11585 A. Riedinger PLII

DECISION

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

FILE: B-194948 DATE: October 4, 1979

MATTER OF: Mr. David G. Saulter
[Entitlement To Pay and Allowances of

DIGEST: 1. A service member whose enlistment expired while in confinement pending appellate review of his court-martial sentence is not entitled to pay and allowances for period of confinement subsequent to expiration of his enlistment unless the conviction is completely overturned or set aside. Where it is so overturned or set aside and a portion of confinement time is served in a parole status, since the military exercises constraints on parolee's action, even though to a lesser degree than actual confinement, such constraints are just as real. Therefore, the individual is entitled to pay and allowances for his parole period. Compare Cowden v. United States, Ct. Cl. No. 242-78, decided June 13, 1979.

2. The rules governing parole of a service member confined by military authorities as a result of a court-martial sentence require as a prerequisite to that parole that the parolee will have gainful employment. Therefore, in the absence of a statute so authorizing, it would be improper to set off civilian earnings against military pay due for a parole period which becomes a period of entitlement to pay and allowances, unless the earnings are from Federal civilian employment which is considered incompatible with military service.

This action is in response to a request for advance decision from the disbursing officer, Marine Corps Finance Center, on several questions regarding the legality of crediting pay and allowances to the account of former Marine Corps Sergeant David G. Saulter. This matter has been assigned Control No. DO-MC-1319 by the Department of Defense Military Pay and Allowance Committee.

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The reported facts are that Mr. Saulter, was arraigned on August 7, 1975, and tried by General court-martial on August 22, 1975, he was found guilty and sentenced to be confined at hard labor for 2 years, to forfeit all pay and allowances, to be reduced to the pay grade of E-1 and to be discharged from the service with a bad conduct discharge. On September 19, 1975, that sentence was approved by the convening authority.

On January 9, 1976, while serving the confinement portion of his sentence, the member's enlistment expired. Subsequently, Mr. Saulter was transferred to the United States Disciplinary Barracks, Fort Leavenworth, Kansas, to serve out the remainder of his period of confinement. While there, he applied for parole, and on December 10, 1976, he was released and sent home in an "Adjudged Parole" status, pending completion of appellate review of his case. That parole status ended August 20, 1977, and he was immediately placed in an indefinite excess leave status awaiting completion of appellate review. On September 28, 1978, the finding of guilty and the sentence imposed were set aside and all rights, privileges and property of which he was deprived by virtue of such findings were restored to him. Mr. Saulter was honorably discharged from the service on December 15, 1978, without being returned to a duty status, and received pay and allowances through December 10, 1976, the date of inception of his parole period.

Based on the foregoing, the following specific questions are asked:

> "a. Is Mr. Saulter entitled to pay and allowances for the period of "Adjudged Parole"?
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> "b. If the answer to the above question is in the affirmative, is there any provision to recoup a difference between his military pay and allowances and his civilian pay entitlements?
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> "c. If it is determined that he is not entitled to pay and allowances for the period of "Adjudged Parole," on what day would payment commence for the leave Mr. Saulter accrued through the date he was released on parole?"

It is a rule of long standing that the pay and allowances of an enlisted person whose term of service expires while he is in confinement awaiting trial by court-martial or appellate review of his conviction terminate on the date of the expiration of his term of enlistment and do not accrue to him while subject to military control and in confinement thereafter, unless he is acquitted. In that event, the individual is considered to have been held for the convenience of the Government and entitled to military pay and allowances until he is discharged. 30 Comp. Gen. 449 (1951); 37 Comp. Gen. 228 (1957). This rule is subject to modification in those cases where an enlisted member, sentenced by a court-martial to dishonorable or a bad conduct discharge, and who is retained in the service after the expiration of his enlistment, is released from confinement and restored to duty pending completion of appellate review. In such a case, the enlisted member is entitled to pay and allowances while performing duty after restoration to duty, even though upon appellate review the sentence of dishonorable or bad conduct discharge is ordered executed. See 33 Comp. Gen. 281 (1953) and 37 Comp. Gen. 228, supra.

Section 952 of title 10, United States Code, authorizes the Secretaries of the several services to provide a system of parole for offenders who are confined in military correctional facilities as a result of court-martial convictions and who were at the time of their offenses subject to the authority of that Secretary.

Secretary of the Navy Instruction 5815.3D, dated February 7, 1977, issued pursuant to that authority, in part establishes the rules under which Navy and Marine Corps prisoners may be paroled. The term "parole" as used therein, is defined in paragraph 105 as being:

> "A form of conditional release from confinement in a military correctional facility granted to carefully selected individuals to help them * * * make the transition from controlled living in confinement to a life of normal liberty in a civilian community."

If an individual is granted parole, he is to be issued a "Certificate of Parole," Form NAVSO 1640/4 (Rev. 5-76). Contained on the reverse side of that form is an agreement which

the prospective parolee must consent to by his signature. Listed among the agreement items are such statements as: (a) he will go to his parole destination without delay; (b) he will immediately report to his probation officer; (c) he will remain within the limits of his parole destination unless given written permission by his probation officer to go elsewhere; (d) he will report monthly to his probation officer; and (f) he will not associate with persons of bad or questionable reputation. The agreement also contains the statement that the parolee further agrees that violation of any of these or other conditions stated therein will subject him to apprehension and return to confinement.

It is evident from the foregoing that an individual enjoys more freedom of action in a parole status than he would under the constraints of actual confinement. However, when these limitations on freedom are considered in terms of the authority by which the military can and does exercise constraints over the parolee, we believe a distinction between confinement and parole is without essential difference in this case. If an individual is permitted to act without supervision and control; if he is under no obligation to, for example, military authority, and if he is unfettered as to time, location or style of living, only then could it be said that the military had no control over him. However, so long as restraints can be and are exercised by military authority, it is our view that parole is not of sufficient character to divorce itself from the restraint of confinement for pay and allowance purposes. Compare the recent decision of the Court of Claims in the case of Cowden v. United States, Ct. Cl. No. 242-78, decided June 13, 1979, wherein it was held that an individual who was court-martialed, convicted, confined beyond his term of service and then paroled, and where his conviction was overturned on appeal, was entitled to military pay and allowances for the entire time after the expiration of his term of service, including his period of parole.

Therefore, it is our view that Mr. Saulter is entitled to pay and allowances from December 11, 1976, to August 20, 1977, the period of his parole, and in addition, payment for leave accrued prior to that latter date, not to exceed 60 days, if otherwise correct. 37 U.S.C. 501 (1976).

On the question of setoff of civilian earnings during his parole time, Instruction 5815.3D specifically provides in paragraph 1005 that unless an employment waiver is granted, "no prisoner will be released on parole until satisfactory evidence has been furnished that the parolee will be engaged in a reputable business or occupation." Since the involuntary securing of gainful employment is established as a prerequisite of parole, it is our view that it would be improper to set-off civilian earnings for any parole period where the same period subsequently becomes a period of entitlement to military pay and allowances, in the absence of a statute so authorizing. The only exception to this would be if the parolee engaged in Federal civilian employment which has long been viewed as incompatible with military service. 46 Comp. Gen. 400 (1966), and 49 Comp. Gen. 444 (1970). If that is the case, the Federal civilian salary should be set off against the military pay and allowances due for the same period.

The questions are answered accordingly.

R.F. Keller

Deputy Comptroller General
of the United States