
In Re:

[Redacted]

Claimant

Claims Case Nos. 02101611 through

02101635

CLAIMS APPEALS BOARD DECISION

DIGEST

It is a settled rule of statutory construction that the interpretation of a statutory provision, as expressed in implementing regulations by those charged with the execution of the statute, is to be sustained and is deemed to be within an agency's statutory authority and consistent with congressional intent unless shown to be arbitrary or contrary to the statutory purpose.

DECISION

Twenty-five retired officers appeal the Defense Finance and Accounting Service's (DFA

situation for retired members, including these officers, working as civilian employees for the FAA became different from that of retired members who were employed by other Federal agencies. It is their position that Section 5532 was repealed as to FAA employees by Section 347 of Public Law 104-50.(1) Section 347 provided in part that:

"(a) . . . notwithstanding the provisions of title 5, United States Code, and other Federal personnel laws, the Administrator of the Federal Aviation Administration shall develop and implement . . . a personnel management system for the Federal Aviation Administration that addresses the unique demands on the agency's workforce. Such a new system shall, at a minimum, provide for greater flexibility in the hiring, training, compensation, and location of personnel."

"(b) The provisions of title 5, United States Code, shall not apply to the newer personnel management system developed and implemented pursuant to subsection (a), with the exception of . . . [§ 5532 not specified]."

"(c) This section shall take effect on April 1, 1996."

DFAS notes that the claimants seek recovery of the Section 5532 deductions based on their interpretation of Section 347(b) of Public Law 104-50, a matter within the special competency of the FAA. DFAS deferred to the FAA regulations promulgated in the wake of Public Law 104-50, regulations which anticipated the general continuation of the Section 5532 deductions but with the waiver authority noted below. DFAS states that it had initially received copies of a Notification of Personnel Action (Standard Form 50) or equivalent for each claimant authorizing the Section 5532 deductions, but it did not receive notice of any waiver. DFAS points to Chapter II, Section 3 of the *FAA Personnel Management System-Compensation* regulation, under which the authority of the Director of the Office of Personnel Management (OPM) in Section 5532(g) to waive (in whole or part) application of the offsets to specific individuals was vested in the Administrator from April 1, 1996, until September 30, 1999.(2) As a secondary issue, DFAS found that FAA could not retroactively amend its regulations to remove the general applicability of the Section 5532 restrictions because rights are fixed when a regulation is properly promulgated.

Counsel for the claimants does not dispute that the FAA regulations purport to continue the offsets mandated by Section 5532, but he contends that these regulations are improper. Counsel for the claimants counters that neither the Secretary

of Defense nor the Administrator has authority to re-impose by regulation a burden that FAA employees were released from by the Congress pursuant to the wording of Section 347(b). Counsel also argues that once FAA employees were relieved of the burden of Section 5532, the Administrator cannot affect non-FAA funds like military retired pay. Finally, Counsel argues that the waiver process is irrelevant here because Section 347(b) freed FAA employees otherwise subject to Section 5532 from the burdens of that statute. Counsel also separately submitted extensive written arguments supporting the validity of a possible FAA retroactive amendment of regulations to remove the general applicability of the Section 5532 restrictions.

Discussion

Preliminarily, we will not address the issue of whether the FAA may retroactively amend its regulations to eliminate the general applicability of the Section 5532 restrictions because it is

not ripe for our consideration. We will consider only the actual regulations in effect, and not regulations that FAA may or may not promulgate at some future date.

It is fundamental that Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. It is equally fundamental, however, that regulations are deemed to be within an agency's statutory authority and consistent with congressional intent unless shown to be arbitrary, capricious, an abuse of discretion or contrary to the statutory purpose. It is a settled rule of statutory construction that the interpretation of a provision of a statute, as expressed in implementing regulations by those charged with the execution of the statute, is to be sustained in the absence of any showing of plain error, particularly when the regulations have been long followed and consistently applied, and Congress has declined to alter the interpretation in later amendments to the statute.[(3)] *See* 64 Comp. Gen. 319, 321 (1985) and decisions cited therein. Also, *see generally* 2B *Sutherland on Statutes and Statutory Construction* § 49.05 (Norman J. Singer ed., 6th ed. 2000).

In effect, the claimants argue that the plain language of Section 347(b) supports their position. We agree that if the Congress had directly spoken to the precise question in issue, then the intent of Congress would have been clear, and that would have ended the matter. However, when a statute is silent or ambiguous with respect to the specific issue, the question for our Office or a court is whether the agency's interpretation is a permissible construction of the statute. If Congress has explicitly left a gap for the agency to fill, there is an express delegation for the agency to elucidate on a specific provision by regulation. The courts accord considerable weight to an executive agency's construction of a statutory scheme it is entrusted to administer. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984). In the case before us, the Congress said that title 5 did not apply to "the newer personnel management system," and anticipated that notwithstanding title 5 the FAA Administrator "shall develop and implement . . . a personnel management system . . . that addresses the unique demands on the agency's workforce." The Congress deferred to the Administrator to determine what is in the personnel management system, and inferentially, what is not a personnel management issue. Where Congress has conferred broad discretion on an agency to implement possibly conflicting legislative goals, we defer to the agency's interpretation unless manifestly unreasonable. *See 2B Sutherland on Statutes, supra*. DFAS properly deferred to the FAA's interpretation of its own statute, and for the reasons stated below, we cannot conclude that the FAA's regulations were arbitrary and capricious, or contrary to the law in determining that the provisions of 5 U.S.C. § 5532 were not repealed as to the FAA's employees by Section 347(b). There has been an insufficient showing by the claimants of plain error on the part of the FAA.

The claimants have not demonstrated that Congress intended to confer a benefit on them or any other individual.[(4)] Rather, a reasonable interpretation of Section 347 is that it was enacted for the purpose of granting the Administrator the authority to flexibly redesign the agency's personnel management system for the purposes stated in Section 347(a). The FAA interpreted Section 347(b) as applicable only to those provisions of title 5 that it considered to be personnel management provisions (unless specifically excepted), but not to provisions of title 5 that it considered to be non-personnel management provisions. The FAA had discretion to determine what provisions were personnel management provisions and what provisions were non-personnel management provisions. It narrowly construed its authority to disregard title 5 and avoided an expansive interpretation of its own powers. *See* 2B *Sutherland on Statutes, supra*. It viewed the substantive provisions of Section 5532 as being a part of the non-personnel management provisions of title 5; therefore, these statutory limits on military retired pay still generally applied to retired officers who came to work for

the FAA after retirement. But the FAA determined that only Section 5532(g) was a personnel management provision in so far as it named the Director of the OPM as the government official who granted waivers when there was exceptional difficulty in recruiting or retaining qualified individuals or in emergency or unusual circumstances. Therefore, it modified that subsection to grant the Administrator the authority to waive all or part of the reductions mandated by other subsections of Section 5532. It seems reasonable that the Administrator would exercise such authority to assure that the goals in Section 347(a) were attained (e.g., to adequately address critical personnel shortages in those extremely rare circumstances where there is exceptional difficulty in recruiting or retaining qualified individuals). *See* FAA *Personnel Management System-Compensation*, Chapter II, paragraph 3(a); and footnote 4, *supra*.

The fact that the claimants offer a plausible alternative construction of Section 347, which incidently supports their positions, is of no moment. A finding of reasonableness with respect to an agency's interpretation of a statute does not require that the agency interpretation be the only possible construction, or even the most desirable one. Where there is more than one reasonable interpretation which can be given to a statute, a reviewing administrative board such as this one must accept the interpretation adopted by the administrative authorities responsible for its interpretation and implementation. 2B *Sutherland on Statutes*, *supra*.

Conclusion

The decision of DFAS is affirmed and the claims are disallowed.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: William S. Fields

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William S. Fields

Member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin

Member, Claims Appeals Board

1. *Department of Transportation Appropriations Act*, Pub. L. No. 104-50, 109 Stat. 436, 460 (199

2. Additionally, the Administrator's policy to generally continue the offsets directed by Section 5532 was clearly enunciated in Personnel Reform Implementation Bulletin (PRIB) 008, April 1, 1996, in which the FAA stated that waivers of offsets to military retired pay should be granted "only in extremely rare circumstances." PRIB 008 cites such circumstances as critical staffing shortages that can only be filled with a uniquely qualified individual or group of persons with specialized expertise or to temporary emergencies involving direct threats to life or property.

3. The public policy in Section 5532 had been in existence for many years. After the FAA regulations noted above were promulgated, our research indicates that the Congress passed two laws that included amendments that continued the personnel management reform process begun in Public Law 104-50: the *Air Traffic anagement System Performance Improvement Act of 1996*, Pub. L. No. 104-264, 110 Stat. 3213, 3227 (1996), passed in October 1996 while the Section

5532 restrictions were was still in effect; and the *Wendell H. Ford Aviation Investment and Reform Act for the 21st Century*, Pub. L. No. 106-181, title III, § 307, 114 Stat. 61 (2000), which was passed after Public Law 106-65 but codified much of the language in Section 347. In neither instance did the Congress indicate a problem with the Administrator's construction of Section 347 in respect to Section 5532.

4. *See* H.R. Conf. Rep. No. 286, 104th Cong., 1st Sess. (1995); and Senate Report No. 126, 104th Cong., 1st Sess. (1995).