

DECISION



11954 PLM-H  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

FILE: B-194949

DATE: November 7, 1979

MATTER OF: Sergeant Richard M. Tracey, USMC

DIGEST: A Marine Corps enlisted member was charged with a crime by civilian authorities and placed in civil confinement pending trial. At trial he was found not guilty by reason of insanity and transferred to a state mental institution for an indefinite period of time. An administrative determination should be made in each individual case in absence in confinement whether it is to be excused as unavoidable as required by the Military Pay and Allowances Entitlements Manual. Payment for the period in question may be made if an administrative determination favorable to the individual is made.

APC 98

*Military Member* This action is in response to a request for an advance decision regarding the pay status of Sergeant Richard M. Tracey, USMC, while in the custody of civil authorities as the result of criminal charges against him. We find that he is entitled to military pay and allowances for the period in question only if an administrative determination is made in his case to excuse the absence as unavoidable.

The request has been assigned Control Number DO-MC-1321 by the Department of Defense Military Pay and Allowance Committee.

The reported facts are as follows. On September 11, 1974, the member was turned over to civilian authorities by the Marine Corps based on an arrest warrant. He was thereafter adjudged mentally unable to stand trial by court action dated October 1, 1974, and committed to the South Florida Mental Institute with internment for an indefinite period with civil charges pending. However on November 24, 1976, he was tried and found not guilty by reason of insanity and transferred to the Florida State Hospital for an indefinite period of time. On

*Compensation claim*  
*Mental illness as crime or offense*  
*Sick leave*  
*Unauthorized absence*  
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*Air Force personnel*

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November 18, 1977, while still a patient in the Florida State Hospital, he was placed on the Temporary Disability Retired List by the Marine Corps.

As the disbursing officer indicates the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), at Table 1-3-2, Rule 5, states:

"When member is absent from duty in confinement by civil authorities \* \* \* and the absence was excused as unavoidable the member is entitled to otherwise proper credits of pay and allowances."

Also, Table 1-3-3, Rule 1, indicates that an absence such as Sergeant Tracey's "may be excused as unavoidable."

The disbursing officer points out that instructions contained in paragraph 4009 of the Marine Corps Individual Records Administration Manual, MCO P1070.12, August 19, 1977, seem to have taken the discretion out of the determination of whether an absence was unavoidable in cases where a Marine is released without trial, or after trial and acquittal, or the conviction is set aside on legal grounds as distinguished from clemency. Additionally, the cited paragraph directs that under various guidelines time lost for unexcused absences will be recorded. It is indicated that Sergeant Tracey's record fails to show any time as being lost and it is suggested that such fact conclusively establishes that his entire absence has been determined to be unavoidable.

The disbursing officer goes on to state, however, that some doubt exists as to the accuracy of such a conclusion citing to several Court of Claims decisions and rulings by our Office.

Based on the foregoing, two questions are presented for resolution. First, what is the member's military pay status from September 11, 1974, until found not guilty by reason of insanity on November 24, 1976? Second, what was

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his military pay status thereafter until his medical retirement on November 18, 1977? ✓

Subsection 503(a) of title 37, United States Code provides:

"A member of the Army, Navy, Air Force, Marine Corps, Coast Guard, or Environmental Science Services Administration, 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."

The DODPM contains the implementing instructions and rules for the above statutory provision. Subparagraph 10312(b) of the Manual provides:

"b. Administrative Determination of Unauthorized Absence. When a member is in an unauthorized absence status, an administrative determination must be made as to whether the absence was unavoidable. Table 1-3-3 contains rules for determining 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. This applies even though a court-martial finds the member not guilty of a charge of unauthorized absence, or when a finding of guilty has been disapproved by the reviewing authority."

Table 1-3-3 sets forth the rules for determining whether a member's absence may be considered as unavoidable. As indicated above, Rule 1 therein states that when a member is absent from duty due to confinement by civilian authorities and is tried and acquitted then the absence may be excused as unavoidable.

The disposition of a criminal case by civilian courts on the basis of insanity does not in itself resolve the

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question of excused versus unexcused absences for pay and allowance purposes. In 40 Comp. Gen. 366 (1960), at page 368 we stated:

"\* \* \* Whether a particular unauthorized absence was unavoidable is a question of fact and an enlisted man's mental competency is one fact for consideration in determining the character of his absence. If, because of mental incompetency, an enlisted man could not comprehend that he was absent from his post of duty without authority, that fact may justify a conclusion that such absence, as far as the enlisted man is concerned, was unavoidable within the scope of the definition and statute mentioned. \* \* \*"

See also Merwin v. United States, 78 Ct. Cl. 561 (1933).

Therefore, in order for an individual to have an absence while in confinement by civilian authorities excused as unavoidable each case should be considered on its own merits. The service concerned should determine based on the facts whether excusing the individual is appropriate.

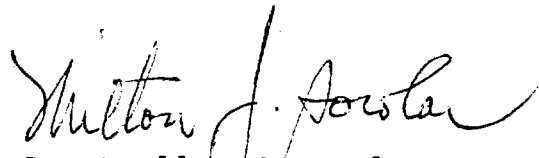
It does not appear that the time lost entry in Sergeant Tracey's retirement record was a specific determination to excuse his absence by the appropriate authority. The appropriate administrative authorities should review his case and determine whether excusing the absence would be appropriate. In the absence of such an administrative finding, he is not entitled to pay and allowances for the period September 12, 1974, through November 17, 1977. On the other hand if he is excused, payment for that period is authorized including the period from the finding of not guilty by reason of insanity to the date action was taken to separate him.

In this connection, Sergeant Tracey's DD Form 214 MC indicates his placement on the Temporary Disability Retired

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List with credit for 9 years, 1 month and 24 days active duty, includes the period in question. If it is determined that his absence is not excused retired pay should be recomputed based upon service not including the absence in question.

Nothing herein should be taken as indicating that we have reached any conclusion as to whether the absence of Sergeant Tracey should be excused as unavoidable. We do hold however that the Marine Corps should review the case on its merits and take appropriate action to excuse the absence or specifically deny excuse. Action to pay additional sums or collect overpayments will follow that determination.

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

For the Comptroller General  
of the United States