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DECISION

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

[Computation of Lump-Sum Leave Payment]

FILE: B-194948

DATE: July 9, 1980

MATTER OF: Mr. David G. Saulter

DIGEST: A service member's enlistment expired after he was confined as a result of a court-martial conviction. Thereafter, he was placed in a parole status in lieu of remaining confinement time, which status was terminated on date confinement would have ended. He was then placed in an excess leave status pending appellate review of his conviction. Upon review the conviction and sentence were set aside and all rights restored including leave accrual. He is entitled to leave accrual through the last day of parole, not to exceed 60 days. While pay and allowances accrued only through last day of parole (59 Comp. Gen. 12) payment of lump-sum leave is to be based on rates of basic pay in effect on the date of the member's discharge, even though he was not returned to a duty status.

This action is in response to a letter dated December 7, 1979, from the Assistant Secretary of Defense (Comptroller) seeking resolution of an additional question in connection with our decision B-194948, October 4, 1979 (59 Comp. Gen. 12), rendered in the case of Mr. David G. Saulter, a former member of the United States Marine Corps. The question involves the proper rate of basic pay to be used for the purpose of computing a lump-sum leave payment to Mr. Saulter and has been assigned Committee Action No. 548 by the Department of Defense Military Pay and Allowance Committee.

The facts in Mr. Saulter's case are as follows. The member was tried by General court-martial, and on August 22, 1975, was sentenced to forfeit all unpaid pay and allowances, be reduced in grade to E-1, be confined at hard labor for 2 years and receive a bad conduct discharge upon completion of the 2-year

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confinement period. While serving in confinement the member's enlistment expired. Additionally, he applied for and was granted parole from confinement on December 10, 1976, pending completion of appellate review of his case. The parole period was terminated on August 20, 1977, the date his period of confinement would have ended had he remained in prison. Since appellate review of his case was not yet completed, he was immediately placed in an indefinite excess leave status. In September 1978, his conviction and sentence were set aside and all rights, privileges and property of which he had been deprived were restored to him. In December 1978, he was honorably discharged from the service without having been returned to a duty status.

The basic questions asked in the original submission involved the extent of the period for which pay and allowances would accrue. In the October 4, 1979 decision, we concluded that Mr. Saulter was entitled to pay and allowances until August 20, 1977, and leave accrued through the same date, not to exceed 60 days.

The Committee Action indicates that because of the wording of that conclusion, there is some uncertainty as to the rate of basic pay which should be used to compute the lump-sum leave payment due in the case. Apparently, our response is viewed as suggesting that the rate of basic pay to be used in computing that payment would be the rate in effect on August 20, 1977. The Committee Action expresses doubt as to the propriety of such a conclusion and takes the position that under the provisions of 37 U.S.C. 501 (b)(1), since no payment would be due until the member's date of discharge, that payment should be computed on the rates in effect on that date. For the reasons stated below we concur in the view of the Committee. The decision of October 7, 1979, should not be read as requiring computation of the lump-sum leave payment or rates other than those in effect on the date of discharge.

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Section 501 of title 37, United States Code, provides in part in subsection (b)(1):

"(b)(1) A member of the * * * Marine Corps * * * who has accrued leave to his credit at the time of his discharge, is entitled to be paid * * * for such leave on the basis of the basic pay to which he was entitled on the date of discharge."

Similar language was contained in section 4 of Armed Forces Leave Act of 1946, 60 Stat. 964, as amended by the act of August 4, 1947, 61 Stat. 748, the predecessor of 37 U.S.C. 501.

In 35 Comp. Gen. 666 (1956), we considered a case involving an enlisted Navy member on active duty who was convicted by special court-martial confined for 4 months and whose obligated active service period expired before he was confined. Upon release from confinement, he was immediately placed in an inactive duty status in the United States Naval Reserve. At that time he still had unused leave to his credit which was not forfeited under his court-martial sentence. After he was released to an inactive duty status, he had no rate of pay upon which payment for leave could be computed. After analyzing the then current provisions of law, we stated:

"* * * The term 'discharge' as used in such provisions includes release from active duty, and unquestionably there is a rate of pay applicable to the grade held by an enlisted reservist even though the reservist may be in a nonpay status. Thus, even though this reservist was not retained [on active duty] after the expiration of his ordered tour of active duty for the performance of duty * * * he is entitled to be compensated for his unused leave * * *."

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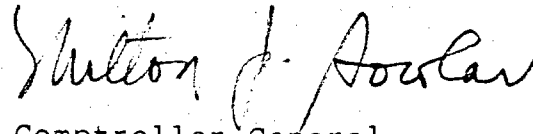
In 44 Comp. Gen. 403 (1965), we considered a situation involving a member on active duty who was placed in a furlough status. That furlough status carried with it entitlement to half pay. His discharge was effected while he was in a furlough status without having been returned to active duty. On the question as to the rate to be used for his lump-sum leave payment, we ruled that the payment was to be based on the full pay in effect on the date of his discharge. See also 37 Comp. Gen. 228 (1957).

It is evident from these situations that payment for any unused leave still to the credit of a member on the date of separation or discharge is to be computed on the basis of the rate of pay applicable on that date. Compare Bell v. United States, 366 U.S. 393 (1961).

In summary of Mr. Saulter's case, we have previously said that an individual whose conviction by court-martial is set aside or overturned on appeal is entitled to pay, even after the expiration of his enlistment, until the day he is discharged. Those cases, however, involved individuals who were in confinement or serving actively until the day of discharge. Here Mr. Saulter had not only passed the date on which his enlistment expired, but he had also served his period of confinement (including parole) and had been placed on excess leave. The only reason he was not separated at the end of his parole time was because he could not be given the adjudged Bad Conduct Discharge until his appeal to the Military Court of Appeals had been decided. During this period (from the last day of parole to discharge) he was without military obligation and in an agreed-upon non-pay status. In the circumstances, as concluded in the prior decision, he was not entitled to pay and allowances to the date of discharge but only to the date he was released from parole.

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However, under the decisions cited herein, his lump-sum leave payment became due at the time of his discharge based upon the rates of pay for his grade then in effect. The decision of October 7, 1979, 59 Comp. Gen. 12, is amplified accordingly.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For the Comptroller General
of the United States