

DECISION



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

50997

FILE: B-183625

DATE: AUG 20 1975

97469

MATTER OF: Date of retirement of members ordered
home to await retirement orders

DIGEST: A member who is ordered to his home in an awaiting order status pending action on whether he will be placed on the temporary disability retired list is entitled to active duty pay and allowances for the period he is in that status until delivery of orders notifying him of his retirement or of official advice that he has been retired.

We have for consideration a question involving the effective date of retirement of military personnel who have been ordered home to await retirement orders. Specifically, the case presented involves an enlisted member who had completed all processing incident to placement on the temporary disability retired list but was ordered home prior to the actual issuance of retirement orders. He departed for home on September 27 and retirement was said to have been approved September 29 with an effective date of September 30. Notice of retirement was dated October 3, however, the member did not receive that notice at his home until November 9. The delay in notifying the member was apparently not due to any action he took but resulted from the failure of the service to mail the retirement notice to him at the home designated in his orders until sometime after retirement was approved.

Subsection 1168(a) of title 10, United States Code provides:

"(a) A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative."

Further 37 U.S.C. 903 provides:

"A retired member or former member of a uniformed service, or a member of the Fleet

B-183625

Reserve or Fleet Marine Corps Reserve, who is serving on active duty is entitled to the pay and allowances to which he is entitled, under this title, for the grade, rank, or rating in which he is serving. In addition, while on active duty, he is entitled to the pay and allowances, while on leave of absence or while sick, of a member of a uniformed service of similar grade, rank, or rating who is entitled to basic pay."

The decision 39 Comp. Gen. 312 (1959) holds that a member who has notice that retirement orders have been issued prior to their effective date is retired on the effective date of those orders even though they have not been delivered to him. Such a member may continue to receive pay for active service actually performed only under the de facto rule. That is, a member who had timely knowledge of his retirement date but continued to perform active duty thereafter under orders issued subsequent to such effective date purporting to delay retirement, may retain the pay and allowances received for such period since he had no knowledge of the lack of legal authority to continue him on active duty.

The Court of Claims in the case of Crist v. United States, 124 Ct. Cl. 825 (1952) and the decision of this Office 49 Comp. Gen. 429 (1979) authorized continuance of active duty pay until receipt of retirement orders. Those decisions were not based on the de facto rule, but rather referred to law now codified in 37 U.S.C. 903, and indicated that retirement orders do not become effective until delivered to the service member and that the member is entitled to active duty pay until that time. In these cases the members performed continuous duty at a military installation and their first notice of retirement was by delivery of the orders.

The contention has been made that members sent home in an awaiting order status are on notice that they will be retired. It has consistently been held, however, that a member ordered home to await orders assigning him to further duty remains in an active duty status, and is entitled to active duty pay even though he performs no military duties. Members ordered home to await final determination with regard to disability retirement, therefore, should be considered in a full active duty status subject to such military orders as may be issued until they actually receive

B-183625

notice that retirement has been approved or receive orders requiring some other action.

The fact that a member in the circumstances at hand knows that retirement orders will probably be issued at some unknown date in the near future would not be the equivalent of the knowledge that retirement has been approved. Accordingly, his service continues until notice, by delivery of orders or official advice that orders have been issued placing him on the retired list.

In view of the above a member ordered to proceed home to await retirement orders should be considered retired upon delivery of orders notifying him of his retirement or of official advice that retirement orders have been issued.

~~REPORT~~
Comptroller General
of the United States