

DECISION

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

cel 333
98692

FILE:

B-185612

DATE:

AUG 12 1976

MATTER OF:

Chief Warrant Officer William Wallace, USAR

DIGEST:

Army Reserve member on inactive duty apprehended by the FBI and charged with larceny of Government property, which charge was later dismissed, is not entitled to reimbursement for private attorney's fees incurred for representing him since the Government was not required to provide him an attorney and no legal authority exists to pay the claim. Also, claim is not so extraordinary nor does it contain elements of legal liability or equity which would warrant reporting it to Congress under the Meritorious Claims Act of 1928, 31 U.S.C. 236 (1970).

This action is in response to a letter dated November 3, 1975 (AFKB-AC-CM-JA), with enclosures, from Colonel Charles E. Brant, USAR, Staff Judge Advocate, Headquarters, 83d United States Army Reserve Command, Columbus, Ohio, concerning the legal fees incurred by Chief Warrant Officer William Wallace, USAR, in the circumstances set out below.

The submission indicates that the member was assigned to an Army Reserve unit whose mission was to support the Army Marksmanship Training Program. Reportedly, in accordance with current regulations and long-standing practice the member retained his service weapons and ammunition in his personal possession for practice in evenings and on weekends at locations near his home. Following a field exercise, he was apprehended by the Federal Bureau of Investigation on March 10, 1974, and charged with violation of 18 U.S.C. 641 (1970). A letter dated June 12, 1974, from Colonel Brant to the Assistant United States Attorney, Louisville, Kentucky, states in part as follows concerning the member's apprehension:

"We understand the facts to be that Wallace was apprehended by the FBI on 10 March 1974 for larceny of Government ammunition and weapons. Apparently, Wallace departed Fort Knox on that date in a US Army jeep with 5,000 rounds of 5.56mm ammunition; 2,500 rounds of 7.62mm ammunition;

and 10,000 rounds of .22 caliber ammunition. This ammunition was excess from a two-day practice firing mission at Fort Knox by the 1451st RTU. That evening, the FBI conducted a search of the jeep, which was parked at Wallace's residence in Valley Station, Kentucky and recovered the above ammunition. Additionally, some 90,000 rounds of ammunition were recovered from Wallace's residence upon search, along with one M-16 rifle, two .45 caliber pistols, one .38 caliber pistol and three .22 caliber pistols. Wallace was apprehended and taken into custody. We have no information that Wallace was selling or otherwise unlawfully disposing of ammunition or weapons. * * *

The submission further indicates that an investigation by Headquarters, 83d Army Reserve Command, revealed no felonious conduct or intent by the member and the United States Attorney was so advised by Colonel Brant's June 12, 1974 letter. On the other hand, it is indicated that Mr. Wallace was not required to have the guns and ammunition at his home as a part of his official duties and it appears that the quantity of guns and ammunition retained by the member was far in excess of the quantity which normally would be retained by a member in Mr. Wallace's position.

Ultimately, by order dated September 3, 1974, the United States District Court, Western District of Kentucky, dismissed the charge against the member.

As a result of the charge brought against him, the member incurred civilian attorney's fees in the amount of \$2,500 for which he seeks reimbursement on the basis that this expense is a moral obligation of the United States arising out of a mistake persisted in by Federal law enforcement agencies. In this regard the submission states as follows:

"It is the view of this command that Wallace acted in good faith and within the spirit, if not the letter, of existing Army Regulations. Had he been a member of the Active Army during this period, military counsel would have been appointed to defend him at no cost. The SJA, Fort Knox (at that time, Colonel James Machlin), was requested to furnish government counsel and declined to do so on the grounds that Mr. Wallace was not a person subject to the

Uniform Code of Military Justice, which of course he was not. However, it is clear that Wallace was acting in the course of his duties as a member of the Army Reserve; that the Army and his unit benefitted from his work; and that there was no criminal intent shown. Had the US Attorney or the FBI coordinated with this headquarters before or at the time of the arrest, a most unfortunate situation could have been avoided. Moreover, had the charges been dropped upon receipt of our letter of 12 June 1974, considerable additional legal expense to Wallace would have been spared."

As the submission indicates, if military court martial proceedings had been instituted against the member, he would have been entitled to military defense counsel provided at Government expense or by civilian counsel if provided by him but not at the expense of the United States. See Article 38(b), Uniform Code of Military Justice, 10 U.S.C. 838 (1970), and Manual for Courts-Martial, United States, 1969 (Revised Edition), paragraph 48a. However, we are aware of no law authorizing payment by the Government of private attorney's fees incurred by a military member incident to charges brought against him for a civil offense in circumstances such as these. While we have authorized payment of private attorney's fees in some limited circumstances involving litigation brought against Government officials as a result of their performance of official duties, in those cases the Department of Justice which, pursuant to law, would ordinarily have represented such officials declined to represent them due to policy or other considerations. See 55 Comp. Gen. 408 (1975) and 53 Comp. Gen. 301 (1973). In this case it does not appear that the member was entitled to be represented by counsel furnished by the Government. Accordingly, we know of no legal authority for payment of the claim and, therefore, it may not be allowed. Compare 49 Comp. Gen. 44, 47 (1969).

Concerning the application of the Meritorious Claims Act of 1928, 45 Stat. 413, 31 U.S.C. 236 (1970), that act provides as follows:

"When there is filed in the General Accounting Office a claim or demand against the United States that may not lawfully be adjusted by the use of an appropriation

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theretofore made, but which claim or demand in the judgment of the Comptroller General of the United States contains such elements of legal liability or equity as to be deserving of the consideration of the Congress, he shall submit the same to the Congress by a special report containing the material facts and his recommendation thereon."

The remedy provided by the Meritorious Claims Act is an extraordinary one, and its use is limited to extraordinary circumstances. In this case the member incurred legal expenses as a result of civil criminal charges brought against him by the United States. The bringing of such charges and the decision to have them dismissed were matters within the legitimate discretion of the United States Attorney in carrying out his official duties. While such charges were related to member's status as a member of the Army Reserve, they did not result from his performance of required official duties, but resulted from actions which at most were permitted under existing regulations and practices. In the circumstances we see no basis on which to distinguish the expense he incurred from expenses incurred by others who are subject to criminal charges which do not result in prosecution. Therefore, we do not consider his claim to contain such elements of legal liability or equity as would warrant reporting it to the Congress under the Meritorious Claims Act of 1928. Accordingly, no action will be taken by this Office to report the claim to the Congress.

R.F.KELLER

Deputy) Comptroller General
of the United States