

DECISION



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

*Riedinger
Pay II
8174*

FILE: B-192444

DATE: October 30, 1978

MATTER OF: Specialist Fourth Class Myers Darby,
USA, Retired

- DIGEST:
1. Where an individual, who is in an "absence without leave/dropped from rolls as a deserter" status, is apprehended and returned to military control and who is ordered into a military hospital for in-patient treatment for a mental condition which condition antedated his return to military control and is restored to the rolls as a service member for accountability purposes, such action may be considered as tantamount to restoring him to a full duty status for pay purposes. Cf. 54 Comp. Gen. 862 (1975).
 2. An individual who is in an "absence without leave/dropped from rolls as a deserter" status for more than 30 days, even though it is determined by medical authority that he is mentally incompetent, is not entitled to pay and allowances for that absence period unless the absence is excused as unavoidable (37 U. S. C. 503(a) (1970)) by an officer exercising general courts-martial jurisdiction (para. 10312b, DODPM and para. 1-14, AR 630-10). Cf. 40 Comp. Gen. 366 (1960).
 3. In the absence of a court-martial conviction and sentence which includes forfeiture of accrued but unpaid pay and allowances, that which accrues but is unpaid at the time a member enters an absence without leave status may be paid following his return to military control.

This action is in response to a letter dated June 10, 1978, from Luther J. Battiste, III, Esquire, written on behalf of Specialist Fourth Class Myers Darby, USA, Retired, concerning his entitlement to pay and allowances believed due for the period January 1, 1969, through February 13, 1976, for service in the United States Army.

The matter of this claim was the subject of a settlement by our Claims Division, dated May 24, 1978, which disallowed that claim for the reasons that the member was in an absence without leave/dropped from the rolls (AWOL/DFR) status during the major portion of the

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period in question, that it was well after the expiration of his term of service when he was returned to military control, and that the absence was not excused as unavoidable by an officer having authority to excuse such an absence nor was he required to make good the time he lost from his enlistment period by reason of his AWOL/DFR status.

The record in the member's case shows that he was inducted into the United States Army on February 9, 1967, for a 24-month tour of duty, with the normal expiration of his tour of duty being February 8, 1969. On January 10, 1969, the member was reported as being in an AWOL status and on February 14, 1969, was dropped from the rolls as a deserter. That status remained until he was apprehended by civil authorities and returned to military control at Fort Jackson, South Carolina, on May 9, 1975. Because there was some evidence that he was mentally impaired, he was released to Moncrief Army Hospital at Fort Jackson on that same day.

By Special Orders No. 143, dated July 9, 1975, issued by Headquarters, United States Army Training Center and Fort Jackson in confirmation of verbal orders, the member was assigned to "Company Area HHC Hq CMD FT JACKSON SC Z9027" for accountability purposes while an inpatient at the hospital.

From May 9, 1975, until November 26, 1975, the member was treated for a mental disorder, which disorder was determined to have existed for quite some time prior to his return to military control. In this connection, it was discovered that during the member's six years' absence, he had received treatment at various Veterans Administration (VA) hospitals for the same general mental condition.

On August 20, 1976, an investigation of the circumstances surrounding the member's unauthorized absence was ordered. The report of that investigation, dated November 14, 1975, stated that the member was mentally incapacitated at the time he was dropped from the rolls as a deserter in February 1969; that he had been in and out of VA hospitals since early 1969 and that the VA authorities were negligent in notifying military authorities that he was in their hospital facilities. Based on those findings, the report recommended that the member not be tried by court-martial for his

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unauthorized absence; that he be retained under medical jurisdiction for treatment and that he be presented to a Physical Evaluation Board to determine his fitness.

By Special Orders No. 197, dated November 26, 1975, issued by Headquarters, U. S. Army Medical Department Activity, Fort Jackson, the member was reassigned to the Medical Holding Detachment. Thereafter, based on a finding of permanent disability rated at 70 percent, he was retired under the provisions of 10 U. S. C. 1201, effective February 14, 1976, as a Specialist 4 (pay grade E-4) and credited with 9 years and 5 days service for active duty pay purposes.

The member's pay records show that he did not receive any pay and allowances for any of the period January 1, 1969, to February 13, 1976. For the purposes of determining the member's entitlements, that period is divisible into three parts: (1) January 1-9, 1969, the active duty period immediately prior to the inception of his AWOL/DFR status, (2) January 10, 1969-May 8, 1975, -- the period of his AWOL/DFR status and (3) May 9, 1975-February 13, 1976--the period following his return to military control. And since such actions as were administratively taken in the member's case in an effort to resolve his military status occurred during the latter period, we will treat these periods in reverse order.

Section 972 of title 10, United States Code (1976), provides in pertinent part:

"An enlisted member of an armed force who--

"(1) deserts;

"(2) is absent from his organization, station, or duty for more than one day without proper authority, as determined by competent authority;

* * * * *

"is liable, after his return to full duty, to serve for a period that, when added to the period that he served before his absence from duty, amounts to the term for which he was enlisted or inducted."

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Pertinent provisions of Department of Defense regulations which implement 10 U.S.C. 972, are contained in the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM). Paragraph 10318b thereof and, entitled "After Expiration of Term of Service," provides in part:

* * * * *

"(3) Return to Military Control: An absentee who surrenders or is apprehended after his term of enlistment has expired is not entitled to pay and allowances until he is restored to a full duty status for the purpose of making good lost time. * * *

* * * * *

"(6) Absentee. An enlisted member, whose term of enlistment or induction terminates while he is in a status of absence without leave or desertion, is not entitled to pay and allowances upon his return to military control * * * if * * * his return to full duty has never been effected. * * *"

It is clearly evident from the foregoing that in order for a member who is returned to military control from an AWOL/DFR status after the expiration of his term of service to become entitled to pay and allowances thereafter, he must be returned to full duty and that the return be for purpose of making up time lost.

In 54 Comp. Gen. 862 (1975) we considered several questions concerning that which constituted restoration to full duty for pay and allowances purposes in a situation where a member was returned to military control after expiration of his enlistment where, because of manning problems at the particular installation, he could not be utilized in his grade, military occupation specialty and years of experience. In answer to questions (a) and (f) of that decision, we ruled that the attainment of "full duty" is achieved when the appropriate military commander, either the installation commander of the installation where the member is held or the commander of the unit to which the member is assigned, takes appropriate administrative action to assign him to useful and productive duties, so long as those duties are not inconsistent with his grade and years of service.

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In the present case, it is evident from the record that at the time the member was returned to military control on May 9, 1975, he was in some way mentally impaired and that because of that impairment he required immediate medical assistance without thought given by order-issuing authority to the concept that he was to make good time lost, or that he was being held for disciplinary action. It is also evident that upon official assignment to the hospital, in view of his impairment, the only military duties which he could have performed were those of a hospital patient. In the circumstances, it is our view that the orders of July 9, 1975, confirming verbal orders of May 9, 1975, may be considered tantamount to appropriate administrative action restoring the member to a full duty status for the purpose of both medical treatment as a member of the armed forces and making good time lost.

As to the period after the member made good the time he lost (approximately one month), the file shows that his condition persisted. In view of the fact that no "misconduct--not in line of duty" finding was made in connection with the illness; that it was recommended that he be retired for physical disability and was so retired, it is our view that the member was to be regarded as retained in service for the convenience of the Government until retired. Accordingly, the member is entitled to pay and allowances for the period May 9, 1975, through February 13, 1976.

With regard to the member's AWOL/DFR period, 37 U. S. C. 503(a) (1970) provides:

"(a) A member of the Army, * * * who is absent without leave or over leave, forfeits all pay and allowances for the period of that absence, unless it is excused as being unavoidable." (Underscoring supplied.)

Implementing regulations contained in the DODPM, provide in paragraph 10312b thereof:

"b Administrative Determination of Unauthorized Absence. When a member is in an unauthorized absence status, an administrative determination must be made as to whether the absence was unavoidable. * * * if it is not excused as unavoidable, the member (including one

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mentally incompetent) forfeits pay and allowances for the period of absence. This applies even though a court-martial finds the member not guilty of a charge of unauthorized absence, or when a finding of guilty has been disapproved by the reviewing authority."

In conjunction with the foregoing, Army Regulation 630-10 provides in paragraph 1-14 thereof:

"a. If an absence is to be reclassified from AWOL to an authorized absence, or an unauthorized absence qualifies as an unavoidable absence which may be excused, the following commanders may reclassify or excuse * * *.

* * * * *

"(3) If an absence exceeds 30 days, the officer exercising general courts-martial jurisdiction.

* * * * *

"c. That portion of an absence which is classified as authorized will be considered duty time, even though the member was absent from immediate Army control."

The extract of the morning reports of the member's unit in Fort Hood, Texas, shows that on January 10, 1969, the member officially entered an AWOL status and that on February 14, 1969, he was dropped from the rolls of that organization as a deserter. As a result of those actions, in order for the member to become entitled to pay and allowances for any of the period from January 10, 1969, to May 9, 1975, when he was returned to military control, official action excusing such absence had to be taken by the officer exercising general courts-martial jurisdiction.

It appears from the file that no such official action was taken. In this regard, it is noted that by DA Form 2496, dated December 23, 1975, the Chief, U.S. Army Deserter Information Point, requested an opinion of the Surgeon General's office whether there was sufficient information to determine if the period of absence would qualify as

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unavoidable. The response dated January 8, 1976, was a recommendation by a psychiatry consultant that the absence be considered unavoidable. By internal routing slip from the Special Actions Branch of the United States Army Finance and Accounting Center, dated January 9, 1976, such absence was administratively approved as being unavoidable. Collateral to this action, DA Form 3713, dated February 6, 1976, stated in item 36 thereof, that "The Office of the Surgeon General (DA SG-HCC) has determined the period of unauthorized absence * * * be excused as unavoidable."

The validity of that action was questioned by our Claims Division in letter dated July 22, 1976, addressed to the United States Army Finance and Accounting Center. In response, this Office was advised that none of the officers who purported to excuse the member's absence as being unavoidable had the authority to do so. We concur. There is nothing in the file to show that any officer having such jurisdiction officially acted to excuse the member for the period. In addition it appears doubtful that this absence may be excused as unavoidable. Compare 40 Comp. Gen. 366 (1960), and cases cited therein. Therefore, in the absence of a showing that the member's AWOL/DFR period or any part thereof was properly excused, pay and allowances would not accrue to him for that period. Based on the record before us, the actions by our Claims Division disallowing the member's claim for pay and allowances for the period January 10, 1969, through May 8, 1975, is sustained.

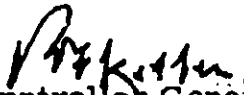
Regarding the period January 1-9, 1969, there is no question that the member was in full duty status then. In the absence of a courts-martial conviction where the sentence would include forfeiture of accrued unpaid pay, a member is entitled to all proper pay and allowances which accrued prior to that time. Since no courts-martial action was taken in the member's case, he would be entitled to pay and allowances for the period January 1 through 9, 1969.

In summary, the member is entitled to pay and allowances for the periods January 1 through 9, 1969, and May 9, 1975, through February 13, 1976, if otherwise correct, for which a settlement will be issued in due course. He is not entitled to such pay and allowances for the period of his AWOL/DFR status, January 10, 1969, through May 8, 1975.

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As to the matter of the member's retired pay entitlement, it was previously observed that the DA Form 3713 "DATA FOR RETIRED PAY" prepared in the member's case credits him with 9 years and 5 days for both active duty pay purposes and for retired pay computation purposes. While the record does not show the actual rate of retired pay being received by the member, we presume that the active duty pay rate used for such computation in his case was as an E-4 with over 8 years of service. If that is the case, such computation is in error. Since pay and allowances would not accrue to the member during the period January 10, 1969 through May 8, 1975, because his absence was not properly excused as unavoidable, such time may not be considered as "good time" for any purpose.

Therefore, based on the record before us, the member's active duty pay rate for retired pay computation purposes at the time of retirement should be as an E-4 with over 2 years of service, and adjustments are to be made for any overpayments of retired pay from February 14, 1976, to the present.


Deputy Comptroller General
of the United States