

Hipple



Comptroller General  
of the United States

Washington, D.C. 20548

B-229294.2

December 20, 1988

The Honorable Daniel K. Inouye  
United States Senate

Dear Senator Inouye:

This letter is in response to your inquiry of October 4, 1988, on behalf of Colonel Frank Slocum, U.S. Army Reserve (Retired) concerning the crediting of retirement points earned between the time of his mandatory removal date from active Reserve status on March 16, 1982, and his actual removal from this status on May 26, 1983. Actual removal was delayed due to administrative oversight. Under the circumstances presented here, the retirement points claimed by Colonel Slocum cannot be credited.

At the time of his mandatory removal, Colonel Slocum had more than 20 years of service and was otherwise entitled to actually receive retired pay when he reached 60 years of age on September 4, 1986. He received his letter of notification of eligibility for retired pay at age 60 in October 1969, but continued in the active Reserve up to and beyond March 16, 1982. In fact, he attended Reserve drills from March 17, 1982 through May 16, 1982, and is claiming 10 retirement points based on this attendance. After May 16, 1982, Colonel Slocum stopped attending drills but still claims 17 additional membership points as a participant in the active Reserve from March 17, 1982 through his actual transfer from the active Reserve on May 26, 1983. Other than the characterization of it as administrative error, the record is devoid of any explanation for the 14-month delay in transferring Colonel Slocum from the active Reserve. Colonel Slocum does not contest the time established for his mandatory removal.

On December 9, 1987, the Department of the Army Board for Correction of Military Records denied Colonel Slocum's request for the crediting of these points. It cited our decision in B-146603 (actually B-146608, Dec. 1, 1961, 41 Comp. Gen. 375) as the basis for denying retirement credit where a member participates beyond mandatory removal due to administrative oversight.

044236/137628

Colonel Slocum qualifies for retired pay for non-regular service under chapter 67 of title 10 of the United States Code, §§ 1331-1337. The question presented here, therefore, is not whether he should have been allowed to have these points considered for the purpose of determining entitlement to retired pay, but whether the points he earned after the date established for his mandatory removal can be considered under 10 U.S.C. §§ 1333 and 1401 in computation of his retired pay.

Chapter 67 of title 10, United States Code, 10 U.S.C. §§ 1331-1337, authorizes payment of retired pay for non-regular service, upon application, to a person who is at least 60 years of age and has performed at least 20 years of service as specified in that chapter. However, 10 U.S.C. § 1334 provides a limitation in that "service in an inactive status may not be counted in any computation of years of service under this chapter." Additionally, that section provides that services performed "after retirement (without pay) for failure to conform to standards and qualifications prescribed" under 10 U.S.C. § 1001 may not be counted in the computation of years of service under this chapter.

Among other provisions, 10 U.S.C. § 3851 contains statutory qualifications for retaining Reserve officers in the grade of colonel. It provides that each officer in that grade shall, 30 days after completion of 30 years of service or after the fifth anniversary of appointment in current grade, be transferred to the Retired Reserve, if qualified and he applies, or if he is not qualified or does not apply, be discharged from his Reserve appointment.

Implementing regulations are found in Army Regulation (AR) 140-10, chapter 3, section I, para. 3-3a(1)(b) (15 December 1978, as amended, 1 July 1981). Concerning Colonel Slocum's situation, we note subparagraph 3-6c of AR 140-10 specifically provides that a member "will not be credited any retirement points earned after the date removal action was required even though actual removal is effective at a later date."

In 41 Comp. Gen. 375, we held that when provisions of law required mandatory transfer from an active status, 10 U.S.C. § 1334 precludes the crediting of service performed subsequent to the mandatory removal date. An exception to this rule precluding service credit occurs only when the member is called to active duty or extended in the active Reserve by the affirmative and intentional action of the service secretary. Grahl v. United States, 336 F.2d 199, 204-206 (Ct. Cl. 1964); Fogg v. United States, 180 Ct. Cl. 605, 613 (1967); Colonel John F. McCormick, B-190830,

Feb. 13, 1978. Although Colonel Slocum requests that we change our position on this point, the holding in 41 Comp. Gen. 375 with which he disagrees was based on statutory provisions which have not changed materially in the intervening years. Accordingly, there is no basis for changing our position.

In the absence of a showing that the Secretary of the Army, or an official with proper authority, intends to retain an officer and affirmatively exercises this authority through some valid order, instruction, directive or regulation (specific or general in nature), retirement points earned after the date of mandatory removal cannot be credited to him. An unexplained administrative error resulting in a delay in transferring a member from the active Reserve is insufficient to demonstrate that an appropriate official intended to retain the member.

Since it appears that there was no intent to retain Colonel Slocum in an active status beyond his mandatory removal date, he may not be credited with retirement points for service performed subsequent to that date.

We trust this serves the purpose of your inquiry.

Sincerely yours,

*Milton J. Fowler*  
for Comptroller General  
of the United States