

DECISION

DIGEST - L. Mill
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

181

FILE: E-187272

DATE: NOV 4 1976

MATTER OF:

, SA, USN

DIGEST:

Member's claim for pay and allowances for period in which he was in an unauthorized leave status (part of which he was under psychiatric treatment in civilian hospitals) is disallowed since the administrative determination required by 37 U.S.C. 503(a) (1970) was not made that the absence was excused as unavoidable, which determination is primarily administrative and based on the actual facts involved.

This action is in response to a letter from Mr. _____, a former enlisted member of the United States Navy _____, appealing our Claims Division settlement dated July 9, 1976, which disallowed his claim for pay and allowances for the period from February 4, 1974, through March 25, 1975, during which time he was in an unauthorized absence status from the Navy.

The record indicates that the claimant was absent without leave from February 4, 1974, to March 26, 1975, and had been declared a deserter as of March 3, 1974. The file shows that while absent without leave, the member apparently returned home to Texas, until November 1, 1974, when he was admitted by his family to a civilian hospital in Galveston, Texas. The file also shows that he was shortly thereafter transferred to Graves Hospital, Galveston, Texas, where he remained under psychiatric treatment until March 26, 1975, when he was released to naval authorities and transferred to the Naval Hospital, Memphis, Tennessee, and then to the Naval Regional Medical Center, Portsmouth, Virginia. On August 7, 1975, he was granted a neuropsychiatric waiver of the desertion charge and on October 24, 1975, he was honorably discharged from the Navy.

Mr. _____ submitted a claim for pay and allowances to the Navy for the period of his unauthorized absence, which claim the Navy forwarded to our Claims Division as doubtful. The Claims Division disallowed the claim on the basis that there is no record that the unauthorized absence was excused as unavoidable and the official records show the period of the claim as lost time.

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In his letter appealing the Claims Division disallowance of his claim, Mr. [redacted] indicates that on August 7, 1975, his absence was excused by the Portsmouth Naval Medical Center and that he is therefore entitled to be paid for the period of his absence.

The right of members of the uniformed services to receive pay and allowances for periods of absence without leave is governed by the provisions of 37 U.S.C. 503(a) (1970) derived from section 4(b) of the Armed Service Leave Act of 1946--which reads in part as follows:

"A member of the * * * Navy * * * who is absent without leave or over leave, forfeits all pay and allowances for the period of that absence, unless it is excused as unavoidable."

Regulations implementing that provision of law are contained in chapter 3, section B, Department of Defense Military Pay and Allowances Entitlements Manual, paragraph 10312b which provides in part:

"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 mentally incompetent) forfeits pay and allowances for the period of absence. * * *"

The question of whether sufficient grounds exist for excusing absence of members of the Armed Forces as unavoidable under 37 U.S.C. 503(a) is primarily for administrative determination based on the actual facts involved. Under the provisions of paragraph 3020075.13, Bureau of Naval Personnel Manual, in effect during the period in question, such determination was to be made by the Chief of Naval Personnel.

The mere determination that an enlisted man was mentally incompetent during a period of absence without leave will negate the imposition of any punishment for such absence, but such a determination does not remove the requirement that he comply

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with the obligations of his enlistment in order for him to be entitled to pay. See 40 Comp. Gen. 366/(1960), and 47 Comp. Gen. 214/(1967).

In this case, as the claimant points out, the record indicates that on August 7, 1975, a waiver of the desertion charge was granted. However, the record does not show that the administrative determination was made that his absence was excused as unavoidable so as to entitle him to pay and allowances for that period. The Report of Separation from Active Duty, DD Form 214N, does show the period of February 4, 1974, to March 26, 1975, as lost time, and the reason shown for his discharge on his Record of Discharge is physical disability "resulting from intentional misconduct/willful neglect incurred during period of unauthorized absence."

In these circumstances and since the file does not show that the claimant's absence during the period in question was excused as unavoidable, no pay and allowances are due him for such period. Accordingly, the action taken by our Claims Division is sustained.

R.F. KELLER

[Deputy] Comptroller General
of the United States

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