

## RETIREMENT

### Commissioned Warrant Officer Service Credit Towards 10 U.S.C. §8911

**Introduction.** You asked whether active service as a commissioned warrant officer counts toward the ten years of commissioned officer service required for retirement under 10 U.S.C. §8911. We conclude that it does.

**Law and Analysis.** 10 U.S.C. §8911 governs retirements for regular or reserve officers. Specifically, 10 U.S.C. §8911(a) states:

The Secretary of the Air Force may, upon the officer's request, retire a regular or reserve 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.

The question, which has come up from time to time, is: whether time spent on active-duty, as a commissioned warrant officer, counts toward the 10 years of active service as a commissioned officer.

10 U.S.C. §571 sets out warrant officer grades from W-1 to W-5. W-1 denotes the warrant officer grade, while W-2 through W-5 are chief warrant officer grades. In general, appointments to W-1 are made by warrant, while appointments to the higher grades are made by commission by the President. 10 U.S.C. §571(b). In other words, the W-2 to W-5 positions are "commissioned."<sup>1</sup>

10 U.S.C. §101(b) sets out definitions relating to military personnel that apply to Title 10. The three definitions relevant to this analysis are for the terms "officer," "commissioned officer," and "warrant officer." These definitions are:

"Officer" means a commissioned or warrant officer. (§101(b)(1)).  
"Commissioned officer" includes a commissioned warrant officer.  
(§101(b)(2)).  
"Warrant officer" means a person who holds a commission or warrant in a warrant officer grade. (§101(b)(3)).

Therefore, "officers" include commissioned officers and warrant officers. Commissioned officers, in turn, include commissioned warrant officers. Warrant officers include all commissioned warrant officers and "warranted" warrant officers. In other words, under the §101 definitions, a commissioned warrant officer is: 1) a warrant officer, 2) a commissioned officer, and 3) an officer. Obviously, this means commissioned warrant officers will be captured by a

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<sup>1</sup> Prior to 8 May 1986, no warrant officers received commissions – rather, they were all appointed under 10 U.S.C. §597.

wide range of Title 10 provisions insofar as particular sections apply to officers, commissioned officers, and warrant officers. This would explain why some provisions of Title 10 except out commissioned warrant officers from their application. For example, a Reserve officer's years of commissioned service explicitly do *not* include service as a warrant officer for purposes of Chapters 1407 and 1409 (failure of selection for promotion/involuntary separation and continuation on the reserve active-status list, respectively). 10 U.S.C. §14706. Other Title 10 provisions that explicitly exclude commissioned warrant officers are:

- Legislative adjustment of grades/dates of rank pursuant to the suspension of officer personnel laws during war or national emergency (10 U.S.C. §123(c))
- Basic requirements for appointment as a commissioned officer (10 U.S.C. §532(a))
- Service credit upon original appointment as a commissioned officer (10 U.S.C. §533)
- Procedures for separation of officers for substandard performance of duty (10 U.S.C. §1181)
- Mandatory retirement age (10 U.S.C. §1251)
- Retirement grade (10 U.S.C. §1370(a))
- Distribution of Army Reserve officers (10 U.S.C. §12007)
- Reserve commissioned officer grades (10 U.S.C. §12202)
- Appointment authority for commissioned reserve officers (10 U.S.C. §12203)
- Service credit upon original appointment as a commissioned reserve officer (10 U.S.C. §12207)
- Failure to comply with participation point requirements (10 U.S.C. §12642)
- Sanctuary (10 U.S.C. §12646)
- Retention of certain officers on active duty (10 U.S.C. §12647)
- Grade on transfer to retired reserve (10 U.S.C. §12771)

The exclusion of commissioned warrant officers from the scope of "commissioned officers" in select sections of Title 10 indicates that commissioned warrant officers *are* included in "commissioned officers" for the remainder of Title 10. This conclusion is bolstered by the fact that at least two sections of Title 10 have been amended to remove the words "commissioned warrant officer," because the term was considered surplus to words like "officer" and "warrant officer." For example, in 1956, the words "commissioned warrant officer" were omitted from the definition of "officer" in §101 as surplusage. The words were similarly removed from 10 U.S.C. §5589, since "warrant officer" includes commissioned warrant officers. Therefore, our conclusion is that commissioned warrant officers fall under the umbrella of commissioned officers throughout Title 10, except in the specific cases where commissioned warrant officers are explicitly excluded.

We have previously addressed a similar question in OpJAGAF 2002/27 which addressed whether or not prior commissioned warrant officer time was included in the years of "commissioned officer" service under 10 U.S.C. §14706 (computing time for purposes of continuation on the reserve active-status list and selective early removal). Section 14706 states a Reserve officer's years of service "include all service of the officer as a commissioned officer ... other than the following: service as a warrant officer ...." Since "warrant officer" includes

“commissioned warrant officer,” then commissioned warrant officer time is excluded from the §14706 calculation by the terms of §14706 itself (“other than the following: service as a warrant officer”). This opinion was part of an Air Force submission to an Air Force Board for Correction of Military Records case in which the BMCR agreed that all warrant officer time, commissioned or not, was excluded from the §14706 calculation. Docket No. 02-00089, Index Code 110.01.

Reading §8911 to count commissioned warrant officer time while reading §14706 to exclude it does result in different treatment for similarly situated servicemembers. For example, a member with four years of active commissioned warrant officer time, six years of non-warrant commissioned officer time and ten years of other service would be eligible to retire under §8911 (10 years commissioned service, 20 years total service). That same member, however, would only have 16 total years for purposes of determining when the member must be removed from the active-status list. In other words, the member could voluntarily retire before facing mandatory removal from the active-status list. There is nothing patently arbitrary about this distinction that would persuade us to read an exception into §8911.

We have been asked whether the case of *Duncan, et al. v. United States*, 949 F.2d 1134 (Fed. Cir. 1991) compels a different result. It does not. *Duncan* – and the case it was based on, *McCarron v. United States*, 12 Cl.Ct. 582 (1987), *aff’d*, 846 F.2d 78 (Fed.Cir. 1988) (Table), *cert. denied*, 488 U.S. 853 (1988) – dealt with servicemembers retiring *as warrant officers* (they had prior non-warrant commissioned officer time) and what grade they should be allowed to retire in. Essentially, the appellants in *Duncan* and *McCarron* argued they should be retired in their prior non-warrant officer grades under 10 U.S.C. §3911 (the Army analogue to the Air Force’s 10 U.S.C. §8911) rather than the warrant-officer retirement provision in 10 U.S.C. §1371. Section §1371 provides for advancing the retired grade of a retiring warrant officer to the highest grade satisfactorily held, as long as the warrant officer has 30 years of service. The appellants in those cases had less than 30 years and were largely based their arguments on repealed statutes under which all officers only required 20 years in order to retire in the highest grade held (*i.e.*, their commissioned officer grades). The courts rejected their claims, because the law clearly provided for different treatment of retiring warrant officers and retiring non-warrant officers.

One difference between *Duncan* and the case at hand is the grade held at the time of retirement. Here, we are dealing with a retiring commissioned officer and the computation of the amount of time required for that retirement. In *Duncan* and *McCarron*, the appellants were retiring warrant officers essentially arguing for a promotion that would only be available upon completion of 30 years’ total service. It should be noted that the *Duncan* and *McCarron* appellants were warrant officers in the first place because they had been passed over at least twice for promotion while they were serving as non-warrant commissioned officers – the appellants resigned their regular commissions in order to accept appointments as warrant officers. *Duncan*, 949 F.2d at 1135. Thus, those appellants were seeking to retire at a higher grade than what they held at retirement. Moreover, those appellants were appointed – not commissioned – warrant officers, rendering *Duncan* and *McCarron* even less applicable to the instant case.

A second key difference is that §§1370 and 1371 address *grade upon* retirement, not *eligibility for* retirement. The “general rule” for warrant officer retired grade, 10 U.S.C. §1371, explains

that warrant officers typically retire in the grade “held on the day before the date of his retirement.” 10 U.S.C. §1370 – the general rule for commissioned officer retirement grade is that they retire in the highest grade held – expressly excludes commissioned warrant officers, which means the status held upon retirement (*i.e.*, warrant officer or not) drives which set of rules to apply to the retirement. As such, once an officer is eligible to retire, §1370 determines the retirement grade for non-warrant officers and §1371 addresses the same for warrant officers. This is a practical approach to addressing retirement grade based upon status at the time of retirement. The two provisions do not, however, discuss credit for prior service in computing eligibility for retirement in the first place.

Therefore, a straightforward reading of 10 U.S.C. §§101, 1370-71, and 8911 is that commissioned warrant officer time is computed as commissioned officer time under 10 U.S.C. §8911. Although not controlling authority, it is worth noting that the Army, Navy and Marine Corps all include commissioned warrant officer time as commissioned officer time. 10 U.S.C. §6323(b)(2) directs the Navy and Marines to count any time served in grades over W-1 as commissioned officer time (this is echoed in regulations; see, e.g., OPNAVINST 1120.11, *Appointment of Regular and Reserve Officers in the Navy Judge Advocate General’s Corps*, and MCO P1400.31C, *Marine Corps Promotion Manual, Volume 1, Officer Promotions*, where “active commissioned service” is defined as service as “a commissioned officer or commissioned warrant officer”). Army-specific statutes and regulations do not specifically address the issue, but the Army Board for Correction of Military Records has held that commissioned warrant officer time applies to the ten years of commissioned officer time required for retirement under 10 U.S.C. §3911. Docket No. AR2001058576.

**Conclusion.** Under 10 U.S.C. §101, commissioned officers include commissioned warrant officers. Therefore, time served as a commissioned warrant officer counts as commissioned officer time under 10 U.S.C. §8911.