DECISION

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

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FILE: B-183576 DATE: February 14, 1979

MATTER OF: Department of Defense Military Pay and Allowance Committee Action No. 5427

DIGEST: 1. It is the policy of the General Accounting Office to decline ruling on matters in litigation. Hence, no action will be taken on questions of whether Variable Reenlistment Bonus payments may be made to members of the Armed Forces who (1) cancelled enlistment extension agreements on the basis of erroneous advice that they were not eligible for the previously authorized Variable Reenlistment Bonus, 37 U.S.C. 308 (1970), and (2) executed new enlistment extension agreements in order to become eligible for the new Selective Reenlistment Bonus, 37 U.S.C. 308 (1976), since those questions are the subject of pending litigation in the Federal courts.

2. Selective Reenlistment Bonus payments for extensions of enlistments, authorized by 37 U.S.C. 308 (1976), must be based on the award level multiplier in effect on the date the extension agreement is executed rather than on the date the extension agreement becomes operative, in accordance with the Supreme Court's decision in United States v. Larionoff, 431 U.S. 864 (1977), concerning the similar Variable Reenlistment Bonus. Comptroller General decisions to the contrary should no longer be followed.

3. If an individual enlists in a Reserve component under the Delayed Entry Program with a concurrent commitment to serve in a Regular component for a period of at least 4 years in a skill designated as critical, the award level of the enlistment bonus authorized by 37 U.S.C. 308a (1976) must be fixed on the date of enlistment in the Delayed Entry Program, rather than on the date of entry on active duty. Payment of the bonus must, however, be contingent on the member's qualifying and serving in his designated military specialty, United States v. Larionoff, 431 U.S. 864 (1977); 52 Comp. Gen. 105 (1972).

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This action is in response to a letter dated May 11, 1978, from the Assistant Secretary of Defense (Comptroller) requesting an advance decision concerning the payment of enlistment and reenlistment bonuses to members of the Armed Forces in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 542, enclosed with the submission.

Background

In the Committee Action it is noted that former 37 U.S.C. 308(a) and (b) provided for a Regular Reenlistment Bonus (RRB) for a first reenlistment or extension of enlistment, determined by multiplying an enlistee's monthly pay at the time of the expiration of his initial enlistment by the number of years agreed to in the reenlistment or extension agreement. That bonus program was augmented in 1965 through the enactment of section 3 of Public Law 89-132, 79 Stat. 545, 547, by the Variable Reenlistment Bonus (VRB) program (37 U.S.C. 308(g), now repealed). The purpose of the VRB program was to encourage members with skills that were in short supply ("critical skills") to reenlist or extend. The VRB was to be a multiple of the RRB. The multiple was to be determined under prescribed regulations by the critical need for the skill and was to be revised from time to time. The statutory authority for the VRB program was repealed effective June 1, 1974, by the Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Public Law 93-277, 88 Stat. 119. The VRB and RRB were thereby replaced with the current Selective Reenlistment Bonus (SRB) program, now codified in 37 U.S.C. 308 (1976).

It is further noted in the Committee Action that regulations governing individual eligibility for the VRB were set forth in Department of Defense Instruction 1304.15, dated September 3, 1970. Those regulations, as applied, required calculation of the VRB using the multiple in effect when the reenlistment or extension became operative. Thus, it is said, an enlistee who signed a 2-year extension for advanced training in a critical skill some time prior to the expiration of his current enlistment would sometimes find that when his extension became operative, his skill was no longer critical and his multiple was zero, or the multiple in effect when he executed his extension agreement, e.g., four, was reduced when his extension

became operative, e.g., two. Also, an enlistee who began to serve a 2-year extension in a critical skill after June 1, 1974, which extension was agreed to prior to that date, found himself disentitled by the repeal of the VRB program when his extension became operative.

It is further noted that this situation gave rise to the case of United States v. Larionoff, 431 U.S. 864 (1977), wherein the United States Supreme Court concluded that the regulations were contrary to the manifest purposes of Congress in enacting the VRB program, and hence invalid, insofar as they required the amount of a VRB to be determined by reference to the award level in effect at the time the member began to serve the extension, rather than at the time he agreed to it. The Supreme Court ruled that because Congress intended to provide at the reenlistment decision point a promise of a reasonably certain and specific bonus for extending service in the Armed Forces, the members in the affected class were entitled to VRB's determined according to the multiples in effect at the time they agreed to extend their enlistments, not the award levels in effect when the extension agreements became operative.

It is indicated that the Supreme Court's ruling required a recomputation of many thousands of VRB entitlements. That ruling has also given rise to a number of questions concerning bonus payments.

First of all, it is said that after June 1, 1974, the date the VRB program was replaced by the SRB program, a significant number of enlisted personnel opted for an SRB by terminating their original extension agreements and executing reenlistment contracts for 3 or more years, or executing a second extension agreement. Some portion of this group received an SRB less than the VRB and RRB they would have received but for the fact that their original extension agreements were cancelled. A question thus arises as to whether authority exists to pay such members VRB and RRB, and if so, by what computation formula.

Secondly, it is said that the objective of the SRB is essentially the same as the VRB, that is, to increase the number of reenlistments in critical military specialties and attain adequate career manning in those designated specialties. In light of the Supreme Court's ruling in United States v. Larionoff, supra, a question has arisen as to whether SRB payments for extensions of enlistments should also be based on the date the extension agreement is executed.

Third, it is noted that under 37 U.S.C. 308a (1976), a person who initially enlists in an Armed Force for a period of at least 4 years, in a skill designated as critical, may be paid an enlistment bonus in an amount prescribed by the Secretary of Defense, but not more than $3,000. It is said that this enlistment bonus is a recruiting incentive offered to influence individuals to enter the service concerned either by immediate entry on active duty or through the Delayed Entry Program (DEP). Under the DEP, an individual may delay entry into the Regular component for a specific period of time by enlisting in a Reserve component. Questions have arisen as to the proper treatment to be accorded an individual entering the DEP for ultimate service in a designated critical skill, since the bonus amount may change or the skill may even be removed from the critical skill list between the time the individual enters the DEP and the time he actually enlists in the Regular component of the service concerned. Except for the Army, the services have taken the position that entitlement to the bonus may vest as of the date the individual enters the DEP because, at that time, he has committed himself to serve and been promised a bonus after meeting all other prerequisites. The Army position, however, is that entitlement to the bonus should be fixed on the date the individual enlists in the Regular component of the service concerned, contingent upon the successful completion of advanced training.

In view of the foregoing, five specific questions relating to the VRB, the SRB, and the enlistment bonus have been submitted for resolution.

I. Variable Reenlistment Bonus

The first question presented in the submission is:

"1. Is a member in the following circumstances now entitled to a Variable Reenlistment Bonus (VRB) to the extent that it exceeds the Selective Reenlistment Bonus (SRB), 37 U.S.C. 308, paid to him?

"a. On 30 April 1974 he executed an extension of enlistment for two years to become operative on 1 October 1974 and his rating or Navy Enlisted Classification (NEC) was VRB eligible at the time he executed the extension.

"b. On 1 October 1974 he cancelled his extension to either execute a new agreement to extend his enlistment or to reenlist, in either case, to become SRB eligible.

"c. If the answer to the aforesaid question is affirmative, would the VRB entitlement be based on the original two year extension (30 April 1974), or the number of years agreed to in order to become SRB eligible?"

Subsequent to our receipt of the request for an advance decision, we were informed by the Department of Justice that the legal issues presented in the first question are a subject matter of litigation in the case of James Thomas Edmonds, Jr., et al. v. United States, a class action filed in the United States District Court, District of South Carolina, Civil Action No. 75-1624, and several related cases. In particular, we have been advised that there has been no ruling on the issue of whether RRB and VRB payments may be made on the basis of an extension of enlistment that was cancelled in the manner described, or the issue of whether members who opted for an SRB in these circumstances may all properly be regarded as belonging to one class or subclass. We have been further advised that the litigation may be protracted.

We have also received and considered a brief primarily concerning question "1", submitted by attorneys representing plaintiffs in this litigation.

It is a longstanding rule that this Office will not act on matters which are in the courts during pendency of litigation. Since the eventual outcome of the litigation may fully resolve the first question submitted, we decline to answer that question at this time. If, at such time as these court cases have been finally decided, it is the view of the Department of Defense that the issues presented by the first question have not been fully resolved, the question may be resubmitted to this Office for further consideration.

II. Selective Reenlistment Bonus

The second and third questions presented in the submission are:

"2. Under Larionoff, should SRB payments for extensions of enlistments be based on the multiple in effect on the date the extension agreement is executed, or on the date the extension agreement becomes operative?

"3. If it is determined that SRB payments should be based on the date the extension agreement is executed, would such a determination have a retroactive effect to the inception of the SRB program (i.e., 1 June 1974)?"

Subsection 308(a) of title 37, United States Code (1976), provides as follows with respect to the payment of the SRB:

"(a) A member of a uniformed service who--

"(1) has completed at least twenty-one months of continuous active duty (other than for training) but not more than ten years of active duty;

"(2) is designated as having a critical military skill by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy;

"(3) is not receiving special pay under section 312a of the this title; and

"(4) reenlists or voluntarily extends his enlistment in a regular component of the service concerned for a period of at least three years;

may be paid a bonus, not to exceed six months of the basic pay to which he was entitled at the time of his discharge or release, multiplied by the number of years, or the monthly fractions thereof, of additional obligated service, not to exceed six years, or $15,000, whichever is the lesser amount. Obligated service in excess of twelve years will not be used for bonus computation."

Subsection 308(e) further provides that the SRB program shall be administered under regulations prescribed by the Secretary of Defense for the Armed Forces under his jurisdiction, and by the Secretary of

Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

Implementing regulations issued by the Secretary of Defense are contained in Department of Defense (DOD) Instruction 1304.22, June 3, 1975, as amended. Section III of Enclosure 2 to DOD Instruction 1304.22 (change 1, December 1, 1976) provides in pertinent part as follows with respect to SRB eligibility:

"III. Criteria for Individual Member Eligibility

"A. General Eligibility. An enlisted member is eligible to receive a Selective Reenlistment Bonus if he meets all of the following conditions:

* * * * *

"4. Attains eligibility prior to the effective date of termination of awards in any military specialty designated for termination of award. (Member must attain eligibility prior to the effective date of a reduction of award level to be eligible for the higher award level. * * *")

And further with respect to the reduction or termination of SRB:

"E. Maintenance, Reduction, and Termination of Awards

* * * * *

"When a military specialty is designated for reduction or termination of award, an effective date for reduction or termination of awards shall be established and announced to the field at least 30 days in advance. All awards on or after that effective date in a military specialty designated for reduction of award will be at the level effective that date. No new awards will be made on or after the effective date in a military specialty designated for termination of award."

Those provisions are nearly identical to the language of the VRB regulations scrutinized in United States v. Larionoff, supra, in which the Supreme Court concluded (at page 877, 431 U.S.):

> "* * * We therefore hold that insofar as the Defense Department regulations required that the amount of the VRB to be paid to a service member who was otherwise eligible to receive one be determined by the award level as of the time he began to serve his extended enlistment, they are in clear conflict with the congressional intention in enacting the VRB program, and hence invalid. Because Congress intended to provide at the re-enlistment decision point a promise of a reasonably certain and specific bonus for extending service in the Armed Forces, Larionoff and the members of his class are entitled, as the Court of Appeals held, to payment of VRB's determined according to the award levels in effect at the time they agreed to extend their enlistments."

As is noted in the Committee Action, the SRB was established to accomplish the same purpose as the VRB, that is, to induce members with critical skills to extend their service in the Armed Forces. It is therefore our view that the Supreme Court's reasoning in the Larionoff case is applicable to the SRB program. While we have previously held differently concerning the VRB, to the extent our decisions conflict with the Supreme Court's decision in Larionoff, our decisions should no longer be followed. See for example, 50 Com. Gen. 515, 518 (1971), and B-175846, October 4, 1972. Accordingly, in answer to question "2", SRB payments for extensions of enlistments must be based on the multiple in effect on the date the extension agreement is executed rather than on the date the extension agreement becomes operative.

Concerning question "3", the construction of the SRB statute provided in answer to question "2" is an original construction applicable from the effective date of the statute. Accordingly, question "3" is answered in the affirmative.

III. Enlistment Bonus under the Delayed Entry Program

The fourth and fifth questions presented in the submission are:

"4. Does a member's entitlement to an enlistment bonus under 37 U.S.C. 308a become fixed on (a) the date the member enlists in a reserve component under the Delayed Enlistment Program (DEP), or (b) the date the member enlists in the regular component of the service concerned, or (c) whichever of those two dates is more advantageous to the member?

"5. Would the answer to Question 4 be the same if the individual entered the DEP prior to the inception of the bonus program and enlisted in the regular component of the service concerned after the bonus program had been implemented?"

Under delayed enlistment or entry programs, a qualified individual is generally authorized to enlist in a Reserve component of one of the Armed Forces with a concurrent commitment to enter on active duty in a Regular component at a future date, at which time he will receive specialized training in the career field of his choice and serve in that career field upon the successful completion of training. In general, service regulations provide that in the event the enlistment option, school course, or training for which an applicant enlists is cancelled or for some other reason becomes unavailable, the applicant may secure a discharge from the DEP. Otherwise, however, the applicant is generally obligated to enter on active duty, and he may be subject to disciplinary action under the Uniform Code of Military Justice if he fails to honor his obligation in this respect.

Subsection 308a(a) of title 37, United States Code (1976), provides as follows with respect to the payment of an initial enlistment bonus:

"(a) Notwithstanding section 514(a) of title 10 or any other law, under regulations prescribed by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a person who enlists in an armed force for a period of at least four years in a skill designated as critical or who extends his initial period of active duty in that armed force to a total of at least four years in a skill designated as critical, may be paid a bonus in an amount prescribed by the appropriate Secretary, but not more than $3,000. The bonus may be paid

in a lump sum or in equal periodic installments, as determined by the appropriate Secretary."

Neither DOD Instruction 1304.22 nor the other Defense Department directives governing payment of the enlistment bonus prescribe a method for computing the award level for individuals who enlist through the DEP. However, section XII of Army Regulation 601-210 (change 6, July 28, 1976) directs that the following provision be included in the Statements of Enlistment of an individual who becomes a member of the Army Reserve through the DEP:

"If I subsequently enlist in the Regular Army for an option for which an enlistment bonus is authorized, has been authorized in the past, or may be authorized in the future, I will be entitled to the bonus only if it is authorized at the time of my enlistment in the Regular Army."

Thus, as is noted in the Committee Action, under this procedure an individual who enters the Army Reserve through the DEP, chooses an option for which an enlistment bonus is then authorized, and incurs an active duty obligation of at least 4 years, may subsequently receive a bonus in a reduced amount or no bonus at all. On the other hand, it is also possible under these procedures that an individual who enlists in the Army through the DEP may later receive a totally gratuitous bonus award which was not authorized at the time he made his service commitment.

In our view, the rationale of the Larionoff case is for application in this situation, i.e., the award level of the enlistment bonus must be fixed on the date the member enlists in a Reserve component under the DEP with a concurrent commitment to serve for a period of at least 4 years in a skill designated as critical. Hence, a subsequent increase or decrease in the award level for the critical skill may not operate to increase or decrease the amount of the bonus payable to the member after he has obligated himself to serve the required 4 years of active duty. Any regulatory provision to the contrary is therefore ineffective and invalid. Of course, payment of the enlistment bonus thus fixed in amount must also be contingent on the member qualifying and serving in his designated military specialty. See 52 Comp. Gen. 105 (1972). Question "4' is answered accordingly.

It is recognized that the enlistment bonus procedure which is determined to be invalid has been included in the Statement of Enlistment which individuals entering the Army's DEP are required to sign. However, as stated in United States v. Larionoff, supra, at page 869, 431 U.S., the entitlement of service members to pay and allowances depends upon law and regulation and not on ordinary contract principles. Thus, inclusion of the wording in question in an enlistment document signed by the member provides no basis for computing payments in a manner not permissible under the controlling statute.

Consistent with our answer to question "4," question "5" is answered in the affirmative. If a member entered the DEP prior to the inception of the bonus program, he could gain no entitlement to an enlistment bonus simply by later entering on active duty as he was already obligated to do anyway under the terms of the DEP enlistment. In that situation, the bonus could not have been an inducement to enlist; hence, payment of the bonus would constitute a totally gratuitous and improper award. Compare United States v. Larionoff, supra, at page 876, 431 U.S.

Conclusion

It is our view that the Supreme Court's reasoning with respect to the VRB in the Larionoff case is for application to the SRB and enlistment bonus programs authorized by 37 U.S.C. 308 and 308a, and we therefore hold that SRB and enlistment bonus payments must be based on the award levels in effect on the date a member executes the appropriate enlistment, reenlistment, or extension documents in order to qualify for that particular bonus. We recognize that this ruling may require a recomputation of some SRB and enlistment bonus payments that have been made in the past, and that it may be determined that some members are in debt on account of erroneous overpayments of bonus monies received. Such members may receive consideration for waiver of the claims against them, pursuant to 10 U.S.C. 2774 (1976).

R.F.K.11m

Deputy Comptroller General
of the United States