



DEPARTMENT OF DEFENSE
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Matter of: Applicability of Pay Cap to Retired Reservists -

File: Department of Defense General Counsel Opinion:
DoD/GC #97-6

Date: July 22, 1997

DECISION

The Director, Defense Finance and Accounting Service (DFAS), has requested an advance decision under the authority of 31 U.S.C. § 3529 concerning the applicability of the provisions of 5 U.S.C. § 5532(c) to the retired pay entitlement of [REDACTED], an Air Force Reserve member. The specific issue involved is whether the so-called "pay cap" provisions of section 5532(c) would be applicable when a civilian employee elects to defer applying for Reserve retired pay until after retirement from civil service. For the reasons set forth below, we conclude that the pay cap provisions apply only when there is concurrent receipt of a civil service salary and military retired pay.

FACTS

[REDACTED], who was born on May 4, 1937, previously completed the years of service necessary to qualify for Reserve retirement and became eligible to receive military retired pay under the provisions of 10 U.S.C. § 12731 on his 60th birthday, May 4, 1997. He is currently employed as an Administrative Law Judge (pay grade AL-3/F) with the Social Security Administration, with a basic pay rate of \$104,130 per year.

In correspondence to DFAS dated April 2, 1997, [REDACTED] states that he does not intend to retire from his civil service position for at least another 2 years. Because the pay cap is now set at \$108,200 annually, most of his retired pay would be forfeited if he applies for it upon reaching age 60.



Therefore, [redacted] states that he is deferring the filing of his application for retired pay until he receives a decision as to whether the pay cap offset would still be required if he waits until after his civil service retirement to apply for the military retired pay.

LAW

The pay cap provisions of 5 U.S.C. § 5532(c), which were enacted by the Civil Service Reform Act of 1978, Public Law No. 95-454, limit the total amount of combined military retired pay and civilian salary that an individual can concurrently receive. Specifically, section 5532(c)(1) provides that:

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

The requirements governing entitlement to Reserve retired pay, which are set forth in 10 U.S.C. § 12731, generally provide that, upon application, a member is entitled to retired pay if the individual is at least 60 years of age, has performed at least 20 years of qualifying service, the last 8 of which are in certain specified categories, and is not entitled to military retired pay under any other provision of law. The Comptroller General has held that when a member is otherwise fully qualified to receive Reserve retired pay but does not file an application for such pay until some time after reaching age 60, the member's retired pay is retroactively payable from the time the member reached age 60 (subject to the 6-year statute of limitations in 31 U.S.C. § 3702(b)), unless the member specifies a later date for the pay to begin. (See 53 Comp. Gen. 921 (1974); 48 Comp. Gen. 652 (1969); 37 Comp. Gen. 653 (1958).)

ANALYSIS

It appears clear from the provisions set forth above that if Colonel [redacted] applies for his Reserve retired pay upon reaching

age 60 and continues to be employed in his civil service position, his retired pay will be subject to a significant offset because of the pay cap provisions. In his correspondence, the member expresses the view that the pay cap provisions should not be interpreted as being applicable in a situation where the member applies for or begins receiving military retired pay after retirement from civil service.

As is noted by [redacted] in his correspondence, the language of section 5532(c)(1) states that the pay cap is applicable when a member "is receiving" retired pay and "is employed" in a civil service position. Although not necessarily definitive, the statutory language does appear to contemplate the concurrent receipt of military retired pay and civil service salary. Similarly, the implementing DoD regulations follow the statutory language and require reduction of retired pay if the total of the two payments exceeds the rate "currently" paid for Level V. (See DoD 7000.14-R, Vol. 7B, para. 20119.)

We were not able to locate any legislative history further illuminating the congressional intent in enacting the pay cap statute. We note, however, that when Congress has intended to prohibit the dual receipt of entitlements covering the same period of time, it has more clearly done so. For example, the statute governing receipt of Department of Veterans Affairs compensation makes it clear that such compensation may be paid to a retired member only if the member waives receipt of the same amount of military retired pay, and that payment of both entitlements for the same period is not allowed, even if one of the entitlements should be awarded or paid retroactively. (See 38 U.S.C. § 5305; DoD 7000.14-R, Vol. 7B, paras. 30111-30114.)

Consequently, even though there may not be an apparent reason why application of the pay cap provisions should vary depending on whether the member receives retired pay concurrently with the civil service salary or retroactively at a later date, we conclude that the plain language of section 5532(c) directs a reduction of a member's retired pay only when the member is receiving concurrent payments of a civil service salary. Therefore, in the event that [redacted] does not apply for his Reserve retired pay until such time as he is no longer

receiving a civil service salary, the retroactive payment of his retired pay from the time he reached age 60 would not be subject to any offset because of the pay cap provisions.

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