



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

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AUG 30

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Dear Mr. Secretary:

Further reference is made to letter of June 27, 1967, from the Assistant Secretary of Defense (Comptroller) requesting decision on several questions concerning the applicability of certain provisions of law in the case of those members of the Regular components of the Army and Air Force who are subject to removal from the temporary disability retired list because of fit-for-duty determinations but who, being otherwise qualified, desire to be retired under other statutory provisions rather than being returned to active duty. A discussion of the matter is set forth in Department of Defense Military Pay and Allowance Committee Action No. 400 received as an enclosure.

Four questions are presented in Committee Action No. 400. The first three are as follows:

- "1. May airmen, Regular Air Force, or enlisted men, Regular Army, who are subject to removal from the Temporary Disability Retired List because they are fit for duty, but who are qualified for and desire to retire for length of service under 10 USC 8914 or 10 USC 3914, respectively, rather than return to active duty, acquire a new retirement status without being re-enlisted, and have their retired pay computed according to applicable law in force on the effective date of retirement?
- "2. May officers or warrant officers, Regular Air Force, or Regular Army, in the circumstances cited in question 1, who desire to retire under 10 USC 8911, 3911 or 1293, respectively, rather than return to active duty, acquire a new retirement status without being reappointed, and have their retired pay computed according to applicable law in force on the effective date of retirement?
- "3. May officers or warrant officers, Regular Air Force, or Regular Army, subject to removal from the Temporary Disability Retired List as in the above cases, but who have attained the maximum age or length of service for their grade under the applicable mandatory provisions of

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10 USC, and desire retirement rather than return to active duty, acquire a new retirement status without being re-appointed, and have their pay computed according to applicable law in force on the effective date of retirement?"

In the discussion set forth with respect to question 1 it is stated that when enlisted members of the Regular Army and Regular Air Force are removed from the temporary disability retired list for the reason shown above, they are, under current procedures, reenlisted with their consent and as soon as practicable thereafter retired for length of service. As to questions 2 and 3, it is stated that under current procedures a Regular commissioned officer is recalled to active duty with his consent and as soon as circumstances permit he is reappointed by the President, by and with the advice and consent of the Senate, to the active list. Retired pay is terminated in such a case on the date the officer is recalled to active duty and his status on the temporary disability retired list ceases on the date preceding the date of his reappointment. Permanent retirement under other applicable provisions of law then follows as soon as practicable.

It is further stated that the procedures outlined above cause undue personal hardship since the member "is required to leave his home and civilian job to regain his military status in order to retire." It is added that "An affirmative answer to questions 1, 2, and 3 would alleviate the need for travel, termination of employment, reappointment or reenlistment and attendant administrative problems."

Section 1210, title 10, U.S. Code, provides that periodic physical examinations shall be given at least once every 18 months in the case of each member whose name is on the temporary disability retired list and that the Secretary concerned shall make a final determination in the case of each member whose name has been on that list for five years. If, as a result of a periodic physical examination or upon a final determination at the expiration of five years, it is determined that the disability is permanent, the member's name is required to be removed from the temporary disability retired list and he is permanently retired by transfer to the permanent disability retired list or separated from the service with severance pay, whichever action is required under the provisions of law applicable in the circumstances of the particular case.

Section 1210(f) provides that if as a result of a periodic physical examination or upon a final determination at the expiration of five

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years it is determined that the member is physically fit to perform the duties of his office, grade, rank, and rating, the Secretary concerned shall treat him as provided in section 1211, that is, return him, with his consent, to an active duty status on the active list.

Section 1211(a) provides in pertinent part that, with his consent, any member of the Army or the Air Force whose name is on the temporary disability retired list and who is found to be physically fit to perform the duties of his office, grade or rank shall:

"(1) if a commissioned officer of a regular component, be recalled to active duty and, as soon as practicable, may be reappointed by the President, by and with the advice and consent of the Senate, to the active list of his regular component in the regular grade held by him when his name was placed on the temporary disability retired list, or in the next higher regular grade;

"(2) if a warrant officer of a regular component, be recalled to active duty and, as soon as practicable, be reappointed by the Secretary concerned in the regular grade held by him when his name was placed on the temporary disability retired list, or in the next higher regular warrant grade;

"(3) if an enlisted member of a regular component, be reenlisted in the regular grade held by him when his name was placed on the temporary disability retired list or in the next higher regular enlisted grade;"

If the member concerned does not consent to recall to active duty and reappointment or reenlistment, it is provided in section 1211(c) that the temporary disability retired status and the temporary disability retired pay of such a member "shall be terminated as soon as practicable."

The statutory provisions above referred to provide only for transfer to the permanent disability retired list, separation from the service with severance pay, return (with the member's consent) to an active duty status on the active list or, if he does not so consent, termination of the member's status on the temporary disability retired list and

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termination of temporary disability retired pay as soon as practicable. No provision is contained in the statute relating to the case of a member of the uniformed services whose name must be removed from the temporary disability retired list because of a fit-for-duty determination, who meets the statutory conditions prescribed for voluntary or mandatory retirement based on years of service and/or age and who desires to be so retired immediately after the termination of his temporary disability retired status rather than return to an active duty status on the active list.

Specific reference is made in Committee Action No. 400 to decision of October 28, 1964, B-154836. That decision involved the case of an enlisted member of the Regular Army who was placed on the temporary disability retired list in 1960. His name was removed from that list on November 30, 1963, and being eligible therefor he was placed, upon his own application, on the Army of the United States retired list effective December 1, 1963, in the grade of colonel, U. S. Army Reserve, under authority of 10 U.S.C. 3911. The placement of his name on the temporary disability retired list in 1960 did not terminate his membership in a Reserve component of the Army (37 Comp. Gen. 811, 812). When his name was removed from the temporary disability retired list on November 30, 1963, he was then still a member of the Army Reserve in an "active status"--see 10 U.S.C. 101(25)--and hence was eligible to be retired in his Reserve status effective the next day, December 1, 1963, as a Reserve officer under authority of 10 U.S.C. 3911 without the necessity of being reappointed and recalled to active duty.

However, the situation there considered must be distinguished from the situation of an officer or enlisted man having a status in the Regular Army or Regular Air Force only. The placement of the name of such an officer or enlisted member on the temporary disability retired list removes such a person from the active list. 31 Comp. Gen. 213, 215. While such action does not terminate his status as a member of his uniformed service, the subsequent removal of his name from the temporary disability retired list in the case of a member of a Regular component of the Army or Air Force does not automatically restore such person to the active list, otherwise the provisions of 10 U.S.C. 1211 would be unnecessary.

Hence, it is readily seen why a reappointment in the case of an officer and reenlistment in the case of an enlisted member, together with an actual recall to active duty as required by the statute, is necessary if the individual concerned is to be returned to active duty and regain

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his former status on the active list of his uniformed service. It would appear, therefore, that when the name of a member of the Regular Army or Regular Air Force is required to be removed from the temporary disability retired list other than for the purpose of transfer to the permanent disability retired list or separation from the service, his retired status is terminated and he has no active status. In the absence of some statutory provision authorizing the placement of such a member on a retired list, we are of the opinion that he must be reappointed or reenlisted, as the case may be, and placed on the active list of his Regular component as provided in 10 U.S.C. 1211 in order to establish a proper basis of eligibility for retirement under other applicable statutory provisions.

Questions 1, 2 and 3 are answered in the negative.

The fourth question is as follows:

"4. If the answer to questions 2 and 3 is negative, may such Regular Air Force or Regular Army officers or warrant officers who are reappointed solely for the purpose of being retired, but are not recalled to active duty, continue to be employed in a civilian capacity in the Federal Government and be paid from appropriated or non-appropriated funds for the civilian position?"

It seems to us that question 4 envisions a situation not contemplated by law. Section 1211(a)(1), (2), provides that with his consent a commissioned or warrant officer whose name is on the temporary disability retired list and who is found to be physically fit to perform the duties of his office, grade or rank "shall \* \* \* be recalled to active duty" and thereafter be reappointed as soon as practicable. Since the law provides for reappointment of only those officers who previously were so recalled to active duty, we find no authority for the reappointment of officers who have not been so recalled and who contemplate no active duty.

Question 4 is answered accordingly.

Sincerely yours,

R.F.KELLER

Acting Comptroller General  
of the United States

The Honorable  
The Secretary of Defense