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**DECISION**

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

*Redinger*  
*LMJ*

FILE: B-169366

DATE: November 29, 1977

MATTER OF: Mr. Alexander Tucker

- DIGEST:
1. Where a service member is indicted by Japanese civil authorities for the pre-meditated murder of a Japanese civilian and is tried, convicted and sentenced and where the Status of United Nations Forces Agreement (Japan) calls for the transfer of custody and control from the sending State (U. S.) to Japanese authorities upon indictment, the fact that transfer to a Japanese facility did not occur neither diminished the Japanese authorities jurisdiction over the arrested member nor alter their right to have him incarcerated pending the outcome of trial.
  2. Where incarceration in a United States Military Correctional facility is at the request of Japanese authorities, and no discretionary authority exists in the military installation commander to incarcerate or merely to restrict to installation, the member is deemed to be constructively absent during period of such actual incarceration subsequent to indictment and other than to the extent that such time is covered by accrued unused leave, no entitlement to pay and allowances accrues. The action previously taken in case, 51 Comp. Gen. 380 (1971), is sustained. Compare 55 Comp. Gen. 186 (1975).

This action is in response to correspondence received from Mr. Alexander Tucker, concerning his claim for active duty pay and allowances believed due during the period 1970 to 1971, incident to his service in the United States Army.

The matter of that claim was the subject of our decision B-169366, December 29, 1971 (51 Comp. Gen. 380), which denied entitlement to

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such amounts for the reason that he was incarcerated by United States Military authorities on behalf of the Japanese civil authorities and while so confined performed prison-type duties.

Mr. Tucker's present claim of entitlement is based on our decision, B-128493/B-158834, September 3, 1975 (55 Comp. Gen. 186), which modified an earlier decision (36 Comp. Gen. 173 (1956)), which latter decision was cited with approval in the 1971 decision in Mr. Tucker's case. It apparently is Mr. Tucker's belief that the modification of the 1956 decision would provide sufficient grounds to reverse the earlier decision in his case and authorize payment to him.

In decision 36 Comp. Gen. 173, *supra*, we held that where a member of the uniformed services is (1) arrested by civil authorities of a foreign country for a civil offense, (2) released to the custody of the United States Military authorities, (3) confined by the United States Military authorities pending release to civilian authorities for trial and (4) is tried and found guilty of the offense by the foreign court, such a member is to be regarded as absent without leave during the period of his pre-trial confinement by the military authorities and not entitled to pay for the period unless the absence is excused as unavoidable.

The conclusion in that case was based on the proposition that while a member is in the custody of the military authorities, since that custody must be given up on call by the foreign civil authorities, he is not under the "unqualified and unconditional control" of military authorities. As such, once the member is charged by such civil authorities, he is deemed to be "constructively absent." 36 Comp. Gen. at 176.

In 1975, we were asked by the Secretary of Defense whether certain rules contained in the Department of Defense Military Pay and Allowances Entitlements Manual, which were promulgated based on the foregoing decision and 45 Comp. Gen. 766 (1966), could be rewritten to prospectively permit a member, who was confined by military authorities for foreign civil authorities, to accrue pay and allowances at least until he was initially convicted. The context within which the request was made was the NATO Status of Forces Agreement (Germany) and the 1959 Supplementary Agreement thereto.

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In response to that request, by decision 55 Comp. Gen. 186, supra, we held that the regulations could be so rewritten and in the process, redefined the term "constructively absent" from duty to mean only actual incarceration of a member by military authorities on the basis of a request by the foreign civil authorities, since the member would otherwise be at that point under the effective control of the foreign government.

We also stated on page 192 of that decision that:

"\* \* \* in any case where the commander of a 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. \* \* \*"

The file in Mr. Tucker's case shows that while he was serving on active duty in the United States Army in Japan in 1970, he was arrested by Japanese authorities as a suspect in the death of a Japanese civilian. He was apparently held by United States Military authorities beginning January 21, 1970, pending further action by Japanese authorities. On February 10, 1970, the Japanese authorities asserted jurisdiction in his case and on February 14, 1970, indicted Mr. Tucker for premeditated murder and abandonment of a corpse. Mr. Tucker was convicted of murder and on February 19, 1971, was sentenced to 12 years hard labor. During the period of trial and appellate review, the Japanese authorities permitted Mr. Tucker to be incarcerated by the United States Military authorities in lieu of incarceration in a Japanese facility. Following appellate review, however, he was transferred to and confined in a Japanese correction facility to serve out his sentence.

Article XVI of the agreement on the Status of United Nations Forces in Japan, signed February 19, 1954 (5 U.S.T. 1123, et seq.), which governs the treatment to be afforded members accused of the commission of certain offenses in Japan, provides in subsection 1(b) that:

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"\* \* \* the authorities of Japan shall have jurisdiction over members of the United Nations forces \* \* \* with respect to offenses committed within the territory of Japan and punishable by the law of Japan."


Further in subsection 5(c) of that Article it is provided:

"The custody of an accused member of the force of a sending state \* \* \* over whom Japan is to exercise jurisdiction shall, if he is in the hands of the sending state, remain with that State until he is charged by Japan."

That language clearly indicates that in cases of breach of the civil law of Japan, custody of the arrested member remains in the sending State only until he is charged with a crime (indicted), there being no basis under the agreement for the sending State to assert custody or control of an arrested member thereafter.

In the present case, since Japan had charged Mr. Tucker, under the agreement provisions they had every right to incarcerate him in their own prison facilities during trial and appellate review. The fact that they did not actually retain physical custody over him neither deminished their jurisdiction nor altered their right to have him incarcerated pending the outcome of trial. Since the file shows that Mr. Tucker was actually incarcerated in the United States Naval Correctional facility at the request of the Japanese civil authorities, it would appear that no discretionary authority to incarcerate or to simply restrict Mr. Tucker's movements remained in the installation commander. It is our view, therefore, that Mr. Tucker must be considered as being constructively absent during the time of actual incarceration by United States Military authorities subsequent to indictment and other than the time spent in the correctional facility otherwise covered by accrued unused leave, no entitlement to pay and allowances accrued to him.

Accordingly, the decision of December 29, 1971, denying payment in Mr. Tucker's case is sustained.

  
Deputy Comptroller General  
of the United States