Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Courts-martial Sentences—Records Lost Before Appellate Review—Appellate Leave Benefits

File: B-271415

Date: September 12, 1996

DIGEST

1. An enlisted member, who is in an appellate leave status under 10 U.S.C. § 876a (1994), and whose court-martial conviction with punitive discharge or dismissal is set aside administratively because the service concerned has lost the records of trial before completion of action by the convening authority or before completion of appellate review, and is thereafter given an administrative discharge, is entitled to pay and allowances during the period he is retained in the service, even for the period after he has passed the expiration of his term of service.

2. An enlisted member, who is in an appellate leave status under 10 U.S.C. § 876a (1994), and whose court-martial conviction with punitive discharge is set aside administratively because the service concerned has lost the records of trial before completion of action by the convening authority or before completion of appellate review, is thereafter given an administrative discharge. His placement in an appellate leave status may be voluntary or required. In addition, a voluntary appellate leave status under those provisions may become a required appellate leave status. Since all appellate leave under 10 U.S.C. § 876a could be processed as required leave and the member remains subject to military control, the member is entitled to pay and allowances for the entire appellate leave period because his placement in that status is for the government's benefit.

3. The pay and allowances entitlement of a member who is in an appellate leave status under 10 U.S.C. § 876a (1994), where the court-martial conviction with punitive discharge is set aside administratively because the service concerned has lost the records of trial before completion of action by the convening authority or before completion of appellate review and is thereafter given an administrative discharge, is authorized under 10 U.S.C. § 707(a) (1994). However, under 10 U.S.C. § 707(b)(2), that pay is to be reduced by the total of all the outside earnings received by the member for the period of appellate leave.

DECISION

This decision responds to a request from the Office of the Judge Advocate General, Department of the Navy (JAG), through the Defense Finance and Accounting Service (DFAS).[1] The issue involves the entitlement of service members, who have been convicted by court-martial and placed in an appellate leave status, but whose sentences have been set aside and the charges dismissed because the records of trial were lost before completion of action by the convening authorities or before completion of appellate review, to receive pay and allowances during their appellate leave status. As discussed below, those members are entitled to that pay and allowances, subject to set-off for any earnings the member received during that leave.

BACKGROUND

In September 1994, the Navy discovered that the trial records of approximately 141 cases, which were needed to accomplish the statutorily-mandated appellate review, were missing. Most of the cases involved special courts-martial with punitive discharges. DFAS reports that for those cases where the records cannot be reconstructed, the sentences will be set aside and the members will be subject to a rehearing. However, if a rehearing is impractical, the charges will be dismissed. Since in that event the adjudged punitive discharges cannot be ordered executed, it is likely that administrative discharges will be substituted.

DFAS reports that at the time these members were sentenced, most of them were placed on voluntary appellate leave, although some were placed on involuntary appellate leave. Presently, most, if not all, of these members are beyond the expiration of their terms of service, but have not been separated or discharged from the service.

ISSUES PRESENTED[2]

If the courts-martial sentences are set aside and the charges against the members are dismissed because of the service's inability to conduct appellate reviews:

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[1]This request has been assigned control number DFAS 96-1-M.

[2]While the request for decision was submitted by DFAS, the Deputy Assistant Judge Advocate General of the Navy (Criminal Law), subsequently advised us that the request was submitted in behalf of the Navy but contained some errors and the issues needed to be rephrased. Our discussion is based on the issues as set forth by the Deputy Assistant Judge Advocate General.

a. Is the member entitled to back pay and allowances beginning the date the member was placed on appellate leave, whether it was voluntary or involuntary?

b. Is the member entitled to back pay and allowances after the member passed his/her expiration of enlistment, before or after being placed on appellate leave, voluntarily or involuntarily?

c. If the member is entitled to back pay while in an appellate leave status, is there a set-off because of any earnings the member received during appellate leave?

OPINION

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.[3] However, a punitive discharge or dismissal of a service member, as ordered by a court-martial, cannot be executed until all appellate review through the service courts has been completed.[4] Because of the time necessary to complete appellate review, the member may pass the date on which his enlistment expires before appellate review is completed and the punitive discharge can be executed.

Before the Uniform Code of Military Justice was amended by the Military Justice Amendments of 1981, Pub. L. No. 97-81, November 20, 1981, 95 Stat. 1087, a member sentenced to a punitive discharge or dismissal from the service would be restored to a duty status pending appellate review of that sentence, or be placed in a leave status if the member voluntarily agreed to take leave. If the member had accrued leave to his credit, he could take that leave. If the member exhausted that leave pending appellate review, or had no accrued leave, he would be placed in an excess leave status until appellate review of his case was completed, but only if he agreed to be in that status.[5] He could not be ordered to take excess leave, but if the member voluntarily did so, there was no authority to pay the member for excess leave, even if the punitive discharge sentence was set aside by a court of military appeals.

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[3]63 Comp. Gen. 25 (1983), and cases cited.

[4]10 U.S.C. § 866 (1994).

[5]If he refused to take excess leave, he would remain in his unit even though he had been adjudged unfit for duty.

Public Law 97-81, supra, added articles 76a (10 U.S.C. § 876a (1994)), to the Uniform Code of Military Justice, and sections 706 and 707 to the leave chapter of title 10, United States Code. Section 876a of title 10, United States Code, was enacted to prevent a member who has been adjudged unfit for continued military service from having the option of being restored to duty while awaiting the outcome of his appellate review. The intent of the provision is to give military commanders the authority to compel these court-martialed individuals to take leaves of absence pending completion of appellate review if the sentences include a punitive discharge. Congress also provided, however, that if a member's court-martial sentence of dismissal or punitive discharge from the service is subsequently set aside or disapproved by the court, the member is entitled to be paid for leave charged as excess leave, unless as a result of a new trial the dismissal or punitive discharge is later executed.[6]

The threshold issue is whether the administration dismissal of a punitive discharge, because the records of the trial have been lost, entitles the member to receive the same pay and allowances that he would have received had the discharge been set aside by a court of military appeals. The holding in Cowden v. United States, 600 F.2d 1354 (Ct. Cl. 1979) supports an affirmative answer. There, the court held that an Army member who was on parole and sent home in a furlough status was entitled to pay and allowances following expiration of his term of enlistment to the date of his formal release, because his court-martial sentence was set aside and never set for rehearing. The court reasoned that since the Army had retained the member in the service and dismissed the charges against him for its own convenience, it thus had an obligation to pay him.[7] Id. at 1359.

The Navy JAG notes the holding in Cowden, but believes it cannot be applied to a member on appellate leave where the charges are similarly dismissed administratively. It points to language in our decision, David G. Saulter, 59 Comp. Gen. 595 (1979), where we held that a member on excess leave when his conviction was set aside was not entitled to pay and allowances during such period, as

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[6]10 U.S.C. § 707 (1994).

[7]In support of its position, the government relied on 40 Comp. Gen. 202 (1960). There, we held that an Army member who died subsequent to the expiration of his enlistment and while a prisoner pending appellate review of his sentence, was not entitled to pay and allowances and his right to benefits could not be restored by the Secretary of the Army after his death. The Court in Cowden stated that our decision "may be wrong insofar as it adheres to the rule that only a formal acquittal will require payment of pay and allowances to an enlisted man held in confinement awaiting trial or some review of his court-martial sentence after his period of enlistment."

distinguished from the situation where the member was serving on parole.[8] However, the distinction between a parole status and an excess leave status relative to pay and allowances can no longer be made in view of 10 U.S.C. § 707(a), supra. If the Court of Military Review sets aside the sentence of a member while he is in an excess leave status, that member is entitled to pay and allowances for excess leave.

The question here is whether the same result should obtain if the court-martial sentence is dismissed or set aside administratively because the service concerned has lost the records of trial. As the court in Cowden observed, a punitive discharge that is set aside without rehearing, or is dismissed, has the effect of nullifying the original action, even though it is not an acquittal for purposes of double jeopardy. Id. at 1359. Since individuals on appellate leave pending review of their courts-martial convictions with a punitive discharge or dismissal still have a residual status as military members, they remain subject to military control and may be brought back for further judicial hearings, for medical evaluation and treatment, or for other purposes of an official nature in appropriate circumstances.[9] Consequently, the government has an obligation to pay the member during such period of retention in the service. Moreover, the obligation to pay continues even after the member has passed the expiration of his term of enlistment, no matter when the member was placed on appellate leave.

The issue is also raised whether the member is entitled to pay and allowances if his placement on appellate leave pending appellate review was voluntary. The Navy believes that the member should not receive pay and allowances for any period of voluntary appellate leave. It advises that a member may be placed on voluntary appellate leave immediately upon completion of any sentence of confinement. In contrast, placing a member on required appellate leave cannot occur until the member's sentence has been approved at a high command level, which may not happen until well after the member has been released from confinement. Thus, the Navy believes that voluntary appellate leave serves the convenience of the member.

While there may be a difference between when a member may begin voluntary appellate leave and when he would be placed on required appellate leave, the purpose of the appellate leave is the same. In both cases, the purpose is to move the member from a duty status to a leave status pending completion of appellate review. While a member may receive a longer period of appellate leave if he agrees

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[8]The Navy advises in this connection that a member on parole in a furlough status is subject to many more restrictions than is a member on appellate leave.

[9]See H.R. Rep. No. 306, 97th Cong. 1st Sess. 1-4, reprinted in 1981 U.S. CODE CONG. & AD. NEWS 1769-1772. See also 63 Comp. Gen. 135, 138-139 (1963).

to it, his placement in such a leave status clearly is intended to serve the government's interest.

The legislative history of Public Law 97-81, supra, confirms this view. The Committee report, cited above, noted the testimony of the Army's Judge Advocate General questioning whether repayment for involuntary excess leave where a conviction is reversed would create a disincentive for an accused to apply for voluntary leave while awaiting appellate review. In response, the Committee said that it is not the intention of the appellate leave provision that the Department of Defense (DOD) should create two classes of appellate leave with different pay results if courts-martial sentences are overturned. The Committee advised that the DOD regulations could state the requirement that all appellate leave be processed as required leave, since the decision to place a member on appellate leave belongs to the command and not to the member. Id. at 1772.

DFAS and the Navy JAG appear to disagree as to whether the DOD has adopted such a regulation. DFAS notes that under paragraph F.21.c of DOD Directive 1327.5, Sept. 21, 1985, when a sentenced member is placed in a voluntary leave status, that status is changed to "required" appellate leave after the member's sentence is approved by the convening authority, and the command is required to send a written notice to the member of his change in statue. The Navy argues that the subsequent administrative recharacterization of the leave as "required" changes nothing, since "these service members voluntarily embarked upon the status of appellate leave, an agree-upon, non-pay status."

Contrary to the Navy's contention, it does appear from the cited DOD Directive that all voluntary appellate leave shall be processed as required appellate leave once a court-martial sentence has been approved by the convening authority. The fact that the member voluntarily agreed to the appellate leave status has no particular significance. Until a member in an appellate leave status is separated from the service, he remains under military control, however minimal, and is subject to all lawful orders.[10] If a member does not voluntarily agree to take leave pending the outcome of appellate review, the service can require him to do so. Thus, the member's agreement to take appellate leave is a mere formality and there is no logical basis to draw a distinction between these two methods of appellate leave placement. The important factor is that the appellate leave, whether required or voluntary, is for the government's benefit.

The last issue is whether a member, who is entitled to back pay while in an appellate leave status, is subject to set-off on account of outside earnings received during the period of appellate leave. Members who are authorized under 10 U.S.C.

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[10]Cf. David G. Saulter, 59 Comp. Gen. 12, 14 (1979).

§ 707(a) to receive pay and allowances during a period of voluntary or required appellate leave, are required under 10 U.S.C. § 707(b)(2) to have that pay reduced by the total of all other income received "from wages, salaries, tips, other personal service income, unemployment compensation, and public assistance benefits from any Government agency during the period." Therefore, all outside earnings of a member while on appellate leave are to be set-off against his back pay and allowances entitlement during the period of appellate leave.

/s/Seymour Efros
for Robert P. Murphy
General Counsel