

DOCUMENT RESUME

02306 - [A1602586]

[Claim for Accrued Leave and Mustering-Out Pay]. B-188669. June 2, 1977. 4 pp. + enclosure (1 pp.).

Decision re: Richard Allen Kiske; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Military Personnel.

Budget Function: General Government: Central Personnel Management (805).

Organization Concerned: Department of the Air Force.

Authority: Veterans' Readjustment Assistance Act of 1952, title V (66 Stat. 688). Veterans' Readjustment Assistance Act of 1952, sec. 501(a) (38 U.S.C. 1011(a)). 37 U.S.C. 501. 37 U.S.C. 33. Presidential Proclamation 3080. 20 Fed. Reg. 173. B-188041 (1977). B-183900 (1976).

Arthur H. Larson, Service Officer of the St. Louis County, Minnesota, Veterans Service Office, appealed a GAO decision disallowing a claim for accrued leave and mustering-out pay. The former Air Force member was not eligible for mustering-out pay authorized for members who served during the Korean conflict, since he did not serve on active duty during the period specified in the relevant legislation. The claim for payment for unused accrued leave based on an administrative action in 1972 must be disallowed, where the discharge occurred in 1958, and all records which might establish how many days of accrued leave, if any, he had at the time of his discharge have been destroyed. (Author/SC)

02306
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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

FILE: B-188669

DATE: June 2, 1977

MATTER OF: Richard Allen Kiske

- DIGEST:
1. Former Air Force member who served on active duty from August 17, 1955, to February 26, 1958, is ineligible for mustering-out pay authorized for members who served during the Korean conflict by the Veterans' Readjustment Assistance Act of 1952, 66 Stat. 688, since the statute and the proclamation issued thereunder required that members must have served on active duty at some time during the period June 27, 1950, to February 1, 1955, in order to be entitled to such mustering-out pay.
 2. Former Air Force member's claim for payment for unused accrued leave based on administrative action in 1972 to change character of discharge from undesirable to honorable must be disallowed, where discharge occurred in 1958 and in the intervening period all records which might establish how many days of accrued leave, if any, he had at the time of his discharge were destroyed.

This action is in response to a letter dated February 22, 1977, from Mr. Arthur H. Larson, Service Officer of the St. Louis County, Minnesota, Veterans Service Office, on behalf of Mr. Richard Allen Kiske, 7430 Mineral Street, Duluth, Minnesota 55810, a former member of the United States Air Force, which letter constitutes an appeal from the settlement of our Claims Division dated September 27, 1976, disallowing Mr. Kiske's claim for accrued leave and mustering-out pay believed due by reason of a change in his military records to show that he received a general discharge under honorable conditions rather than an undesirable discharge from the Air Force on February 26, 1958.

It is indicated that the claimant enlisted in the Air Force on August 17, 1955, for a term of 4 years, but that he was separated from military service on February 26, 1958, with an undesirable

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discharge after having served approximately 2 years and 6 months of his 4-year term of enlistment. The Report of Discharge (Department of Defense Form 214) issued in February 1958 states that the claimant was not eligible for mustering-out pay and was not entitled to pay for accrued leave.

The available records further indicate that in October 1972 the claimant made application for relief to the Air Force Discharge Review Board, and that on or about December 12, 1972, the Board concluded the character of his discharge should be changed to that of a general discharge under honorable conditions.

Subsequently, Mr. Kriske filed claim for mustering-out pay and payment for accrued leave, which he believed were due him as the result of the action taken to upgrade the character of his discharge. On September 27, 1976, the Claims Division of this Office issued settlement disallowing his claim for mustering-out pay for the reason that he had not entered on active duty during the qualifying period for such pay (June 27, 1950 to February 1, 1955). His claim for accrued leave was also disallowed for the stated reason that the records necessary to justify payment had been destroyed and also for the stated reason that because he had slept on his rights for a long period of time it was presumed his claim was never valid or had already been paid.

The correctness of that settlement is now being questioned.

With respect to the claimant's eligibility to receive mustering-out pay, payment of such pay to members of the Armed Forces who served on active duty during the Korean conflict on or after June 27, 1950, was authorized, under the conditions specified, by Title V of the Veterans' Readjustment Assistance Act of 1952, 66 Stat. 688. Subsection (a) of section 501 of that act, 38 U. S. C. 1011(a) (1952 ed.), is as follows:

"(a) except as provided in subsection (b) of this section, each member of the Armed Forces who shall have been engaged in active service on or after June 27, 1950, and prior to such date as shall be determined by Presidential proclamation or concurrent resolution of the Congress, and who is discharged or relieved from active service under honorable conditions, shall be eligible to receive mustering-out payment."

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Proclamation No. 3080, January 5, 1955, 20 Federal Register 173, fixed February 1, 1955, as the date prior to which members of the Armed Forces engaged in active service on or after June 27, 1950, must have so served in order to be eligible for mustering-out payments under Title V of the Veterans' Readjustment Assistance Act of 1952.

In view of the pertinent statutory provisions and the proclamation issued pursuant to such provisions and since the claimant did not serve on active duty prior to February 1, 1955, he was not eligible for mustering-out pay incident to this military service, irrespective of the type of discharge issued to him.

With regard to the claimant's entitlement to payment for accrued leave, 37 U.S.C. 33 (1958 ed.), in effect at the time of his discharge, generally provided that any member of the Armed Forces honorably discharged having unused accrued leave standing to his credit at time of discharge would be compensated for such unused leave in cash on the basis of the basic and longevity pay, and allowances, applicable to such member on the date of discharge. Subsection (d) of that statutory provision specifically requires:

"(d) Forfeiture for discharge other than honorable.

"Any member of the armed forces discharged under other than honorable conditions shall forfeit all unused accrued leave to his credit at the time of discharge."

Similar provisions are currently contained in 37 U.S.C. 501 (1970).

It thus appears that the claimant would, under ordinary circumstances, become entitled to payment for any unused accrued leave he may have had at the time of his discharge in 1958, as the result of the administrative action taken in 1972 to upgrade the character of that discharge to one under honorable conditions. However, the records before us do not disclose how many days of unused accrued leave, if any, the claimant had at the time he was discharged. In addition, the National Personnel Records Center, St. Louis, Missouri, the repository for records such as would be involved in this case, has advised that they have no such records; further that if such records were on file with that activity prior to July 12, 1973, they were destroyed in the fire which occurred there on that date.

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The burden of proof as to the existence and nonpayment of a valid claim against the Federal Government is on the person asserting such a claim. Ordinarily, proof of the validity of a claim can be found in Government records. However, in situations such as this, where records which may prove or disprove the validity of a claim have been destroyed, this Office has no alternative but to disallow the claim. B-183900, August 3, 1976; B-188041, April 22, 1977. Thus, while we do not necessarily conclude that the claimant "slept on his rights" in this matter, we have no alternative but to disallow his claim for payment of unused accrued leave, since we are unable to determine from the available records what amount, if any, might have been payable to him for such leave. If Mr. Kriske has personal records or other evidence which would be of value in determining the amount of leave to his credit on discharge, such records should be submitted to us for consideration in reevaluating his claim.

Accordingly, the settlement of our Claims Division is sustained.

R. J. J. J. J.
Deputy Comptroller General
of the United States



Donald Gritz
Mil.Pers.

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

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June 2, 1977

The Honorable James L. Oberstar
House of Representatives

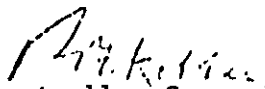
Dear Mr. Oberstar:

This is in further reference to your communication dated March 8, 1977, with enclosures, on behalf of your constituent, Mr. Richard Allen Kiske, 7430 Mineral Street, Duluth, Minnesota 55810, which, in effect, requests reconsideration of the settlement by our Claims Division disallowing Mr. Kiske's claim for amounts believed due as the result of action taken by the Department of the Air Force to change the character of his discharge from the United States Air Force from undesirable, to general, under honorable conditions.

Enclosed is a copy of decision B-188669, of today's date, in which we concluded that on the basis of the facts presented and the applicable provisions of law, the settlement of our Claims Division must be sustained.

We trust this will serve the purpose of your inquiry and regret that we are unable to reach a determination more favorable to your constituent.

Sincerely yours,


Deputy Comptroller General
of the United States

Enclosure