

DECISION



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

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GD 98088

FILE: B-163443

DATE: SEP 2 1976

MATTER OF: Department of Defense Military Pay
and Allowance Committee Action No. 525

- DIGEST:
1. Administrative waiver action taken by the military services on voidable fraudulent enlistments, with a "conditional" suspension of execution of discharge pending member's future good behavior, is contrary to guidance furnished in 54 Comp. Gen. 291 (1974).
 2. Once an administrative determination is made as to fraudulent enlistment, the fraud should be waived or the individual should be promptly released from military control.

This action is in response to letter dated May 18, 1976, from the Assistant Secretary of Defense (Comptroller) requesting a decision on a question concerning fraudulent enlistments as presented in Department of Defense Military Pay and Allowance Committee Action No. 525, enclosed with the letter.

The question presented is:

"In the case of an enlistment that is determined to be fraudulent, may the Services administratively waive the fraud for the purpose of pay and allowances by conditionally allowing the enlistment-contract to stand?"

As background, the Committee Action discussion states that Department of Defense (DOD) Directive 1332.14, September 30, 1975, provides for administrative discharges by reason of misconduct for fraudulent enlistments which are voidable, and that the same directive authorizes the discharge authority or higher authority to suspend execution of an approved administrative discharge for a specified period of time.

The discussion further states that in accordance with Rule 2 of Table 1-4-1, Department of Defense Military Pay and

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Allowances Entitlements Manual (DODPM), when an individual is determined to be serving under a fraudulent enlistment or induction, pay and allowances are suspended until the Government either voids the enlistment or induction, or allows it to stand. However, the Committee Action discussion points out that under the authority of DOD Directive 1332.14, supra, the discharge authority may suspend execution of an approved discharge in these cases, thus allowing the enlistment or induction to stand provisionally. In such cases, it is surmised, that possibly the Government has retained its option to separate the member by reason of misconduct for fraudulent enlistment for a specified period of time if the member's future conduct warrants vacating the suspension of the approved discharge. However, the discussion notes that such a procedure appears to be in conflict with the guidance provided in 54 Comp. Gen. 291 (1974).

By way of projection, the Committee discussion states that under current regulations, when it is determined that a member is serving under a fraudulent enlistment and the member is ordered discharged, but the discharge authority suspends execution of the approved discharge for fraudulent enlistment, the member's entitlement to pay and allowances is as if the fraud were waived. It is further projected that if, at some later point in time, the suspension of the approved discharge for fraudulent enlistment is vacated and the discharge is ordered executed, the member will be entitled to pay and allowances through the date of discharge. Conversely, in the case where a determination is made that the member is serving under a fraudulent enlistment, which is voidable, and the Government avoids the contract and discharges the member, there is no entitlement to pay and allowances from the date of the determination of the fraud.

At the outset, we agree with the observation in the Committee Action discussion that the "conditional" waiver procedure described in the submission is in conflict with the rules laid down in 54 Comp. Gen. 291, supra. In that decision, we dealt with submitted questions concerning the propriety of payment of pay and allowances to a member through date of separation when he was being administratively separated from the service for fraudulently concealing or misrepresenting a material fact which disqualified him for enlistment.

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Among the problems considered in 54 Comp. Gen. 291, supra, was the pay and allowance consequences arising from required administrative determinations as to whether a fraudulent enlistment was void, or if not void, was voidable at the option of the Government. We stated therein, referring to prior regulations concerning fraudulent enlistments as considered in 47 Comp. Gen. 671 (1968), that once an administrative determination is made as to fraudulent enlistment, the fraud should be waived or the individual should be promptly released from military control unless, of course, he was to be held for court-martial proceedings under Article 83 (offense of fraudulent enlistment) of the Uniform Code of Military Justice, 10 U.S.C. 883.

In consonance with the foregoing guidance in 54 Comp. Gen. 291, paragraph 10401 of the DODPM states that a fraudulent contract of enlistment or induction is not void but is voidable at the option of the Government, and that when the Government becomes aware of the fraud it may void the contract or waive the objection and allow the contract to stand. In addition, Rule 2, Table 1-4-1, DODPM, sets out, for pay and allowance purposes, that when an individual is determined to be serving under a fraudulent enlistment or induction and the Government has neither voided the enlistment or induction nor waived the fraud (or defect), then pay and allowances are suspended until the Government either voids the enlistment or induction; or allows it to stand. That administrative procedure is correct under our prior holdings on this subject.

On the other hand, DOD Directive 1332.14, dated September 30, 1975, as cited in the submission deals with administrative separations of enlisted personnel. It provides for the suspension of execution of approved discharges in appropriate circumstances. The suspended discharge may be put into effect if the member does not meet the standards of work and conduct prescribed.

That procedure is not questioned where members are subject to discharge from valid enlistments; however, in the case of a fraudulent enlistment the individual has not become a member of the service. The fraud in the enlistment nullifies the status of the individual as a member of the service concerned unless positive action is taken by the service to waive the fraud. A member who has no status as a member of the service has no right to pay or allowances and only if the defect in enlistment is

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waived by the service. does the individual become a member of the service and entitled to pay and allowances. That entitlement relates back to the date of original enlistment as if the enlistment had not involved a fraud.

In these circumstances waiver of the fraud in enlistment is necessary before the individual is entitled to pay and allowances. Once the fraud is waived and the individual becomes a member of the service, we are aware of no basis for using that fraud to void the enlistment.

Accordingly, in the case of a fraudulent enlistment, the fraud in enlistment may not be conditionally waived and the individual retained in service with pay and allowances under specified conditions. Thus, the suspension of discharge provisions of DOD Directive 1332.14 are not to be applied in fraudulent enlistment cases.

~~Acting~~ R.F. KELLER
Comptroller General
of the United States