

**DECISION**

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

61389

FILE: B-185116

DATE: AUG 26 1976

98636

MATTER OF:

Mr. Leonard D. Ellison

**DIGEST:**

Former enlisted member who was issued a discharge under other than honorable conditions as a result of a determination that he fraudulently enlisted, which discharge was changed to honorable by Army Board for Correction of Military Records, is not entitled to pay accrued after determination of fraudulent enlistment was made, since no change in the record was made regarding the fraudulent nature of his enlistment. Also under regulation then in force he is not entitled to travel pay as a result of the Board action.

This action is in response to a letter dated September 25, 1975, from Mr. Leonard D. Ellison, which, in effect, requests further consideration of a settlement dated August 13, 1975, by our Transportation and Claims Division (now Claims Division), which disallowed his claim for arrears of pay and for mileage to his home of record, incident to a correction of his military records in 1973.

The file shows that Mr. Ellison enlisted in the Army on July 12, 1939, and was separated from the service on August 13, 1940, under the provisions of Army Regulation (AR) 615-360, for fraudulent enlistment, and was issued a discharge under other than honorable conditions. The file also shows that, upon Mr. Ellison's application, the Army Board for the Correction of Military Records recommended on February 21, 1973, that his records be corrected to show that he was discharged under honorable conditions, concluding therein that while the original discharge was issued in accordance with the Army regulations in effect in 1940, the change in the character of his discharge was warranted due to the different treatment accorded cases similar to that of Mr. Ellison under section IV of AR 615-360 after January 1, 1944.

The Claims Division of this Office disallowed Mr. Ellison's claim on the grounds that a discharge upon discovery of fraudulent enlistment constitutes an avoidance of the enlistment contract and

that there is, therefore, no entitlement to pay and allowances for any period served under the fraudulent enlistment. It was indicated further that a subsequent change made in the character of the discharge does not increase the member's entitlement, since the mere change in the character of the discharge from other than honorable to honorable does not affect the basic reason for the discharge.

It is well established that a fraudulent enlistment is voidable by the Government. A discharge for fraudulent enlistment is an avoidance of the enlistment ab initio and there is, therefore, no entitlement to pay and allowances for any period served under the fraudulent enlistment. See 1 Comp. Gen. 511 (1922); 3 Comp. Gen. 691 (1924); 9 Comp. Gen. 436 (1930); 31 Comp. Gen. 562 (1952); 36 Comp. Gen. 439 (1956); and 47 Comp. Gen. 671 (1968).

AR 615-360, paragraph 47(a), dated April 4, 1935, in effect at the time of Mr. Ellison's separation, provided that:

"An enlisted man discharged for fraudulent enlistment is not entitled to pay or to allowances of any kind, including those for travel."

AR 35-1460, paragraph 3, dated December 15, 1924, also in effect at the time of his separation, stated in part that:

"a. It is well settled that an enlisted man whose enlistment is procured by fraud, unless the Government waives the objection and allows the enlistment to stand, is not entitled to any arrears of pay and allowances for the service under the fraudulent enlistment. See 12 Comp. Dec. 446."

In this connection, by analogy to the rule applicable to a de facto officer, an enlisted member is permitted to retain the pay already received by him while so serving, if the payments were otherwise proper. See 31 Comp. Gen. 562, supra, and decisions cited. Later cases have held that pay should be suspended once it is determined that there has been a fraudulent enlistment and the disbursing officer has received notice of the determination. 47 Comp. Gen. 671 (1968); 54 Comp. Gen. 291 (1974); and B-179517, May 15, 1974.

Thus, the refusal by the service in 1940 to pay Mr. Ellison arrearages of pay and allowances, based on the determination that he fraudulently enlisted, was proper.

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The change in the type of discharge by action of the Correction Board did not entitle Mr. Ellison to any further pay or allowances including those for travel as provided in AR 615-360 as quoted above.

Accordingly our Claims Division settlement of August 13, 1975, is sustained.

R. F. Keller

Acting Comptroller General  
of the United States