

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

*Edited for publication --
name omitted*

FILE: B-183824

DATE: JUL 6 1976

MATTER OF: Private

✓ USA X

DIGEST: Enlisted member's period of authorized excess leave pending appellate review of his court-martial including a bad conduct discharge is creditable service for computing period served on term of enlistment and, even though court-martial sentence was approved and discharge effected thereafter, period of such leave is not to be included in unexpired part of member's enlistment upon which computation of recoupment of reenlistment bonuses is based.

This action is in response to letter (ATZLCM-FA (MP)) from Major Kenneth M. West, USA, Finance and Accounting Officer, Fort Leavenworth, Kansas, requesting an advance decision concerning whether a period of excess leave should be considered as a portion of the unexpired part of the term of enlistment of former Private , USA, , in computing the amount of reenlistment bonuses to be recouped from Private . The request was assigned control number DO-A-1235 by the Department of Defense Military Pay and Allowance Committee and was forwarded to this Office by Office of the Comptroller of the Army letter dated April 30, 1975 (DACA-FAF-P).

The submission presents the following facts. Private reenlisted in the Army for a period of 6 years on October 21, 1970, at which time he was a Specialist, E-5, with over 2 years of service. Incident to that reenlistment he was paid a total of \$6,000 in reenlistment and variable reenlistment bonuses. During the period of December 24, 1972, through January 23, 1973, he was in an absent without official leave status. He was tried before a special court-martial, found guilty on various charges and sentenced to be confined at hard labor for 2 months and to be discharged from the service with a bad conduct discharge. He served the confinement portion of his sentence and, pending the completion of the appellate review of his trial as required by Article 66, Uniform Code of Military Justice, 10 U.S.C. 866(1970), was restored to duty. Effective the date he was restored to duty (May 4, 1973), Private was authorized excess leave under

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B-183824

paragraph 5-2d(3) of Army Regulation 630-5, in effect at the time, which leave was voluntary on his part with the understanding that no pay or allowances would accrue to him during such leave. Private remained in such excess leave status until his sentence was affirmed and his bad conduct discharge was executed effective October 25, 1974.

Since because of his misconduct the member failed to complete the 6-year term of enlistment for which the bonuses were paid, partial recoupment of the bonuses is required. The Finance and Accounting Officer indicates that under the applicable provisions of Part One, Chapter 9, Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), the amount of such bonuses to be recouped is computed on a percentage basis for that portion of the reenlistment remaining to be served. He indicates that since the period of excess leave was an authorized absence from duty, and is considered creditable service in accordance with current regulations, it is considered as time served on the enlistment when determining the amount of the bonuses to be recouped. However, the Finance and Accounting Officer questions whether the inclusion of excess leave as creditable service in computing bonus recoupment is proper since, although the member's excess leave was authorized, he was not (at his own request) performing the duties of his military occupational specialty, or any other military duties, for which he contracted when he reenlisted. Thus, the Finance and Accounting Officer asks whether such excess leave is to be considered creditable service and, therefore, also considered as time served when determining the amount of reenlistment bonuses to be recouped from Private .

The statutory authority under which Private was paid reenlistment and variable reenlistment bonuses is 37 U.S.C. 308 (1970). Subsection 308(d) of title 37 (Supp. IV, 1974), as amended by the Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Public Law 93-277, 88 Stat. 119, 120, which essentially restated former subsection 308(e) provides as follows:

"(d) A member who voluntarily, or because of his misconduct does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid."
(Emphasis added.)

~~183~~

B-183824

That provision is the sole statutory authority for denying or curtailing bonuses otherwise authorized under 37 U.S.C. 308. Compare 49 Comp. Gen. 829 (1970). Under its provisions the amount to be recouped is to be based on "the unexpired part of the member's enlistment."

In this regard paragraph 10923, DODPM (change 35, January 25, 1974), in effect at the time of Private discharge provided that time lost during a period for which a reenlistment bonus was paid must be made good before discharge or, a pro rata part of the bonus must be recouped. Such "time lost," however, is that time which an enlisted member is to make up pursuant to 10 U.S.C. 972 (1970). See 49 Comp. Gen. 829, supra, and 33 Comp. Gen. 513 (1954). Section 972 provides as follows:

"An enlisted member of an armed force who--

"(1) deserts;

"(2) is absent from his organization, station, or duty for more than one day without proper authority, as determined by competent authority;

"(3) is confined for more than one day while awaiting trial and disposition of his case, and whose conviction has become final;

"(4) is confined for more than one day under a sentence that has become final; or

"(5) is unable for more than one day, as determined by competent authority, to perform his duties because of intemperate use of drugs or alcoholic liquor, or because of disease or injury resulting from his misconduct;

is liable, after his return to full duty, to serve for a period that, when added to the period that he served before his absence from duty, amounts to the term for which he was enlisted or inducted."

B-183824

While such time lost includes periods of absence without leave and periods of confinement, it does not include periods of excess leave and, as the Finance and Accounting Officer recognizes, the applicable provisions of the DODPM do not require excluding excess leave from creditable service in computing recoupment of reenlistment bonuses or for other purposes. See DODPM paragraph 10104b and Table 1-1-2, Rule 1. ✓

Private excess leave status was authorized under paragraph 5-2d(3) of AR 630-5 (change 5, September 3, 1971) which provided that the officer exercising general court-martial jurisdiction over an accused "may grant excess leave for an indefinite period, pending appellate review, upon application by an accused" whose sentence includes a dismissal, dishonorable discharge, or bad conduct discharge. Such excess leave is leave authorized pursuant to 37 U.S.C. 502(b)/(1970) for which pay and most allowances do not accrue. We have indicated that pursuant to 37 U.S.C. 502(b), a member may be in an excess leave active duty status. See 47 Comp. Gen. 467, 469 (1968), and 44 Comp. Gen. 830/(1965).

While a member may not be placed in an excess leave status without his consent (52 Comp. Gen. 482/(1973) and 46 Comp. Gen. 261/(1966)), the decision whether or not to grant such leave is still generally discretionary with the military commander. Thus, Private could have been denied excess leave and required to remain at his military duty station and to perform military duties. In any event it has been held that the purpose of enlistment bonuses is to offer a substantial financial inducement solely in exchange for reenlistment. Once the right to a bonus is vested in the member nothing appears in 37 U.S.C. 308 to authorize curtailing such bonus by requiring the member to continue to qualify in a critical military skill or to satisfactorily perform his duties in the specialty for which the bonus was authorized. See 45 Comp. Gen. 379/(1966) and compare 49 Comp. Gen. 829/(1970).

Accordingly, it is our view that in accordance with applicable regulations Private period of excess leave is to be included as creditable service in determining the unexpired part of his enlistment for bonus recoupment purposes. The voucher and leave record enclosed with the submission are returned.

In addition the Finance and Accounting Officer presents a question which does not apply to Private case. The situation involves excess leave which begins subsequent to or extends

B-183824

beyond the date the member's enlistment would have expired. In that situation, if the member has lost time which must be made good as required by DODPM, paragraph 10104c, is the period of excess leave to be counted towards making up the lost time?

In view of the conclusion reached in this case it appears that a period of excess leave after expiration of the member's term of enlistment would be counted towards making up lost time.

R. F. KELLER

Deputy Comptroller General
of the United States