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FILE: B-184585

DATE:

MATTER OF: Pay and allowances upon determination of status by court order - SR

Name eliminated for publication purposes

DIGEST: An enlisted member of the United States Naval Reserve who after being ordered to active duty filed a petition for habeas corpus on grounds that he was not a member and was determined by Federal court order to have been lawfully enlisted and in a military status, is entitled to pay and allowances during the litigation, regardless of whether he performs military duties. However, settlement of the member's claim for such pay and allowances is subject to a deduction of gross civilian earnings when he performed no meaningful or useful services for the United States Government during the period.

This action is in response to letter dated June 13, 1973 (file reference LM:lh 7240 Sar: 443), with enclosures, from H. G. Abajian, Navy Finance Office, Long Beach, California, requesting an advance decision, regarding the entitlement of Seaman Recruit ; USNR, to active duty pay and allowances for the period September 3, 1974, to March 4, 1975, in the circumstances described. The request was forwarded to this Office by the Office of the Comptroller of the Navy and has been assigned submission number DO-M-1239 by the Department of Defense Military Pay and Allowance Committee.

The record shows that the member was ordered to report for active duty by Active Duty For Training Order, Serial No. 0035-03-64-11, dated February 27, 1973, issued by the Navy-Marine Corps Reserve Center, Los Angeles, California, to report to the Commanding Officer, Recruit Training Center, San Diego, California, on March 14, 1973, for 109 days of active duty for training. The submission states that the member failed to report as ordered and was declared a deserter on April 13, 1973. He was apprehended and released to military control on July 17, 1973. A Special Court Martial, convened in September 1973, found him not guilty of unauthorized absence from March 14, 1973, through July 16, 1973. However, while awaiting that disposition, the member further absented himself without authority during the periods October 1, 1973, to October 24, 1973, and November 5, 1973, to August 26, 1974, each time being apprehended and returned to military control.

djb

PUBLISHED DECISION
55 Comp. Gen.

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On September 3, 1974, the member filed a petition in the United States District Court for the Central District of California (No. CV-74-2557-LTL(P)), for a writ of habeas corpus directed to the naval officer having custody and control of him in which he sought a determination that he was not and never had been a service member and that he was not within the jurisdiction of the United States Navy. He also sought his release and discharge and an order restraining the Navy from sending him outside the territorial limits of the Central District of California or taking any adverse action against him. The District Court issued an order setting the matter for hearing on September 24, 1974, and restrained the Navy from sending the member outside the district, or from taking any adverse action against him. On February 20, 1975, the court issued an order dismissing the petition for habeas corpus, finding that the member was lawfully enlisted into the United States Naval Reserve and bound by the documents signed in connection with that enlistment.

Since the member had received no recruit training and was required to remain within the jurisdiction of the court, he was verbally instructed to remain at home, to continue his civilian employment, and to muster daily by telephone with the Legal Office, Naval Support Activity, Long Beach, California, from September 3, 1974, to March 4, 1975. During this period he was employed by Alarm Clock Corporation, Los Angeles, California, and earned \$4,207.60. On March 5, 1975, he voluntarily returned to military jurisdiction. He has been paid his pay and allowances for the period July 17, 1973, through September 2, 1974, less periods of unauthorized absences. The following questions are presented for decision:

- a. Is the member entitled to pay and allowances for the period September 3, 1974, through March 4, 1975?
- b. If the answer to question a is in the affirmative, should the amount of the member's civilian earnings during the period be deducted from the entitlement?

A service member is entitled to basic pay while he occupies a military status, regardless of whether he actually performs military duties. United States v. United States, 43 Ct. Cl. 225 (1908); United States v. United States, 72 Ct. Cl. 459 (1931); United States v. United States, 163 Ct. Cl. 512 (1963); and United States v. United States, 366 U.S. 393 (1961). See also 43 Comp. Gen. 293, 297 (1963); and B-183625, August 20, 1975.

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On the record, the District Court has determined that the member's entry on active duty in the United States Navy was proper and that he was bound by their requirements. Although commend interpretation of the initial court order enabled the member to remain at home and continue his civilian employment, he continued his status as a serviceman by mustering daily. Therefore, by establishing the status of the member at the time he filed his habeas corpus petition, the court continued the member's active duty status from September 3, 1974, through March 4, 1975, thus, entitling him to pay and allowances for the period. Question a is answered accordingly.

Since its opinion in W. United States, 110 Ct. Cl. 236, cert. denied, 335 U.S. 821, rehearing denied, 335 U.S. 864 (1948), the Court of Claims has permitted deductions of outside civilian earnings from recoveries of civilian and military pay. See W. United States, 175 Ct. Cl. 862 (1966) and cases cited.

In those cases the employees and members concerned were improperly separated and later restored to duty status. The court held that they were entitled to pay for the period of erroneous separation but that the Government's liability was subject to reduction in the amount of interim earnings from civilian employment. Here, the member contended that he was not properly enlisted and under a court order remained in his civilian status pending a determination of the case. Upon a holding of the court that the enlistment and order to active duty were proper the member's status on active duty was established and he became entitled to pay for the period as indicated above.

In this case as in the numerous Court of Claims decisions cited, the member concerned was not required to perform military duties pending a judicial determination of his military status. Since this situation seems to be similar to the situation involved in the court cases so far as is relevant to backpay entitlement we believe that the member's civilian earnings for the period in question may be used to reduce the amount due him as military pay.

Therefore, in answer to question b, it is our view that payment to the member for pay and allowances for the period September 3, 1974, through March 4, 1975, would be subject to a deduction of the member's gross civilian earnings.

R. F. [Signature]

Comptroller General
of the United States