PLM-11

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

10,796

FILE: B-192210 DATE: July 17, 1979

MATTER OF: Alvin G. Vaverka, Jr.

DIGEST: 1. A Navy enlisted man received a general discharge due to his fraudulent enlistment and was not entitled to receive accrued pay and allowances. Because the basis of withholding pay and allowances is that the enlistment was fraudulent and not that the discharge was less than honorable, the upgrading of the discharge to honorable by the Navy Discharge Review Board without altering the fact that the enlistment was fraudulent does not entitle the member to receive the accrued pay and allowances.

2. A military member's claim for pay and allowances accrues upon discharge and must be filed ~~in the General Accounting~~ with the GAO Office within the time specified ~~in 31 U.S.C. § 71~~ by statute a or be forever barred from ~~our~~ consideration. Thus, a claim for pay and allowances which accrued upon a member's discharge in 1954 and which was not received in GAO until 1971 is barred.

3. A claim for Korean conflict era mustering-out pay must have been filed with the Secretary of the service concerned before July 17, 1959, to be paid. ~~Where~~ there is no evidence of such a filing, the claim for such pay may not be paid. 38 U.S.C. § 2104 (1958).

Mr. Alvin G. Vaverka, Jr., has requested reconsideration of our Claims Division's disallowance of his claim for arrears of pay and allowances which he believes due as the result of a change in the type of discharge he received from the Navy in 1969. Since, although the type of discharge was changed, the reason for it (fraudulent enlistment) was not changed, we must sustain the disallowance of the claim.

Having completed three periods of enlistment in the Navy or the Navy Reserve between 1943 and 1968 with breaks of several years

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[Fraudulent Enlistment, General Discharge and Claim for Arrears of Pay and Allowances]

between each enlistment, Mr. Vaverka commenced a fourth enlistment on August 30, 1968. On June 13, 1969, he received a general discharge on the basis that he had fraudulently entered into this enlistment by failing to reveal certain information that would have prevented his enlistment. Since, in effect, his enlistment was voided due to the fraud, Mr. Vaverka was not entitled to any accrued pay and allowances which were unpaid at the time the fraud was determined although he was entitled to retain any payments he had received. Subsequently, as a result of Mr. Vaverka's request for review of his general discharge, he was informed in September 1970 that the Secretary of the Navy had approved the recommendation of the Navy Discharge Review Board to change his discharge "to Honorable by reason of Convenience of the Government." See 10 U.S.C. § 1553 (1970); 32 C.F.R. §§ 724.1-724.31 (1970).

Based on this change in his discharge, Mr. Vaverka filed a claim for:

1. Pay and allowances from May 29, 1969, to June 13, 1969;

2. Recomputed longevity pay taking into account his time for the fourth enlistment;

3. Accumulated leave;

4. Mustering-out pay; and

5. Interest on all money due from the date of discharge.

As to whether the changing of Mr. Vaverka's discharge from general to honorable will allow payment of his claim, we have consistently held that under a fraudulent enlistment it is not the nature of the discharge but rather the reason behind the change in discharge status which is determinative of the issue. For example, in 30 Comp. Gen. 18 (1950), we considered a case where an individual received a general discharge because his enlistment was fraudulent by reason of concealment of his police record. When the member's discharge was changed to honorable, we ruled that he was still not entitled to receive previously withheld pay and allowances because the change in discharge status did not change the character of the enlistment.

The legal principle underlying this result is that the discharge of a military member for a fraudulent enlistment constitutes an avoidance of the contract of enlistment, and the person is not entitled to pay and allowances for any period served under the fraudulent enlistment. 31 Comp. Gen. 357, 359 (1952), and 54 Comp. Gen. 291, 293 (1974). Therefore, even if it had been possible to initially give the claimant an honorable discharge, he would still have not been entitled to accrued pay and allowances since the nature of the discharge would not have altered the fraudulent nature of the enlistment. 31 Comp. Gen. 357, and B-122440, June 8, 1955. It is only when the change in the discharge is brought about because the record is corrected to show that the enlistment was not fraudulent that the member is entitled to receive the accrued pay and allowances. See B-188041, April 22, 1977.

We have examined the records of the Discharge Review Board regarding the change in Mr. Vaverka's discharge and find that although the Board saw fit to detail certain extenuating circumstances, the Board did not find that the character of the enlistment was other than fraudulent. To change the record to show that the reason for Mr. Vaverka's discharge was other than fraudulent enlistment would appear to require action by the Navy Board for the Correction of Military Records. 10 U.S.C. § 1552 (1976). Without such a change in the record there is no authority to pay Mr. Vaverka any additional amounts accrued under that enlistment.

Finally, in the recent submissions in support of Mr. Vaverka's claim, there is supplied, for the first time, information which indicates that apparently certain bases of his claim (e.g., portion of accrued leave and mustering-out pay) arose from his active service from September 6, 1950, to November 16, 1951, during the Korean conflict.

As to the mustering-out pay, apparently he refers to such pay authorized for Korean conflict service under title V of the act of July 16, 1952, 66 Stat. 688-691, as amended, codified at 38 U.S.C. §§ 2101-2105 (1958). However, under 38 U.S.C. § 2104, assuming he was otherwise entitled, he must have filed an application for the mustering-out pay before July 17, 1959, with the Navy. 37 Comp. Gen. 475 (1958). The record before us does not show that Mr. Vaverka timely filed such an application.

Concerning payment for leave accrued during the 1950-1951 period, since that service was completed during an enlistment from which the claimant was discharged on July 31, 1954, this portion of Mr. Vaverka's claim accrued on the day of discharge in 1954. At that time and until his claim was first received in the General Accounting Office (December 21, 1970), the act of October 9, 1940, ch. 788, 54 Stat. 1061, 31 U.S.C. 71a (1970) provided that any claim against the United States cognizable by the General Accounting Office must be received in that Office within 10 years from the date it first accrued or be forever barred. Since his claim was first received in the General Accounting Office in 1970, that portion is barred from consideration. Therefore, any portion of Mr. Vaverka's claim arising from his service in Korea is barred from our consideration.

Accordingly, the settlement of our Claims Division is sustained.

Deputy Comptroller General
of the United States