

**DECISION**



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

60607  
MAR 3 1976

FILE: B-184382

DATE:

MATTER OF: DOD Pay and Allowance Committee  
Action No. 517

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**DIGEST:** An officer of the Navy who serves in a position listed under the provisions of 37 U.S.C. 202(i) and is entitled to the highest basic pay of his grade while so serving, upon retirement under the provisions of 10 U.S.C. 6323 may compute his retired pay on the basis of the highest rate of pay of that grade if he is retired in that grade in accordance with 10 U.S.C. 6323(c), if he is serving in the position listed in 37 U.S.C. 202(i) at the time of his retirement or if he has been reassigned to another position not subject to that provision.

This action is in response to letter dated June 24, 1975, from Assistant Secretary of Defense requesting an advance decision as to whether the retired pay of an officer who retires under the provisions of 10 U.S.C. 6323 while serving in a position listed in 37 U.S.C. 202(i) may be based on the active duty pay of the position in which serving. The specific questions and a discussion pertaining thereto are contained in the Department of Defense Military Pay and Allowance Committee Action No. 517, enclosed with the letter.

The questions presented in the Committee Action are as follows:

"1. May the retired pay of an officer who retires under the provisions of 10 U.S.C. 6323 while serving in a position listed in 37 U.S.C. 202(i) be computed on the rate of basic pay provided such officer by 37 U.S.C. 202(i)?

"2. Would the answer to question one be the same if such officer had vacated the position listed in 37 U.S.C. 202(i) and had served on active duty in another position not listed in such section prior to the date of his retirement?"

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35 Comp. Gen. \_\_\_\_\_

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The discussion contained in the Committee Action notes that 37 U.S.C. 202(i) provides that officers of the naval service who are assigned to certain positions are entitled to "the highest pay of their rank" while serving in such positions.

It is also noted that 10 U.S.C. 6323 provides in part that unless otherwise entitled to a higher grade, each officer retired under this section shall be retired in the highest permanent or temporary grade in which he served satisfactorily on active duty as determined by the Secretary of the Navy or if the Secretary determines that he did not serve satisfactorily in his highest temporary grade, he will be retired in the next lower grade in which he had served but not lower than his permanent grade.

Subsection (e) of 10 U.S.C. 6323 provides as follows:

"(e) Unless otherwise entitled to higher pay, an officer retired under this section is entitled to retired pay at the rate of 2-1/2 percent of the basic pay of the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay may not be more than 75 percent of the basic pay upon which the computation of retired pay is based."

The discussion then notes that as a result of variant decisions by this Office and the Court of Claims in the case of Rear Admiral Robert D. Powers, Jr., doubt arises as to whether the provisions of 10 U.S.C. 6323(e) permit the retired pay of an officer in the grade of captain with over 22 years of active service who is serving in a position listed under 37 U.S.C. 202(i) on the date of his retirement, to be computed on the highest pay of his rank--which would be a captain with over 26 years of service as authorized by 37 U.S.C. 202(i)--or whether retired pay of such officer must be based on the rate of basic pay he would receive without regard to that provision--a captain with over 22 years of service.

It is noted in the discussion that on the basis of our decision B-153595, dated March 31, 1964, in the Powers case it would appear that 10 U.S.C. 6323(e) does not authorize an

officer to compute his retired pay on the rate of pay authorized by 37 U.S.C. 202(i). However, the Court of Claims arrived at an opposite conclusion after reviewing Rear Admiral Powers' claim for retired pay on the basis of the higher rate of pay in Powers v. United States, 185 Ct. Cl. 431 (1968). The court concluded in that case that Rear Admiral Powers was entitled to compute his retired pay on the basis of rear admiral (upper half) since the statutory scheme of retirement statutes indicated a congressional intent to authorize officers in such circumstances to compute their retired pay on the basis of the highest rate of pay they received while on active duty.

In 49 Comp. Gen. 618 (1970), it was stated in connection with Powers case and its predecessors that:

"\* \* \* where an existing statute authorizes computation of the retired pay of a member or former member of an armed service on the basis of the pay of the grade in which the individual had 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 \* \* \*."

Thus, that decision specifically holds that an individual is entitled to compute his retired pay on the pay of a higher grade held while the Court of Claims has stated a broader rule that the individual is entitled to compute his retired pay on the highest rate of pay he received on active duty.

Our decision 49 Comp. Gen. 618 (1970) was in response to a letter from the Assistant Secretary of Defense requesting a decision as to whether the Court of Claims decision in Miller v. United States, 180 Ct. Cl. 872 (1967), had any effect on our previous decisions holding that the retired pay of a military member may not be based upon a higher grade previously held in a branch of the Armed Forces other than that in which serving at the time of retirement.

In our response to this question we noted that we had been advised by the Assistant Attorney General, Civil Division, that

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the Department of Justice was unaware of any argument not previously presented to the Court of Claims which might persuade the court to reverse its holdings in a line of cases, among which was Powers v. United States, supra, which he stated indicated the disposition of the court to hold that the language in various statutes indicates the intent of Congress that the retired pay of members of the armed services should be based upon the highest rate of pay received on active duty.

We then indicated that on the basis that further litigation would result in no material change in its interpretation of the law, we would follow the broad principle enunciated by the Court of Claims in those cases.

The line of cases which were the subject of that decision generally dealt with situations where a member of a uniformed service is retired in the grade in which serving, but has held a higher grade at some other time and that higher grade in some cases was in connection with active duty in a different uniformed service from that in which retired.

The Powers case was included in this line of cases since the court viewed the grade of rear admiral as actually being two grades rear admiral (upper half) and rear admiral (lower half) and since Powers had received only the maximum pay of rear admiral (upper half), he was entitled to compute his retired pay on the basis of that basic pay. The court, however, also pointed out that if the grade of rear admiral were to be considered as one grade with different rates of basic pay within that grade, Powers would be entitled to compute his retired pay on basis of highest rate of basic pay he received while on active duty.

It appears that the Court of Claims has rejected all arguments presented in our decision B-153595, March 31, 1964, to the effect that a naval officer who is serving in a position for which the basic pay is designated as the highest pay of his grade at the time of his retirement may not compute his retired pay under 10 U.S.C. 6323 on the basis of the basic pay authorized by 37 U.S.C. 202(1).

The facts involved in the cases presented to the Court of Claims were not the same as the facts here involved in that the

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court has not considered specifically the entitlement to retired pay based upon a higher rate of pay in the grade in which the officer is serving except as an additional argument in the Powers case. However, it seems clear that the court's position is favorable to the individual here involved. Accordingly, and in keeping with the Powers case, we conclude that an officer serving satisfactorily in a position covered by 37 U.S.C. 202(i) at the time of retirement under 10 U.S.C. 6323 is entitled to retired pay based upon his rate of basic pay while so assigned. Similarly, an officer who, subsequent to satisfactory service in a position covered by 37 U.S.C. 202(i), serves in a position not subject thereto prior to retirement under 10 U.S.C. 6323, may have his retired pay computed on the basis of the pay received while in the covered position.

Accordingly both questions presented are answered in the affirmative.

R.F.KELLER

Deputy            Comptroller General  
                    of the United States