

**DECISION**

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

FILE: B-185426

DATE:

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SEP 21 1976

MATTER OF: Major Pedro J. Acevedo Torres, USAR

**DIGEST:** Where an Army Reserve member claims entitlement to administrative function pay, in the absence of an officially verified showing that the member either commanded a separate unit necessarily requiring the performance of administrative functions or that he actually performed the specified administrative functions of a subordinate unit, such claim may not be allowed.

This action is in response to a letter dated March 15, 1976, with enclosures, from Ismael Cardona, Esq., attorney for Major Pedro J. Acevedo Torres, USAR, which constitutes an appeal from our Transportation and Claims Division settlement dated March 5, 1975, disallowing the member's claim for administrative function pay for the period September 5, 1958, to December 31, 1968, during which the member was Complement Commander of, among other units, the 369th Station Hospital (300B) MSC-USAR, San Juan, Puerto Rico.

In response to an earlier appeal on the same issue, we advised the member on January 19, 1976, that since the matter of his appeal was the subject of litigation in the United States District Court for the District of Puerto Rico, Civil Action No. 75-1048, filed on September 18, 1975, no further action would be taken on his claim pending the outcome of those court proceedings. Those proceedings have been concluded in favor of the Government. The court in its February 26, 1976 opinion and order dismissed the complaint for lack of jurisdiction. Since failure of a plaintiff to amend a complaint so as to bring it within the jurisdiction of the court does not go to the merits of the case, dismissal of such an action does not give *res judicata* affect to judgment rendered for the defendant on jurisdictional grounds. See Takashi Kataoka v. May Department Stores Co., 115 F. 2d 521 (9th Cir. 1940), cert. denied, 312 U.S. 700 (1940). Therefore, we may now rule on the present appeal.

The member's original claim for administrative function pay was disallowed by our Transportation and Claims Division on grounds that in the absence of an administrative determination that the member qualified for the administrative function pay, no authority existed for its payment. The member contends that as Complement Commander of the 369th Station Hospital during the period September 3, 1958, to December 31, 1968, he is entitled to back administrative function pay pursuant to the provisions of paragraph 80423, AR 37-104-3 (change 1, July 13, 1973), which states that the commanders and unit commanders of all hospital units are eligible for administrative function pay when otherwise qualified under the regulation. In addition, the member states that the four successors to his position have all received administrative function pay.

Administrative function pay is that pay which is paid from the appropriation "Reserve Personnel, Army" to officers commanding organizations having certain administrative functions connected therewith. The Reserve officer's entitlement thereto must be determined pursuant to applicable regulations in effect during the period for which the member claims his entitlement. The period of the member's claim was from September 3, 1958, through December 31, 1968. Since the regulations cited in the appeal were not promulgated until 1973, they do not govern the member's entitlement. The 1957 edition of AR 37-104 remained in effect until superseded by the 1965 edition of AR 37-104 on February 15, 1965, which was in turn not superseded until and by the 1973 edition of AR 37-104-3. Therefore, the member's entitlement to administrative function pay during the period in question, is governed by the 1957 and 1965 editions of the regulation.

Paragraph 20-46 of the 1957 edition of AR 37-104, provides that eligibility for administrative function pay is dependent upon the faithful performance of administrative functions in keeping with the requirements of the position, which performance must be affirmed on the quarterly payroll by the unit advisor. The member has not submitted, nor does the record provide any evidence that the member was officially recognized as having performed the administrative functions of his unit. In the absence of the substantiation required by the regulation, there is no legal basis upon which the member's claim for administrative function pay for the period September 3, 1958, to February 14, 1965, may be allowed.

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The 1965 edition of AR 37-104, deleted the requirement that the officer's eligibility for administrative function pay be formally affirmed on the quarterly payroll. However, it notes, as does the 1973 edition of AR 37-104-3, relied on by the member, that the commanders and unit commanders of all hospital units are eligible for administrative function pay when otherwise qualified under the regulation. In this connection, subparagraph 30144(c)(1), AR 37-104, February 1965, states that, "An officer is entitled to administrative function pay only if he performs the administrative functions of the organization in keeping with the oath and requirements of his office."

In our decision B-147755, January 22, 1962, we held that when it is shown that an individual commands a separate organization, only the showing of a separate organization is required to support the payment of administrative function pay to such commander. However, where an organization is not functioning separately but is a subordinate part of a larger group and the administrative functions of the organization are normally performed by the headquarters of the larger group, payment of administrative function pay must be supported by a clear showing that the commanders of the subordinate units did in fact perform the administrative functions of their units. In the present case, the member has neither shown that he commanded a separate organization nor presented proof that he did in fact perform the administrative functions of a subordinate unit.

Accordingly, on the present record, the action previously taken disallowing the member's claim, is sustained. If, however, he can establish either that he commanded a separate unit or that he actually performed the specified administrative functions of a subordinate unit and official verification can be obtained, the matter will receive further consideration.

R.F.KELLER

Deputy ] Comptroller General  
of the United States