



DEFENSE FINANCE AND ACCOUNTING SERVICE

8899 EAST 56TH STREET
INDIANAPOLIS, IN 46249-0206

HGE

December 17, 2014

MEMORANDUM FOR Deputy Director, Defense Military Pay Office, Fort Drum

SUBJECT: Pay entitlements of SSgt [REDACTED] while awaiting rehearing

It is our opinion that the member, SSgt [REDACTED] is entitled to pay at the rate of E-1 while he is on active duty awaiting rehearing.

This opinion is based upon the information provided to us, as set forth in this paragraph. The member was sentenced by general court-martial to a bad conduct discharge, confinement for eight years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved only so much of the sentence as provided for a bad conduct discharge, confinement for eight years, and reduction to the grade of E-1. The United States Army Court of Criminal Appeals (ACCA) subsequently set aside the findings of guilty and the sentence. ACCA also authorized a rehearing. The member was subsequently released from confinement. He is currently present for duty while he is awaiting rehearing. The member's personnel records indicate that he is an E-6, his grade prior to the court-martial sentence. You have asked for our opinion concerning the member's pay entitlements while he is on active duty awaiting retrial, specifically, whether he should be paid at the E-1 rate or the E-6 rate.

The member's pay entitlements are governed by 10 U.S.C. § 875, which concerns a member's right to restoration of rights, privileges and property after a court-martial sentence is set aside. Section 875 of Title 10 provides that to the extent an executed court-martial sentence is set aside and not imposed by a rehearing or new trial, a member is entitled to restoration of the rights, privileges and property affected by the original sentence. The Court of Appeals for the Federal Circuit addressed the application of 10 U.S.C. § 875 in *Dock v. United States*, 46 F.3d 1083 (Fed. Cir. 1995). In *Dock*, the Court ruled that to the extent penalties contained in the original sentence are included in the sentence imposed by a new trial, they relate back to the date they originally took effect. Relying upon the holding in *Dock*, the United States Court of Federal Claims ruled in *Combs v. U.S.* that when a new trial is conducted, entitlement to restoration of pay is dependent upon the outcome of the new trial. See *Combs v. U.S.*, 50 Fed. Cl. 592 (2001). *Combs* is particularly relevant to the case at hand because the Court of Federal Claims specifically addressed the member's pay entitlement for the period he was on active duty awaiting rehearing. The Court ruled that because both the original sentence and the sentence imposed at rehearing included reduction to E-1, the member was entitled to E-1 pay while on active duty awaiting rehearing.

As 10 U.S.C. § 875 governs the restoration of rights, privileges and property resulting from a court-martial sentence being set aside, DFAS must restore SSgt [REDACTED] pay in accordance

with this statute and its interpreting case law. The Court of Appeals for the Federal Circuit and the Court of Federal Claims have jurisdiction to decide questions regarding the pay entitlements of military members. *See* 28 U.S.C. §§ 1295 and 1491. Consequently, DFAS is required to abide by the rulings of the Court of Appeals for the Federal Circuit and the Court of Federal Claims in paying restoration entitlements under 10 U.S.C. § 875.

Being bound by the *Combs* decision, DFAS must determine how to correctly pay the entitlement, as it is set forth in *Combs*, prospectively, before the results of the rehearing are known. There are two potential ways to apply *Combs* prospectively. DFAS could either: (1) pay the member at the reduced rate before the rehearing has taken place and then pay the member back pay if the reduction is not imposed at rehearing; or (2) pay the member at his pre-conviction rate before the rehearing has occurred and place him in debt for the overpayment if the reduction is imposed at rehearing.

The DFAS Office of General Counsel has concluded that DFAS is required to use the former method. There are several reasons for this conclusion. The first reason is that this method was intended by Congress. The Court of Appeals for the Federal Circuit stated in *Dock* that the Congressional history of 10 U.S.C. § 875

makes clear that a forfeiture ordered by court-martial and subsequently found to be erroneous is to be restored, except that, in a situation in which a rehearing is ordered, no restoration is called for *until the outcome of the rehearing is known*, and then only to the extent the forfeiture is not imposed.

Dock, 46 F.3d at 1088 (emphasis added). Although in *Dock*, the Court of Appeals for the Federal Circuit discussed the legislative intent of 10 U.S.C. § 875 in terms of forfeitures, the logic applies equally to the effect of reductions in grade on pay. Restoration is not to be made until the outcome of the rehearing is known.

Additionally, paying a member at the unreduced rate before the rehearing results are known is highly problematic, because this method requires DFAS to make speculative payments. Certifying officers are responsible for the legality of a proposed payment. 31 U.S.C. § 3528. Per *Dock*, no restoration is to be made until the outcome of the rehearing is known. *See Dock*, 46 F.3d at 1088. Per *Combs*, the member's entitlement while awaiting retrial is wholly dependent upon the outcome at rehearing. *See Combs*, 50 Fed. Cl. at 604. Certifying officers cannot certify a payment to which a member may be entitled depending upon the outcome of a future event. Thus, DFAS cannot pay members awaiting rehearing at an unreduced rate until it is known whether the reduction has been imposed at rehearing.

DFAS is bound by 10 U.S.C. § 875, its interpreting case law and fiscal law principles to pay members, such as SSgt [REDACTED] who are awaiting rehearing at the rate to which the member was reduced in the original court-martial sentence.

Jennifer E. Riley
Assistant Counsel
Military and Civilian Pay Law