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DECISION



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

FILE: B-210963

DATE: August 3, 1983

MATTER OF: Petty Officer Rodney L. Kruse, USN

DIGEST:

To qualify for special pay for diving duty, under 37 U.S.C. 304(a), an individual must be assigned to, maintain a proficiency in, and actually perform diving duty. Each requirement must be met before special pay begins to accrue. Therefore, where a member was assigned to duty as a student at Officer Candidate School during which he did not actually perform diving duty, although he may have met the other requirements, he may not receive special pay.

This action is in response to a request for an advance decision to determine the legality of paying Petty Officer Rodney L. Kruse, USN, special pay for diving duty to which he was assigned while attending Officer Candidate School. We find that he is not entitled to the special pay because he did not actually perform diving duty during that period.

The question was submitted by the Disbursing Officer, Naval Personnel Support Detachment, Newport, Rhode Island, and has been assigned submission number DO-N-1413 by the Department of Defense Military Pay and Allowance Committee.

Petty Officer Kruse was transferred from duty at San Diego, California, to temporary duty for instruction at the Officer Candidate School, Naval Education and Training Center, Newport, Rhode Island, beginning July 31, 1982, and, thereafter for further assignment. While the duration of the temporary assignment is not apparent from the record furnished us, we presume that it exceeded one month, as is usually the case. Petty Officer Kruse's original orders were modified to indicate that "primary duty involving diving" was an essential part of his military duty. However, as a student at the school he did not actually perform any diving duty.

Under 37 U.S.C. § 304(a), as amended by Public Law 97-60, § 115, October 14, 1981, a member of the armed services is entitled to special pay for diving duty when the individual:

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- "(1) is assigned by orders to the duty of diving;
- "(2) is required to maintain proficiency as a diver by frequent and regular dives; and
- "(3) actually performs diving duty."

Implementing regulations found in paragraph 11101a (interim change No. 375, effective July 1, 1982), of the Department of Defense Military Pay and Allowances Entitlements Manual follows the language of the statute almost verbatim as to the prerequisites for the special pay. The legislative history of the 1981 version of 37 U.S.C § 304 indicates that Congress, in accepting the Senate's version of the bill, clearly intended that all three requirements of the statute had to be met before an individual became entitled to the special pay. In rewriting the section,* the Senate noted that under then current law, special pay for diving duty accrued when an individual was assigned to, maintained a proficiency in, and actually performed diving duty. Its goal was to maintain that policy but also to raise the amount of special pay. S. Rep. No. 97-146, 97th Cong., 1st Sess. 10 (1981); See also Conf. Rep. No. 97-265, 97th Cong., 1st Sess. 7, 23 (1981).

In rewriting subsection (a), and dividing it into three parts, Congress attempted to make its intentions clear. However, the use of the conjunction "and" between clauses (a)(2) and (a)(3) may have led to the confusion in this case

*Prior to 1981 section 304(a) reads as follows:

"Under regulations prescribed by the Secretary concerned, a member of a uniformed service who is entitled to basic pay and who is assigned by orders to the duty of diving is also entitled to special pay at a rate not more than \$110 a month for periods during which diving duty is actually performed. A member may not be paid special pay under this subsection in addition to incentive pay authorized under section 301 of this title." 37 U.S.C. § 304(a)(1976).

as to when special pay begins to accrue. A number of courts have considered similar statutory construction problems and have held that where a number of items or requirements are listed in a statute and connected by conjunction (e.g. "and") only before the last of the series, "the same connective is understood between the previous members." Wilcox v. Warren Construction Co., 95 Or. 125, 186 Pac. 13 (1919); Lithium Corporation of America v. Town of Bessemer City, 261 N.C. 532; 135 S.E 2d 574, 577 (1964); People v. Donner, 435 N.Y.S. 2d 225, 227 (1980). See generally Sutherland Stat. Const. 21.14 (4th Ed.).

With "and" being the similar connective in the present case, it is clear that Congress intended that all three requirements of the statute be met for an individual to qualify for special pay.

We note that the Naval Military Personnel Manual, which prescribes requirements for qualifying as a Navy diver and maintaining such qualification, provides that Naval personnel may receive special pay for diving "when the following criteria are met:

"(a) Member is a designated diver or under training for a specific diver designation.

"(b) Member's diving qualifications are current.

"(c) Member is under competent orders to diving duty * * *."

Naval Military Personnel Manual, art. 2620200. The regulation further provides that entitlement to special pay for diving duty shall not be interrupted during periods of authorized leave or temporary additional duty.

In some circumstances, the dives performed by a member to maintain his diving qualifications will suffice to meet the actual performance requirement of the statute. We held, for example, that helium-oxygen divers, who qualified for incentive pay for a fixed period by performing the requisite dives at the beginning of that period, were entitled to such pay for the remainder of that period, provided their duty assignments aboard helium-oxygen equipped vessels were not terminated. 37 Comp. Gen. 546, 550 (1958).

Unlike those divers, who were required by normal ship operations to perform helium-oxygen diving, Petty Officer Kruse was assigned to duty as a student at the Officer Candidate School, where notwithstanding the statement in his amended orders, he was not actually performing diving duty. His assignment to the unit in which diving duty was required was terminated and he was assigned on temporary duty to a course of instruction leading to commissioning as an officer. Following that course of instruction he was to be given another permanent assignment.

As stated earlier, article 2620200 of the Personnel Manual provides that entitlement to diving duty pay shall not be interrupted during periods of temporary additional duty. However, since Petty Officer Kruse's assignment to a unit in which diving duty was required was terminated, this paragraph is not authority for continuing his diving pay.

Although his orders were amended to indicate that he was assigned to diving duty while at Officer Candidate School, that was not the case. Such an amendment to orders cannot supply the requirement imposed by statute if that amendment is not in keeping with the facts. Further, since Petty Officer Kruse did not actually perform diving duty, as required by 37 U.S.C. § 304(a)(3), he is not entitled to the special pay for the period of his duty as a student at the Officer Candidate School.

Milton J. Fowler
for Comptroller General
of the United States