



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

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B-178170

May 17, 1973

The Honorable William P. Clements, Jr.
The Deputy Secretary of Defense

Dear Mr. Clements:

We refer to letter dated March 7, 1973, of the Acting Assistant Secretary of Defense (Comptroller) requesting a decision as to whether retired pay of military personnel may be computed on basic pay rates in excess of \$36,000 per annum contained in Executive Order 11692, and subsequent cost of living increases computed on that amount, or must such computation be based on the \$36,000 per annum limit applicable to civilian employees as prescribed by section 5308 of title 5, U. S. Code.

There was enclosed copies of Committee Action No. 470 of the Department of Defense Military Pay and Allowance Committee setting forth and discussing the following questions:

1. Where monthly basic pay, as established by EO 11692, is in excess of \$3,000, may retired pay, upon initial retirement, be computed on the basic pay rates stated in the Executive Order?
2. If question 1 is answered in the affirmative, would the restriction imposed by Section 5308, Title 5, U.S. Code, as amended, apply to adjustments of retired pay for cost of living increases authorized under Section 1401a, Title 10, U.S. Code?

As stated in the Committee Action discussion, military retired pay is computed in accordance with specific statutory authority as set forth in title 10, U. S. Code, and upon initial retirement such pay is limited to 75 percent of the monthly basic pay of the grade to which the member is entitled. Executive Order 11692 dated December 19, 1972, effective January 1, 1973, establishes the monthly basic pay of grade O-10 at rates in excess of \$3,000; however, a footnote specifies that the rate of basic pay for military personnel at these rates is limited by 5 U.S.C. 5308 to the rate of level V of the Executive schedule (\$36,000 per annum or \$3,000 per month).

Computation of Retirement Pay of Military Personnel
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Footnote 1 of Executive Order 11692, pertaining to officers in pay grade O-10 (General-Admiral) states that "While serving as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, basic pay for this grade is \$3,745.20 * * *." The footnote indicates, however, that personnel serving in these positions are subject to the above-mentioned restriction in 5 U.S.C. 5308.

It is pointed out in the Committee Action that while the basic rate established may exceed \$3,000, the retired pay in no case would exceed that figure. As an example, it is pointed out that the rate of basic pay established by Executive Order 11692 for an officer in pay grade O-10 with over 26 years of service is \$3,394.20, whereas his retired pay computed at 75 percent of that amount is \$2,545.65. In the case of a Chief of Staff, it is stated that the rate of basic pay established by the Executive Order is \$3,745.20, whereas his retired pay computed at 75 percent would be \$2,808.90.

The Committee Action discussion also points out that while 10 U.S.C. 1401a provides for subsequent adjustments of retired pay to reflect changes in the Consumer Price Index (CPI), the statute contains no reference to the pay limitation provision of 5 U.S.C. 5308, nor does it place any other limit on the amount of retired pay adjusted by application of the CPI formula.

It is provided in 5 U.S.C. 5301 that it is the policy of Congress that Federal pay fixing for employees under statutory pay systems be based on the principles that, among others, Federal pay rates be comparable with private enterprise pay rates for the same levels of work and pay levels for the statutory pay systems be interrelated. Subsection 8(a) of the act of December 16, 1967, Public Law 90-207, 81 Stat. 654, 37 U.S.C. 203, notes, provides that unless otherwise provided by law enacted after January 1, 1968, whenever the General Schedule of compensation for Federal classified employees is adjusted upwards, there shall immediately be placed in effect a comparable upward adjustment in the monthly basic pay authorized members of the uniformed services.

Subsection 8(b) of the 1967 act provides that such adjustments of the various tables establishing the rates of monthly basic pay for members of the uniformed services shall provide all personnel of the uniformed services with an overall average increase in regular compensation which equates to that provided General Schedule employees. Subsection 8(c) defines "regular compensation," for the purposes of that section, as meaning basic pay, quarters and subsistence allowances (either in cash or in kind), and the tax advantage on those allowances.

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The limitation of \$3,000 per month or \$36,000 per annum in Executive Order 11692 (pursuant to 5 U.S.C. 5308) is imposed on the active duty pay, not on the retired pay, of those officers in pay grade O-10 with over 20 years' service and officers serving as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps. In computing retired pay, it is necessary to look to the applicable retirement law in order to determine the basis for computing retired pay.

An Air Force officer who retired for years of service under 10 U.S.C. 8911 or 8918 as indicated in the example stated in Committee Action No. 470, is entitled to have his retired pay computed under the provisions of 10 U.S.C. 8991, which provides in part as follows:

| Formula | For sections | Column 1 Take | Column 2 Multiply by | Column 3 Add | Column 4 Subtract |
|---------|------------------------------|--|--|-----------------|---|
| | | * | * | * | * |
| B | 8911 8918 8920 8924 | Monthly basic pay ² of member's retired grade. ¹ | 2½% of years service credited to him under section 1405 of this title. | | Excess over 75% of pay upon which computation is based. |

1 For the purposes of this section, determine member's retired grade as if section 8962(b) did not apply and, for an officer who has served as Chief of Staff, compute at the highest rates of basic pay applicable to him while he served in that office.

2 Compute at rates applicable on date of retirement. (Under-scoring supplied.)

Similar provisions applicable to the Army are contained in 10 U.S.C. 3901.

As noted, footnote 1 in section 8991 refers to the "member's retired grade" and expressly provides that in the case of an officer who has served as Chief of Staff, retired pay will be computed " * * * at the highest rates of basic pay applicable to him while he served in that Office." Footnote 2 of section 8991 has reference to the member's "monthly basic pay" as provided in column 1. and reads, "Compute at rates applicable on date of retirement."

Thus, the active duty pay rates established in Executive Order 11692 must be read in conjunction with the language of section 8991 of title 10, namely, "Compute at rates applicable on date of retirement." While the monthly active duty rates of basic pay for certain officers established in Executive Order 11692 exceed \$3,000 per month, the rates actually payable to them while serving on active duty, as imposed by 5 U.S.C. 5308, and the Executive Order, in conjunction with the above-mentioned act of December 16, 1967, is limited to \$3,000 per month.

We find nothing in the language of footnotes 1 or 2 of section 8991 which would warrant the conclusion that the phrase "Compute at rates applicable on date of retirement" means the greater rate of basic pay established in the Executive Order which the member was precluded by law from receiving while serving on active duty. Compare the answer to question d in 47 Comp. Gen. 696, 699 (1968) where the language in footnotes 1 and 2 are discussed and interpreted.

While the provisions of law with respect to the retirement of Navy and Marine Corps officers are stated in language somewhat different from the provisions concerning Army and Air Corps officers, we find no sufficient basis for making any distinction between the different services in applying the \$3,000 limitation in the computation of retired pay.

Moreover, certain civil service employees, like certain military personnel, are subject to the same statutory pay limitation of \$36,000 per annum as imposed by 5 U.S.C. 5308. See Executive Order 11691 dated December 15, 1972, which establishes the basic pay and salary rates for civilian personnel beginning on or after January 1, 1973. In this connection, H.R. 6336, 93rd Congress, which was introduced on March 29, 1973, would amend title 5, U. S. Code, to provide that employees subject to certain pay limitations shall be credited, for civil service retirement and life insurance purposes, with the pay which would be received if such pay limitations were not applicable. No action has been taken on this bill as of this date.

It is our view that in the absence of specific statutory authority authorizing the computation of retired pay based on the rates of active duty pay that a member would be entitled to receive (as set forth in Executive Order 11692) but for the pay limitation provision in 5 U.S.C. 5308, there is no authority to compute retired pay based on basic pay rates in excess of \$3,000 per month.

Accordingly, question 1 is answered in the negative. In the light of the answer to question 1 no answer is required for question 2. In

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connection with question 2, however, the active duty pay limitation provision would not appear to be applicable to adjustments of retired pay for cost of living increases authorized under 10 U.S.C. 1401a.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States