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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: U.S. Court of Appeals for Veterans Claims: Retroactive
Reimbursement of Professional Liability Insurance Costs

File: B-300866

Date: May 30, 2003

DIGEST

Section 605 of Public Law No. 107-103, December 27, 2001, amended title 38 of the United States Code by adding new section 7287. It provides that the United States Court of Appeals for Veterans Claims (CAVC) may exercise the management, administrative, and fund expenditure authorities available to other U.S. courts as defined in 28 U.S.C. § 451. In exercising this authority, the CAVC's Board of Judges passed a resolution authorizing the Court to utilize the authority found in Public Law No. 105-277, October 21, 1998, as amended (found at 5 U.S.C. prec. § 5941 note), to reimburse eligible employees for one-half the cost of professional liability insurance. Since the change in the law adding 38 U.S.C. § 7287 was not explicitly made retroactive, it does not apply to professional liability insurance payments made prior to the effective date of the legislation, December 27, 2001.

DECISION

This is in response to a request for an advance decision pursuant to 31 U.S.C. § 3529 by the Financial Manager of the United States Court of Appeals for Veterans Claims (CAVC) on whether the CAVC may retroactively reimburse an eligible Court employee for one-half the cost of professional liability insurance paid during calendar years 1998 to 2001. For the reasons stated below, we find that the effective date of the authority to pay the premium involved is not earlier than December 27, 2001, the date of passage of the amendment adding 38 U.S.C. § 7287, which allowed the CAVC to utilize the professional liability insurance reimbursement authority. The statutory language of 38 U.S.C. § 7287 does not specifically state that any entitlements arising under its authority should be provided retroactively, nor does the legislative history clearly indicate that such entitlement was meant to be retroactive.

BACKGROUND

The CAVC was established by Congress under Article I of the Constitution as an independent tribunal not subject to the control of the President or the Administrative Office of the U.S. Courts. 38 U.S.C. § 7281. The CAVC submits its budget directly to and receives its appropriations directly from Congress, and is permitted to develop its own personnel and job classification system for its judicial and nonjudicial personnel. 38 U.S.C. §§ 7281(a)–(g), 7282. As a result of this independent status, the CAVC has not had available to it the same general management, administrative, and expenditure authorities available to the Article III courts. Since its establishment, there have been various times that the CAVC has requested and Congress has enacted various gap-filling statutory provisions. See S. Rep. No. 86, 107th Cong., 1st Sess., at 28 (2001) and H.R. Rep. No. 156, 107th Cong., 1st Sess., at 6-7, 22-24 (2001) for a list of gap-filling statutory provisions.

One authority from which the CAVC was definitionally excluded was the authority to cover a portion of the costs incurred by its employees for professional liability insurance. Government employees, whose jobs place them in positions where they risk being sued for certain tortious conduct, may purchase liability insurance as a protection against such suits, which may result in an award of compensatory or punitive damages that the federal employees themselves would be required to pay. See B-211883, Dec. 14, 1983. In 1996, as part of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997,¹ Congress enacted legislation authorizing the reimbursement of “qualified employees” of the executive and legislative branches for up to one-half the costs incurred by such employees for professional liability insurance. These permissive reimbursements were to be paid from amounts appropriated for salaries and expenses. In 1998, Congress amended the law to include as “qualified employees” justices, judges, judicial officers, supervisors, and managers within the judicial branch.² In doing so, the amendment defined “justices” and “judges” as those covered by 28 U.S.C. § 451, which excluded judges of the CAVC. Then, in 1999, Congress once again amended the law to make the reimbursement mandatory as of October 1, 1999.³ The statute now provides in relevant part:

¹ Pub. L. No. 104-208, div. A, title I, § 101(f), 110 Stat. 3009 (incorporating title VI, § 636 of the Department of the Treasury, Postal Service, and General Government Appropriations Act, 1997), 110 Stat. 3009-363 to 3009-364, Sept. 30, 1996.

² Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, title VI, § 644, 112 Stat. 2681-526, Oct. 21, 1998.

³ Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, title VI, § 642(a), 113 Stat. 430, 437, Sept. 29, 1999.

“Notwithstanding any other provision of law, amounts appropriated . . . for salaries and expenses shall be used to reimburse any qualified employee for not to exceed one-half the costs incurred by such employee for professional liability insurance. A payment under this section shall be contingent upon the submission of such information or documentation as the employing agency may require.”⁴

The statute provides that a “qualified employee” means an agency employee whose position is that of a law enforcement officer or a supervisor or management official. Id. It defines the term “agency” to mean: an “Executive agency” as defined by 5 U.S.C. § 105; “any agency or court in the Judicial Branch”; or “any agency of the Legislative Branch of Government including any officer or committee of the Senate or the House of Representatives.” Id. With regard to the Judicial Branch, the terms “supervisor” and “management official” mean a justice or judge of the United States as defined in 28 U.S.C. § 451, the so-called “Article III” judges whose courts were established under Article III of the Constitution. Id. As an Article I court, the authority to pay these costs did not extend to the CAVC.

Recently, Congress added section 7287 to the CAVC’s statutory grants of authority in title 38 of the United States Code,⁵ which provides:

“Notwithstanding any other provision of law, the Court of Appeals for Veterans Claims may exercise, for purposes of management, administration, and expenditure of funds of the Court, the authorities provided for such purposes by any provision of law (including any limitation with respect to such provision of law) applicable to a court of the United States (as that term is defined in section 451 of title 28), except to the extent that such provision of law is inconsistent with a provision of this chapter [38 U.S.C. §§ 7251 et seq.].”

According to the materials submitted by the CAVC Clerk of the Court, the CAVC’s Board of Judges used the authority granted in 38 U.S.C. § 7287 to pass a resolution authorizing the CAVC to exercise the authority found in Public Law 105-277, supra, as amended by Public Law 106-58, supra, to reimburse designated judges and managers for one-half of the costs of a professional liability insurance policy. Letter from Norman Y. Herring, Executive Officer/Clerk of the Court, CAVC, to Comptroller General, GAO, March 6, 2002, appending “Resolution Before the Board of Judges,

⁴ These provisions were not enacted in the form of an amendment or addition to title 5, U.S. Code, although their text is set out as an uncodified note under subchapter IV, “Miscellaneous Allowances,” preceding 5 U.S.C. § 5941.

⁵ Veterans’ Benefits Improvement Act of 2001, Pub. L. No. 107-103, § 605, 115 Stat. 976 (December 21, 2001).

United States Court of Appeals for Veterans Claims,” approved on January 30, 2002.⁶ On February 25, 2002, Chief Judge Kramer filed a claim for reimbursement of one-half the cost of his professional liability insurance premiums for calendar years 1998 through 2001.

The Financial Manager believes that, since the enactment of 38 U.S.C. § 7287 and the Board of Judges’ resolution on insurance premiums occurred in fiscal year 2002, that portion of the Chief Judge’s claim covering October 2001 through December 2001 is payable as a necessary expense of fiscal year 2002. She views the remainder of the claim as falling into two buckets: (1) the portion of the claim covering fiscal years 2000 and 2001 (October 1999 through September 2001), which occurred during the time that Congress amended the legislation to make the payment mandatory for Article III judges; and (2) the portion of the claim covering the period from January 1998 through September 1999, when the reimbursement was discretionary, noting especially that during part of that period no court was covered until added by Public Law 105-277, supra, October 21, 1998. Statement by Ann B. Olson, CAVC Financial Manager, appended to the Letter from Norman Y. Herring, supra. The Financial Manager seeks our views on which portion of the Chief Judge’s claim may be reimbursed.

DISCUSSION

It is well established that in the absence of statutory direction, retroactivity is not favored by the law. INS v. St. Cyr, 533 U.S. 289, 121 S. Ct. 2271 (2001); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855, 110 S.Ct. 1570 (1990) (Scalia, J., concurring); Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208, 109 S. Ct. 468 (1988). The general rule of statutory construction is that a statute is effective on and after the date of its enactment unless it is clear from its language or by necessary implication that a different effective date was intended. 62 Comp. Gen. 396 (1983); B-259479, B-259479.4, July 25, 1996; B-237791, Sept. 6, 1991; 2 Norman J. Singer, Sutherland Statutes and Statutory Construction § 41:4 (6th ed. 2001).

For example, in 62 Comp. Gen. 396 (1983), cited above, we considered circumstances analogous to those in this case and applied the general rule that an amendatory statute is applied prospectively only absent specific congressional direction. In that case, Congress enacted 5 U.S.C. § 5546a(a) in order to correct an inequity involving premium pay. Under the prior legislation, instructors at the Federal Aviation Academy in Oklahoma City who train individuals to perform air traffic control, airway facilities, and flight inspection functions would not be entitled

⁶ The March 6, 2002, letter from Mr. Herring to the Comptroller General got caught in the postal irradiation procedures and did not reach our Office until March 6, 2003. On March 7, 2003, we verified by phone that the CAVC was still interested in receiving a response to the letter.

to premium pay while those whom they trained were entitled to the additional compensation. The amendment permitted these instructors and their immediate supervisors to receive the premium pay. We found that neither the express language of the amendatory statute nor the legislative history provided support for the view that the amendment was retroactively effective. Remarks in the legislative history on the intended equality of treatment of the Academy instructors were insufficient to demonstrate the requisite congressional intent that the provision would operate retroactively. The Academy instructors' entitlement to the premium pay under 5 U.S.C. § 5546a(a) was prospective only, from the date of enactment of the amendment.

In this case, there is nothing in the language of either section 605 or any other section of Public Law 107-103 which provides that actions taken by the CAVC under this authority, such as the Board of Judges' resolution authorizing the CAVC to exercise the insurance reimbursement authority, could be done on a retroactive basis. In addition, an examination of the legislative history of section 605 does not establish the existence of a legislative intent that the authority granted in the amendment may be used retroactively. The statement in the Senate Report on the bill that included section 605 shows that the purpose of the section was to make the authorities granted to Article III courts available to the CAVC:

“Section 605 of the Committee [on Veterans' Affairs] bill, derived from S. 1063 and as requested by the court [CAVC], would provide a generic authority for it to use court-related management, administrative, and fund expenditure authorities that are appropriate for its efficient operation. This would preclude the need for gap-filling provisions. For example, there are two recently enacted authorities that the court is lacking, but that seem to be generally available to the rest of the Federal Government, to reduce the risk of personal liability for official actions (5 U.S.C. subchapter IV note found preceding 5 U.S.C. § 5941 [professional liability insurance reimbursement]; 28 U.S.C. § 613 [designation of disbursing and certifying officers]; 31 U.S.C. § 3529 [authority for disbursing or certifying officers to seek an opinion from the Comptroller General on any question of law involved in a payment request presented for certification]). Under the proposed new section, the court would have these types of authorities available to it. However, the court would not have available any provision of law that is inconsistent with any provision of chapter 72 of title 38. Moreover, the court would have to exercise the new authority in accordance with all limitations with respect to the underlying authorities themselves, subject, as with all authorities, to the availability of appropriations provided for its operation.”

S. Rep. 107-86, supra, at 28 (explanatory information provided in bracketed language). Similar language concerning this new authority for the CAVC can be found in the House Report. H.R. Rep. 107-156, supra, at 6-7. While the language

clearly shows that Congress expected the CAVC to use the new authority provided in 38 U.S.C. § 7287 to exercise the professional liability insurance reimbursement provisions, there is no indication of legislative intent that the entitlement of CAVC eligible employees to the reimbursement was to operate on a retroactive as well as a prospective basis.

CONCLUSION

In the absence of express language or a clear implication in the statute or legislative history, the eligible CAVC employees' entitlement to professional liability insurance reimbursement is prospective only, from the date of enactment of Public Law 107-103, December 21, 2001. There is therefore no authority to pay any of the claims presented by Chief Judge Kramer for liability insurance premiums paid before that date.

/signed/

Anthony Gamboa
General Counsel