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DECISION



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

10,637

FILE: B-194342

DATE: July 2, 1979

MATTER OF: Colonel William N. Jackomis, USAF, Retired

Entitlement to Allowances for Quarters and Subsistence in Lump-Sum Payment Due Military Member Upon Retirement

DIGEST: An amendment to 37 U.S.C. § 501(b) deleted inclusion of allowances in lump-sum leave payments to military members upon discharge; however, a saving provision retained entitlement to include the allowances for leave accrued prior to the amendment. Although the claimant contends that the services' regulation determining when a member will be charged with use of preamendment leave frustrates congressional intent of the saving provision, in view of the services' authority to prescribe regulations for accrual and use of leave, the language and legislative history of the amendment, the regulation is proper.

A disbursing officer requests an advance decision as to whether basic allowance for subsistence (BAS) and basic allowance for quarters (BAQ) may be included in computing the lump-sum payment due Colonel William N. Jackomis, USAF, Retired, for 6 days' accrued leave. We conclude that BAS and BAQ may not be included in the computation.

The request for decision was presented by Major N.F. Heisey, USAF, Accounting and Finance Officer, Bolling Air Force Base, and has been assigned Submission No. DO-AF-1314 by the Department of Defense Military Pay and Allowance Committee.

Colonel Jackomis retired on January 31, 1979, at which time he received a payment for 60 days of accrued leave. The payment consisted of basic pay for all 60 days and BAS and BAQ for 54 of the days. Colonel Jackomis argues that he was entitled to be paid BAS and BAQ for all 60 days. The basis of his claim is that the Department of Defense (DOD) regulation governing entitlement to payment for accrued leave upon release from active duty is inconsistent with the underlying statutory scheme enacted by the Congress. Specifically, the question is whether the current DOD system frustrates the congressional

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intent manifested in the 1976 amendments to 37 U.S.C. § 501 which repealed the provision authorizing the inclusion of BAS and BAQ in the computation of lump-sum leave payments. See Department of Defense Appropriation Authorization Act, 1977, Public Law 94-361, § 304(c), July 14, 1976, 90 Stat. 925.

In deleting the allowances from lump-sum leave payments, Congress saw fit to preserve inclusion of the allowances in payments for leave accrued before the effective date of the amendments to 37 U.S.C. § 501. This was done by including a saving provision in the amendments; that is, § 304(h), Public Law 94-361, 90 Stat. 926 which states:

"(h) Notwithstanding the provisions of section 501(b)(1) of title 37, United States Code, as amended by subsection (c), and subject to the limitations prescribed in section 501(b)(3) of such title, as amended by subsection (c), any leave accrued by any member of the Army, Navy, Air Force, Marine Corps, Coast Guard, or National Oceanic and Atmospheric Administration prior to the first day of the second calendar month following the month in which this section is enacted shall, at the option of such member, be paid for on the same basis such leave would have been paid for under the provisions of section 501(b) of title 37, United States Code, on the day prior to the first day of the second calendar month following the month in which this section is enacted." (Emphasis added.)

In explaining the elimination of BAS and BAQ from the leave computation, and the saving provision, the Senate Armed Services Committee where those provisions originated, stated as follows:

"The committee amendment also deletes the authority for payment of the quarters and subsistence allowances as a part of terminal lump sum payment for unused leave for all military members. This is likewise not retroactive and only applies to leave accrued after the enactment of this provision. Thus,

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military members would continue to be paid the current authorized amounts for quarters and subsistence allowances in terminal lump sum payments for unused leave accrued prior to the date of enactment. Payment for all unused leave accrued after enactment would be limited to basic pay." S. Rep. No. 94-878, 94th Cong., 2d Sess. 135 (May 14, 1976).

Thus, for leave accrued prior to the amendment's effective date (September 1, 1976), a member is entitled to have included in the lump-sum payment basic pay, BAS and BAQ, whereas for leave accrued after the amendment's effective date, a member is entitled to have included only basic pay. Colonel Jackomis disagrees with the method devised by DOD to determine when leave should be charged to preamendment accruals. The specific DOD regulation is found in Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), Part Four, Chapter 4, paragraph 40402 (change 49, September 2, 1977) which states:

"Settlement for leave accrued as of 31 Aug. 1976 will include basic pay, BAQ, BAS, and PMA as appropriate. See Table 4-4-5. Settlement for leave accrued on and after 1 Sep 1976 will include basic pay only.

Example: On 31 Aug. 1976 a member has 65 days of accrued leave. The member takes leave from 5 through 24 Sep 1976 (20 days). As he accrued 2 days of leave 1-24 Sep 1976, he used 18 of his 65 days of saved leave reducing the saved balance to 47 days. Future leave accrued and used will be computed accordingly."

Colonel Jackomis carried over the allowable maximum of 60 days' accrued leave into the 1977 fiscal year (10 U.S.C. § 701(b) (1976)) which was all preamendment leave. Thus, he had a potential entitlement to receive a payment upon retirement which included 60 days' basic pay and 60 days' BAS and BAQ. However, at some point in a postamendment fiscal year prior to his retirement on January 29, 1979, he took 6 days more leave than he had accrued for that fiscal year. Accordingly, those 6 days were charged to his carried over amount which reduced it to 54 days. While Colonel Jackomis later increased

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his accrued leave balance to 60 days prior to his retirement, 6 of those days were postamendment accruals and, therefore, under paragraph 40402, DODPM, he was to be paid only basic pay for those 6 days upon his retirement.

The gist of Colonel Jackomis's argument is that it is inequitable that the loss of carried over leave with entitlement to inclusion of BAS and BAQ in his lump-sum payment may depend on when in the fiscal year a member takes leave. For example, the taking of extended leave in October 1976 (e.g. 15 days), the beginning of the fiscal year, would require the use of carried over leave, whereas taking 15 days' leave in September 1977, the end of the fiscal year, after having accrued additional leave, would not require the use of the carried over leave.

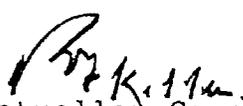
Colonel Jackomis takes issue with the regulation implementing the saving provision because of the potential for loss of entitlement to include BAS and BAQ solely due to when leave is taken. He questions whether the regulation frustrates the congressional intent behind the saving provision. He contends that only used leave which exceeds the amount which will be earned in a fiscal year should be charged to preamendment accruals. In effect, he is stating that advance leave should be given if the used leave is more than the member's current fiscal year accrual but less than the member's potential accrual for the fiscal year, thus preserving the leave previously accrued.

From the legislative history behind the amendments, it does not appear that Congress considered the precise question before us. However, both the saving provision and the legislative history base the determination as to whether allowances are to be included in the computation on when the leave is "accrued." The DOD regulations are consistent with the statute and legislative history in that regard. In addition, under 10 U.S.C. § 704 (1976) the Secretaries concerned have the authority to prescribe regulations providing for the computation of leave and the determination of the amount of leave to which members are entitled. See 33 Comp. Gen. 337 (1954).

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As a general rule, in the absence of a clear indication of legislative intent, the administration construction by the agency responsible for implementing the statutory scheme is deemed to be consistent with the congressional intent unless it can be characterized as arbitrary or inconsistent with the statutory purpose. See Forbes Federal Union v. National Credit Union Administration, 477 F. 2d 777 (10th Cir. 1973) and citations therein; see also Satty v. Nashville Gas Company, 522 F. 2d 850 (6th Cir. 1975).

In our view the DOD regulation is in accord with the language of, and rationally effectuates the statutory purpose behind the amendment and the saving provision. Accordingly, we conclude that Colonel Jackomis is not entitled to BAS and BAQ for the 6 days' leave he claims.


Deputy Comptroller General
of the United States