

DATE: September 29, 2022

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In Re: )  
 )  
 [REDACTED] ) Claims Case No. 2021-CL-052114.2  
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 Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

When the language of a statute is clear on its face, the plain meaning of the statute will be given effect and that plain meaning cannot be altered or extended by administrative action.

**DECISION**

The Defense Finance and Accounting Service (DFAS) requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claims No. 2021-CL-052114, dated August 17, 2021. In that decision, our office allowed a retired U.S. Army member's claim for retired pay based on the "uncapped" rate of pay of \$21,147.30 per month.

**Background**

In 1969, the member entered the Army through enlistment in the Army National Guard. He was commissioned as an officer in 1981 and achieved the rank of General (O-10) on September 7, 2012. He assumed the position of Chief of the National Guard Bureau (CNGB) on September 7, 2012. A few months earlier, the position of CNGB had been added to the Joint Chiefs of Staff (JCS) by § 512 of Public Law 112-81, December 31, 2011, 125 Stat. 1298.

On December 31, 2014, the member was eligible for retirement, but remained on active duty. On August 3, 2016, he turned over command of the NGB to his successor and on September 1, 2016, he retired. At retirement, the member had 36 years, two months and three days (36.17 years) of service for retired pay purposes under 10 U.S.C. § 1405. Prior to the member's retirement, the Defense Finance and Accounting Service (DFAS), Office of General

Counsel (DFAS-OGC), determined that his retired pay base was \$19,762.50, the basic pay of an O-10 member with over 40 years of service on December 31, 2014, without the cap set forth under 37 U.S.C. § 203(a)(2). DFAS-OGC further determined that the member was not entitled to receive the retired pay base amount of \$21,147.30, the uncapped pay of a JCS member on December 31, 2014. Notwithstanding this, the member's retired pay was established based on that figure: \$21,147.30 retired pay base times 36.17 years times 0.025 multiplier, which equaled \$19,123.00 (cents rounded off).

In September 2019, after the conclusion of an audit, DFAS determined that the wrong retired pay base figure, \$21,147.30, had been used to calculate his retired pay and the member had been overpaid a total of \$47,370.00. In October 2019, the member was advised of the audit's findings and told that his correct monthly retired pay was \$14,749.43, which would be adjusted accordingly effective October 1, 2019. The member was advised that he had the right to seek waiver of repayment of the overpayment of his retired pay. Instead, the member disputed the overpayment of retired pay by claiming his entitlement to the greater amount of retired pay and appealing DFAS's determination to reduce his retired pay. The member researched the applicable statutes and submitted his claim to DFAS.

In DFAS's administrative report, DFAS concluded that the member's retired pay base was \$19,762.50, not \$21,147.30. The member, through his attorney, maintained that the retired pay base was \$21,147.30.

In the appeal decision, the DOHA adjudicator allowed the member's claim, following the long-standing principle that when the language of a statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action. In applying the law to the facts in the member's case, the adjudicator found the following:

1) Public Law 108-136, subsection 601(b), November 24, 2003, 117 Stat. 1392, established a table that set forth the monthly basic pay for commissioned officers of the uniformed services. The table was codified under 37 U.S.C. § 1009 note, and footnote 1 of the table capped the actual rate of basic pay for commissioned officers in pay grades O-7 through O-10 (commonly known as General Officers and Flag Officers) (GFOs) at the monthly equivalent of the rate of pay for the level III pay of the Executive Schedule. The cap was codified at 37 U.S.C. § 203(a)(2) and it was also applied to the retired pay bases of those officers. Footnote 2 of 37 U.S.C. § 1009 established a special rate of basic pay for certain command or leadership positions, including the JCS. The CNGB was not among those positions. The cap of footnote 1 also applied to members entitled to pay under footnote 2;

2) Public Law 109-364, subsection 602(a), October 17, 2006, 120 Stat. 2083, raised the cap of 37 U.S.C. § 203(a)(2) from level III to level II of the Executive Schedule. At the same time, Public Law 109-364, subsection 641(a), added 10 U.S.C. § 1407a to remove the cap applicable to computation of the retired pay base of an O-7 through O-10 member who retired after September 30, 2006;

3) Public Law 112-81, section 512, December 31, 2011, 125 Stat. 1298, added the CNGB to the JCS, but the active duty and retired pay for that position were not changed at the time of enactment;

4) Public Law 113-291, subsection 603(a), December 19, 2014, 128 Stat. 3292, added a note to 37 U.S.C. § 203 to direct that the CNGB's basic pay be the same as the other JCS members as set forth in footnote 2 of the "Commissioned Officers" table in subsection 601(b) of Public Law 108-136, 37 U.S.C. § 1009 note. Elsewhere in Public Law 113-291, subsection 622(a) amended 10 U.S.C. § 1407a to reinstate the cap of 37 U.S.C. § 203(a)(2) on an O-7 through O-10 member's retired pay base. Section 622(b) stated that 10 U.S.C. § 1407a, as amended by subsection (a), "shall be effective for retired pay that commences after December 31, 2014." At that time in 2014, the uncapped basic pay of a JCS member under footnote 2 of the table at 37 U.S.C. § 1009 note was \$21,147.30, but the reinstated pay cap as set forth under 10 U.S.C. § 1407a and 37 U.S.C. § 203(a)(2) limited that basic pay to \$15,125.10. The uncapped basic pay of an O-10 with the member's years of service on December 31, 2014, was \$19,762.50;

5) There were O-7 through O-10 members, including the member in this case, who had been eligible for retirement as of December 31, 2014, but had remained on active duty past that date with the expectation that the cap would not be applied to their retired pay bases. To protect their interests, Congress enacted Public Law 113-291, subsection 622(a), amending 10 U.S.C. § 1407a(b) to preserve the computation of the members' retired pay base using uncapped rates of basic pay for covered officers who first became members before September 8, 1980, but whose retired pay commences after December 31, 2014. Subsection (b) of 10 U.S.C. § 1407a was thereby amended to state:

- (1) Officers retiring after December 31, 2014. – In the case of a covered general or flag officer who first became a member of a uniformed service before September 8, 1980, and who is retired after December 31, 2014, under any provision of law other than chapter 1223 of this title or is transferred to the Retired Reserve after December 31, 2014, the retired pay base applicable to the computation of the retired pay of that officer shall be determined as provided in paragraph (2) if determination of such retired pay as provided in that paragraph results in a higher retired pay base as otherwise provided by law (including the application of section 203(a)(2) of title 37).
- (2) Alternative determination of retired pay base using uncapped rates of basic pay as of December 31, 2013. – For a determination in accordance with this paragraph, the amount of an officer's retired pay base shall be determined by using the rate of basic pay provided as of December 31, 2014, for that officer's grade as of that date for purposes of basic pay, with that officer's years of service creditable as of that date for purposes of basic pay, and without regard to any reduction under section 203(a)(2) of title 37.

(6) Subsection 603(d) of Public Law 113-291 specifically amended 10 U.S.C. § 1406(i)(1) to preserve the rate of basic pay to apply to the determination of retired pay base of a member who has served as a Chairman or Vice Chairman of the JCS, as CNGB, or as a

commander of a unified or specified combatant command, in order to apply the highest rate of basic pay applicable to a member while serving in such a position. Subsection 603(e) of Public Law 113-291 set forth the effective date of the law as follows:

(e) Effective Date. – This section and the amendments made by this section shall take effect on the date of the enactment of this Act, and shall apply with respect to months of service that begin on or after that date.

The date of enactment of Public Law 113-291 was December 19, 2014, and the first month after that date started January 1, 2015.

The DOHA adjudicator considered the member's attorney argument that in accordance with the plain meaning of subsection 603(e) of Public Law 113-291, the date of December 19, 2014, the date of its enactment, was the effective date of the various provisions of section 603. The member's attorney maintained that January 1, 2015, was the date the CNGB's receipt of basic pay at the rate of a JCS member was vested. The attorney contended that with the effective date of December 19, 2014, subsection 603(d) of Public Law 113-291 and its amendments to 10 U.S.C. § 1406(i)(1) apply to the member's retired pay. Therefore, under 10 U.S.C. § 1407a(b), the member's retired pay base is \$21,147.30, the uncapped rate of a JCS member that was in effect as of December 31, 2014. The member's attorney maintained that 603(e) of Public Law 113-91 was written with the intention of giving the CNGB the same retired pay base as well as the same basic pay as the other JCS members at that time.

The adjudicator then considered DFAS's position in the matter. He found that DFAS emphasized the part of subsection 603(e) that states that the amendments made by that section of Public Law 113-291 "shall apply with respect to months of service that begin on or after that date of [enactment]." Based on this part of the law, DFAS determined that the effective date of section 603 of Public Law 113-291 was January 1, 2015, the beginning of the first month of service after the enactment date of December 19, 2014. Therefore, DFAS maintained that the member's pay on December 31, 2014, his retired pay base, was not \$21,147.30, the uncapped pay of a JCS member on that date. Instead, DFAS held that on December 31, 2014, the member was entitled to \$15,125.10, the pay of an O-10 with his years of service as limited by the reinstated cap under 10 U.S.C. § 1407a and 37 U.S.C. § 203(a)(2). However, DFAS stated that under the comparison provisions of 10 U.S.C. § 1407a(b), the member was entitled to the greater amount of \$19,762.50 as his retired pay base, the pay of an O-10 with his years of service without the reinstated cap under 10 U.S.C. § 1407a and 37 U.S.C. § 203(a)(2). DFAS also emphasized the rule that great weight is to be accorded to the interpretation of a statute by the agency charged with its implementation. DFAS maintained that their interpretation of the various germane provisions of Public law 113-291 represents a desire by Congress to limit the number of members "grandfathered" under 10 U.S.C. § 1407a(b).

The adjudicator found that the gravamen of the case is the meaning of subsection 603(e) of Public Law 113-291, which is entitled "Effective Date." The adjudicator noted that subsection 603(e) opened with the following:

This section and the amendments made by this section shall take effect on the date of the enactment of this Act.

The adjudicator then found that the plain meaning rule compelled him to conclude that the date of enactment, December 19, 2014, is the effective date of section 603 and its subsections. The adjudicator noted that regarding the part in subsection 603(e) that states that it shall apply with respect to months of service that begin on or after that date, there was no language that plainly makes the first day of that month (January 1, 2015) supersede or supplant the plainly stated enactment date as the effective date of the changes made by section 603. Therefore, the adjudicator decided that effective December 19, 2014, the CNGB became entitled under subsection 603(a) to the pay of a JCS member. On December 31, 2014, the basic pay of a JCS member was \$21,147.30, uncapped under 10 U.S.C. § 1407a(b). That amount is greater than \$19,762.50, the uncapped basic pay of an O-10 with the member's years of service on December 31, 2014. Therefore, the adjudicator concluded that under 10 U.S.C. § 1407a(b), the member's retired pay base is \$21,147.30.

On September 2, 2021, DFAS-OGC requested an extension of 30 days to respond to DOHA's appeal decision dated August 17, 2021, allowing the member's retired pay claim. On September 7, 2021, DOHA granted the extension. On October 15, 2021, DFAS submitted their request for reconsideration to DOHA for the consideration of the DOHA Claims Appeals Board. The member's attorney was provided with DFAS's reconsideration request. On January 21, 2022, the member's attorney submitted the member's rebuttal to DFAS's reconsideration request to DOHA.

In their reconsideration request, DFAS states that the fundamental issue in this case is whether the member became entitled to the rate of basic (active) pay of \$21,147.30 (subject to 37 U.S.C. § 203(a)(2)) on December 19, 2014, or on January 1, 2015. DFAS states that if the member became entitled to the rate of basic (active) pay of \$21,147.30 on December 19, 2014, then \$21,147.30 is to be used as his retired pay base. However, if the member was not entitled to the rate of basic (active) pay of \$21,147.30 on December 19, 2014, then \$21,147.30 is not to be used as his retired pay base. DFAS asserts that the member focuses on the phrase "shall take effect on the date of the enactment of this Act" to support his contention that he became entitled to the rate of basic (active) pay of \$21,147.30 on December 19, 2014, whereas DFAS focuses on the words "shall apply with respect to months of service that begin on or after that date" to find that the member did not become entitled to the rate of basic (active) pay for a JCS member until January 1, 2015. DFAS states that the DOHA appeal decision should be reversed because it is conclusory, perfunctory, and undeveloped. DFAS maintains that the DOHA adjudicator's explanation for allowing the claim comes down to one single sentence: DOHA does not see any language that plainly makes the first day of the month (January 1, 2015) supersede or supplant the plainly stated enactment date as the effective date of the changes made by section 603 of Public Law 113-291. DFAS describes DOHA's explanation for allowing the claim as consisting of nothing more than a threadbare recital of a general canon of statutory construction, the plain meaning rule, followed by a conclusory statement. DFAS cites U.S. Supreme Court case law reflecting that the cardinal rule of statutory construction is that every clause and word of a statute should be given effect. *See TRW Inc. v. Andrews*, 534 U.S. 19 (2001); and *Williams v. Taylor*, 529 U.S. 362 (2000). DFAS states that the principal basis for their view is that the words "shall

apply with respect to months of service that begin on or after that date” have meaning. DFAS avers that in applying that language in the member’s case, the member became entitled to the rate of basic (active) duty pay for a JCS member on January 1, 2015, not December 19, 2014, because January 2015 is the first month of service that began after December 19, 2014. DFAS maintains that DOHA did not address DFAS’s position, nor the reason why those words were even present in the legislation. DFAS contends that if those words do not mean what DFAS contends they mean, DOHA, at the very least, must explain what they do mean.

In their reconsideration request, DFAS submits two executive orders for the Board’s consideration, Executive Order 13655 of December 23, 2013, as superseded by Executive Order 13686 of December 19, 2014. DFAS maintains that these two executive orders reflect that the President previously came to the same conclusion as DFAS, that the words “shall apply with respect to months of service that begin on or after that date” mean that the member became entitled to the rate of basic (active) pay for a JCS member on January 1, 2015, not December 19, 2014. DFAS notes that in calendar year 2014, when Public Law 113-291 was enacted, the rate of pay for a JCS member had already been prescribed by Congress and implemented by the President in Executive Order 13655 of December 23, 2013, and that rate was \$21,147.30 (although it was capped at the rate of \$15,125.10 while serving on active duty). DFAS cites to Schedule 8 of that Executive Order (or the “footnote 2” rate) and notes that the CNGB was not among the covered GFOs mentioned in that Schedule for 2014. However, after Public Law 113-291 was enacted, the President published Executive Order 13686 on December 19, 2014, which specifically stated that Schedule 8, which now included the CNGB, is effective January 1, 2015. Executive Order 13686 also stated that its Schedule 8 effective date superseded the effective date of Executive Order 13655. Therefore, DFAS maintains that Executive Order 13686 clearly states that it and the addition of the CNGB under the covered GFOs in footnote 2, is not effective until January 1, 2015. DFAS states that there is no provision in Executive Order 13686 stating that the rate of pay for the CNGB is superseded on a date earlier than January 1, 2015. DFAS states that it is obvious that when the President issued Executive Order 13686, he interpreted section 603(e) of Public Law 113-291, in the same way as DFAS, namely, that the rate of pay for the CNGB was not raised to the pay for a JCS member until January 1, 2015. DFAS states that nowhere in Executive Order 13686 does the President state that the pay for the CNGB was raised on December 19, 2014, as the member and DOHA contend.

DFAS also maintains that Congress made a distinction between the two phrases “the date of enactment of this Act” and the “months of service that begin on or after that date.” DFAS contends that Congress’s use of different terms connotes a difference in their meanings. DFAS states that in using different terms, they are not to be used as synonyms, and should be recognized as two different concepts. DFAS argues that because Congress used different terms, they cannot both be interpreted to mean the same date, December 19, 2014. DFAS states that Congress’s use of “months of service” reflects meaning. DFAS suggests that Congress could have said that the section and its amendments shall take effect on the date of enactment of this Act, and “shall apply with respect to periods of military service commencing on or after that date.” However, Congress did not do so, and chose to make the amendments applicable only to “months of service that begin on or after that date.” DFAS also states that Congress knows that military pay is a monthly entitlement. As an example, DFAS states that when Congress increases military pay, the increases are operative on the first day of a month, not in the middle

of a month, which would necessitate prorating a partial month and paying the increase based on days of service. DFAS argues that since December 19, 2014, is not the beginning of a month, and therefore, the month of service that begins on or after December 19, 2014, begins January 1, 2015. DFAS emphasizes that Congress did not specify that the amendments would apply with respect to days of service that begin on or after December 19, 2014, or to periods of military service commencing on December 19, 2014. DFAS also submits that a more specific provision controls one of more general provisions, and cites *Gozlon-Perez v. United States*, 498 U.S. 395 (1991). DFAS concludes that the second phrase in section 603(e) is the more specific term, and should be controlling.

DFAS maintains that DOHA's decision does not address the design of Public Law No. 113-291 as a whole or its object and policy. DFAS states that Public Law No. 113-291 contains other provisions impacting certain GFOs. DFAS points to section 622(b) which amended 10 U.S.C. § 1407a to remove the ability of GFOs to use the uncapped pay rates as their retired pay base. DFAS acknowledges that the law included a grandfather provision for certain GFOs who were retirement eligible on December 31, 2014, and elected to continue their active duty service beyond that date. DFAS states that Congress was shrinking, not expanding, the pool of officers entitled to the use of the higher uncapped rate as their retired pay base. DFAS contends that DOHA must address how its conclusion fits into the design of the law given Congress's intent to cap the retired pay base. DFAS argues that accepting DOHA's interpretation would require accepting the proposition that Congress intended to expand the use of an uncapped rate of pay for a JCS member as the retired pay base for an officer (CNGB) who had never previously (before December 19, 2014) been listed as being entitled to the pay for a JCS member. Therefore, DFAS concludes that the more sensible interpretation of section 603(e) is that the changes were to become operative on January 1, 2015, in keeping with the general practice that active pay changes are effective on the first day of the month after they are enacted.

On January 21, 2022, the member's counsel filed a rebuttal to DFAS's reconsideration request. He asserts that the DOHA appeal decision should be sustained on the basis that the statutory language in question making the CNGB's pay and retired pay base the same as the other members of the JCS is clear and unambiguous, and its plain meaning ensures that the member's retired pay is consistent with congressional intent. He states that although DFAS acknowledges the cardinal rule of statutory construction, that interpretation must begin with the language of the statute and that no clause, sentence or word shall be superfluous, DFAS then implores DOHA to ignore the statutory language as if it does not exist.

## **Discussion**

Pursuant to 31 U.S.C. § 3702, DOHA has appellate authority over military pay and allowances claims, including retired pay. *See* DoD Instruction 1340.21 (May 12, 2004), the implementing regulation for the Department of Defense, which is also codified in the Code of Federal Regulations at 32 CFR 282. In the adjudication of cognizable claims under 31 U.S.C. § 3702, it is a well-established rule that a claim may only be allowed for an expense authorized by statute or regulation. *See* DOHA Claims Case No. 2016-CL-052003.2 (September 27, 2016); and DOHA Claims Case No. 2012-CL-070601.2 (October 16, 2012). When the language of a

statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 2016-CL-112901.2 (February 2, 2017); DOHA Claims Case No. 2012-CL-070601.4 (August 31, 2015); and DOHA Claims Case No. 2012-CL-061105.2 (September 27, 2012). Statutory provisions with unambiguous and specific directions may not be interpreted in any manner that will alter or extend their meaning. *See* 71 Comp. Gen. 125 (1991); and 56 Comp. Gen. 943 (1977).

Under Article I of the Constitution, Congress has broad powers over the Armed Forces, including the power to raise and support armies, to provide and maintain a Navy, and to make rules for the governance of those forces. In exercising its constitutional authority over the Armed Forces, Congress has enacted a number of laws which govern important aspects of military personnel management. These laws include the appointments, assignments, grades, promotions and separations of military personnel. Congress has used its authority to specify the grade and duties of certain senior military officers. The most senior officers in the Army, Air Force, and Marine Corps are known as general officers. The most senior officers in the Navy are known as flag officers. The term general and flag officers or GFO refers to all officers in paygrades O-7 through O-10, thereby including one-star, two-star, three-star and four-star officers. The GFOs at the highest level, O-10, hold the most visible, senior and important positions within the Department of Defense, including the Chairman of the JCS, the chiefs of the four military services and the combatant commanders. *See* Congressional Research Service (CRS) Report dated February 1, 2019.

Congress has specified the grade for a number of key GFO positions by statute. With the passage of the National Security Act of 1947, Congress formally established the Joint Chiefs of Staff (JCS), which at that time was comprised of the Chairman, the Chiefs of Staff of the Army, Navy and Air Force. On October 20, 1978, Congress included the Commandant of the Marine Corps as a full member of the JCS. *See* Public Law 95-485, Title VIII, § 807, Oct. 20, 1978, 92 Stat. 1611. In 1986 the position of Vice Chairman was added to the JCS. *See* Public Law 99-433, Title II, § 201, Oct. 1, 1986, 100 Stat. 1006.

In 1994 Congress enacted 10 U.S.C. § 10501 to create the National Guard Bureau within the Department of Defense, as a joint bureau of the Department of the Army and the Department of the Air Force. At that time, Congress also created the position of Chief of the National Guard Bureau (CNGB) under 10 U.S.C. § 10502, and set the grade for that position as a Lieutenant General. *See* Public Law 103-337, Div. A, Title IX, § 904(a), Oct. 5, 1994, 108 Stat. 2824. In 2008 Congress increased the grade of the CNGB from Lieutenant General to General. *See* Public Law 110-181, Title XVIII, § 1811, Jan. 28, 2008, 122 Stat. 3.

In 2006 Congress increased the maximum basic pay for general and flag officer to conform to the increase in the pay cap for senior executive service personnel by increasing the pay to level II of the Executive Schedule by amending 37 U.S.C. § 203(a)(2). *See* Public Law 109-364, Title VI, § 602(a) and (b), Oct. 17, 2006, 120 Stat. 2083. Although the date of enactment of Public Law 109-364 was October 17, 2006, Congress specified that the amendment to 37 U.S.C. § 203(a)(2) would take effective on January 1, 2007. Section 602(b) stated the following:



(b) Effective Date.—The amendment made by subsection (a) shall take effect on January 1, 2007, and shall apply with respect to months beginning on or after that date.

Also in Public Law 109-364, Congress approved the use of the uncapped rates of pay for the purposes of computing GFO retired pay. *See* Public Law 109-364, Title VI, § 641(a) and (b), Oct. 17, 2006, 120 Stat. 2083. Prior to the enactment of that law, the retired pay base for all GFOs was subject to an executive pay cap required by 37 U.S.C. § 203(a), which limited GFO pay to the monthly equivalent of the rate of pay for level III of the Executive Schedule. On October 17, 2006, Congress removed the pay cap limitation for GFO retired pay base by enactment of 10 U.S.C. § 1407a. That new provision of law read as follows:

§ 1407a. Retired pay base: officers retired in general or flag officer grades

(a) Rates of basic pay to be used in determination.—In a case in which the determination under section 1406 or 1407 of this title of the retired pay base applicable to the computation of the retired pay of a covered general or flag officer involves a rate of basic pay payable to that officer for any period that was subject to a reduction under section 203(a)(2) of title 37 for such period, such retired-pay-base determination shall be made using the rate of basic pay for such period provided by law, rather than such rate as so reduced.

(b) Covered general and flag officers.—In this section, the term “covered general or flag officer” means a member or former member who after September 30, 2006, is retired in a general officer grade or flag officer grade.

In 2011 Congress elevated the position of the CNGB to full membership on the JCS by amending 10 U.S.C. § 10501 and 10 U.S.C. § 151 to specify that the CNGB was a statutory member of the JCS whose duties included addressing matters involving non-Federalized National Guard forces in the support of homeland defense and civil support missions. *See* Public Law 112-81, Title V, § 512(a), December 31, 2011. This decision by Congress was met by controversy within the Department of Defense. In early November 2011, after the House of Representatives gave a voice vote to amend the law to make the CNGB a permanent member of the JCS as part of the Fiscal Year 2012 Defense Authorization Bill, the Senate Armed Services Committee called a hearing of historic significance. All six of the four-star officers on the JCS appeared to testify and state their opposition to adding the CNGB to serve as a full member of the JCS. However, the CNGB’s full membership on the JCS was hugely popular with state governors and adjutant generals, Guard members, and many politicians. *See* Tom Philpott, *National Guard Gains Joint Chiefs Status*, Military Update, Dec. 8, 2012; and Jack Moore, *Dempsey Advises Against Adding National Guard to Joint Chiefs*, Federal News Radio, Nov. 8, 2011.

On December 19, 2014, Congress passed *The Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015*, Pub. L. No. 113–291, 128 Stat. 3292 (2014). Section 603 of that Act is titled *Inclusion of Chief of the National Guard*

*Bureau and Senior Enlisted Advisor to the Chief of the National Guard Bureau among Senior Members of the Armed Forces for Purposes of Pay and Allowances*, and as set forth under subsection 603(a), the Chief of the National Guard Bureau received basic pay rate equal treatment as other officers specified in Footnote 2 of the table entitled “Commissioned Officers” in section 601 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136; 37 U.S.C. § 1009 note). Under subsection 603(d), Congress also amended 10 U.S.C. § 1406(i)(1) to preserve the rate of basic pay to apply to the determination of the retired pay base of a member who has served as a Chairman or Vice Chairman of the JCS, as CNGB, or as a commander of a unified or specified combatant command, in order to apply the highest rate of basic pay applicable to a member while serving in such a position. Specifically, subsection 603(e) of Public Law 113-291 set forth the effective date of the law as follows:

(e) Effective Date. – This section and the amendments made by this section shall take effect on the date of the enactment of this Act, and shall apply with respect to months of service that begin on or after that date.

In this case, the member held the position as the CNGB effective September 7, 2012. As of that date, he was also a member of the JCS, as was his predecessor, who became a member when Congress added the CNGB to the JCS in December 2011. The member’s leave and earning statement (LES) reflected that he was promoted from an O-9 to an O-10 (a three-star to a four-star officer) effective September 7, 2012. His LES for October 2012 reflected retroactive earnings for this promotion by indicating pay due him effective September 7, 2012. Although he was a member of the JCS, his active duty pay rate, as well as his retired base pay, were not the same as the rate of basic pay and retired base pay for the officers specified in Footnote 2 (which included the members serving on the JCS) until the enactment of Public Law 113-291. The member was eligible to retire from the service on December 31, 2014, but remained on active duty as the CNGB until he retired on September 1, 2016.

This procedural history frames the ultimate question: for purposes of determining whether the amendments set forth in section 603 of Public Law 113-291 apply to the member’s retired pay base, do we use the date Congress specified as the effective date in the law, December 19, 2014, or the date of the first month after that date, January 1, 2015?

In matters concerning the interpretation of a statute, the first question is whether the statutory language provides an unambiguous intent of Congress. If it does, then the matter ends there, for the unambiguous intent of Congress must be given full effect. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41 (1997). This is because the first canon of statutory interpretation is that we must presume that Congress says in a statute what it means, and means in a statute what it says. *See Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-4 (1992). This is the so-called plain meaning rule of statutory interpretation, where the language of a statute is unambiguous, its plain meaning controls. It is a fundamental canon of statutory construction that words, unless otherwise defined by the statute, will be interpreted consistent with their ordinary, contemporary, common meaning. *See GAO, Principles of Federal Appropriations Law*, Vol. 1, at 2-89 (3d ed. 2004).

The law in question, Public Law 113-291, was enacted by Congress on December 19, 2014. As set forth above, section 603 is entitled *Inclusion of Chief of the National Guard Bureau and Senior Enlisted Advisor to the Chief of the National Guard Bureau among senior members of the Armed Forces for purposes of pay and allowances*. Section 603(a) is entitled *Basic Pay Rate Equal Treatment of Chief of the National Guard Bureau and Senior Enlisted Advisor to the Chief of the National Guard Bureau*. Section 603(a)(1) specifically states that the CNGB's rate of basic pay for an officer serving as the CNGB shall be the same as the rate of basic pay for the officers specified in Footnote 2 of the table entitled "Commissioned Officers" in Section 601(b) of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136; 37 U.S.C. § 1009 note), regardless of cumulative years of service computed under section 205 of title 37, United States Code. Section 603(d) created the entitlement for the CNGB to have basic pay calculated at the special position pay rate for retired pay purposes by amending 10 U.S.C. § 1406(i) to include the CNGB:

10 U.S.C. § 1406. Retired pay base for members who first became members before September 8, 1980: final basic pay

(i) Special rule for former chairmen and vice chairmen of the JCS, Chiefs of Service, Chief of the National Guard Bureau, Commanders of Combatant Commands, and Senior Enlisted Members.-

(1) In general.-For the purposes of subsections (b) through (e), in determining the rate of basic pay to apply in the determination of the retired pay base of a member who has served as Chairman or Vice Chairman of the Joint Chiefs of Staff, as a Chief of Service, as Chief of the National Guard Bureau, as a commander of a unified or specified combatant command (as defined in section 161(c) of this title), or as the senior enlisted member Chiefs of Staff or the Chief of the National Guard Bureau, the highest rate of basic pay applicable to the member while serving in that position shall be used, if that rate is higher than the rate otherwise authorized by this section.

Section 622 of Public Law 113-291, is entitled *Modification of Determination of Retired Pay Base for Officers Retired in General and Flag Officer Grades*. That provision of the law amended 10 U.S.C. § 1407a, and along with section 603(d) and the amendment to 10 U.S.C. § 1406, created the member's entitlement to be covered by the following retired pay base provision:

10 U.S.C. § 1407a. Retired pay base: officers retired in general or flag officer grades

(a) Rates of Basic Pay to Be Used in Determination. - Except as otherwise provided in this section, in a case in which the determination under section 1406 or 1407 of this title of the retired pay base applicable to the computation of the retired pay of a covered general or flag officer involves a rate of basic pay payable to that officer for any period between October 1, 2006, and December 31, 2014, that was subject to a reduction under

section 203(a)(2) of title 37 for such period, such retired-pay-base determination shall be made using the rate of basic pay for such period provided by law, without regard to the reduction under section 203(a)(2) of title 37.

(b) Partial perseveration of Computation of retired pay using uncapped rates of basic pay for covered officers who first became members before September 8, 1980, and whose retired pay commences after December 31, 2014.-

(1) Officers retiring after December 31, 2014.-In the case of a covered general or flag officer who first became a member of a uniformed service before September 8, 1980, and who is retired after December 31, 2014, under any provision of law other than chapter 1223 of this title or is transferred to the Retired Reserve after December 31, 2014, the retired pay base applicable to the computation of the retired pay of that officer shall be determined as provided in paragraph (2) if determination of such retired pay base as provided in that paragraph results in a higher retired pay base than determination of such retired pay base as otherwise provided by law (including the application of section 203(a)(2) of title 37).

(2) Alternative determination of retired pay base using uncapped rates of basic pay as of December 31, 2014.-For a determination in accordance with this paragraph, the amount of an officer's retired pay base shall be determined by using the rate of basic pay provided as of December 31, 2014, for that officer's grade as of that date for purposes of basic pay, with that officer's years of service creditable as of that date for purposes of basic pay, and without regard to any reduction under section 203(a)(2) of title 37.

These changes put the CNGB under the provisions of both 10 U.S.C. § 1406(i) and § 1407a, effective December 19, 2014. In relevant part, 10 U.S.C. § 1406(i) states that “the highest rate of basic pay applicable to the member while serving in that position shall be used, if that rate is higher than the rate otherwise authorized by this section.” Under 10 U.S.C. § 1407a(b)(2), the law provides that for “a determination in accordance with this paragraph, the amount of an officer's retired pay base shall be determined by using the rate of basic pay provided as of December 31, 2014, for that officer's grade as of that date for purposes of basic pay .... ” After 10 U.S.C. § 1406 became effective on December 19, 2014, the highest rate of basic pay applicable to the member on December 31, 2014, for purposes of determining his retired pay base while he served in the position of the CNGB was \$21,147.30, the uncapped amount under 10 U.S.C. § 1407a(b).

The language concerning the effective date of section 603 of Public Law 113-291 is very clear that the amendments made by that section shall take effect on the date of enactment of the law, December 19, 2014. The effective date for the changes in 10 U.S.C. § 1406 and 10 U.S.C.

§ 1407a is December 19, 2014, and that is the still the most current date Congress has amended those two statutes. Congress by clear direction in statute placed the CNGB on pay parity with the other members of the JCS for establishment of his final basic pay to establish his retired pay base. Congress did not specify that the amendments under section 603 “shall take effect” on January 1, 2015. Congress could have made the law retroactive to the date of the fiscal year, October 1, 2014, or the date the member assumed the position of the CNGB, September 7, 2012. However, Congress chose not to do so by using unequivocal language that the effective date was December 19, 2014, and applied to months of service on that date or after that date. This is consistent with another general rule of statutory construction that a statute is effective on and after the date of its enactment and is not to be applied retroactively unless it is clear from its language or by necessary implication that a different date was intended. *See* 39 Comp. Gen. 286 (1959); B-237791, Sept. 6, 1991; and B-217565, June 27, 1985. Since the language under section 603(e) is clear and its direction specific, its plain meaning may not be altered or extended by subsequent administrative regulations, nor may administrative regulations be formulated in an attempt to add to the law something which is not there. *See* 56 Comp. Gen. 943, *supra*.

Our analysis should end here, and need not continue, as DFAS urges, to address the design of Public Law No. 113-291 as a whole, and its objective and policy. *See* DOHA Claims Case No. 2018-CL-112801.2 (October 8, 2019). However, given DFAS’s arguments, we note the following points: 1) The specific language used under section 603 was to bring pay parity to the CNGB in alliance with other members of the JCS; 2) The member had been a permanent member of the JCS since September 7, 2012, when he assumed the position, a four-star, O-10 GFO; 3) The member could have retired on December 31, 2014, but chose to remain on active duty as the CNGB past that date until he retired on September 1, 2016. Although Congress amended 10 U.S.C. § 1407a to reinstate the cap of 37 U.S.C. § 203(a)(2) on an O-7 through O-10 member’s retired pay base for member’s retiring after December 31, 2014, Congress simultaneously preserved the computation of officers’ retired pay bases by using the uncapped rates of basic pay for covered officers who first became members before September 8, 1980. Therefore, the rate of pay used to calculate the retired pay of a covered member of the JCS who had remained on active duty past December 31, 2014, is the “uncapped” rate of pay of \$21,147.30 per month.

As to the third point set forth above, we note that Congress has done something similar to this before in protecting members’ retired pay bases when they choose to stay on active duty past the date they are eligible to retire. As previously discussed in this decision, on October 17, 2006, Congress enacted two provisions of law: 1) increasing the maximum basic pay for GFOs to conform to level II of the Executive Schedule; and 2) approving the use of the uncapped rates of pay for the purposes of computing GFO retired pay. Even though Congress has done this before, in 2006 they specifically set forth the dates the provisions would become effective. Congress specified that the increased maximum basic pay for GFOs was effective January 1, 2007, and would apply with respect to months of service beginning on or after that date. As for using uncapped rates of pay for purposes of computing GFO retired pay under the newly enacted statute, 10 U.S.C. § 1407a, Congress defined a covered GFO as a member or former member who after September 30, 2006, is retired in a general officer grade or flag officer grade.

We point to another example of Congress doing something similar in protecting eligible members' retired pay bases. In 1975, Congress enacted the Tower Amendment to address the so-called "retired pay inversion problem." *See* Public Law 94-106, § 806, Oct. 7, 1975, 89 Stat. 538. The retired pay inversion problem arose when 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. This occurred because military retired pay was adjusted to reflect changes in the Consumer Price Index rather than changes in active duty pay rates. Congress adopted subsection 1401a(f), title 10, United States Code, to alleviate the problem, and that subsection authorized a method of computing retired pay based not on a member's actual retirement but rather on his earlier eligibility for retirement. In B-204120, March 5, 1982, upon the request of the Marine Corps Finance Center, the Comptroller General issued an advanced decision concerning the retirement eligibility date under 10 U.S.C. § 1401a in computing the retired pay of a retired Brigadier General. The member retired on May 1, 1981, after his completion of more than 20 years of service; he had 26 years, 5 months and 6 days of active duty service. The member served in the position of Assistant Judge Advocate General of the Navy from August 1, 1978, until his retirement on May 1, 1981. While serving in that position, he held the commissioned grade of Colonel. However, he was retired in the higher grade of Brigadier General under the authority of 10 U.S.C. § 5149(c), which provided in pertinent part, that an officer who is retired while serving as the Assistant Judge Advocate General of the Navy may, in the discretion of the President, be retired with the rank and grade of Brigadier General; and if retired as a Brigadier General, is entitled to the retired pay of that grade, unless entitled to higher pay under another provision of law.<sup>1</sup> The disbursing officer indicated that the member's retired pay was being computed on the premise that May 1, 1981, was the earliest possible date he was eligible for retired pay as a Brigadier General. The disbursing officer also indicated that a more favorable computation would result if an earlier date of retirement eligibility in that grade could be established for the member under 10 U.S.C. § 1401a(f). However, doubt had arisen concerning the appropriateness of using that alternative computation because the member was not promoted to the grade of Brigadier General while serving on active duty. The Comptroller General held that the member's retired pay was payable in accordance with the computation most favorable to him under section 1401a(f) based on his eligibility as a Brigadier General on any date after August 1, 1978, up to the date he actually retired in that grade. In reaching that conclusion, the Comptroller General found that since the member began serving in the position of the Assistant Judge Advocate General of the Navy on August 1, 1978, under the provisions of 10 U.S.C. § 5149(c), it was hypothetically possible that the member could have voluntarily retired the following day in the commissioned grade of Brigadier General with entitlement to the retired pay of that grade, even though his active duty grade was Colonel. Based on the conclusion that the member became eligible for voluntary retirement as a Brigadier General immediately after he began serving as the Assistant General Counsel of the Navy, the Comptroller General held that his retired pay was payable under the most favorable computation authorized by 10 U.S.C. § 1401a(f), premised on his hypothetical retirement on any date after August 1, 1978. Applying the same reasoning as set forth under the Comptroller General's decision, the member in case commenced his service as the CNGB on September 7, 2012, and Congress gave him pay parity for retired pay purposes with the other

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<sup>1</sup>10 U.S.C. § 5149(c) is now cited as 10 U.S.C. § 8089(c), and the member must serve in the position as the Assistant Judge Advocate General of the Navy for at least twelve months before the President has the discretion to retire the member with the rank and grade of Brigadier General.

members of the JCS effective December 19, 2014. Much like the member who served as a Colonel until he was retired as a Brigadier General, the member in this case was a member of the JCS, and effective December 19, 2014, his basic pay for the establishment of his retired pay base was the same as the other members of the JCS. Hypothetically, at that time, the member would have been eligible to retire, and we find his retired pay base by law was the “uncapped” rate of pay of \$21,147.30 per month. However, the member chose to remain on active duty, and even though Congress reinstated the capped rate effective January 1, 2015, Congress preserved the member’s right to the uncapped rate for retired pay base purposes pursuant to 10 U.S.C. § 1407a.

We find DFAS’s reliance on the President’s Executive Order 13686, issued by President Barack Obama on December 19, 2014, to be misplaced. In reviewing Executive Order 13686, the President does state the effective date for Schedule 8 (Pay of the Uniformed Service Monthly Basic Pay under 37 U.S.C. § 205) is January 1, 2015. However, the President sets the adjustments of certain rates of pay, ranges of pay, and caps on pay based on statute, on an annual basis for different pay systems such as civilian employees under the General Schedule, Foreign Service Officers under their specific schedule, Senior Executive Service, and certain executive, legislative and judicial salaries, as well as pay for Uniformed Service members’ monthly basic pay. This annual duty by the President does not change the language of an effective date set by Congress. Using the President’s Executive Order to interrupt the intent of Congress is wholly irrelevant when the statutory language is unambiguous. We find that the Executive Order submitted by DFAS does not supersede the effective date used in the law by Congress. Congress was not silent in its language and clearly indicated the effective date of the law. In addition, as stated above, congressional control over a GFO’s grade and duties, including separation from service and retired pay is in their broad authority set forth under the Constitution. Congress in enactment of section 603 was doing so under its constitutional powers, and did so with specificity.

As for DFAS’s argument that military pay and allowances are paid on a monthly basis, this argument lacks merit for the following reasons. By clear language, Congress stated that the Chief of the NGB’s retired pay base should be the uncapped rate as any other member of the JCS effective December 19, 2014. This was a narrow law giving pay parity to this member for his service on the JCS, which he was a member of since September 7, 2012. In any event, the member here, as well as other O-10 members, was eligible to retire as of December 31, 2014, but had remained on active duty past that date, and Congress preserved the computation of the member’s retired pay base using the uncapped rates of basic pay for covered officers who first became members before September 8, 1980. Second, we note that pay and allowances are effective on the actual date that the entitlement begins. For example, when a member enters the service, the member’s pay starts on the date of entry, which is rarely the first day of the month. When a member leaves the service, except when a member is leaving for a regular retirement, pay ends on the date the member’s active duty ends. Also, a reservist of the Armed Forces who serves on active duty for less than whole months is paid for the days of service. *See* 47 Comp. Gen. 515 (1968). In addition, for permanent change of station (PCS) or temporary duty (TDY), a member’s pay and allowances for that type of pay begins on the date the member’s duty status changes. Further, when a member receives a promotion, as the member did in this case on September 7, 2012, that member’s pay and allowances are adjusted accordingly. Therefore,

although members are paid on a monthly basis, that does not mean that a member's pay entitlement does not change until the first of each month.

The plain language Congress used in section 603 of Public Law 113-219 specifically and unambiguously took effect on December 19, 2014, and preserved the member's right to be paid his retired pay based on the "uncapped" rate of pay of \$21,147.30.

### **Conclusion**

In accordance with the Department of Defense Instruction 1340.21 ¶ E7.15, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

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Catherine M. Engstrom  
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

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Jennifer I. Goldstein  
Member, Claims Appeals Board