

DECISION



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

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DOD Pay and Allowance Committee Action
MATTER OF: No. 512 - Pay and Allowance Entitlements
of Confined Military Personnel

DIGEST:

1. A service member charged with commission of a civil offense on foreign soil is entitled to his pay and allowances for any pretrial custodial period at a U.S. military installation where the decision to incarcerate or to merely restrict member to duty station and assign him to perform duties on full-time basis remains in installation commanders.
2. A service member charged with commission of a civil offense on foreign soil is not entitled to pay and allowances for period when actually absent from military installation for purposes of judicial proceedings by foreign civil authorities unless such absence is excused as unavoidable.
3. A service member charged with commission of a civil offense on foreign soil is to be considered constructively absent from duty and not entitled to pay and allowances when member is actually incarcerated on the basis of request for incarceration by foreign civilian authorities under the provisions of a treaty or other international agreement.
36 Comp. Gen. 173 (1956) modified.

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller) requesting an advance decision concerning the pay status of service members held in confinement by military authorities for foreign civil offenses as discussed in Department of Defense Military Pay and Allowance Committee Action No. 512, which was enclosed with the request.

The question posed in the Committee Action is:

"May Rules 7 and 8, Table 1-3-2, Department of Defense Military Pay and Allowances Entitlements Manual, which are based on Comp Gen Decisions

PUBLISHED DECISION
55 Comp. Gen.

B-128493

B-158834

(36 Comp Gen 173 and 45 Comp Gen 766), be modified to allow members in confinement by military authorities for foreign civil offenses to accrue pay and allowances at least until they are initially convicted?"

The Committee Action states that the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) provides that a member held in confinement by military authorities for a foreign civil offense is entitled to otherwise proper credits of pay and allowances until the foreign country exercises jurisdiction by charge, indictment, recall of waiver of jurisdiction or other proper process and that these rules are based on several decisions of this Office and cited in the Committee Action. It is, however, pointed out that when these decisions and the resultant rules have been applied in certain situations, they have operated to deny pay and allowances to certain members who are in essentially the same circumstances of confinement as other members who are entitled to receive pay and allowances.

The Committee Action states that under various status of forces agreements, foreign courts have jurisdiction over American servicemen who allegedly commit certain categories of offenses on foreign territory. Cited as a typical example, is the status of forces agreement between the United States and the Federal Republic of Germany. It is indicated that in accordance with the agreement applicable to that country, there is a general waiver of jurisdiction by German authorities with regard to the alleged commission of most civil offenses by United States military members. Under this agreement, the German authorities have 21 days to recall the waiver. Apparently, during this time, charges under the Uniform Code of Military Justice are preferred against the accused members, with a view toward trial by court-martial. If so, the member may be placed in pretrial confinement at the military installation under these charges. Should the German authorities recall their waiver, the service member may still remain in military confinement while awaiting trial by the German courts. It is pointed out, however, that the military charges can remain in effect even though trial by the foreign authorities does not materialize.

The Committee Action goes on to state that the only lawful basis for military authorities to confine a member would be the alleged violation of the Uniform Code of Military Justice, as the recall of waiver by German authorities provided no basis for military confinement.

B-128493
B-158834

Cited as an example of the difficulties which the services have encountered regarding pay and allowance entitlements in these cases, involved two soldiers who may have committed the same offense. Both are placed in the same military stockade in pretrial confinement under Uniform Code of Military Justice charges. German authorities recall waiver of jurisdiction in one case, but not the other. Under the current regulations entitlement to pay and allowances stops for the member subject to recall of waiver, but continue for the other member until the sentence of the court-martial, which may include either a partial or total forfeiture of pay and allowances, is approved and applied by the convening authorities.

In this regard, the discussion indicates that in the case in which recall of waivers are exercised, one member may remain in a military confinement facility for as much as a year or more before German authorities try him, yet the physical circumstances of confinement are the same for the other member who will ultimately be tried by courts-martial since both prisoners are under custodial control of American military authorities. Furthermore, it is pointed out that both may have dependents whose welfare is predicated on the continuation of such pay and allowances.

With regard to the above, the Committee Action states that the decisions to recall or not recall waivers by German authorities are, at best, based on factors completely unrelated to the merits of allowing a member continued pay and allowance entitlements during such periods and that such waiver decisions are not irrevocable.

The law provides that a member of the military service who is absent without leave forfeits all pay and allowances for the period of that absence unless it is excused as unavoidable. 37 U.S.C. 503. For many years service regulations have provided that a member who is charged with a civil offense and confined by civil authorities is in an unauthorized absence and is not entitled to pay and allowances for such period unless his commanding officer excuses the absence as unavoidable after the results of the civil trial are known. If the absence is excused as unavoidable, the withheld pay and allowances may be paid. See Section B, Chapter 3, Part 1, DODPM.

B-128493

B-158834

Similar regulations have been recognized and applied over the years by accounting officers of the Government and the Court of Claims. See White v. United States, 72 Ct. Cl. 459 (1931), where the court refers to the rules which have been in effect at least since 1844.

We believe that it is established without question that a member who is not on authorized leave and who is in the hands of civil authorities charged with a crime is in an absence-without-leave status and is not entitled to receive his pay until it is determined that his absence is unavoidable and, therefore, excused.

Regarding the above, it is clearly evident that if, in the situation described in the Committee Action, a member had been turned over to the German authorities to be held in a German prison pending trial, he would not have been entitled to pay for the period of his confinement until the nature of his absence could be determined after disposition of the civil charges against him.

One of the purposes of a status of forces agreement is to permit a member who has committed an offense in a foreign country, e.g., the Federal Republic of Germany, to be held in confinement by American military authorities for the German authorities in lieu of confinement in a civil prison. Such agreement appears to be for the benefit of the member in that it would seem more desirable for him to be confined by his military service than be restricted to a foreign jail.

In 36 Comp. Gen. 173 (1956), we considered several questions presented in Department of Defense Military Pay and Allowances Committee Action No. 144, concerning situations where members of a uniformed service (1) are arrested by civil authorities in a foreign country for civil offenses, (2) are then released to the custody of United States military authorities, (3) are confined by such military authorities pending release to civilian authorities for trial, and (4) are tried and found guilty by the foreign court. We concluded therein that since the members were being held by the military authorities for the local civil authorities and were only under qualified and conditional custody and control of the United States military authorities,

B-128493

B-158834

such members were to be regarded as being constructively absent during such periods and precluded from receiving pay and allowances during such absence unless the absence was excused as unavoidable.

In decision B-132595, August 26, 1957, involving an Air Force enlisted man charged with, and convicted of, a civil offense by Japanese civil authorities, but who was released to United States military authorities for certain periods pending trial and pending appeal of his conviction, we concluded that the member was entitled to pay and allowances for each day when he was neither held in "confinement" for civil authorities nor considered to be absent from duty without leave.

In reaching that conclusion we said that:

"While a member of the uniformed services who is restricted to his base, in a sense, is being confined by military authorities, the term 'confinement' was used in the decision of August 28, 1956 /36 Comp. Gen. 1737/, as having reference generally to periods of actual incarceration. The term as there used does not include periods when the member is in a duty status while awaiting civil trial even though his area of movement is restricted during such periods."

In 45 Comp. Gen. 766 (1966), we held that the right to pay and allowances of a member of the uniformed services while being held by United States military authorities on behalf of German civil authorities is not to be determined on the basis of custody alone. The criterion expressed in that case was whether there is a loss to the Government of the member's services and if there is such a loss, whether it was the direct result of his committing the civil offense or whether it may be considered that his confinement or any part thereof was effected solely in connection with court-martial proceedings.

Decision B-169366, April 8, 1970, involved an Army enlisted man who was charged, convicted and sentenced to a period of confinement for a civil offense by Spanish authorities, who was released to United States Naval authorities in Spain pending

B-128493

B-158834

appeal and who performed military duties at a Naval Station. We held therein, that except for any period of actual confinement by military authorities, the member might be allowed pay and allowances for any periods during which he performed military duties appropriate to his grade and military specialty as distinguished from those duties normally required of military prisoners. Compare 51 Comp. Gen. 380 (1971). Also compare 52 Comp. Gen. 317 (1972) and B-180768, April 15, 1975 (54 Comp. Gen. ____).

Based on the foregoing, the DODPM provides in Rules 7 and 8 of Table 1-3-2, that a member in confinement by military authorities for a foreign civil offense is entitled to otherwise proper credits of pay and allowances for the period before the date the foreign country exercises jurisdiction, but that the member is not entitled to pay and allowances on and after the date jurisdiction is exercised except for that part of the confinement period that is covered by authorized leave, unless the absence is excused as unavoidable.

Rules 7 and 8 are operable, however, only in situations where the foreign country has the right to exercise jurisdiction over members of the United States Armed Forces under the terms of a treaty or other agreement with the United States.

The basic statutory provision underlying the decisions of this Office is 37 U.S.C. 503(a) (1970), which states:

"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."

For purposes of the statute, this Office has considered a member confined by the military for civil authorities as being "absent" when the member is not under the unqualified and unconditional control of the United States military authorities. The determining factor has not been who has physical custody of the member, but rather, who has jurisdiction over the individual

B-128493
B-158834

member. It is upon this basis that the regulations of the several services have been written to indicate that entitlement to pay and allowances would be determined on the jurisdictional aspect rather than that of physical custody.

In this regard, the Supplementary Agreement to the NATO Status of Forces Agreement (14 U.S.T. 531 et seq.), signed at Bonn, Germany, August 3, 1959, contains therein provisions which govern the treatment to be afforded members accused of the commission of certain offenses in the Federal Republic of Germany and provides in part:

"Article 22

"1. (a) Where jurisdiction is exercised by the authorities of a sending State, custody of members of the force, of the civilian component, or dependents shall rest with the authorities of that State.

"(b) Where jurisdiction is exercised by the German authorities, custody of members of a force, of a civilian component, or dependents shall rest with the authorities of the sending State in accordance with paragraphs 2 and 3 of this Article.

"2. (a) Where the arrest has been made by the German authorities, the arrested person shall be handed over to the authorities of the sending State concerned if such authorities so request.

"(b) Where the arrest has been made by the authorities of a sending State, or where the arrested person has been handed over to them under sub-paragraph (a) of this paragraph, they

"(i) may transfer custody to the German authorities at any time;

"(ii) shall give sympathetic consideration to any request for the transfer of custody which may be made by the German authorities in specific cases.

B-128493

B-158834

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"3. Where custody rests with the authorities of a sending State in accordance with paragraph 2 of this Article, it shall remain with these authorities until release or acquittal by the German authorities or until commencement of the sentence. The authorities of the sending State shall make the arrested person available to the German authorities for investigation and criminal proceedings * * * and shall take all appropriate measures to that end and to prevent any prejudice to the course of justice * * *. They shall take full account of any special request regarding custody made by the competent German authorities." (Emphasis added.)

The language of this agreement seems to indicate clearly that custody and control of the arrested member is to remain with the sending State (United States), until release, acquittal of charges or commencement of the sentence. The agreement states that the sending State "may transfer custody" at any time and that it "shall give sympathetic consideration" to a request for transfer of custody. These provisions, however, are not mandatory.

In the present case, however, since charges were preferred under the Uniform Code of Military Justice, it would seem that both the civilian and military authorities have exercised some degree of jurisdiction over the accused member. Thus, it would appear that where both authorities are authorized to exercise jurisdiction over the member, entitlement to pay and allowances cannot be based on a determination of which state has jurisdiction. Rather, the appropriate test would seem to be which state has the appropriate effective control over the member.

Indicative of the degree of control exercised by the military authorities, as noted in the submission, is the degree of restraint which will be imposed upon the member while he is in military custody as decided exclusively by the appropriate military commander. A final indication of the continuing control exercised by the military authorities is demonstrated by the continued confinement of the member if the civilian authorities withdraw the recall of waiver or drop the charges before disposition of the case, since the member is still subject to disposition of the charges under the Uniform Code of Military Justice.

B-128493

B-158834

It appears from the submission that there are few, if any, definitive rules regarding the need for actual incarceration as opposed to mere restriction to the base in most instances where custody remains in United States military authorities and that the commander of the military installation involved may act at his discretion. While no information was presented in the submission to show the percentage of custodial prisoners who are actually placed in pretrial confinement following withdrawal of waiver by the foreign civil authorities, or the types of offenses which by service regulation may require incarceration pending such civilian trial, other than in the most serious offenses, no reason is apparent why a member merely by virtue of having committed a civil offense on foreign soil must remain incarcerated for protracted periods of time prior to sentencing. It is our view that in any case where the commander of the military installation retains the discretionary authority to decide to incarcerate a member (or to merely restrict him to the duty station and assign him to perform useful and productive duties on a full-time basis) such member could not be considered as being "constructively absent" for the purposes of entitlement to pay and allowances. However, such member would not be entitled to pay and allowances for those periods when actually absent from the military installation where his presence is required by foreign civil authorities for purposes of any judicial proceedings, unless such absence is excused as unavoidable.

In connection with the above, it is to be noted that in paragraph 3 of the before-quoted Supplemental Agreement, it provides that where custody rests with the sending State (United States): "They shall take full account of any special request regarding custody made by the competent German authorities." Thus, where a member is actually incarcerated by military authorities on the basis of a specific request by the foreign civilian authorities, it is our view that the member is at that point under the effective control of the foreign civilian authority and must be considered as "constructively absent" from duty during the time of such incarceration. Therefore, in such a situation, we must conclude that the member is not entitled to pay and allowances unless such absence is excused as unavoidable.

The question asked in the Committee Action is answered in the affirmative, subject to the before-stated limitations. Our decision 36 Comp. Gen. 173 (1956) is modified accordingly, and

B-128493

B-158834

any other decisions inconsistent with the foregoing will no longer be followed.

R.F. KELLER

Deputy Comptroller General
of the United States