

DECISION

24170
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-206133

DATE: February 1, 1983

MATTER OF: Captain John B. Turpit, USMCR, Retired

- DIGEST:
1. Reserve officer who is placed on temporary disability retired list with entitlement to retired pay after serving over 5 years of continuous active duty is not entitled to readjustment pay. Readjustment pay does not accrue to a Reserve officer who serves over 5 years of continuous active duty if upon release from active duty the member is immediately eligible for retired pay based entirely on his military service which includes retired pay for a member on the temporary disability retired list.
 2. During the time a Reserve officer is on the temporary disability retired list, he is not in an active duty status. Therefore, when the member is declared fit for duty and is removed from the retired list, he must begin a new period of 5 continuous years of active duty to qualify for readjustment pay.

The Disbursing Officer, United States Marine Corps Finance Center, Kansas City, Missouri, requests an advance decision whether Captain John B. Turpit, Marine Corps Reserve, Retired, is entitled to readjustment pay. Since Captain Turpit received disability retired pay based on and immediately following his period of active duty for which he would have qualified for readjustment pay, he is statutorily precluded from receiving readjustment pay.

Background

The case was originally forwarded to us in January 1982 by the Department of Defense Military Pay and

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Allowance Committee under submission number DO-MC-1383. While the case was under active consideration, we were advised by the Department of Justice that Captain Turpit had filed an action in the Court of Claims (now the United States Claims Court) on March 31, 1982, on the identical issue presented to us for resolution. Accordingly, we declined to issue a decision since it is our long-standing policy not to issue an advance decision on a claim pending in the Court of Claims. 33 Comp. Gen. 479, 481 (1954). The reason for this policy is that the eventual outcome of the litigation likely will resolve fully the issue presented. See 58 Comp. Gen. 282, 286 (1979).

However, in this case a stay was granted in the court proceedings, and the presiding judge has indicated that the proceedings were held in abeyance pending our decision. When a court indicates its interest in receiving our views on a matter before it, then the matter may be appropriate for our consideration. See Matter of Thomas Construction, Inc., 55 Comp. Gen. 139, 142 (1975). In the circumstances of Captain Turpit's case we find that issuance of a decision is appropriate.

Facts

Captain Turpit was ordered to active duty on January 6, 1969, and his expiration of active service date was April 15, 1974. He served on active duty and was notified by the appropriate official that he would be released from active duty on April 15, 1974, as scheduled. Captain Turpit sought to avoid his release from active duty, and he requested augmentation into the regular Marine Corps or retention on active duty as a Reserve officer. Both alternative requests were denied by the Commandant of the Marine Corps on February 4, 1974.

Since the member was a Reserve officer who had served on active duty continuously for over 5 years and who was being released from active duty involuntarily,

he initially was determined to be entitled to readjustment pay upon release under the provisions of 10 U.S.C. § 687 (1976). Prior to his scheduled release, however, Captain Turpit was determined not to be qualified for release due to a medical condition. Consequently, the orders for his release from active duty on April 15, 1974, were revoked and he was ordered retained on active duty at the convenience of the Government, pending information of his medical conditions.

Subsequently, under 10 U.S.C. § 1202, the Secretary of the Navy determined him to be physically unable to perform the duties of his grade and he was rated as being 30 percent disabled under the standard schedule of rating disabilities in use by the Veterans Administration. Based on this disability rating Captain Turpit was released from active duty on August 31, 1974, and transferred to the temporary disability retired list on September 1, 1974.

As a member on the temporary disability retired list, he was required to take a physical examination every 18 months. 10 U.S.C. § 1210(a) (1976). Following his March 1976 physical examination, he was ordered to appear before a physical evaluation board in November of 1976. This proceeding resulted in the member being found fit for duty on January 27, 1977. Consequently, his name was removed from the temporary disability retired list on April 6, 1977.

Pursuant to his request Captain Turpit was reappointed in the Marine Corps Reserve on April 7, 1977. He requested augmentation into the Regular Corps or to be returned to active duty as a Reserve officer, but both requests were denied. On June 1, 1980, he was transferred to the retired Reserve list without pay and allowances since he apparently did not have the age and service requirements to qualify for retired pay at that time.

During the period from April 7 to August 30, 1977, Captain Turpit was paid disability retired pay which payment was erroneous since his entitlement to disability retired pay ceased upon his removal from the retired list on April 6, 1977. See 10 U.S.C. §§ 1210 and 1211(c) (1976). Accordingly, he became indebted

to the Government for the erroneous retired pay he received in the amount of \$3,436.60. By letter received at the General Accounting Office in May 1978, Captain Turpit sought waiver of this debt. See 10 U.S.C. 2774 (1976). This request was denied by our Claims Group by letter Z-2801689-121, August 9, 1979. Also, although not decided by the Claims Group, Captain Turpit for the first time to our knowledge raised the issue of his entitlement to readjustment pay in this letter.

Captain Turpit next requested readjustment pay, through his attorney, by letter of June 27, 1980, to the Commandant of the Marine Corps which started in motion the process leading to this decision.

Discussion

A Reserve officer in the Marine Corps, such as Captain Turpit, who had completed 5 years of continuous active duty and was not accepted for an additional tour of duty for which he volunteered was entitled to readjustment pay, under certain conditions. 10 U.S.C. 687 (1976). Readjustment pay is an entitlement given by Congress to encourage Reservists to make a career of military service by providing a financial cushion to facilitate their readjustment to civilian pursuits if and when, after having been out of the civilian workforce for a substantial period of time, they are released from active duty against their wishes. See, e.g., Florence v. United States, 662 F.2d 751 (Ct. Cl. 1981); and Matter of Hughes, 57 Comp. Gen. 451, 453 (1978). In providing this entitlement, Congress limited it by making it inapplicable to a member who "upon release from active duty, is immediately eligible for retired pay or retainer pay based entirely on his military service." 10 U.S.C. § 687(b)(4).

Had Captain Turpit qualified for readjustment pay at the time of his intended release in April 1974, he would have received a one-time payment of 2 months' basic pay for each year of active service. Based upon the pay rates in effect at that time he would apparently have received about \$10,500.

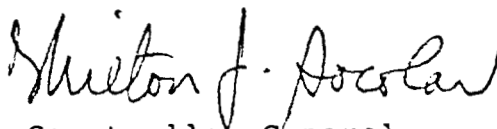
The purpose of the temporary disability retired list was to authorize a limited retirement status for

military members on active duty who become unfit to perform such duty because of a physical disability incurred while entitled to basic pay, but where the disability was not deemed permanent. Retention on the list may not exceed 5 years. See 53 Comp. Gen. 971, 974 (1974). While on the temporary disability retired list, Captain Turpit was in a retired status, not in an active status. See 31 Comp. Gen. 213 (1951). His pay entitlement continued at 30 percent of his final active duty pay for the 3 years he was on the temporary disability retired list. Based on pay rates in effect he would have received pay in monthly installments amounting to about \$12,000.

The question is whether, upon release from active duty for disability and not for years of service the retired pay entitlement must be considered "retired pay based entirely on military service." As indicated above our review of the legislative history of the readjustment pay provisions shows that Congress intended to encourage reservists to make a career of military service by providing a measure of financial protection for them in case they were involuntarily released from the service.

If we adopted the view that readjustment pay was payable to Major Turpit when he was placed on the temporary disability retired list we would also authorize payment of readjustment pay to all reservists retired for disability including those retired on permanent disability with retired pay at rates of up to 75 percent of the individual's final active duty pay. This result was not intended by the Congress in enacting the readjustment pay provisions. Further, we do not read the wording of the statute as requiring this result.

Accordingly, Captain Turpit is not entitled to readjustment pay based on his placement on the temporary disability retirement list. When he was later released from service after being removed from the temporary disability retired list he did not qualify for readjustment pay because he was not being released after a period of 5 years of continuous active duty.

for 
Comptroller General
of the United States