4,469 of amount incurred in first 6 months of military service, because the officer could have detected subsequent overpayments by comparing his leave and earnings statement to standard pay chart he had been provided. Captain Charles E. Marunde, USAF, B-247263, July 23, 1992.

D. Effect of Disciplinary or Adverse Administrative Action

1. Court-martial sentence which includes forfeiture of pay and allowances

A Marine Corps officer whose sentence for violating the Uniform Code of Military Justice on November 22, 1972, was approved as to the forfeiture of pay and allowances, but not as to dismissal, and finally executed on December 18, 1972, following which the officer was detached from duty and ordered to travel to his home or record without entitlement to active duty pay and allowances through December 17, 1972, pursuant to the interpretation of 10 U.S.C. §§ 857 and 871 that the day of the execution of a sentence controls, but not to payment for the unused leave as the forfeiture imposed was "all pay and allowances." 52 Comp. Gen. 909 (1973).

2. Leave pending review of court martial sentence

A military member, who has been convicted and sentenced by court-martial to dismissal, or dishonorable or bad conduct discharge, and, pursuant to 10 U.S.C. § 876a, has been ordered to take leave pending the

completion of appellate review of his case, is entitled to payment for accrued leave to his credit on the day before that leave began, even though his sentence included forfeiture of pay and allowances. That accrued leave is to be computed on the basis of the rate of pay applicable to the member on the day before the leave begins even though he may have been in a nonpay status at that time. B-212663, May 2, 1984.

A member of the military service on involuntary leave pending appellate review of a court-martial sentence to a dishonorable or bad conduct discharge or dismissal from the Service, to the extent entitled to pay and allowances, is entitled to the allowances for his duty station. Private J.E. Gines, USMC, 70 Comp. Gen. 435 (1991).

3. Court-martial set-aside and member restored to all rights

A service member's enlistment expired after he was confined as a result of a court-martial conviction. Thereafter, he was placed in a parole status in lieu of remaining confinement time, which status was terminated on date confinement would have ended. He was then placed in an excess leave status pending appellate review of his conviction. Upon review the conviction and sentence were set aside and all rights restored including leave accrual. He is entitled to leave accrual through the last day of parole, not to exceed 60 days. While pay and allowances accrued only through last day of parole (59 Comp. Gen. 12) payment of lump-sum leave is to be based on rates of basic pay in effect on the date of the member's discharge, even though he was not returned to a duty status. 59 Comp. Gen. 593 (1980).

4. Records corrected to show honorable discharge but not to delete court-martial pay forfeiture

A dishonorably discharged enlisted man whose military records were corrected to show honorable discharge, but not corrected to delete pay forfeiture provisions of court-martial sentence, is entitled to travel allowance and mustering-out pay which are incident to honorable discharge; however, payment may not be made for any unused leave which is part of member's compensation for active military service. 34 Comp. Gen. 95 (1954). See also B-178320, Aug. 9, 1977.

5. Records corrected to rescind court-martial sentence but not to show active duty status

Although an officer of the United States continued on active duty for 2 months subsequent to the imposition of a court sentence, the correction of his military records to show the rescission of the court sentence not reflecting the active service, neither the Army Board for Correction of Military Records nor the Secretary of the Army recognizing the existence of a de facto status for the period, the officer is not entitled to the active duty pay and allowances claimed. Nor did he earn or accrue additional leave in the period, and in the absence of fraud, the authorized correction of the records made is final and conclusive under 10 U.S.C. § 1552(a) on all officers of the United States. 44 Comp. Gen. 143 (1964).

6. Upgrade of discharge—effect on pay grade

The change of an undesirable discharge to general under honorable conditions under 10 U.S.C. § 1553 for an Army enlisted member who at the same time had been reduced in grade from master sergeant to private, first class, pursuant to the mandatory provisions in the regulations applicable to undesirable discharges, removes the ground for the reduction in grade and makes the reduction a nullity so that restoration to the grade of master sergeant is required. Therefore, payment of pay and allowances and accrued unused leave at the time of discharge should be made on the basis of the master sergeant grade—the grade in which the member was serving at the time of discharge. 41 Comp. Gen. 703 (1962).

7. Upgrade of discharge—documentation required to substantiate payment for leave

If the character of a former service member's discharge is upgraded from undesirable to honorable, the former member may gain entitlement to certain military benefits he would have received at the time of his original discharge—such as payment for unused accrued leave—had that discharge been granted under honorable conditions, provided that sufficient documentation has survived to substantiate his entitlement. B-193417, Feb. 16, 1979. See also B-140972, Oct. 27, 1979; and B-203752, Mar. 2, 1982.

8. Upgrade of discharge—leave records lost or destroyed

Former Army member's claim for payment for unused accrued leave at time of discharge, based on administrative action to change the character

of his discharge from under other than honorable to under honorable conditions, must be disallowed, where the discharge occurred in 1967 and in the intervening period all records which might establish how many days of accrued leave, if any, he had at the time of his discharge, were lost or destroyed. B-193417, Feb. 16, 1979. See also B-140972, Oct. 24, 1979; B-213654, Mar. 6, 1984.

9. Upgrade of discharge—mustering out pay

If the character of a former service member's discharge is upgraded from less than honorable to honorable the former member becomes entitled to additional amounts that would have been payable at the time of actual discharge if it had been issued under honorable conditions. Thus, a former Army member who received a dishonorable discharge in 1953 later became entitled to the mustering out payment authorized only for honorable discharged veterans of the Korean Conflict when his discharge was upgraded in 1979. B-217631, June 12, 1985.

E. Reserve Members

1. Leave accrual under separate training orders

The fact that the more than 30 days of continuous active duty for training and travel time served by a Reserve officer was performed under two sets of orders issued on different dates does not defeat his entitlement to a lump-sum payment for the accrued leave earned pursuant to 10 U.S.C. § 701, there being no requirement that the active duty be directed by but one order or even that all the duty be related so long as it qualifies for the accrual of leave and that it is continuous for at least 30 days. Therefore, the statutory right to accrue leave, existing independently of administrative authorization, may not be defeated because of the issuance of two separate sets of orders on different dates, and the officer having accrued leave incident to the performance of his training duty is entitled to a lump-sum payment for the unused leave to his credit. 43 Comp. Gen. 802 (1964).

2. Member recalled to active duty with no actual break in service

The immediate recall to involuntary active duty of naval reservists who upon completion of a prescribed period of service are released from active duty may not defeat their right to payment for accrued unused leave and to mileage allowances which are due members of the uniformed services released from active duty at the expiration of prescribed periods of

service, even though there was not actual break in service. 42 Comp. Gen. 35 (1962).

3. Member injured—leave accrual while hospitalized

A member of the Marine Corps Reserve who while on his initial period of active duty for training sustains an injury determined to be in line of duty may receive pay and allowances in accordance with 37 U.S.C. § 204, after expiration of the initial tour of duty while hospitalized and until he is fit for military duty, but during such period reservist is not considered to be in active military service within the meaning of 10 U.S.C. § 701(a) which would entitle the member to leave. 54 Comp. Gen. 33 (1974). See also 41 Comp. Gen. 706 (1962).

4. Member injured—extends tour and performs limited service

Member of Marine Corps Reserves entitled to receive pay and allowances under 37 U.S.C. § 204 for period subsequent to the termination of the initial active duty for training, who then returned to his Reserve unit where he performed military duties as a photographer, having agreed to extend his active duty for a period of about 6 months or until physically qualified for release from active duty, may be regarded under 10 U.S.C. § 683(b) to be on active duty until discharge and is entitled to active duty pay and allowances, and leave under 10 U.S.C. § 701(a). 54 Comp. Gen. 33 (1974).

Subchapter II—Disability Severance Pay

A. Entitlement

1. Less than 6 months of active duty

The legislative history of the disability severance pay provisions in section 403 of the Career Compensation Act of 1949 (now 10 U.S.C. § 1212) indicates a congressional intent that members of the uniformed services with less than 6 months of active service would not be entitled to severance pay, and the specific elimination of fractions of a year of less than 6 months in the computation of severance pay in 10 U.S.C. § 1212(b) requires the conclusion that members with less than 6 months of active

service at time of separation are not entitled to disability severance pay. 39 Comp. Gen. 291 (1959).

2. Separation based on disability is ineffective

An enlisted member who was paid disability severance pay, and lump-sum leave incident to a discharge which was subsequently determined not to have terminated the member's active duty status because the member was hospitalized for a new disability prior to the effective date of the discharge is considered in an active duty status after the discharge so that check should be made for payments made incident to the ineffective discharge. 39 Comp. Gen. 766 (1960).

3. Discharge without severance pay—attempted retroactive cancellation

A member of the Marine Corps was discharged without severance pay because of a disability, and subsequently the Secretary of the Navy directed that action to be taken to issue a discharge with such pay, the member is not entitled to severance pay under section 401(a) of the Career Compensation Act of 1949, as the purported retroactive cancellation of the original discharge is ineffective in the absence of evidence to show that it was procured through fraud or misrepresentation. 31 Comp. Gen. 665 (1952).

4. Discharge without severance pay—claim barred by 6-year statute of limitations

The exception to the 6-year statute of limitations, 31 U.S.C. § 71a (now 31 U.S.C. § 3702), tolling the running of the 6-year period for members of the Armed Forces in wartime, is applicable only to members on active duty and does not apply to the claim of a former Navy member for retired pay which first accrued while he was on the temporary disability retired list and for severance pay which first accrued when he was discharged from that list. 59 Comp. Gen. 463 (1980).

5. Disability incurred while in pay forfeiture status

A member of uniformed services who incurred a disability while in a pay forfeiture status is not entitled to the disability severance pay which is authorized by the Career Compensation Act of 1949 for members who incur disability while entitled to receive basic pay, even though the

Secretary of the Department remits the unexecuted portion of the sentence including all uncollected forfeitures. 34 Comp. Gen. 65 (1954).

6. Disability incurred during period of confinement after enlistment expired

An Army enlisted member whose enlistment expired while he was in confinement pending appellate review of a court-martial sentence was not entitled to pay subsequent to the expiration of his enlistment. Therefore, he is not entitled to disability retirement or severance pay under 10 U.S.C. §§ 1201 or 1203 for a disability incurred during that period. B-192082, Dec. 21, 1978.

7. Convicted of certain crimes

Severance pay authorized under section 402 of the Career Compensation Act of 1949 to members of the uniformed services upon separation is a lump-sum payment, as distinguished from "retired," "retirement," "retainer," or "equivalent pay" which refer to payments of a continuing nature. Therefore, the term "equivalent pay" as used in act of September 1, 1954, which prohibits annuity payments to members or former members who are, or have been, convicted of certain offenses, does not preclude payment of severance pay. 35 Comp. Gen. 293 (1955). For current instructions, see 5 U.S.C. §§ 8311-8322.

8. Medically unfit at time of induction

Where medically unfit persons were released on the basis of a void induction prior to 48 Comp. Gen. 377 holding that physically or mentally unqualified inductees into the military service are entitled to basic pay, and if qualified to disability retirement or separation under 10 U.S.C. Chapter 61, the military records of the erroneously released persons may be corrected to show discharge as of the date of release from military custody and control, any disability retirement or severance pay determination effected under 10 U.S.C. § 1552 to consider the aggravation of an unfit condition acquired while on duty. Absent a change in a physical condition while on active duty, discharge may be made for the convenience of the government without disability retirement or severance pay, and all discharged persons may be informed of their entitlement to the pay and allowances that accrued prior to release. 49 Comp. Gen. 77 (1969).

B. Computation

1. Higher permanent reserve grade at time of separation

The similarity of language in the disability retired pay provisions in section 402(d) of the Career Compensation Act of 1949, with respect to computations based on rank, grade or rating at time of retirement and in the disability severance pay provisions in section 403 of the act—superseded by 10 U.S.C. § 1372 and 10 U.S.C. § 1212, respectively—requires the same construction. Therefore, members of the uniformed services who held higher permanent Reserve grades at time of disability retirement are entitled to higher grade. 38 Comp. Gen. 268 (1958).

2. Highest temporary or permanent grade in which served satisfactorily

Although the provisions of 10 U.S.C. § 1372 are applicable only in a case where a member of the Armed Forces is retired for physical disability under section 1201 or 1204, or placed on the temporary disability retired list under section 1202 or 1205, where the provisions of 10 U.S.C. § 1212(a)(2)(B)(ii) are for application in a closely comparable situation in computing the disability severance payment of a member of an armed force separated under section 1203 or 1206 by reason of physical disability, the rule in Friestedt v. United States, 173 Ct. Cl. 447, should be followed; however, absent statutory amendment the case may not be expanded and applied to retirement statutes such as 10 U.S.C. §§ 3963(a) (repealed in 1985), 3964, 6151, 8963(a) (repealed in 1985), and 8964 on the basis the words "temporary grade or rank" are to be read "temporary or permanent grade or rank," and only the officers and enlisted men within the purview of section 1212(a)(2)(B)(ii) who were paid disability severance pay below their highest permanent grades are entitled to relief under the Friestedt rule. 46 Comp. Gen. 17 (1966).

3. Disability found during examination for promotion

An officer of the uniformed services whose physical disability was not considered disqualifying prior to a physical examination qualifying him for a promotion denied by a physical evaluation board, upon his subsequent simultaneous transfer as a second lieutenant to the temporary disability retired list under 10 U.S.C. § 1201 and advancement to the grade of first lieutenant under clause (4) of 10 U.S.C. § 1372, is entitled to retired pay and disability severance pay computed on the basis of the higher grade. Since the first determination of physical disability did not disqualify the officer for service, the disqualifying disability for which he was retired may be

considered as having been discovered as a result of a physical examination for promotion within the purview of clause (4) of 10 U.S.C. § 1372. 50 Comp. Gen. 156 (1970).

4. Time on temporary disability retired list

Time spent on the Temporary Disability Retired List by a member of the uniformed services after the expiration of the 5-year period prescribed in 10 U.S.C. § 1210(b) may be included in determining the rate of basic pay for purposes of computing disability severance pay coming within the scope of 10 U.S.C. § 1212(a)(A), the member's status on the Temporary Disability Retired List not automatically terminating at the expiration of the 5-year period prescribed for the payment of temporary disability retired pay, but continuing until removal of his name as prescribed in 10 U.S.C. § 1210(c) or (f), or until terminated in some other manner, such as by resignation or death. 42 Comp. Gen. 52 (1962). See also 37 Comp. Gen. 923 (1958).

5. More than 12 years' service—second payment of severance pay

A Navy enlisted man who, after discharge for physical disability and receipt of a severance payment based on 11 years, 3 months, and 20 days of service, reenlisted and was subsequently discharged for disability with a total of 13 years, 2 months, and 1 day of active service is precluded by the 12-year service limitation in 10 U.S.C. § 1212—which is a limitation on the amount to a particular individual rather than a limitation as to the amount which may be paid each separation—from receiving another severance payment based on total service. However, the member may receive an additional severance payment on the basis of the remaining period of active service not to exceed a total of 12 years. 37 Comp. Gen. 289 (1957).

C. Receipt of Retired Pay or Veterans Benefits for Same Disability

1. Compensation from Veterans Administration

The action of a Naval Retiring Board in ordering a lieutenant in the Nurse Corps discharged for physical disability with severance pay 2 years after she had been released from active duty and transferred to the retired list without pay related to the time of her active release. Inasmuch as she has been accruing compensation from the Veterans Administration for the same disability in an amount which exceeds the amount which would have been paid as severance pay at the time of original release, she is not now entitled to severance pay. 35 Comp. Gen. 300 (1955).

2. Records correction—placement on permanent disability retired list

The disability severance pay recoupment provisions in 10 U.S.C. § 1212(c), which require deduction of severance pay when a former member of the uniformed services becomes entitled to other compensation for the same disability, relate to benefits awarded by Veterans Administration, 10 U.S.C. §§ 1212(c) and 1213, and evidence an intent that a member is entitled to only one benefit arising from the same disability. Therefore, a member in receipt of disability severance pay when his military records are corrected to place him on the permanent disability retired list with entitlement to retired pay from the time that he began receiving disability severance pay must have his retired pay withheld by the military service, plus the severance pay withheld by Veterans Administration, until the amount of severance pay has been recovered. 41 Comp. Gen. 597 (1962).

Subchapter III—Repeals in 1981

A. Severance Pay Other Than Disability

Chapters 359 and 859, and section 1167, of title 10, United States Code, which had authorized severance pay for certain Regular officers separated for reasons other than disability, were repealed effective September 15, 1981, by section 109(b)(3) and 213 of the Defense Officer Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835, 2870, and 2885. Therefore, all cases on this subject have been deleted from this edition of the Military Personnel Law Manual. However, see saving clause as to proceedings begun prior to effective date.

B. Readjustment Pay

Section 687, of title 10, United States Code, which had authorized a readjustment payment for certain reservists separated from active duty after completing at least 5 years of continuous active duty, was repealed effective September 15, 1981, by section 701 of the Defense Officer Personnel Management Act. Pub. L. No. 96-513, 94 Stat. 2835, 2870, and 2885. Therefore, all cases on this subject have been deleted from this edition of the Military Personnel Law Manual. However, see saving clause as to proceedings begun prior to effective date.

Death Payments

Subchapter I—Death Gratuity

A. Distinguished From Pay and Allowances

Where claimant obtained Mexican divorce from prior spouse and subsequently married now-deceased member, fact that Coast Guard paid her the deceased member's unpaid pay and allowances as designated beneficiary under clause (1) of 10 U.S.C. § 2771(a) does not estop government from challenging validity of marriage. Such payment was neither determinative of question of her marital status nor was such question even in issue, since by statute the designated beneficiary has primary entitlement to the unpaid pay and allowances under 10 U.S.C. § 2771, but surviving spouse has primary entitlement to the death gratuity under 10 U.S.C. § 1477. 55 Comp. Gen. 533 (1975).

B. Entitlement of Surviving Spouse

1. Conflicting claims, generally

Where neither of two conflicting claimants to a death gratuity payable under 10 U.S.C. §§ 1475-1480 can clearly establish entitlement to payment as the surviving spouse of the deceased service member, the gratuity may not be paid to anyone unless and until more conclusive evidence is submitted in the matter, or a certified copy of a decree of a court of competent jurisdiction establishing entitlement is presented. B-207214, Nov. 4, 1982.

2. Conflicting claims, good-faith putative spouse

Where several women, each purporting to be the widow of a deceased member of an Armed Force, submit conflicting claims for entitlement to the death gratuity due under 10 U.S.C. §§ 1475-1480, and there is a sufficient basis in the record to support a finding that only one claimant is the surviving spouse, her claim will be allowed to the preclusion of all others. Although Louisiana law permits a good-faith putative spouse to take an equal share in the civil effects of a putative marriage, she is not entitled under the federal statute to a portion of the death gratuity as a surviving spouse. B-209076, Aug. 25, 1983.

3. Spouse cannot be located or identified

The gratuity provided in 10 U.S.C. §§ 1475-1480 that is payable upon the death of a service member may be paid to survivors only according to the

priority list contained in 10 U.S.C. § 1477. Since surviving children are lower in priority on that list than a surviving spouse, the children may not be paid when there is an eligible spouse, even though the current address of the spouse is unknown or the spouse cannot currently be identified because of conflicting claims. B-187581, Jan. 5, 1977; and B-207214, Nov. 4, 1982.

4. Direct payment to former spouse

Notwithstanding a 1986 modification to a divorce decree giving her a direct interest in her former husband's retired pay, the former spouse of a retired U.S. Army member is not entitled to receive direct payments from the retired pay of the service member since the original divorce decree issued in 1977 awarded the retired pay solely to the member. According to the Uniformed Services Former Spouses' Protection Act and implementing regulations, a subsequent amendment of a court order issued on or after June 26, 1981, to provide for a division of retired pay as property is unenforceable. Phyllis M. Tharp, 68 Comp. Gen. 116 (1988).

5. Attempt to defeat spouse's rights by contrary designation

An enlisted man of the Coast Guard cannot defeat the right of his widow to the 6 months' gratuity upon his death under the conditions named in the act, by designating his father as the person to receive such gratuity. 1 Comp. Gen. 547 (1922).

6. Common-law marriage

Payment of the 6 months' gratuity to a person claiming to be the common-law widow of a deceased soldier is unauthorized where the evidence presented is insufficient to show with convincing certainty all the requisites necessary to establish the fact of a common-law relationship of man and wife. 11 Comp. Gen. 138 (1931).

7. Marriage by proxy

The 6 months' death gratuity may be paid to the nondesignated widow of a serviceman—resident of California—who was married by proxy in Mexico, where proxy marriages are valid, in the absence of a ruling of the California courts on the validity of proxy marriages performed in a state recognizing such marriages. 33 Comp. Gen. 305 (1954).

8. Member's death caused by surviving spouse

Wife of enlisted man who killed husband following quarrel, but who was not indicted by grand jury which returned "no bill," may not be allowed 6 months' death gratuity in the absence of evidence clearly absolving wife of any felonious action incident to husband's death. 34 Comp. Gen. 103 (1954). See also 55 Comp. Gen 1033 (1976).

In the absence of evidence that husband of deceased service member acted with felonious intent in connection with the member's death, he is entitled to death gratuity payable under 10 U.S.C. § 1477. 68 Comp. Gen. 340 (1989).

Where through administrative mistake of fact or law a death gratuity payment is made to a person clearly not entitled to it and it is equally clear that another person is entitled thereto, the administrative office should make payment to the proper payee, whether or not the erroneous payment is recovered. Thus when death gratuity payment was made to the spouse of a member who later was implicated in the member's death second payment may be made to her parent. Six-month Death Gratuity, B-227582.3, Feb. 21, 1992.

9. Surviving spouse accessory to member's death

The claim of the widow of a deceased Air Force member for the 6 months' death gratuity (10 U.S.C. § 1477) is denied where claimant pleaded guilty to being an accessory before the fact to voluntary manslaughter in connection with the member's death and the facts fail to establish her lack of felonious intent. Denial of the claim is based on the long-standing policy which prohibits payment of benefits to a beneficiary who acted with felonious intent in bringing about the death of the member upon whose death the benefits become payable. B-188403, May 5, 1977.

10. Waiver of rights by spouse

When a member and his wife were separated and an agreement was executed by them prior to the time the member entered the Air Force whereby the wife waived all rights and other benefits to which she may be entitled as a result of the member's possible future military service and the member designated his mother to receive the 6 months' death gratuity in the event there was not surviving spouse, the mother's claim was properly disallowed. 10 U.S.C. § 1477(a) provides that the surviving spouse shall be

paid the gratuity and a simple waiver of an unknown future right does not afford a legal basis for payment of the gratuity due from the United States to someone other than the recipient designated by statute. 54 Comp. Gen. 152 (1974).

11. Wife's remarriage without obtaining a divorce

A married service member was declared missing in action in April 1969, and presumptive finding of his death was made in February 1978. Where his spouse remarried in August 1973, without obtaining a divorce, his parents are not entitled to the 6 months' death gratuity under 10 U.S.C. § 1447(a) because the member was survived by a spouse. B-193503, Mar. 8, 1979.

12. Wife's marriage to member is invalid

A woman's claim for a death gratuity as the widow of a deceased service member is denied since she never obtained a divorce from her first husband and legally was not a surviving spouse. Also, her alternative claim for the death gratuity to be paid to her children as the stepchildren of the deceased is denied since her invalid marriage to the deceased precludes her children from having become the deceased's stepchildren. Thus deceased's mother is the rightful recipient of the death gratuity. Private Calvin A. Allen, USA, 67 Comp. Gen. 569 (1988).

13. Divorce not recognized in state of domicile

The legal status of the spouse of an officer of the uniformed services who had been granted a divorce by the state of Nevada that was not recognized by the wife's matrimonial domicile, the state of North Carolina, in court proceedings in which she was also granted support and custody of the child born of the marriage, and at which the husband was present and consented to the decree, remained that of the officer's wife. Therefore, upon the death of the officer, the wife having maintained her status as lawful spouse is entitled to the payment of the 6 months' death gratuity, and the fact that the officer had consented to the decree of the North Carolina court is assurance the government will receive a good acquittance by payment of the gratuity to the deceased officer's widow. 49 Comp. Gen. 116 (1969).

14. Divorce proceeding not finalized

The 6 months' gratuity authorized to be paid to the widow of an enlisted man of the Navy who died while on the active list, is not barred where the enlisted man died after the granting of an interlocutory decree of divorce but before 6 months had expired, under a state statute that provides in specific terms that decrees of divorce shall not become final and operative until 6 months after the trial and decision. 6 Comp. Gen. 704 (1927).

15. Divorce obtained through fraud

Where the decree of divorce of an Army officer from his first wife was set aside subsequent to the officer's death by a court of competent jurisdiction because of fraud, the person whom the officer married after such decree was obtained may not be regarded as having been the wife, or the widow, of such officer to whom payment of the 6 months' death gratuity pay may be made; rather, the first wife, who remained the officer's wife and who, upon his death, became his widow, is entitled to such gratuity. 26 Comp. Gen. 327 (1946).

16. Attempt to set aside divorce subsequent to death

Six months' death gratuity may not be allowed the alleged widow of a deceased Army officer on the basis of a decree of a state court, subsequent to the death of the officer purporting to vacate a former decree of divorce a vinculo matrimonii, which under its own terms and the statutes of the state had become final and had been so accepted and acted on by the parties, in the absence of satisfactory evidence that the court had jurisdiction of the cause and all interested parties to vacate the former decree. 16 Comp. Gen. 890 (1937).

17. Remarriage valid where performed but not where prior divorce obtained

Remarriage in another state of a divorced soldier within the period prohibited by the statute of the state where the divorce was granted, being recognized as valid in the state where the marriage was celebrated, payment of 6 months' death gratuity, because of the death of the soldier, to the wife by the said remarriage, is authorized. 19 Comp. Gen. 56 (1939).

18. Former spouses

A member filed for and was awarded a divorce from his second wife by a state court. His military records were changed to reflect his single status. At his death, both of his former wives filed claims as the mothers of the member's children, for the death gratuity and pay and allowances due. Their claims were paid, each former wife receiving half of the amount due on behalf of her child. The second wife then had her divorce from the member reversed on appeal. She claims the full amount of the death gratuity and allowances, based on the fact that she is now the member's widow. Payment to her would require that a second payment of the death gratuity and allowances be made. It has been well established that where confusion as to the member's marital status was largely due to his own representations, the government can receive a good acquittance of its obligation even though the payment of the death gratuity and other amounts may not have been made to the lawful wife. Where the member and the former spouse were divorced at the time of the member's death have represented themselves as such, the government has a good acquittance and a second payment should not be made. Major Joseph B. Noffginger II, USAF, B-244830, Feb. 14, 1992.

19. Invalid marriage

A woman's claim for a death gratuity as the widow of a deceased service member is denied since she never obtained a divorce from her first husband and legally was not a surviving spouse. Also, her alternative claim for the death gratuity to be paid to her children as the stepchildren of the deceased is denied since her invalid marriage to the deceased precludes her children from having become the deceased's stepchildren. Private Calvin A. Allen, USA, Deceased, 67 Comp. Gen. 569 (1988).

C. Entitlement of Member's Children

1. Member remarried

Claim of ex-wife guardian of minor children of deceased member for 6-month death gratuity may not be allowed since records show that member remarried and was apparently survived by spouse who, although she never filed claim and has not been located, is the only eligible beneficiary under 10 U.S.C. § 1477(a)(1). However, if guardian can show that member had no spouse on date of death, or that his spouse died before her claim was barred, 31 U.S.C. § 71a (now 31 U.S.C. § 3702), then further consideration is to be given the guardian's claim. B-187481, Jan. 6, 1977.

2. Payment to natural guardian of member's children

As the 6-month death gratuity payment is not considered an asset of the estate of the deceased member of the uniformed services but is in the nature of survivor insurance that is payable in accordance with federal law to persons listed in 19 U.S.C. § 1477, the principal concern of the government is to obtain a good acquittance when payment to a minor is involved. Therefore, when a state statute provides for a good acquittance, payment of the death gratuity due the minor child of a deceased member of the uniformed services may be made to the natural guardian of the child (and former spouse of the member) upon compliance with the requirements of the law of the state in which the claimant resides, thereby avoiding the cost of obtaining legal guardianship in the settling of small estates. 47 Comp. Gen. 209 (1967).

3. Acknowledged illegitimate child

The 6 months' gratuity statutes authorizing payments to dependent children of deceased servicemen should be viewed as including illegitimate children where the relationship is properly established, so that an illegitimate minor child who was acknowledged in writing by a Navy enlisted man, now deceased, as his child and designated as beneficiary to receive his 6-month gratuity may be regarded as the child of the decedent for death gratuity payments to beneficiaries of deceased members of the Navy. 30 Comp. Gen. 277 (1951).

4. Illegitimate child born after member's death

The right of an illegitimate child to the 6 months' death gratuity is not defeated by the fact that the child was unborn on the date of notification of the death of a Marine Corps enlisted man who had acknowledged in writing the paternity of the child before his death. Therefore, as the decedent was not survived by a widow, the child takes precedence over any other relative previously designated as beneficiary. 34 Comp. Gen. 415 (1955).

5. Child adopted by third party

A deceased naval officer's minor child who was legally adopted by others prior to the officer's death may not be paid the 6 months' death gratuity. 34 Comp. Gen. 601 (1955).

6. Stepchildren—relationship terminated by member's death

Where the relationship by affinity between an officer or enlisted man and a stepchild or other relative by affinity was created by marriage which has been terminated by death—as distinguished from divorce—subsequent to the officer's or enlisted man's designation of such a relative as his beneficiary to receive the 6 months' death gratuity, the relationship, in absence of any evidence to the contrary, may be considered as continuing, insofar as payment of the gratuity is concerned. 24 Comp. Gen. 320 (1944).

7. Stepchildren—relationship terminated by divorce prior to member's death

Where the relationship by affinity between an officer or enlisted man and a stepchild or other relative by affinity was created by a marriage which has been terminated by divorce—as distinguished from death—subsequent to the officer's or enlisted man's designation of such a relative as his beneficiary to receive the 6 months' death gratuity, the relationship may be considered as ended, insofar as payment of the gratuity is concerned, unless clear and convincing affirmative evidence is furnished to establish the maintenance of close family ties and an intention to continue the prior relationship. 24 Comp. Gen. 320 (1944).

8. Stepchildren—residence in member's household at time of death

The death gratuity claimed by the mother of a deceased member of the Air Force, designated as beneficiary in the event no spouse or child survived, and on behalf of three stepchildren, members of the decedent's household at the time of their mother's death shortly before that of the member, who traveled as his dependents to the home of their maternal grandmother, located close to the permanent duty station to which the member had been reassigned for humanitarian reasons, is payable in equal shares to the stepchildren upon proof of a guardian relationship by the persons claiming for them. The airman's status as a "householder"—one who as head of a household gives life, support, and guidance to the family unit—not having terminated upon the death of his wife, as evidenced by his endeavor to maintain a household for the children with their grandmother near his new duty station, and the stepchildren considered members of the decedent's household at the time of his death meet the qualifications in 10 U.S.C. § 1475. 45 Comp. Gen. 413 (1966).

9. Conflicting claims by different guardians

Where different guardians appointed by courts of different jurisdictions each claims 6 months' death gratuity due the minor child of deceased enlisted man, the guardian in actual control of the person and property of the minor child, who was appointed by the court whose jurisdiction to appoint a guardian has been tested between the two contending guardians, may be recognized to receive the 6 months' death gratuity, notwithstanding the lack of final determination between the contending guardians as to the right to receive the 6 months' death gratuity. Such a final determination under these circumstances is not necessary to protect the interests of the United States or of the minor child. 39 Comp. Gen. 123 (1959).

D. Entitlement of Designated Relatives

1. Beneficiary must be one listed under statute

In case a member of the uniformed services designates, for the purposes of death gratuity payment, a beneficiary who is ineligible because he does not have the relationship to the member prescribed for the class by statute, such ineligible designee may not receive the death gratuity payment. 36 Comp. Gen. 741 (1957).

2. Changes in beneficiary designation

Changes in beneficiary designations for payment of the 6-month death gratuity must comply with the formalities prescribed by regulations, and any departure from the established procedure must be entirely free from doubt, fraud, or mistake. 34 Comp. Gen. 616 (1955).

3. Effect of misnomer in designation

A misnomer or an inaccuracy in the name of a beneficiary designated to receive the 6-month death gratuity pay does not render the designation instrument inoperative provided the person whom the decedent intended as the beneficiary can be identified with clearness and certainty by the description in the designation instrument. 32 Comp. Gen. 249 (1952).

4. Nondesignated parent vs. designated person standing in loco parentis

The 6-month death gratuity authorized in 10 U.S.C. § 1477 that is payable incident to the death of an enlisted member of the uniformed services and which is claimed by the decedent's natural father and a cousin designated

to receive the gratuity who is claiming a loco parentis relationship may not be paid to either claimant, absent more conclusive evidence or a judicial determination of entitlement. The evidence presented by both claimants is in conflict, as are the numerous court decisions respecting the determination of the term "in loco parentis," and although a close relationship existed between the decedent and the family of the person alleging the loco parentis relationship, the member prior to enlistment was self-supporting and lived where he chose. 49 Comp. Gen. 167 (1969).

E. Member Must Be on Active Duty or Have Been Separated From Active Service Within 120 Days

1. National Guard officer not in duty status at time of death—absence of advance orders

A National Guard officer who stated he planned to perform military duty on the day he died, but who had not been ordered in advance to perform such duty, may not properly be placed in a duty status retroactively after his death, notwithstanding that on other occasions he had received credit for military duty performed without advance authorization. The regulations requiring advance orders may not be disregarded as a matter of routine, and retroactive orders are permissible only to correct an apparent error or to confirm previously issued verbal orders. B-194189, Jan. 7, 1980.

2. Date of death unknown following separation from active duty

Where the exact hour or date of death of a retired officer of the uniformed service cannot be determined and the official record reflects that the body of the officer was found 121 days after his release from active duty, the death gratuity authorized by 10 U.S.C. § 1476(a) to be paid to the widow of an officer dying within a 120-day period after release from active duty may not be paid. As neither the statement of the doctor signing the death certificate that death could have occurred on the 120th day nor any other document rebuts the official record that the death of the officer occurred more than 120 days after release from active duty, the matter is too doubtful to warrant payment of the death gratuity. 46 Comp. Gen. 409 (1966).

3. Death in confinement after expiration of enlistment

An enlisted member of the uniformed services who dies subsequent to the expiration of his enlistment and while a prisoner in confinement pending appellate review of an unexecuted court-martial sentence is regarded as

having his enlistment expire by operation of law rather than as the result of the imposition of the court-martial sentence then pending appellate review. Thus, the issuance after the member's death of a court-martial order by the Secretary of the Army to restore the rights, benefits, privileges and property of which the deceased may have been deprived by virtue of the findings of guilty and sentence could not have the effect of placing the member in a pay status after the expiration of the enlistment to permit payment of arrears of pay for the following period of confinement or of the death gratuity. 40 Comp. Gen. 202 (1960).

However, in another case, a member was court-martialed and was waiting appeal of the conviction when he died. He was placed in an excess leave status while awaiting the appeal. The member's enlistment had not yet expired. The Comptroller General held that a death gratuity was payable to member's surviving spouse since the member died prior to completion of the appellate process to which he was entitled as a matter of right and his enlistment had not expired by operation of law. B-223536-O.M., May 1, 1987.

4. Fraudulent enlistment undiscovered at time of death

A fraudulent enlistment is voidable at the option of the government. Where the fraudulent character of an enlistment did not become known and the deceased was actually carried on the rolls as an enlisted man of the Army at date of death, he was an enlisted man "on the active list of the Regular Army," and his widow is entitled to the death gratuity. 9 Comp. Gen. 26 (1929).

5. AWOL but not in desertion status at time of death

A member of the Armed Forces who died by suicide during a period of absence without leave occurring after the effective date of section 4(b) of the Armed Forces Leave Act of 1946 is to be regarded as continuing in a pay status during such absence for the purpose of computing the 6 months' death gratuity at the rate of pay received at the date of death. Such gratuity, not being a part of the pay and allowances forfeited by section 4(b) for absence without leave, may be paid upon administrative determination that death was not due to misconduct. 29 Comp. Gen. 294 (1950). See also 31 Comp. Gen. 645 (1952).

6. Effect of desertion status at time of death

An enlisted member of the uniformed services who died after he had breached a restricted status and left for Mexico with the intention of remaining there permanently was in fact in a desertion status even though formal action to declare the member a deserter was delayed until after his death. Therefore, since the member was in a desertion status at the time of his death which effected a termination of his pay status, the 6 months' death gratuity authorized for survivors of members in a pay status at time of death is not payable to the enlisted man's survivors. 42 Comp. Gen. 143 (1962). See also 27 Comp. Gen. 269 (1947); and 31 Comp. Gen. 645 (1952).

7. Correction of records to remove desertion

The correction of a Navy seaman's records to remove the mark of desertion following a determination of presumed death at the end of an unexplained absence of more than 7 years does not establish a presumption as to the date of death, but the records may be corrected again to show a date of death for the purpose of computing the 6 months' death gratuity. 35 Comp. Gen. 643 (1956).

F. Pay and Allowances Included in Computation

1. Combat pay

Inasmuch as combat pay authorized the Combat Duty Pay Act of 1952, is considered monthly compensation within the meaning of the act of June 30, 1906, as amended, it may be included in the 6 months' death gratuity payable upon the death of the member of the uniformed services who is entitled to such pay during the month of death. 32 Comp. Gen. 55 (1952).

2. Flight pay

A naval reservist who, while on authorized leave from duty requiring frequent and regular participation in aerial flights, was admitted to civilian hospital for treatment for poliomyelitis, which subsequently caused his death, may not be regarded as having his flight status automatically suspended by reason of the hospitalization. Therefore, the member's widow is entitled to have the additional flight pay included in the 6 months' death gratuity. 36 Comp. Gen. 57 (1956).

G. Reserve and National Guard Members

1. Death en route from physical examination site

An inactive naval reservist who was killed in an automobile accident returning home from a physical examination pursuant to orders which did not place the member in an active duty status but merely required him to report for examination to determine his physical qualifications for active duty at a later date in the Aviation Officer Candidate Program may not be regarded as having been in an active duty status or any other status for expenses incident to the member's death and death gratuity benefits in 10 U.S.C. §§ 1475-1480, 1482, or 6148 (repealed in 1986; see provisions now in 37 U.S.C. § 204), and, therefore, death benefits are not payable in the absence of a correction of record to show that the member had been ordered to temporary active duty for a physical examination incident to orders to active duty. 44 Comp. Gen. 701 (1965).

2. Death after arrival at reserve center but prior to reporting for duty

A member of the United States Army Reserve who was struck and killed by an automobile before reporting for inactive duty training but subsequent to arriving at the Reserve Center, with the knowledge and consent of his commanding officer to prepare for a drill class he was to instruct, leaving to cross the street to a dairy bar, was in a status that entitles his eligible survivors to the death gratuity payment prescribed by 10 U.S.C. § 1475(a)(3) when a member dies from injuries received "while traveling directly" to inactive duty training. The member having completed travel to his inactive duty training station at the Reserve Center earlier than was necessary to report for scheduled duties was free to go to the dairy bar across the street from the center; therefore, it cannot be concluded as a matter of law that he was not "traveling directly" to his inactive duty training station within the meaning of section 1475(a)(3) when he recrossed the street to return to the center. 45 Comp. Gen. 740 (1966).

3. Death while member under military control

Claims for death gratuity and medical expenses by beneficiaries of National Guard member who was to attend inactive duty training on September 8-9, 1973, but who suffered heart attack and died during early morning of September 9, may be allowed since member was under military control in his training area at time of heart attack and death and was, therefore, on inactive duty training at such time, which is basis for

payment of such benefits, 32 U.S.C. § 321(a)(1) and 32 U.S.C. § 320. 54 Comp. Gen. 523 (1974).

4. Death while performing duty without pay

The provision in 10 U.S.C. § 1478(a)(7) that reservists who perform active duty or inactive duty training, without pay, are considered to be entitled to basic pay while performing such duty for death gratuity payments to their survivors is not to be construed as limiting the amount of the death gratuity to basic pay but rather as placing the reservists forming military duty without pay in a pay status. Therefore, in the computation of a death gratuity payment due a beneficiary of a reservist who was killed in an aviation accident while engaged in flight training duty under orders which authorized special inactive duty training without pay, aviation duty pay is for inclusion. 39 Comp. Gen. 858 (1960).

H. Effect of Erroneous Death Gratuity Payments

1. *Member missing and declared dead, later found alive*

Payment of 6 months' death gratuities and payment of arrears of pay and allowances made to the beneficiaries or heirs of missing members of the Armed Forces pursuant to administrative determinations of death under the Missing Persons Act were legal and valid when made and, therefore, are not required to be refunded by the payees when the members return to military control, and the death determinations are canceled. 34 Comp. Gen. 494 (1955).

2. Member contrives disappearance

Upon discovery that a member of the uniformed services had contrived his disappearance in a manner that suggested accidental drowning, the 6 months' death gratuity paid to his father as the designated survivor is for recovery from the son perpetrating the fraud and not the father whose receipt of the death gratuity was bona fide. Therefore, the determination pursuant to 37 U.S.C. § 556 that the member had died having been proper when made, payment of the gratuity to the father was legal and valid and he may retain the payment. 46 Comp. Gen. 687 (1967).

3. False information given by member

A death gratuity which is paid to a person determined by the appropriate commander to be entitled thereto, based upon representations of record

made by the deceased serviceman as to his marital and dependency status and, in the absence of information which would give rise to doubt as to the status, constitutes a good acquittance even though it subsequently develops that the payee is not the proper statutory payee, and payment would neither impose pecuniary liability on the disbursing officer nor warrant a second payment to the proper person, regardless of whether the misrepresentations were willful or erroneous. 37 Comp. Gen. 131 (1957).

Subchapter II—Deceased Member's Pay and Allowances

A. Order of Precedent in Payment

1. Primary right of designated beneficiary

Where claimant obtained Mexican divorce from prior spouse, subsequently married member in California and claims death gratuity as his surviving spouse, legality of marital status of deceased and claimant is too doubtful for payment of death gratuity in absence of declaratory validity of Mexican divorce so that any impediment to the validity of claimant's marriage to member arising out of divorce proceedings may be removed. However, claimant was properly paid deceased member's accrued pay and allowances, since she was the member's designated beneficiary for such payment and as such had primary entitlement under 10 U.S.C. § 2771 regardless of marital status. 55 Comp. Gen. 533 (1975).

2. Spouse designated as beneficiary

When the record shows that a service member, who was missing in action in April 1969, was determined to have died in February 1978, and that he specifically designated his spouse as beneficiary to receive his unpaid pay and allowances, the member's parents are not entitled to this amount under 10 U.S.C. § 2771 as a designated beneficiary is always the preferred recipient, that designation being the highest on the list of eligible beneficiaries. B-193503, Mar. 8, 1979.

3. Parents claim designation to former wife is an error

A soldier designated, as the person to receive his unpaid military pay and allowances in the event of his death, "Jean S. McBride (wife)." That designated, identifiable person is entitled to the soldier's accumulated pay following his death notwithstanding that they had divorced and she was the soldier's former wife at the time he designated her as his beneficiary. Determinations concerning entitlement to the accumulated pay of deceased service members must be made in conformity with their written designations, and a service member's designation may not be set aside on the basis of conjecture that the member might or should have intended to make a contrary designation. B-222066, June 26, 1986.

4. Designated beneficiaries precedence over widow

The claim of the widow to any pay or allowances due a retired member of the Army at the time of his death may not be paid since the Record of Emergency Data on file, although altered apparently because of space limitations on the form, shows clearly that the member intended to designate his children to share these funds equally. The fact that the widow may have been beneficiary of other funds due upon the member's death does not entitle her to the funds in question in view of the specific provisions of 10 U.S.C. § 2771 regarding the disposition of such amounts. B-189235, Jan. 10, 1978.

5. Designated beneficiary's precedence over legatee named in will

Savings deposits with interest thereon due a deceased member of the uniformed services are considered as part of "the amount found due" in the settlement of a deceased member's account, and therefore payment to the member's designated beneficiary as provided by statute is proper, notwithstanding that the member had executed a will bequeathing the deposits to a relative—not the designated beneficiary—in trust for the minor daughter. 37 Comp. Gen. 832 (1958).

6. Designated beneficiary fails to file a claim

Where a designated beneficiary for purposes of retired pay fails to file a claim and cannot be located within 3 years after a member's death, the person next in order of precedence, here the surviving spouse, is entitled to the unpaid retired pay of the member. B-228767, Sept. 14, 1988.

7. Continuing validity of designation after discharge

The designations of beneficiaries prior to discharge by enlisted men of the uniformed service under the act of July 12, 1955, 37 U.S.C. §§ 361-365 (see revised title 37 for current sections), relating to the final settlement of the accounts of deceased members of the uniformed services, continue to be valid designations subsequent to discharge for purposes of settlement of unpaid pay and allowances, the interpretation of the derivative act of June 30, 1906, that the act is sufficiently broad in scope to encompass the accounts of former officers and enlisted persons being for application to the act of September 2, 1958, which reenacted and codified the 1955 act without substantive change (10 U.S.C. § 2771). Therefore, upon the death of a member, the pay and allowances due on date of discharge and remaining unpaid at the time of the member's death may be administratively settled pursuant to 10 U.S.C. § 2771 and payment made to the designated beneficiaries. 42 Comp. Gen. 215 (1962).

8. Claim based on common-law remarriage

After entry of a final decree of divorce on November 6, 1975, the wife alleges that she and the husband immediately resumed marital status and were husband and wife under the common law of Colorado when husband died on November 21, 1975. Wife, therefore, claims entitlement to survivor benefits including arrears of retired pay of the deceased husband which the Navy declined to pay on the basis she was not the surviving spouse. While common-law remarriage after divorce is possible in Colorado, on the record presented the existence of a common-law marriage is too doubtful to authorize payment. B-194457, May 9, 1979.

9. Designated beneficiary predeceases member

Where the brother named by a member of the uniformed services to share with a sister the retired pay due him at time of death predeceases the member and only the sister and two other brothers survive the member, the sister does not take the undistributed one-half share since the beneficiary designations made pursuant to 10 U.S.C. § 2772(a)(1) became effective upon the member's death. Therefore, the order of precedence prescribed by section 2771(a) applies to the undistributed share of retired pay due. As the member was not survived by a widow, child, grandchild, or parent, and no legal representative was appointed, distribution in accordance with section 2771(a)(6) should be made to the persons, including a corporate entity, entitled to take under the law of the domicile

of the deceased, which accords preference to creditors, or persons paying creditors, for funeral and last illness expenses. 52 Comp. Gen. 113 (1972).

10. First wife is "widow" when second marriage not valid

Where Navy member marries a second wife without dissolving his first marriage, his first wife is his legal widow on the date of his death and is entitled to the balance of his unpaid military retired pay. B-222678, Nov. 28, 1986.

11. Designated beneficiary kills member

Claim of widow of deceased service member for unpaid pay and allowances as member's designated beneficiary (10 U.S.C. § 2771), where she admitted killing him and was indicted for murder, is denied, even though she claimed self-defense and nolle prosequi was entered on indictment, since due to certain information of record, the lack of felonious intent cannot be established. 55 Comp. Gen. 1033 (1976).

12. Spouse accessory to member's murder

Murdered Navy member's wife, who was found guilty of being an accessory after the fact to his murder, is not entitled to receive arrears of pay due the member in the absence of evidence that she was not involved in the murder or that she did not participate in the murder with felonious or wrongful intent, since it is a fundamental rule of law that no person shall be permitted to profit by his own wrongful act. B-187743, July 7, 1977.

Where member's wife was suspected of murdering her husband, and remained under investigation for 4 years, but was never accused, indicted, or charged with any offense arising out of his death, she should be paid his unpaid retired pay and a survivor benefit annuity if otherwise entitled to them. B-219218-O.M., Aug. 20, 1985.

Accrued retired pay may be paid to widow of retired member notwithstanding that she pleaded guilty to misdemeanor charges resulting from his homicide, where the facts in the record otherwise establish that his death resulted from the accidental discharge of a rifle and that the widow lacked felonious intent in the matter. The policy which precludes payment to a claimant who caused the death of the individual upon whose death the payment became due may not be invoked where the facts of record establish with reasonable clarity, the absence of any felonious

intent on the part of the claimant in the homicide. B-222065-O.M., July 22, 1986.

Widow of a retired Army member claims entitlement to an annuity under the Survivor Benefit Plan and unpaid retired pay due at the time of his death. In connection with his death, she entered a plea of guilty to involuntary manslaughter but was not adjudged guilty, instead entering the state's first offender program. The claim, based on the argument that the widow was temporarily insane at the time of the incident, is disallowed because the record does not reasonably demonstrate the absence of felonious intent in light of the guilty plea and the absence of any fact-finding proceedings establishing that the killing was accidental, in self-defense or otherwise justifiable. Widow's Claim for Unpaid Retired Pay and Survivor Benefit Plan Annuity, B-233351, July 27, 1989.

13. Legal entity as designated beneficiary

The word "person" as used in 10 U.S.C. § 2771(a) should be construed similarly to that word as used in 5 U.S.C. § 5582(b) and, thus, may include a legal entity other than a natural person. Therefore, an Army member's designation as beneficiary of his unpaid retired pay upon his death of the United States Soldiers' Home, a government instrumentality with the power to accept donations of money or property, was a valid designation under 10 U.S.C. § 2771(a)(1) and the Home's claim may be allowed. B-187037, Oct. 22, 1976.

14. When law of domicile governs payment

Settlement of accounts of deceased members of the Armed Forces is provided by 10 U.S.C. § 2771. In the absence of a designated beneficiary, a surviving spouse, child, or parent, or a legal representative of the estate, the person entitled under the law of the domicile of the deceased member is entitled to payment. B-191818, Nov. 21, 1978. See also B-199455, Sept. 29, 1980.

Where law of domicile of deceased member of Armed Forces is made controlling by 10 U.S.C. § 2771(a)(6), and where stepdaughter-in-law of marriage dissolved by final decree of divorce in 1950 has no legally recognizable status under the domicile's law, claim for amounts due deceased member of Armed Forces, asserted by stepdaughter-in-law, was properly denied. B-191818, Nov. 21, 1978.

15. Proper settlement under law of domicile—payment bars recovery by later claimant

A settlement was made under 10 U.S.C. § 2771(a)(6) to those properly qualified under the laws of succession of that state based on their assertion of being the deceased member's sole next of kin, and there was no indication of the existence of any other qualified persons. Where another claim was thereafter presented, the government has obtained a good acquittance by the settlement and under 10 U.S.C. § 2771(d) such payment bars recovery by the later claimant of any portion of the settlement. B-199455, Sept. 29, 1980.

B. Member in Missing Status Subsequently Determined to Be Dead

1. Pay increases

The widow and designated beneficiary of an Air Force captain held to be in a missing in action status from March 28, 1969, until that status was terminated on March 19, 1970, on the basis of evidence establishing his death, may be paid the increase in basic pay provided by the Federal Employees Salary Act of 1970, and implemented by Executive Order No. 11525, for the period January 1, 1970, the retroactive effective date of the act, through March 19, 1970, absent a contrary determination under 37 U.S.C. § 556(c) by the Secretary of the Air Force. While the Department of Defense memorandum implementing the executive order permits a retroactive increase in pay for any active service performed in the case of a person "who died" after December 31, 1969, but before April 15, 1970, such authority together with section 5 of the salary act on which it is based is considered to have reference to a termination of pay because of death. 50 Comp. Gen. 148 (1970).

2. Distribution of amount accruing to member's account including deposits in Uniformed Services Savings Deposit Program

The father of a member in a missing status is not entitled to the accrued pay and allowances, including amounts deposited in the Uniformed Services Savings Deposit Program (USSDP), when the member is determined to have been killed in action, even though he was designated to receive an allotment of 100 percent of the member's pay and allowances if he went in a missing status, since the Secretary concerned has the authority under 37 U.S.C. §§ 551-558 to discontinue such an allotment. The amounts accruing to member's account, including deposits in the USSDP are then distributed in accordance with 10 U.S.C. § 2771, in this case to the designated beneficiaries, his sisters. B-196808, July 17, 1980.

3. Designated beneficiary (spouse) remarries while member missing

Any amounts due a member of the Marine Corps—who when he entered a missing status on April 30, 1967, was a private first class E-2, and who by September 20, 1971, the date his death was established as April 30, 1967, had been promoted successively to sergeant E-5—are payable at the rates in effect on September 10, 1971. Pursuant to Pub. L. No. 92-169, the promotion of a member while in a missing status is "fully effective for all purposes," and the member's former spouse as designated beneficiary is entitled to the payment of the arrears of pay due notwithstanding she had remarried before he was officially determined to be dead. 51 Comp. Gen. 759 (1972).

C. Retired Members

1. Accounts to be settled pursuant to 10 U.S.C. § 2771

The term "member" in 10 U.S.C. § 2771 relating to the settlement of accounts of deceased members of the Armed Forces includes former members of the Army of the United States and former members of Reserve components who have been retired. There is no evidence of a congressional intent in the enactment of 10 U.S.C. § 2771 and in the derivative laws to distinguish cases of former members who have been retired from those of Regular and Reserve retired members. Therefore, accounts of such deceased former members may be administratively settled in accordance with established procedures. 40 Comp. Gen. 632 (1961).

2. Requirement that retired member's death and date of death be established

The retired pay of a retired member of the Armed Services accrues only during his lifetime. Payment of such pay is generally authorized to be made only to the retired member, except that upon his death the amount accrued but unpaid may be paid to his beneficiary as provided by 10 U.S.C. § 2771. Therefore, the fact of the member's death and date of death must be established before payment may be made on such claim. B-174048, Dec. 28, 1978.

Where the only basis presented for payment of a claim for retired pay of a missing person is a state court decree entered on the basis of presumptive evidence in a proceeding in which the United States is not a party, the United States is not necessarily bound by such a decree. In the absence of

further proof that the member was alive after the date of disappearance, the claim of the member's son as beneficiary of unpaid retired pay accrued after the date of disappearance is too doubtful to allow. B-174048, Dec. 28, 1978.

A claim by a retired Navy member's wife for the member's retired pay accruing during the 7-year period from the date of his disappearance to the date he was declared dead by a state court may not be allowed since retired pay is payable only during the member's life and there is no showing that he was alive after his disappearance or when he actually died, and the state court determination appears to be presumptive only and does not establish that the member lived for 7 years. 58 Comp. Gen. 131 (1978). Modified by Chief Warrant Officer Glen N. Burbage, USCG (Retired), 71 Comp. Gen. 107 (1991).

Where there is no evidence that a military member died before a state court decree presumptively declaring his date of death to be 7 years from the date of his unexplained disappearance, claim of surviving spouse for undisbursed retired pay up to the court, determined date of death is allowed. 43 Comp. Gen. 503 (1964) and 58 Comp. Gen. 131 (1978) are modified accordingly. Chief Warrant Officer Glen N. Burbage, USCG (Retired), 71 Comp. Gen. 107 (1991).

3. Incompetent member dies while in Veterans Administration facility

Under the ruling in Berkey v. United States, 176 Ct. Cl. 1, the retired pay withheld pursuant to 38 U.S.C. § 3202(a)(1) (now 38 U.S.C. § 5502) from a retired member of the uniformed services adjudged incompetent who died while receiving care in a Veterans hospital is payable to members of the immediate family of a decedent as the forfeiture provisions of section 3203(b)(1) (now 38 U.S.C. § 5503) are inapplicable to witheld retired pay, which is considered earned compensation and not a gratuity. Retired pay is for distribution under 10 U.S.C. § 2771, as there is no basis for distinguishing between cases involving a competent or an incompetent retired member. Therefore distribution of the withheld retired pay in both categories—competent and incompetent—should be on the same basis, and claims similar to the Berkey case handled as indicated in 40 Comp. Gen 666 (1961). 41 Comp. Gen. 218 (1961) is reversed. 47 Comp. Gen. 25 (1967).

4. Claim by sole creditor and "only friend"

Under the act of June 30, 1906, as amended, which governs distribution of amounts due estates of deceased military personnel, no provision is made for payment to a general competitor of the decedent's estate. Therefore the sole creditor of a deceased member of the uniformed services, who was decedent's "only friend," is not entitled to payment of claim from arrears of pay due decedent unless claim is presented by a duly appointed legal representative of the estate. 33 Comp. Gen. 346 (1954). See also 52 Comp. Gen. 113 (1972).

5. Designated beneficiary has doubtful claim

Sister-in-law of deceased member claimed accumulated retired pay of member as designated beneficiary and legal representative of his estate. However, evidence in the record indicates that the member was domiciled in New York and the will was probated in Pennsylvania. In addition the member was permanently hospitalized in a VA facility in New York, after having been determined to be mentally incompetent in 1966, at which time a custodian had been appointed for him. The will was executed in 1967. The member was never found to have regained competency before he died in 1982. Since the claim is of doubtful validity, payment of the accumulated retired pay may not be allowed. B-217563, June 24, 1986.

6. Claim for interest based on negligent delay in payment

The widow of a retired military member seeks payment of an amount equal to investment interest she states was lost on the balance of a settlement payment to which she was entitled under the Military Claims Act. She claims that the check that was initially sent to her in payment was improperly drawn due to negligence, and she claims the interest she lost from the date she received the first check until the date she received a second check which she was able to negotiate. The claim is denied since there is no authority for such a payment. B-214361, May 22, 1984.

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