DECISION

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

26313

FILE: B-210827 DATE: September 21, 1983

MATTER OF: Sergeant Franklin L. Secrest, USMC

DIGEST:

1. In Matter of Timm, B-206550, October 27, 1982, we held that notwithstanding agency regulations, no recoupment action need be taken when a service member who received a regular reenlistment bonus was discharged early for the purpose of immediate reenlistment for which a selective reenlistment bonus was payable. We effectively held that the recoupment regulations were inconsistent with the governing bonus statute and were therefore void effective on the date of enactment of the statute in 1974. Therefore, the Timm decision is to be applied retroactively, and a service member who had an improper recoupment action taken against him prior to the Timm decision may be refunded the amounts recouped.

2. When a Marine serving in an enlistment period for which he received a regular reenlistment bonus is discharged early for the purpose of immediate reenlistment for which no reenlistment bonus is payable, no bonus recoupment action is to be taken so long as the term of the reenlistment following the early discharge includes the remaining period of service in the prior enlistment. Any regulation to the contrary is invalid.

This action is in response to Department of Defense Military Pay and Allowance Committee submission DO-MC-1415, which is a request for an advance decision from the Disbursing Officer of the United States Marine Corps Base, Camp Pendleton, California. The decision requested is whether, under our holding in Matter of Timm, B-206550, October 27, 1982, Sergeant Franklin L. Secrest, USMC, may be paid the amount he has claimed as a refund of a portion of a regular reenlistment bonus he received for a 2-year enlistment

which was then recouped when he was separated early to reenlist immediately for 4 years for which he received a selective reenlistment bonus. Since the decision in the Timm case came after the recoupment action taken against Sergeant Secrest, the first question presented is whether the Timm case is to be given retroactive effect, and if so, whether other service members in Sergeant Secrest's situation must each make a separate claim in order to become eligible for a refund. The second question is whether a portion of a regular reenlistment bonus should be recouped when a member is separated early to reenlist immediately for an enlistment for which he does not receive a selective reenlistment bonus.

In the Timm case we effectively held that the regulations requiring recoupment were inconsistent with the governing statute and were therefore void, so that the Timm case is to be applied retroactively. Hence, we conclude that Sergeant Secrest is entitled to a refund of the recouped portion of his bonus. Other service members similarly situated may be treated as a class if that is determined to be preferable from an administrative standpoint, but refunds will be payable on an individual basis and will be subject to being barred by the 6-year statute of limitations, 31 U.S.C. § 3702(b)(1). Regarding the second question, we conclude that no recoupment action may be taken if the term of the reenlistment following the early discharge includes the remaining period of service in the prior enlistment.

Sergeant Secrest reenlisted in the Marine Corps for 2 years on April 20, 1981, for which he was paid a regular reenlistment bonus of $1,593.20. On April 20, 1982, he was discharged from that enlistment for the purpose of immediate reenlistment for 4 years for which a selective reenlistment bonus was payable.

Because his discharge was more than 3 months prior to the normal expiration date of the enlistment for which he received the bonus, the Marine Corps recouped $794.29 representing the unearned portion of the regular reenlistment bonus. Payment of the selective bonus for the new reenlistment period of 4 years apparently was reduced by 25 percent to reflect the 1-year period which he had yet to serve in the previous enlistment, since payment of that bonus is

computed to exclude that remaining period of service. Effectively, these two actions denied Sergeant Secrest any bonus, regular or selective, for the period of service from April 21, 1982, to April 20, 1983.

A review of the Timm case reveals that the general factual situation there is virtually identical to the one here. That is, Sergeant Timm reenlisted in the Marine Corps for 5 years on December 9, 1975, and received a $2,000 regular reenlistment bonus. On March 7, 1980, he was discharged for immediate reenlistment for a 6-year period for which a selective reenlistment bonus was payable.

Since Sergeant Timm was discharged more than 3 months prior to the normal expiration of his enlistment for which he received the regular reenlistment bonus, a disbursing officer asked whether $301.08, the unearned portion of this bonus, had to be recouped. Apparently, the disbursing officer realized that if recoupment action were taken Sergeant Timm would receive no bonus, either regular or selective, for his 9 months of service from March 8 to December 7, 1980. This conclusion arose since his selective reenlistment bonus for the new reenlistment period was reduced by $1,961.03 to cover the 9-month period that he would not serve in the previous enlistment because payment of the selective bonus is computed to exclude that period of service.

Both Sergeant Timm and Sergeant Secrest apparently received a regular reenlistment bonus under 37 U.S.C. § 308 (1970). This law authorized both a regular reenlistment bonus and a variable reenlistment bonus. 37 U.S.C. § 308(a) and (g) (1970). The purpose of the regular reenlistment bonus was to enable the services to maintain a body of trained personnel and to reduce training costs. The purpose of the variable bonus was to provide an additional financial incentive to induce reenlistments or extensions of enlistments of members who possessed critical military skills in short supply.

Under 37 U.S.C. § 308(e) (1970) recoupment of any bonus paid under section 308, including regular or variable bonuses, was required anytime a member who had received such a bonus was "voluntarily, or because of his misconduct" discharged prior to the expiration of the enlistment period for

which the bonus was paid. Recoupment was for a pro rata amount of the bonus based on the unexpired part of the enlistment period for which the bonus was paid.

In the Timm case, we noted that the statutory authority for the regular and variable bonus programs was repealed effective June 1, 1974, with certain members who were on active duty on that date retaining eligibility to receive those bonuses. See the Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Public Law 93-277, 88 Stat. 119. Apparently Sergeant Timm was one of the members whose eligibility continued, as was Sergeant Secrest. The 1974 act also replaced the previous bonus program with the current selective reenlistment bonus program codified in 37 U.S.C. § 308 (1976). The new bonus program was established to continue in a different manner a program of providing a financial inducement to members of the Armed Forces who have critical military skills to reenlist or extend their enlistments. The selective bonus is computed only on the basis of "additional obligated service." 37 U.S.C. § 308(a)(1) (Supp. IV 1980). Provisions for recouping a selective reenlistment bonus from a member who fails to serve the full enlistment period are similar to those which applied to the regular and variable bonuses. 37 U.S.C. § 308(d) (Supp. IV 1980).

We also noted in the Timm decision that subparagraph 10942a of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) provides that if a service member who receives a regular reenlistment bonus is discharged early for the purpose of reenlisting, a pro rata portion of the bonus must be recouped at the time of discharge. We recognized that one of the obvious purposes of this provision was originally to prevent the receipt of two bonuses for the same period of service. We further recognized, however, that the 1974 revisions in the statutory law made this provision of regulation inappropriate in the case of a member who receives an early discharge and a selective reenlistment bonus because only "additional" obligated service is counted in computing the selective reenlistment bonus. Thus, we concluded that there was no statutory basis for taking recoupment action in a case such as that of Sergeant Timm or Sergeant Secrest, since the member's selective reenlistment bonus is computed to exclude a period

equal to the unexpired term of the prior enlistment. The member performs the full period of service for which the regular bonus was paid without receiving credit under the selective bonus program for that service, so that no recoupment of any portion of the regular bonus is warranted under 37 U.S.C. § 308(d).

Our decision in the Timm case was essentially a holding that as applied to Sergeant Timm's situation the recoupment provisions of subparagraph 10942a of the DODPM were inconsistent with the governing provisions of 37 U.S.C. § 308 and hence were invalid. This was a case of first impression or original construction, since we had not previously had the occasion to consider the issue presented.

Generally, decisions of our Office involving the original construction of a statute apply retroactively to the date that the statute first went into effect. See 40 Comp. Gen. 14, 17-18 (1960); and 39 id. 455, 456 (1959). Compare 60 id. 285, 288 and 357, 359-360 (1981). As an exception to this rule we have occasionally given only prospective effect to such decisions when they resulted in the voiding of administrative regulations, but this was done solely for the limited purpose of precluding collection action against individuals who previously and in good faith received payments from the Government on the basis of the invalidated regulations. See 54 Comp. Gen. 890, 891-892 (1975); 24 id. 688 (1945); and B-170589, August 8, 1974. As indicated, these cases are exceptional, and ordinarily in a decision of first impression regulations found to be inconsistent with statute may not be regarded as invalid or unenforceable merely on a prospective basis. Since the original construction of a statute is involved, the regulations must instead normally be considered as invalidated retroactively to the date of their inception under the statute, i.e., they are considered null and void ab initio. See 56 Comp. Gen. 943, 945 (1977); and 41 id. 213, 217 (1961). This is in accord with principles of statutory construction and judicial precedent followed by the courts. See, generally 1A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 31.02 (4th ed. C.D. Sands 1972); 20 AM. JUR. 2D Courts §§ 233-235 (1965); Annot., 10 A.L.R. 3D 1371 (1966) and 153 A.L.R. 1188 (1944).

Limitation of the Timm decision to prospective application would result in a conclusion that prior to the date of the decision the recoupment of regular reenlistment bonus monies from service members in Sergeant Timm's situation was proper under subparagraph 10942a, DODPM, notwithstanding that this was inconsistent with, and impermissible under, the governing provisions of statute contained in the Armed Forces Enlisted Personnel Bonus Revision Act of 1974. We are unable to find any lawful basis to support such a conclusion, and we therefore hold that the bonus recoupment provisions of subparagraph 10942a, DODPM, are invalid from and after June 1, 1974, to the extent that they were found in the Timm decision to be inconsistent with the 1974 act.

Hence, payment may issue on Sergeant Secrest's claim in the full amount, if otherwise correct. We would not object to other service members or former members similarly situated being treated as a single class, if that is determined to be preferable from an administrative standpoint. However, the burden of establishing the existence and nonpayment of a valid claim against the Government is ultimately on the particular individual asserting the claim, and refunds of regular reenlistment bonus monies based on the Timm decision will be payable on an individual basis regardless of the formation of such a class for administrative purposes. It is especially to be noted that some refund payments may be barred by the running of the 6-year statute of limitations prescribed by 31 U.S.C. § 3702(b)(1), unless in an individual case the running of the statutory period has been tolled by operation of section 205 of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. § 525, due to the individual's continuation on active military service. See 41 Comp. Gen. 812, 818 (1962); and compare Bickford v. United States, 656 F.2d 636, 639-641 (Ct. Cl. 1981).

The second question presented is whether recoupment action is permissible when a member is discharged early from an enlistment for which he received a regular reenlistment bonus to enlist immediately in an enlistment for which no bonus is paid. Currently, the wording in subparagraph 10942a, DODPM, which was held invalid in the Timm decision provides that recoupment must take place in this situation.

We consider our ruling in the Timm case to be dispositive of this issue. When the reenlistment bonus program was

revised by statute in 1974, the recoupment provision in subparagraph 10942a should not have been retained since it was not consistent with the new statute. This provision was not needed to prevent duplicate payments and without that justification recoupment of reenlistment bonuses is inappropriate because the individual in fact renders the service for which the bonus was paid. Thus, as long as the reenlistment following the early discharge includes the remaining period of service on the prior enlistment, no recoupment action is warranted under 37 U.S.C. § 308. To the extent that subparagraph 10942a, DODPM, purports to authorize the recoupment of the regular reenlistment bonus in that situation, it is inconsistent with the statute and invalid.

The questions presented are answered accordingly.

for Milton J. Socolar
Comptroller General
of the United States