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M.P.  
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**DECISION**



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

**FILE: B-189488**

**DATE: DEC 16 1977**

**MATTER OF: DOD Military Pay and Allowance  
Committee Action No. 537**

- DIGEST:**
- 1. Decision by a military court that it does not have personal jurisdiction over an individual for purposes of military law because the Government has failed to prove that the individual was validly enlisted does not automatically void the enlistment for purposes of determining the person's entitlement to pay and allowances.**
  - 2. Unless by court-martial authority, or by another method prescribed by law, an individual is deprived of his pay and allowances as a member of the armed forces, an administrative determination should be made, pursuant to the authority of the Secretary of the service concerned, to determine the validity of an enlistment for purposes of pay and allowances when a military court finds it lacks jurisdiction over the individual due to a defect in his enlistment.**
  - 3. When an enlistment contract is found to be voidable by either the Government or the individual because of a defect in the enlistment, either the Government or the individual may waive the defect and affirm the enlistment so as to confer upon the individual de jure member status for purposes of pay and allowances.**
  - 4. Where an individual has been held by a military court to be outside the jurisdiction of the Uniform Code of Military Justice and the validity of the individual's enlistment has not been administratively determined to be invalid, the individual's military pay and allowances may be continued until the administrative determination**

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is made. In such cases a prompt administrative determination should be made as to whether the enlistment is void, voidable, or valid.

5. Constructive enlistments may arise for purposes of pay and allowances generally when individuals "otherwise qualified" to enlist enter upon and voluntarily render service to the armed forces and the Government accepts such services without reservation. A member serving under a constructive enlistment is regarded as being in a de jure enlisted status and entitled to pay and allowances.
6. A constructive enlistment has been held to arise for purposes of pay and allowances when an individual who was originally ineligible to acquire the status of a member of the armed forces conceals his disability and enlists and after removal of the disability the individual remains in the service and voluntarily performs duties and such work is accepted by the Government without reservation.

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller) dated June 27, 1977, which requests a decision on questions presented by Department of Defense Military Pay and Allowance Committee Action No. 587 concerning the effect of decisions by the United States Court of Military Appeals (USCMA) in the cases of United States v. Russel, 80 C.M.R. 650 (1976), and United States v. Crippen, 68 C.M.R. 758 (1974), on the entitlement of persons to military pay and allowances.

The basic issue presented is whether a holding by a military court that it has no jurisdiction over an individual because of the Government's failure to show a valid enlistment, must be considered as binding for administrative purposes, thus, requiring termination of pay and allowances and release of the individual from service.

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By way of background, in the Celley case it was held that a person who enlists as an alternative to a jail sentence, which was to be imposed as a result of civilian charges, cannot acquire military status because such enlistments are involuntary in nature. The court concluded that without military status the person is not subject to the Uniform Code of Military Justice (UCMJ), 10 U. S. C. 801, et seq. (1970), and cannot be court-martialed for an unauthorized absence. In so holding, the court stated that the Government was required to prove that a valid enlistment had been created and, absent a showing in the case otherwise, the enlistment was void at its inception for purposes of the pending criminal action requiring a dismissal of the charges against the defendant for lack of jurisdiction.

The court in the Russo case held that military courts do not have jurisdiction over an individual where a recruiter aids him in enlisting knowing the enlistee is not qualified to be a member of the military. In so holding, the court stated that common-law contract principles dictate that where a recruiter's misconduct amounts to a violation of the fraudulent enlistment statute (10 U. S. C. 804 (1970)), as it did there, the resulting enlistment is void as contrary to public policy unless the Government shows by controverting evidence the existence of a valid enlistment. Because such evidence was not produced by the Government in the Russo case, the Court of Military Appeals reasoned that the trial court was without jurisdiction to convict the defendant and, accordingly, the finding of guilty should be set aside.

#### Question One

The first question presented is: "A. Does a decision made in accordance with the Uniform Code of Military Justice (UCMJ), 10 U. S. C. 801 et seq. (1970), and based on the holdings of the Court of Military Appeals in the cases of United States v. Russo, 13 USCMA 511, 50 CMR 696 (1973), and United States v. Celley, 13 USCMA 142, 48 CMR 755 (1974), that an enlistment is 'void' and does not subject the enlistee to the jurisdiction of the UCMJ, ipso facto void the enlistment as a basis for entitling the enlistee to pay and allowances?"

We are of the opinion that a decision by the USCMA finding an individual's enlistment in the service void for the purpose of court-martial jurisdiction does not ipso facto void the enlistment for the purposes of determining the individual's entitlement to pay and allowances.

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Military courts do not function to decide administrative matters. Herrod v. Convening Authority, 42 C.M.R. 176 (1970). Military courts are courts of limited jurisdiction, their function is primarily to adjudicate criminal violations of military law, not to decide administrative questions such as whether a person should be discharged from the service, except as part of a sentence pursuant to a court-martial conviction.

Although the facts which would prove an individual's military status are the same for administrative purposes as they are for court-martial jurisdiction purposes, we do not find that in all instances where the Government fails to prove military status to the court it must be concluded that the individual does not, in fact, have military status. This would be the case if the Government in prosecuting the case before the court fails to bring into evidence otherwise available facts which would show that the individual was validly enlisted. Parisi v. Davidson 405 US 34, 43-44 (1972). Thus, while a military court's determination that it does not have jurisdiction over a person (such as in the Evans and Callow cases) is conclusive for its jurisdictional purposes (33 U. S. C. 878 (1970)), such a determination of lack of jurisdiction is not conclusive as to a person's status in the service, for administrative purposes, such as whether he should be released from the service. Administrative matters such as determining under what conditions a member should be released are within the broad and comprehensive powers granted the Service Secretaries. 39 Comp. Gen. 800, 808 (1960). Accordingly, a decision of a military court that it lacks jurisdiction over the individual because the Government has not shown a valid enlistment, while conclusive on the issue of court-martial jurisdiction, does not amount to a service review of the record of the individual to determine the status of that person for administrative purposes, and for entitlement to pay and allowances.

The answer to question number one, therefore, is in the negative.

#### Question Two

The second question presented is: "2. If the answer to question number 1. is in the negative, must, or may, an appropriate administrative authority decide the issue of the validity of such enlistment

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for purposes other than subjecting the enlistee to the jurisdiction of the UCMJ independent of the prior decision?"

We have long held that where questions arise as to the validity of an enlistment contract which could affect an individual's entitlement to pay and allowances, a review of the problem should be made by the appropriate administrative authority in order to make a definitive determination in regard to the matter. See generally 54 Comp. Gen. 291 (1974) and 47 Comp. Gen. 671 (1968). Consistent with the answer to question 1, we see no reason to change that view. Thus, when a court-martial authority makes a determination that it lacks jurisdiction over an individual due to the status of his enlistment, the service concerned should make an administrative determination pursuant to the governing regulations of the service concerned as to the nature of the enlistment in order to determine whether the enlistment is void, voidable, or valid for purposes of determining the individual's military status and entitlement to pay and allowances. 54 Comp. Gen. 291, supra.

While a military court's determination of lack of jurisdiction over an individual for court-martial purposes is a limited determination, it would be appropriate to consider it in making the administrative determination. Thus, where the military court has in evidence all relevant facts and has had a full hearing on the validity of an enlistment in order to decide the jurisdictional issue, an administrative body upon review of the court's record in all likelihood would find it sufficient to support a similar determination for administrative purposes.

Therefore, the second question is answered in the affirmative.

#### Question Three

The third question presented is: "3. If the answer to question number 2. is in the affirmative, and the appropriate administrative authority properly determines that the defect in the enlistment contract renders the enlistment merely voidable for purposes other than subjecting the enlistee to the jurisdiction of the UCMJ, may the Service or the enlistee, as appropriate, waive the defect which renders the enlistment voidable and affirm the enlistment so as to

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confer the enlistee with de jure 'member' status for the purposes of title 37, United States Code, from the beginning of the enlistment?"

Among the problems considered in 54 Comp. Gen. 281, was the pay and allowance consequences arising from required administrative determinations as to whether an enlistment contract was void or merely voidable at the option of the Government. We stated therein, that once an administrative determination is made as to a fraudulent enlistment, if the contract is found to be voidable, the fraud should be waived or the individual should be promptly released from military control. In consonance with the foregoing guidance, paragraph 10401 of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) states that, for purposes of pay and allowances, when an enlistment is determined to be merely voidable, the Government may void the contract or waive the defect and allow it to stand.

Table 1-4-1 of the DODPM, Rule 2, states that once a decision to waive the fraud has been made then pay and allowances continue with no loss of wages for the period, the enlistment being as valid as that of any other member.

Accordingly, for purposes of pay and allowances under title 37 of the United States Code, when the Government becomes cognizant of a fraudulent enlistment and the appropriate administrative body decides to waive the fraud, the waiver acts as a ratification of the individual's enlistment which relates back to the original date of entry conferring upon the individual, for pay purposes, de jure member status for the duration of the enlistment.

A similar conclusion also appears warranted when the voidable character of the fraud places the option to waive the fraud upon the individual whose enlistment has been found to be fraudulent. In those cases where the fraud or defect in the enlistment results from erroneous Government actions upon which the individual justifiably relied, and a decision is made that the enlistment is voidable and not void, it would appear consistent with our discussion above to permit the enlistee to waive the defect in the enlistment so as to confer upon the individual de jure member status for purposes of pay and allowances, such status relating back to the date of the original

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enlistment. Compare 33 Comp. Gen. 24 (1933) and 54 id. 291. Question 3 is, therefore, answered in the affirmative.

#### Question Four

The fourth question presented is: "4. Assuming the answer to question number 3. is in the affirmative, in the case where an enlistee has been held not to be subject to the UCMJ and there has been no administrative determination as to the validity of the enlistment for purposes other than subjecting the enlistee to the jurisdiction of the UCMJ, may the enlistee be presumed to be entitled to pay and allowances until the determination is made?"

Where an enlistee has been held not to be subject to the UCMJ and there has been no administrative determination in regard to the validity of the enlistment, the enlistee may still be presumed to be entitled to pay and allowances. It has long been the rule in the case of a fraudulent enlistment entered into by the member concealing or misrepresenting a material fact that a decision by the Government to discharge the person constitutes an avoidance of the contract, and the individual is not entitled to pay and allowances for any period served under the fraudulent enlistment. However, by analogy to a *de facto* officer he is permitted to retain the pay he received currently while serving. 31 Comp. Gen. 532 (1932).

In 47 Comp. Gen. 671 and 54 Comp. Gen. 291, we recognized the necessity for an administrative determination that a member's enlistment was actually fraudulent before his pay and allowances are stopped. However, once such a determination is made payments must be stopped even if the defect is one which may be waived. Upon waiver, of course, back pay and allowances would then be payable.

In consonance with the principles mentioned above, and our answer to the first question, it is our view that a similar procedure should be followed in cases in which a military court finds that it has no jurisdiction due to the Government's failure to prove a valid enlistment. That is, an administrative determination should be made promptly to decide whether the enlistment is void, voidable or valid. Pay and allowances may be continued until such determination is made. The question, therefore, is answered in the affirmative.

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Question Five

The fifth question presented is: "5. If the answer to question number 1. is in the negative and it is determined pursuant to a procedure suggested by question number 2, that the enlistment is void for all purposes, may a constructive enlistment arise for purposes other than subjecting the enlistee to the Uniform Code of Military Justice? If so, under what circumstances and from what point in time?"

Our Office has recognized constructive enlistments for purposes of pay and allowances where persons "otherwise qualified" to enlist, enter upon and render military service and the Government accepts such services without reservation. Such constructive enlistments may be regarded as *de jure* enlistments. See 33 Comp. Gen. 24, *supra*, 45 *id.* 215 (1935), and compare 22 Comp. Gen. 543 (1973). However, a definite distinction must be drawn between persons "otherwise qualified" to enlist and those who enter military service by fraudulent means and thus whose enlistments are void or voidable. We have stated that a person who enlists in the military while under a disqualification does not by remaining in the service ratify his purported contract of enlistment; however, it has been accepted that the act of remaining in the service and receiving pay and allowances after removal of the disqualification is the equivalent of an enlistment. *Ex parte Hubbard*, 132 F. 76 (8th Cir. 1910); 34 Comp. Gen. 291 (1974); 24 *id.* 175 (1974).

The crucial consideration in determining whether or not a constructive enlistment is present in a given case for purposes of pay and allowances appears to be whether the person who is otherwise qualified to be a member of the armed forces, after removal of the disqualifying factor (24 Comp. Gen. 176, *supra*.), or, who is otherwise qualified to become a member of the armed forces but due to some irregularity in procedure is not technically a member, (45 Comp. Gen. 222), voluntarily accepts the benefits and assumes the obligations of membership in the armed forces without objection from the Government. See *Miller v. Commanding Officer, Camp Bowie, Tex.*, 57 F. Supp. 694 (D.C. Tex. 1944); 23 Comp. Gen. 24 (1933); and compare *United States v. King*, 28 C.M.R. 243 (1958).

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**Application of the rules discussed above to the circumstances which most frequently arise in regard to void versus voidable enlistments yields the following results.**

**Enlistments which are administratively determined to be absolutely void because at the time the individual enlisted and at the time the defect is discovered the individual is under a legal disability which renders him without the legal capacity to acquire military status, neither the Government nor the individual being capable of waiving the defect, could not become constructively enlisted since the individual who enlisted still suffers the disability which originally prevented him from acquiring the requisite status in the armed forces. See *In re Grigley*, 187 U.S. 147, 162-163 (1902); *Hookins v. Pull*, 200 F. 275 (5th Cir. 1917), 54 Comp. Gen. 201 (1974). Thus, for example, in our view a constructive enlistment could not arise where an individual enlists below the minimum statutory age and that fact is discovered before he attains that age. 10 U.S.C. 502(a). See also 10 U.S.C. 504 regarding enlistment of insane persons. The above circumstance is to be distinguished from the case where the disability preventing an individual from acquiring the status of a member of the service is removed during his enlistment giving rise to a voidable enlistment situation. This, for example, is the circumstance where a minor enlists prior to attaining the minimum statutory age of enlistment but reaches the age of legal majority before the original fraud is discovered. Such an individual, who reaches the minimum age and who continues to voluntarily provide services to the Government and the Government accepts those services, for a significant period of time without taking any action to void the enlistment may be considered to be serving in a constructive enlistment.**

**We are unable to provide any more specific answers to the general questions presented concerning constructive enlistments, other than to say, as stated above, that we have recognized them under the facts in the cases cited. If a case arises in which the member's entitlement to pay and allowances is contingent upon a constructive enlistment, we suggest it be submitted here for consideration.**

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