

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

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FILE: B-211076**DATE:** October 31, 1983**MATTER OF:** Department of Defense Military Pay
and Allowance Committee Action
Number 557**DIGEST:**

1. Amendments to 10 U.S.C. 706 and 876a provide that court-martialed enlisted personnel with adjudged bad-conduct or dishonorable discharges may be compelled to take leaves of absence pending completion of appellate review, and that when they are placed on appellate leave they may elect to receive payment for any accrued leave to their credit either in a lump-sum settlement or as pay and allowances during leave. The amendments were designed to avoid any necessity of restoring these persons to duty after their courts-martial, and to allow them some monetary assistance in their transition to civilian life. Payments may be made even though the member's term of enlistment has expired.
2. The lump-sum monetary leave settlement authorized by 10 U.S.C. 706 for court-martialed enlisted personnel required to take appellate leave is to be "based on the rate of basic pay" to which they are entitled on the day before they are placed on leave. Even though they may be in a nonpay or reduced pay status that day because their enlistments have expired or for some other reason, they still have a "rate" of basic pay, which is the full rate applicable by law to the enlisted grade they hold, and the lump-sum settlement is to be computed on the basis of that rate.
3. The rule is well settled that no credit for pay and allowances accrues

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to court-martialed enlisted personnel during periods after their enlistments expire, unless they are restored to a full duty status, or they are found to have been held over in service for the convenience of the Government if their sentences are completely set aside on appeal. The payment of pay and allowances to court-martialed enlisted members involuntarily placed on appellate leave after their terms of enlistment have expired, as specifically authorized by statute on the basis of unused leave previously accrued during past periods of creditable service, is not in conflict with this rule.

4. The appropriate rate of pay to be used in computing the lump-sum leave settlement or pay and allowances payable to court-martialed enlisted personnel with adjudged punitive discharges who are required to take appellate leave, is the appropriate rate of the grade to which the enlisted member was reduced as a result of the court-martial.

This matter concerns the question of whether court-martialed enlisted personnel whose enlistments have expired are entitled to any of the appellate leave benefits authorized by 10 U.S.C. 706.¹

We conclude that these members are entitled to the same benefits under 10 U.S.C. 706 as those whose terms of enlistment have not expired.

¹This matter was submitted by the Assistant Secretary of Defense (Comptroller). The circumstances giving rise to this general question are described in Department of Defense Military Pay and Allowance Committee Action Number 557, which is incorporated in the Assistant Secretary's request.

Background

The Department of Defense Military Pay and Allowance Committee notes that the Military Justice Amendments of 1981, Public Law 97-81, approved November 20, 1981, 95 Stat. 1085, added article 76a to the Uniform Code of Military Justice (10 U.S.C. 876a), which provides that an accused enlisted member who has been found guilty and sentenced by a court-martial may be required to take a leave of absence pending the completion of the appellate review of his case, if the sentence includes an unsuspended bad-conduct or dishonorable discharge. Public Law 97-81 also added section 706 to title 10 of the United States Code, which provides that this appellate leave is to be charged as "excess leave" without pay if the accused has no accrued leave to his credit. However, if the accused does have accrued leave to his credit, 10 U.S.C. 706 gives him the right to elect either (1) to receive a lump-sum monetary settlement for his accrued leave "based on the rate of basic pay to which [he] was entitled on the day before the day [the appellate] leave began," or (2) to receive military pay and allowances after he is involuntarily placed on appellate leave until the accrued leave to his credit is exhausted.

It has long been the rule that when an enlisted person is held in military confinement or control beyond the expiration of his enlistment due to court-martial charges against him, accrual of credit for pay and allowances terminates on the date his term of enlistment expires, unless he is acquitted at the trial or his sentence is completely set aside on appeal, or unless he is restored to full-duty status pending the completion of appellate review. This rule is currently published in paragraph 10317 of the Department of Defense Military Pay and Allowances Entitlements Manual.

Because of this rule uncertainties have arisen concerning the propriety of paying either the lump-sum monetary leave settlement or the military pay and allowances authorized by 10 U.S.C. 706 to court-martialed service members whose terms of enlistment have expired. Four specific questions designed to resolve these uncertainties are presented.

Lump-Sum Leave Settlement

The first question presented is:

"1. May a member whose enlistment expires while in confinement and who is subsequently required to take leave under 10 U.S.C. 876a pending review of Court-Martial conviction be paid for accrued leave to his credit if he elects to be paid under 10 U.S.C. 706(b)?"

Congress added article 76a to the Uniform Code of Military Justice with enactment of the Military Justice Amendments of 1981, Public Law 97-81, to give military commanders the authority to compel court-martialed service members to take leaves of absence pending the completion of appellate review if the sentences adjudged include a punitive discharge. Previously, those members were restored to duty after completing any confinement included in their sentences unless they volunteered to take a leave of absence. Congress concluded that morale and discipline within the Armed Forces would be improved if these persons were no longer allowed the option of returning to duty. The Congress also added section 706 to title 10 of the United States Code to authorize these persons to be paid for any accrued leave to their credit when they were involuntarily placed on appellate leave apparently as a means of allowing them some measure of monetary assistance for their transition into the civilian community. It was particularly noted that they would be ineligible for unemployment benefits administered by the Department of Labor to help them make that transition because of the punitive discharges included in their court-martial sentences. See H.R. Rep. No. 306, 97th Cong., 1st. Sess. 1-4, reprinted in 1981 U.S. CODE CONG. & AD. NEWS 1769-1772.

Prior to enactment of the Military Justice Amendments of 1981, lump-sum monetary settlements for unused accrued leave had generally been authorized only for military personnel separated from service under honorable conditions. See 37 U.S.C. 501. The 1981 legislation authorized payment of a lump-sum leave settlement to court-martialed service members sentenced to receive punitive discharges when they are involuntarily placed on appellate leave. That payment

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is to be "based on the rate of basic pay" to which they were entitled on the day before the appellate leave began. (Emphasis added.) The question is whether any payment may be made to court-martialed members who are in a nonpay status on that day because of the previous expiration of their enlistments.

Court-martial sentences are effective from the date adjudged and approved or on the date they are ordered executed. Pending appellate review, the sentence is considered effective except for the actual discharge which is held in abeyance until review has been completed. 10 U.S.C. 858a.

Many persons required to take appellate leave under article 76a of the Uniform Code of Military Justice will be in a nonpay or reduced pay status on the day before their departure, either because of the previous expiration of their terms of enlistment or because of other reasons. However, we have recognized that an enlisted member in a nonpay status nevertheless has a rate of basic pay, which is the full rate applicable by law to the particular enlisted grade he holds. See 35 Comp. Gen. 666 (1956) and 37 *id.* 228 (1957). Although those decisions were limited to questions involving the lump-sum leave settlements payable to Reserve members who were in a nonpay status because they were held over for court-martial beyond the expiration of their fixed tours of active duty rather than their terms of enlistment, we find that the purpose of 10 U.S.C. 706(b) will be best served if this principle is extended generally and uniformly to every enlisted person involuntarily placed on appellate leave. In particular, we find that since the court-martialed enlisted personnel here in question will retain an enlisted grade until their final discharges are executed following the completion of appellate review, they will have a rate of basic pay on the day before they are placed on appellate leave upon which the lump-sum leave settlement under 10 U.S.C. 706(b) may be based regardless of the amount of basic pay which is actually payable to them for that day. Hence, we conclude that court-martialed enlisted members departing on appellate leave who have accrued leave to their credit may elect to receive a lump-sum monetary leave settlement under 10 U.S.C. 706(b) based on the full rate of basic pay applicable to their enlisted grade even though they may be in a nonpay or a reduced pay status at

the time because their enlistments have expired or for some other reason.

Pay and Allowances During Leave

The second and third questions presented by the Committee are:

"2. Is a member whose enlistment expires while in confinement who is subsequently required to take leave under 10 U.S.C. 876a pending review of Court-Martial conviction entitled to pay and allowances under 10 U.S.C. 706 during the period of leave required to be taken?

"3. Is a member who is required to take leave under 10 U.S.C. 876a pending review of Court-Martial conviction whose enlistment expires during such leave entitled to pay and allowances under 10 U.S.C. 706 after the date his enlistment expired?"

It is a well settled rule that no credit for pay and allowances accrues to a court-martialed enlisted member during periods after the expiration of his term of enlistment, unless he is restored to a full-duty status or is found to have been held over in service for the convenience of the Government. See 30 Comp. Gen. 449, 451 (1951); 33 *id.* 281 (1953); 37 *id.* 228 (1957); and 59 *id.* 12 (1979), *id.* 595 (1980). See also Carter v. United States, 206 Ct. Cl. 61, 70 (1975), cert. denied 423 U.S. 1076 (1976); and Cowden v. United States, 220 Ct. Cl. 490, 498 (1979). Since court-martialed enlisted members whose sentences are not completely set aside on appeal are thus found to have been held over in military control by reason of their own misconduct rather than for the convenience of the Government, no pay and allowances can be considered to have accrued to their credit beyond the expiration of their enlistments except during periods when they may have been returned to the performance of their full military duties while awaiting the outcome of appellate review. This rule is currently expressed by regulation in paragraph 10317, Department of Defense Military Pay and Allowances Entitlements Manual.

Under the Military Justice Amendments of 1981, article 76a of the Uniform Code of Military Justice now

makes it unnecessary to return court-martialed enlisted members with adjudged bad-conduct or dishonorable discharges to duty pending the results of appellate review, and 10 U.S.C. 706 now specifically authorizes payment of military pay and allowances to those persons if they are instead involuntarily placed on appellate leave. However, the payment so authorized is to be based only upon unused leave previously accrued during past periods of creditable service, and does not represent pay or allowances accrued on the basis of an accused's current activities or status. See 10 U.S.C. 706(b)(2). We do not find that payment of pay and allowances to an accused whose enlistment has expired, as specifically authorized by statute on the basis of unused leave accrued during earlier periods of creditable service, to be in any way inconsistent or in conflict with the above-described rule which generally prohibits the accrual of credit for pay and allowances during periods following the expiration of a term of enlistment. Hence, we conclude that the pay and allowances authorized by 10 U.S.C. 706 are payable without regard to whether the accused's enlistment has expired.

Rate of Pay

The fourth question presented is:

"4. If your answer to any of the above questions is yes, what rate of pay would be appropriate?"

In answer to the first three questions, we concluded that court-martialed enlisted members with accrued leave to their credit who are required to take leaves of absence under article 76a of the Uniform Code of Military Justice may elect to receive either a lump-sum settlement or pay and allowances for that accrued leave under 10 U.S.C. 706, regardless of whether their terms of enlistment have expired.

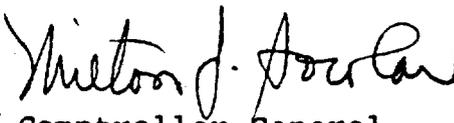
As indicated, the lump-sum monetary leave settlement will be based on the full rate of basic pay applicable to their enlisted grade on the day before they are placed on appellate leave. Because of the punitive discharges included in their sentences, article 58a of the Uniform Code of Military Justice (10 U.S.C. 858a) provides that unless

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otherwise provided in regulation, they will be reduced to the lowest enlisted grade, E-1. Hence, unless otherwise provided the rate of pay applicable on the day before appellate leave begins and the rate to be used in computing the lump-sum settlement will be the appropriate basic pay rate for pay grade E-1. If he has not been reduced to the lowest enlisted grade, the rate of pay applicable will be the rate to which he was reduced by court-martial sentence.

In the event an accused does not elect to receive a lump-sum monetary settlement for his accrued leave, he will be entitled to the military basic pay and allowances of his grade commencing on the day he is placed on appellate leave and continuing for as many days of accrued leave as he has to his credit. Again, the pay grade to which the member was reduced as a result of court-martial sentence will be applicable to the computation of pay and allowances on those days.

The questions presented are answered accordingly.

for 
Comptroller General
of the United States