

OpJAGAF 2018-1/16 April 2018, RETIRED PAY

TOPIC

Application of 10 U.S.C. § 12371 to Discharged Regular and Reserve Component Enlisted Airmen

TEXT OF THE DECISION

You asked whether an enlisted Airman, with more than 20 but less than 30 years of service, whose request to retire in lieu of administrative discharge is denied, will lose his/her retirement pay/benefits. You correctly noted that an officer (Regular and Reserve Component) with 20 years of service is entitled, by law, to retire in lieu of administrative discharge. You also correctly noted that enlisted Airmen with 30 years of service are entitled, by law, to retire in lieu of administrative discharge.¹ Your question, therefore, focuses on Regular and Reserve Component² enlisted Airmen with more than 20 but less than 30 years of creditable service who are discharged and not allowed to retire. For the reasons explained below, the Regular Air Force (RegAF) enlisted members with more than 20 but less than 30 years of creditable service who are discharged and not allowed to retire are not entitled to retirement pay. Similarly situated enlisted members of the Air Reserve Component (ARC) may draw retirement pay upon reaching retirement age in accordance with (IAW) 10 U.S.C. § 12731.

BACKGROUND

Military retired pay is divided into three general categories: retired pay for regular service, retired pay for non-regular (guard/reserve) service, and retired pay for physical disability.³ With the exception of retirement for physical disability and certain temporary authorities for early retirement not relevant to this discussion, a member must be credited with completion of at least 20 years of service to be *eligible* for retired/retainer pay.⁴ Title 10, United States Code (U.S.C.), Chapter 867 addresses retirement eligibility for RegAF members, while Chapter 1223 addresses eligibility for the ARC. As mentioned above, retirement benefits accrue differently for commissioned officers and enlisted members. Each will be addressed, in turn, below.⁵

Officers

Commissioned officers who accrue 20 or more years of active duty service are entitled to retire in lieu of administrative discharge. This entitlement arises through a series of statutes. Title 10 U.S.C. § 8911 gives the Secretary of the Air Force (SecAF) discretion to allow RegAF or ARC commissioned officers to retire, with a regular retirement, after 20 years of active duty service, if

¹ 10 U.S.C. § 8917 (a regular enlisted members with 30 years or more of service “shall” be allowed to retire); OpJAGAF 1998/80 (enlisted Airmen’s ability to retire under this statute is mandatory).

² The Reserve Component includes both the Air Force Reserve and the Air National Guard. 10 U.S.C. § 101(c).

³ DoD 7000.15-R, *Financial Management Regulation*, Volume 7B, Chapter 1, paragraph 010101.A. As of the date of this opinion, a new Blended Retirement System is being implemented. Since no one is currently eligible to retire under that system, it is beyond the scope of this opinion.

⁴ *Id.* See also 10 U.S.C. §§ 1293, 3911, 3914, 8911, 8914.

⁵ Because the Air Force does not currently have any warrant officers, warrant officers’ retirement benefits will not be addressed in this opinion.

the officer has at least 10 years of active service⁶ as a commissioned officer. Title 10 U.S.C. § 1186 limits that discretion by prohibiting administrative involuntary discharge of RegAF commissioned officers with more than 20 years of service, even though a Board of Inquiry has recommended discharge. Instead, officers facing those circumstances must be allowed to retire.⁷

Similarly, as explained in OpJAGAF 1988/45 and OpJAGAF 2009/7, commissioned officers subject to removal from the reserve active status list (RASL), but eligible for a non-regular retirement, *must* be allowed to retire.⁸

Officers who resign their commissions without requesting retirement are not protected by these statutes and are not guaranteed retirement status.

Regular Enlisted Members with at Least 30 Years of Service

As mentioned, the provisions of 10 U.S.C. § 8917 directs the retirement of a RegAF enlisted member who has at least 30 years of service computed under 10 U.S.C. § 8925.⁹

Regular Enlisted Members with More than 20 Years but Less than 30 Years of Service

Title 10 U.S.C. § 8914 provides that enlisted members with 20 to 30 years of active duty service *may* be allowed to retire under the regular retirement statutes.¹⁰ As with RegAF enlisted members with more than 30 years of service, creditable service is based on all active service in the Uniformed Services (service as a cadet or midshipman at a Service academy is included in the computation).¹¹ Unlike commissioned officers, no statute limits SecAF's discretion for regular and non-regular retirement in lieu of administrative discharge for enlisted members with more than 20 but less than 30 years of service.

⁶ 10 U.S.C. § 101(d)(3) ("active service" means service on active duty or full-time National Guard duty). *See also* 10 U.S.C. § 8918 (a regular commissioned officer with 30 or more years of service, may be allowed to retire, upon approval by the President of the United States); 10 U.S.C. § 8924 (regular and reserve commissioned officers with 40 or more years of service "shall" be allowed to retire).

⁷ *See* 10 U.S.C. § 1186(b) ("An officer removed from active duty under [10 U.S.C. § 1184] **shall**--(1) if eligible for voluntary retirement under any provision of law on the date of such removal, be retired in the grade and with the retired pay for which he would be eligible if retired under such provision") (emphasis added).

⁸ *See* 10 U.S.C. § 14905(b) ("An officer removed from an active status under [10 U.S.C. § 14903] shall--(1) if eligible for voluntary retirement under any provision of law on the date of such removal, be retired in the grade and with the retired pay for which he would be eligible if retired under that provision; (2) if eligible for transfer to the Retired Reserve and has completed the years of service required for retired pay under [10 U.S.C. §§ 12731 et seq.], be transferred to the Retired Reserve").

⁹ 10 U.S.C. § 8925 provides that for the purposes of determining whether an enlisted member of the Air Force may be retired under 10 U.S.C. §§ 8914 or 8917, his years of service are computed by adding all active service in the armed forces.

¹⁰ *See* OpJAGAF 1998/80 (enlisted Airmen's ability to retire under this statute is permissive, not mandatory). *See also* DoD 7000.14-R, Volume 7B, Chapter 1, paragraph 010201.A.1; AFI 36-3203, *Service Retirements*, para 2.1.1.2 ("10 U.S.C. § 8914 allows an enlisted member who meets the basic eligibility criteria for [regular] retirement, 20 years TAFMS, to request retirement.").

¹¹ *See* 10 U.S.C. § 8925, DoD 7000.14-R, Chapter 1, paragraph 010202.

10 U.S.C. §12731

Title 10 U.S.C., Subtitle E – Reserve Components, Part II – Personnel Generally, Chapter 1223 – Retired Pay for Non-Regular Service, Section 12731(a) provides:

Except as otherwise provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 12739 of this title, if the person—

- (1) has attained the *eligibility age* applicable under subsection (f)¹² to that person;
- (2) *has performed at least 20 years of service* computed under section 12732 of this title;
- (3) in the case of a person who completed the service requirements of paragraph (2) before April 25, 2005, performed the last six years of qualifying service while a member of any category named in section 12732(a)(1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve, except that in the case of a person who completed the service requirements of paragraph (2) before October 5, 1994, the number of years of such qualifying service under this paragraph shall be eight; *and*
- (4) *is not entitled, under any other provision of law, to retired pay* from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

(Emphases added)

This statute applies to “a person,” without regard to officer or enlisted grade who earned retirement points as described in 10 U.S.C. § 12732.¹³ A service member earns “[o]ne point for each day of active service,”¹⁴ and earns one year of service credit for “[e]ach one-year period, after July 1, 1949, in which the person has been credited with at least 50 points.”¹⁵ Inactive duty, funeral honors duty, and other specified types of service also count for points toward retirement.¹⁶ Thus, ARC members earn points toward non-regular retirement every day they serve, regardless of the component in which they serve. If an ARC Airman serves 20 years on extended active duty, he or she accrues 20 years of points toward a non-regular retirement, even if the Airman never served a single day in a Reserve Component.¹⁷

¹² Generally, the eligibility age for purposes of this statute is 60 years of age. 10 U.S.C. § 12731 (f)(1).

¹³ See also 10 U.S.C. § 12739 (non-regular retirement pay is usually calculated as a percentage of base pay; the applicable base pay is the average of the highest 36-months of base pay the Airman received or would have received if s/he were on active duty orders).

¹⁴ 10 U.S.C. § 12732(a)(2)(A)(i). DoD 7000-14.R, Volume 7B, Chapter 1, paragraph 010208.

¹⁵ 10 U.S.C. § 12732(a)(2).

¹⁶ *Id.* See 10 U.S.C. § 12732(b) for service that does not count toward non-Regular retirement.

¹⁷ AFI 36-3203, paragraph 3.4.3. (“Reserve Age and Service Requirements (10 USC § 12731). This section pertains to Reserve members who attain eligibility for reserve retired pay. 3.4.3.1. ... Members serving on active duty who accrue 20 creditable years of service also qualify for a reserve retirement and therefore will also receive ‘20-year letter’ from HQ ARPC Retirements.”); AFI 36-3203, paragraph 7.3. (“Reserve Age and Service Requirements (10 USC § 12731). This section pertains to Reserve members who attain eligibility for reserve retired pay. 7.3.1. ... As referenced in paragraph 3.4.3.1 members serving on active duty who accrue 20 creditable years of service also qualify for a reserve retirement and therefore will also receive ‘20-year letter’ from HQ ARPC Retirements.”).

Discussion

Section 12731 is intended to provide a retirement for non-regular service members who otherwise are not entitled to retirement under Chapter 867. Many ARC members will *qualify* for retirement before they reach the *eligibility* age. An individual who qualified for retirement but elected not to transfer to the Retired Reserve and was subsequently discharged for (1) physical disqualification, (2) misconduct, (3) upon expiration of their contract, or (4) the member resigned his or her commission is considered a “former member.”¹⁸ The reference to the “Retired Reserve” in this definition does not apply only to ARC members.

As explained above, the Retired Reserves consists of *Reservists* who are or have been retired under 8911.¹⁹ (10 U.S.C. § 10154, *emphasis added*) Additionally, DoDI 1332.30, *Separation of Regular and Reserve Commissioned Officers*, 25 November 2013 (incorporating Change 1, 31 March 2017), paragraph 5, states, “at any time before final action in the case, the Secretary concerned may grant a request by the commissioned officer concerned for: (1) voluntary retirement; (2) transfer to the retired reserve (**when the officer is a reservist**); (3) discharge.” (*Emphasis added*)²⁰ There are no statutory, DoD, or Air Force regulations or instructions allowing for RegAF enlisted members to become part of the Retired Reserve.²¹

“Former member” status, therefore, applies to Reserve Component Airmen (officers and enlisted) who do not qualify for transfer to the Retired Reserve even though they have 20 years of service,²² whose requests to retire in lieu of discharge are denied,²³ or who fail to apply to retire prior to leaving active service.²⁴ These Airmen are not considered “retirees,” but they are entitled to an

¹⁸ AFI 36-3203, paragraph 8.3. Statutory references to “former members” in this context relate to members of reserve components and reserve retirees under age 60. *See* 10 U.S.C. § 1063, *Use of commissary stores and MWR retail facilities: members of reserve components and reserve retirees under age 60*; *See also* AFI 36-3026_IP Volume 1, Army Regulation 600-8-14; BUPERS Instruction 1750.10D; Marine Corps Order 5512.11E; Commandant Instruction M5512.1B; NOAA Corps Directives, Chapter 1, Part 5; Commissioned Corps Manual 29.2; Instructions 1 and 2, *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel*, 4 August 2017. (A former member is an “individual who is eligible to receive retired pay for non-regular service under Chapter 1223 of Title 10, U.S.C., but who has been discharged from the Service and maintains no military affiliation.”)

¹⁹ 10 U.S.C. § 8911 states, “The Secretary of the Air Force may, upon the officer’s request, retire a regular or reserved commissioned officer of the Air Force who has at least 20 years of service computed under section 8926 of this *title*, at least 10 years of which have been active service as a commissioned officer.” Paragraph (b) of § 10154 authorizes the Secretary of the Air Force, from 7 January 2011 through 30 September 2018 to reduce the requirement under section (a) for at least 10 years of active service as a commissioned officer to a period of not less than eight years.

²⁰ *See* OpJAGAF 2017/9.

²¹ *See* 10 U.S.C. § 10154; DoDI 1332.14, *Enlisted Administrative Separations*, 27 January 2014 (incorporating Change 3, Effective 22 March 2018); AFI 36-3203; AFI 36-3208_AFGM2017-01 8 June 2017, *Administrative Separation of Airmen*, 9 July 2004, Incorporating Through Change 7, 2 July 2013; AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, 14 April 2005, Incorporating Through Change 3, 20 September 2011.

²² *See e.g.* OpJAGAF 2017/9 (Regular Component officer who was previously enlisted in a Reserve Component, had 20 years of service but did not have 10 years of active service as a commissioned officer was ineligible to transfer directly to the Retired Reserve).

²³ AFI 36-3203, paragraph 8.5 (“[m]embers who were administratively discharged for cause” are not entitled to transfer to the Retired Reserve).

²⁴ 10 U.S.C. § 1168 (limits Secretarial discretion only prior to removal from active duty; 10 U.S.C. § 14905 (limits Secretarial discretion only prior to removal from the RASL)).

identification (ID) card as “former members,” which allows unlimited access to exchange and morale, welfare, and recreation (MWR) activities, and limited commissary privileges.²⁵ Once former members reach retirement pay age,²⁶ they are entitled to submit an application and draw retirement pay IAW 10 U.S.C. § 12731.²⁷ This entitlement can only be lost if the Airman is court-martialed and receives a death sentence or punitive discharge, is dropped from the rolls, or if the Airman fails to apply for retirement pay.²⁸

After finding that ARC enlisted members who have served at least 20 years but less than 30 years who were then administratively separated may apply for retirement pay under Section 12731, we now consider whether the phrase “a person entitled” includes RegAF enlisted members. We find it does not. Although a plain reading of the phrase “a person entitled” would seemingly include service members of any Component, RegAF or ARC, this provision is contained within the Reserves section of the statute and the chapter is entitled “Retired Pay for Non-Regular Service.” This cannot be interpreted to include RegAF enlisted Airmen who served more than 20 years of regular, as opposed to non-regular, service. Members received credit for each day of active service (as defined by 10 U.S.C. § 101(d)(3)), but service of a RegAF enlisted member is not “non-regular service” as envisioned by this chapter. Airmen who are eligible for regular retirement are not eligible for non-regular retirement.²⁹ The Comptroller General articulated the principle that Congress did not intend Section 12731 “to enhance the rights of person on a retired list or others who might become entitled to retired pay under some provision of law, or to provide an alternate method of computing retired pay if circumstances should make a change advantageous.”³⁰

Moreover, a RegAF Airman with 20 or more years of service must decide whether to apply for retirement under 10 U.S.C., Chapter 867 (i.e., a “regular” retirement). If the Airman fails to do so and simply allows his/her enlistment to expire or is discharged prior to submitting a retirement application, or whose retirement in lieu of (RETILO) discharge application is denied,³¹ the Airman

²⁵ AFI 36-3026_IP, Tables 1.7, 1.8, and 1.13; paragraphs 3.1.1, 13.3, and 16.1; and Attachment 1.

²⁶ As provided in 10 U.S.C. § 12371(f), retirement pay age is typically age 60, but may be advanced to a younger age through active duty service performed after 28 January 2008. Consequently, uniformed service members are “qualified” for retirement pay once they satisfy all service requirements and they are “entitled” to retirement pay upon reaching their retirement pay age. OpJAGAF 1990/22 (“The bottom line: from a legal standpoint, in order for the applicant to receive retired pay and the other entitlements and benefits normally associated with military ‘retirement,’ he does not have to be retired from the military. Once he attains age 60 and makes application for the Section 1331 pay, the other benefits can flow therefrom-- even if he is and remains in a ‘civilian’ status.”)

²⁷ OpJAGAF 1990/22 (10 U.S.C. § 12731, non-Regular retirement, does not require a military duty status in order to draw retirement pay); OpJAGAF 2004/20 (“We note that even if Major J’s [non-regular] retirement application is disapproved and subsequently a discharge board discharges him, he would be eligible for retired pay when he attains 60 years of age [IAW 10 U.S.C. § 12731]. Also, under DoD guidance prior to age 60, Major J [an ARC officer] would be entitled to an ID card as a former military member and eligible for the same privileges as Retired Reserve members. Thus, Major J’s retirement benefits would be virtually the same whether he is transferred to the Retired Reserves or discharged.” Accordingly, the opinion recommended Major J’s application to retire be approved, to avoid the time and expense associated with a discharge board that would ultimately lead to the same result.)

²⁸ 10 U.S.C. § 12740, *Eligibility: denial upon certain punitive discharges or dismissals*; OpJAGAF 2001/44; OpJAGAF 1988/45.

²⁹ See 10 U.S.C. § 12731(a)(4).

³⁰ B-147716, 41 Comptroller General Opinion 458.

³¹ This would apply to Airmen who do not have statutory protection, such as enlisted members, officers who do not have enough commissioned time to retire under 10 U.S.C. § 8911, etc.

loses his/her eligibility for an active duty retirement under 10 U.S.C., Chapter 867.³² Once that occurs, these Airmen will not be eligible to collect retired pay.

The different retirement statutes are not designed to allow members to pick and choose between retirement schemes.³³ Additionally, the Comptroller General has held:

10 U.S.C. § 3914³⁴ relates to retirement of enlisted members of the Regular Army, whereas by virtue of the provisions of 10 U.S.C. § 1331 (A) (3) and (4), 10 U.S.C. §§ 1331-1337³⁵ refers *exclusively* to the granting of retired pay to qualified members and former members of the National Guard and Reserve Components of the Military Forces who are not entitled to retired pay under any other provision of law.³⁶

(Emphasis added)

The Comptroller General further opined it appeared Congress intended to make 10 U.S.C. § 1331 applicable only to Reserve members and former members; accordingly, a Regular Army enlisted member cannot qualify for retirement under 10 U.S.C. § 1331 even if it could be said he otherwise met the conditions of that statute.³⁷

Just as it has been our opinion that the provisions of 10 U.S.C. § 12740 apply to “all reserve members who received a punitive separation after 10 February 1996,”³⁸ it is our opinion the provisions of 10 U.S.C. § 12731 apply to ARC members, not RegAF enlisted members, with more than 20 but less than 30 years of service.³⁹ Courts at various levels have similarly interpreted the provisions of Section 12731 to apply only to ARC members.⁴⁰

³² OpJAGAF 1988/45.

³³ OpJAGAF 1997/45 (“In our opinion, once a member completes 20 years of active duty service, he becomes entitled to retired pay under section 8911 within the intent of the law, even though he needs to make application and that application needs to be approved. In *Flurett v. United States*, 28 Fed. Cl. 153, (1993), the Federal Claims Court held that section 12731, ‘precludes its application to those entitled to retirement benefits under any other provision of law not merely those actually receiving other retirements.’ P.155. Even though the member in your scenario may elect not to apply for an active duty retirement, he would still be entitled to that retirement, precluding his right to a Reserve retirement.”)

³⁴ 10 U.S.C. § 3914, *Twenty to thirty years: enlisted members*, is the Army equivalent to 10 U.S.C. § 8914.

³⁵ 10 U.S.C. §§ 1331-1337 was the statutory predecessor to 10 U.S.C., Chapter 1223.

³⁶ B-147716, January 15, 1962, 41 Comp. Gen. 458.

³⁷ *Id.*

³⁸ OpJAGAF 2001-44.

³⁹ See OpJAGAF 1976/1 (“Since 10 U.S.C. 8914 applies solely to regular enlisted members, your question [whether non-regular Air Force enlisted personnel may qualify for retirement under that provision] is answered in the negative. The appropriate statutory authority for receipt of retired pay for nonregular service is Chapter 67 (Sections 1331 1337), Title 10, U.S.C.”); OpJAGAF 1996/32 (Finding the benefits contained in 10 U.S.C. § 1331 (now 12731) are “only available to Reservists who complete the service requirements of subsection (a)(2) [i.e., 20 ‘good years’, or 15 ‘good years’ in the case of section 12732a retirement] between 5 October 1994 and 30 September 1999.”); OpJAGAF 1996/127 (“Age and service requirements for Reserve retirements are governed by 10 U.S.C. 12731.”).

⁴⁰ See *Brookins v. United States*, 75 Fed. Cl. 133, 135 n.1 (2007) (“The referenced chapter 1223 is titled, ‘Retired Pay for Non-Regular Service,’ which provides for the retirement of reservists at age 60, if sufficient points have been earned.”); *Loeh v. U.S.*, 53 Fed. Cl. 2, 9 (2002) (“Plaintiff erroneously relies on 10 U.S.C. § 12731a, which applies to members of a reserve component of the armed forces.”); *Myers v. Ridgley*, 2017 Ark. App. 411 (Ct. App. Ark. 2017) (“An army reservist is generally entitled to receive reserve-duty retirement pay beginning at age sixty if he or she has accumulated a certain number of participation points over twenty years. See 10 U.S.C. §§12731 to

This legal framework presents a variance between RegAF and ARC enlisted members who have served more than 20 but less than 30 years, as ARC enlisted members meet the statutory requirements of Section 12731 to receive retired pay at age 60, whereas Congress has not carved out the same entitlements for RegAF enlisted members. We have long concluded that this apparent disparity in treatment may be due to the fact that retired pay for regular members is reduced compensation for reduced services for serving on the retired list, and being subject to recall.⁴¹

CONCLUSION

Unlike commissioned officers, RegAF enlisted members who have served more than 20 years but less than 30 years do not have the statutory right to retire in lieu of discharge. The provisions of Title 10, U.S.C., Section 12731 do not apply to RegAF members. Accordingly, an enlisted RegAF Airman, with more than 20 but less than 30 years of service, whose request to retire in lieu of administrative discharge is denied, will lose his/her retirement pay/benefits. Similarly-situated ARC enlisted Airmen meet the statutory requirements of Section 12731 and may apply to collect their retirement pay/benefits once they reach the eligibility age.

12733 (1997 & Supp. 2017). Active duty members are generally eligible for retirement pay after twenty years of creditable service, regardless of age. See, e.g., 10 U.S.C. § 1293 (2010).”)

⁴¹ See OpJAGAF 2001/44. See also *McCarty v. McCarty*, 453 U.S. 210, 222 (1981) (“Appellant correctly notes that military retired pay differs in some significant respects from a typical pension or retirement plan. The retired officer remains a member of the Army, see *United States v. Tyler*, 105 U.S. 244 (1882) and continues to be subject to the Uniform Code of Military Justice, see 10 U.S.C. § 802(4). See also *Hooper v. United States*, 164 Ct. Cl. 151, 326 F.2d 982, cert. denied, 377 U.S. 977 (1964). In addition, he may forfeit all or part of his retired pay if he engaged in certain activities. Finally, the retired officer remains subject to recall to active duty by the Secretary of the Army “at any time.” Pub. L. 96-513, § 106, 94 Stat. 2868. These factors have led several courts, including this one, to conclude that military retired pay is reduced compensation for reduced current services. In *United States v. Tyler*, 105 U.S., at 245, the Court stated that retired pay is ‘compensation ... continued at a reduced rate and the connection is continued, with a retirement from active service only.’”)