

DECISION



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

FILE: B-212663

DATE: May 2, 1984

MATTER OF: Appellate Leave Pay

DIGEST:

A military member, who has been convicted and sentenced by court-martial to dismissal, or dishonorable or bad conduct discharge, and, pursuant to 10 U.S.C. § 876a, has been ordered to take leave pending the completion of appellate review of his case, is entitled to payment for accrued leave to his credit on the day before that leave began, even though his sentence included forfeiture of pay and allowances. That accrued leave is to be computed on the basis of the rate of pay applicable to the member on the day before the leave begins even though he may have been in a nonpay status at that time.

The question to be decided in this case is whether under the provisions of 10 U.S.C. § 706 a military member convicted by court-martial, whose sentence includes confinement and forfeiture of pay and allowances, may upon release from confinement be paid for leave accrued prior to the effective date of sentencing while he is awaiting the completion of appellate review of his case.¹ We conclude that under the statute such a member may be paid for accrued leave.

BACKGROUND

The Military Justice Amendments of 1981, Public Law 97-81, November 20, 1981, 95 Stat. 1085, added article 76a (10 U.S.C. § 876a) to the Uniform Code of Military Justice, and section 706 to the leave chapter of title 10, United States Code. Under 10 U.S.C. § 876a military personnel who have been sentenced by court-martial may be required to take leave pending completion of appellate review, or until such

¹ This question was submitted by Major Patrick T. Shine, the Finance and Accounting Officer at Fort Leavenworth, Kansas. The request was approved by the Department of Defense Military Pay and Allowance Committee and assigned control number DO-A-1425.

leave is otherwise terminated, if the sentence includes an unsuspended dismissal from the service or an unsuspended dishonorable or bad conduct discharge. Under 10 U.S.C. § 706 if a member is required to take leave under 10 U.S.C. § 876a, that leave is to be charged against accrued leave to the member's credit on the day immediately preceding the day the required (appellate) leave begins. Alternatively, a member may elect to be paid in lump sum for the accrued leave based on the rate of basic pay to which he was entitled on the day before such leave begins. If the member elects to charge his accrued leave, he is entitled to pay and allowances during the period of appellate leave to the extent that it is covered by his accrued leave. To the extent the period of required appellate leave is not covered by the member's accrued leave, or if he elects to be paid in lump sum for his accrued leave, appellate leave is to be charged to excess leave.

In his submission of several questions concerning this law, the accounting officer says that:

"* * * statements in the text of * * * [52 Comp. Gen. 909 (1973)] indicate that any sentence to forfeiture of all pay and allowances results in the loss of any accrued leave to the member's credit as of the effective date of the sentence to forfeiture of all pay and allowances.* * *"

The accounting officer states further that unless the provisions of Public Law 97-81 regarding pay for accrued leave supersede conclusions reached in 52 Comp. Gen. 909, it appears that a member whose sentence includes forfeiture of all pay and allowances could only be credited with (and paid for) leave accrued if and when he returned to full duty status following the effective date of his sentence. Otherwise, he would have no accrued leave to his credit when required to take appellate leave or at the time of his separation.

In view of these observations, the accounting officer has raised the questions discussed below concerning the application of 10 U.S.C. § 706.

Forfeiture of Leave Pay

The accounting officer's first question is whether, on the effective date of a convicted member's sentence to forfeit all pay and allowances, the member's accrued leave is forfeited. He also asks whether, in the alternative, the convicted member's forfeiture of accrued leave applies only to his entitlement to a lump-sum leave payment upon separation, but for his forfeiture sentence, or is the member's accrued leave available for use as chargeable leave or a lump-sum leave payment, whichever he elects, when he is placed on appellate leave.

In the decision, 52 Comp. Gen. 909, referred to above, we considered several questions regarding the pay entitlements of a Marine Corps Reserve officer who had been sentenced to dismissal from the service and forfeiture of all pay and allowances. Only that portion of his sentence providing for total forfeiture of pay and allowances was approved and ordered executed. He was subsequently released from active duty and transferred to a Reserve unit.

Concerning the question of the proper action in regard to the member's accrued leave at the time of his discharge, we held that a sentence to forfeit all pay and allowances precluded his entitlement to compensation for unused leave to his credit "at the time of his release from active duty." 52 Comp. Gen. 909, 911. That conclusion was based on the finding that a lump-sum payment for unused accrued leave at the time of discharge is a part of a member's compensation for active military service. See 37 U.S.C. § 501. Thus, it was held that if a member has been sentenced to forfeiture of all pay and allowances that become due on and after the date the sentence is approved, that member's unused accrued leave is forfeited at the time he is discharged or dismissed. The question in the present case then is whether payment for a member's accrued leave, which would otherwise be made under 10 U.S.C. § 706 at the time the member is placed on appellate leave, is forfeited if his court-martial sentence includes, unsuspended, forfeiture of all pay and allowances.

Prior to the enactment of Public Law 97-81, a member who was sentenced by court-martial to dismissal or to a punitive discharge, but who was held over by the service

following his release from confinement pending completion of appellate review, could return to active duty and receive pay and allowances (usually at a reduced level),² or he could take a leave of absence without pay and allowances.³

Because of morale and disciplinary problems often caused when accused persons chose to return to active duty while awaiting appellate review, Public Law 97-81 was enacted to give military commanders the authority to compel court-martialed service members to take leave of absence while awaiting the completion of appellate review of their cases. Matter of Committee Action Number 557, 63 Comp. Gen. 25 (1983). The statute eliminates the option of the accused to choose to return to active duty with pay and allowances since he may be required to take leave.

Under Public Law 97-81 the services have discretion to order a convicted member having an unsuspended sentence to dismissal, or dishonorable or bad conduct discharge, who is awaiting completion of appellate review, to take leave until the reviewing action is completed or until some time prior thereto. Whenever a member is required to take leave under this statute, that leave "shall be" charged to unused accrued leave the member has to his credit, and he is entitled to a lump-sum payment for the leave or pay and allowances during the period for which he has accrued leave to his credit. In authorizing payment for leave it appears to have been the intent of Congress to allow these individuals a financial cushion to facilitate their return to civilian life while awaiting appeal results. (See H. Rep. No. 306, 97th Cong., 1st Sess. 2-3.)

Neither 10 U.S.C. § 876a nor § 706 specifically addresses the situation where the member's sentence includes, unsuspended, total forfeitures of pay and allowances. However, as previously noted, prior to the enactment of those statutes, the return of a member to full duty status operated to effectively suspend the forfeiture provisions of the sentence until appellate review was completed.

² See 37 Comp. Gen. 591 (1958).

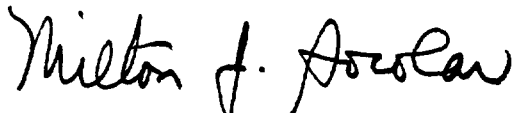
³ See H. Rep. No. 306, 97th Cong., 1st Sess. 1, reprinted in 1981 U.S. Code Cong. and Ad. News, 1769-70; Department of Defense Directive 1327.5; and Matter of Committee Action Number 557, 63 Comp. Gen. 25 (1983).

See 54 Comp. Gen. 862 (1975); 37 Comp. Gen. 591, 593 (1958); B-192082, December 21, 1978. We recognize that placing a member on appellate leave is not returning him to a full duty status. However, in view of the purpose of the new statutes, it is our opinion that even though a member is sentenced to forfeiture of all pay and allowances he is entitled to be paid for his accrued leave if he is required, under the authority of 10 U.S.C. § 876a, to take leave pending completion of appellate review. In view of the leave payment authority in 10 U.S.C. § 706, that portion of the sentence which would have required forfeiture of accrued leave pay is to be treated as suspended. However, if a member sentenced to forfeiture of all pay and allowances has any unused accrued leave remaining to his credit at the time of discharge, payment for this leave is forfeited. 52 Comp. Gen. 909.

Rate of Pay

The accounting officer also asks whether a convicted member has a rate of pay upon which payment for accrued leave may be based, even though the member's sentence to forfeit all pay and allowances was in effect on the day prior to the day appellate leave began. Under the provisions of 10 U.S.C. § 706(b) a member who is required to take leave under 10 U.S.C. § 876a is entitled to payment for accrued leave to his credit based on the rate of pay to which he was entitled on the day before the day appellate leave began. See also Department of Defense Pay Manual, para. 40401b. We have held that the rate of pay applicable to such leave payment is the pay rate of the grade the member held on the day before appellate leave begins, even though the member is in a nonpay status at that time. If the member was reduced in grade by the court-martial sentence, it is the rate to which the member was reduced. Matter of Committee Action Number 557, cited above.

The questions which were asked are answered accordingly.


Acting Comptroller General
of the United States