

DECISION

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DIGEST - L-Mel
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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SEP 16

FILE: B-187165

DATE: SEP 16 1976

MATTER OF: Staff Sergeant

, USAF (Retired)

DIGEST:

1. Laws of State in which garnishment is sought govern garnishment proceedings against agencies of the United States. Whether such garnishment proceeding may be considered as establishing the validity of a debt of the United States is not decided in this case since the facts reported support a determination of the validity of the debt.
2. Although claimant must show existence of missing member as a condition precedent to disbursement of that member's retirement pay, in deciding such cases the GAO will give great weight to court determination based on reasonable evidence and the legal presumption of missing member's continued life when question of his life or death was in issue before the court.

This action is in response to a letter dated May 20, 1976, from the Deputy Chief, Accounting and Finance Division, Air Force Accounting and Finance Center (AFAC), 3800 York Street, Denver, Colorado 80205, requesting an advance decision concerning the propriety of making payment on a voucher in the amount of \$8,440 under a writ of garnishment of retired pay owed to Staff Sergeant , USAF (Retired). The request was approved by the Department of Defense Military Pay and Allowance Committee and forwarded to us August 6, 1976, under Submission No. DO-AF-1259.

Sergeant was placed on the retired list under the provisions of 10 U.S.C. 8914 (1970) on July 31, 1969. He was paid retired pay until June 1, 1972, when the AFAC suspended the retired pay on the basis of a letter received on May 15, 1972, from Mrs. notifying AFAC that Sergeant had been missing since February 1972. It is indicated that for the

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period of June 1, 1972, through April 30, 1976, retired pay in the amount of \$13,910.68 has accrued and is being held pending verification of Sergeant [redacted] existence.

Sergeant [redacted] vanished in February 1972 shortly after he had been served with process in a suit by Mrs. [redacted] for nonpayment of support for their four minor children. On March 15, 1972, a North Carolina court granted Mrs. [redacted] a support decree requiring her husband to pay \$40 per week in child support beginning March 24, 1972. Mrs. [redacted] now lives in Nashville, Tennessee, where on November 4, 1975, she commenced a garnishment action based on the North Carolina judgment. The AFAPC, which had suspended retired pay owed to Sergeant [redacted], was named as defendant garnishee.

The United States attorney in Nashville, Tennessee, who was charged with defending the interests of the United States and AFAPC, the garnishee, was advised by AFAPC that the garnishment would be honored but that no disbursement could be made until the fact of Sergeant [redacted] existence was established. This was the defense interposed on behalf of the United States in a hearing in the Fourth Circuit Court for Davidson County, Tennessee, on April 8, 1976. The Assistant United States Attorney who handled the case has advised us that, as no substantial evidence as to the fate of Sergeant [redacted] was available, nothing was presented in court to prove either his demise or his continued existence.

By decree of April 13, 1976, the Tennessee court stated:

"* * * [I]t further appearing that the defendant garnishee is properly before the Court and that the funds held by the garnishee for the benefit of the defendant, [redacted], are in excess of the arrearage due and owing under the North Carolina judgment, which arrearage is presently in the sum of Eight Thousand Four Hundred Forty (\$8,440.00) Dollars; and it further appearing that no evidence was presented to the Court to rebut the presumption of life of the defendant [redacted], * * * said motion [of AFAPC] for a summary judgment against the defendant garnishee] should be granted."

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The court ordered the defendant garnishee, AFAC, to pay \$8,440 to satisfy the arrearage judgment and \$40 each week during the minority of the youngest child of the marriage, or until the defendant has been declared legally dead, whichever occurs first.

Section 459 of the Social Security Act, as added by the Social Services Amendments of 1974, Public Law 93-647, January 4, 1975, 88 Stat. 2337, 2357, 42 U.S.C. 659 (Supp. IV, 1974) for the first time authorized garnishment of the salary or wages of Federal employees, providing:

"Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to an individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments."

We have held that this statute creates no Federal law of garnishment, nor does it confer jurisdiction upon any Federal court to hear garnishment cases. It does operate to remove, in very limited circumstances, the bar of sovereign immunity that prevented garnishment of Federal employees' salaries, permitting Federal employers and employees, under the laws of each particular State, to be treated as if they were private parties. Hence, this statute requires that a person seeking garnishment follow the garnishment laws and procedures of the particular State, and provides that, for limited garnishment purposes, the United States will be subject to the jurisdiction of the State courts when necessary under that State's garnishment laws. 55 Comp. Gen. 517, 520 (1975). See also, v. _____, 398 F. Supp. 1313 (M.D. Tenn., 1975).

It is a universal rule of garnishment law that there must be a valid debt owed by the garnishee to the principal debtor which the garnisher can attach, for the garnisher's rights against the

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garnishee can rise no higher than the rights of the principal debtor against the garnishee. See 38 C.J.S. Garnishment § 26. However, it is the general rule that the garnishee must bring out in his defense in the garnishment proceeding facts to show that he does not owe a debt to the principal debtor. If he fails to do so in connection with the garnishment his defense against garnishment may be lost. In that connection see section 23.717 Tennessee Code Annotated. While State law governs the garnishment proceedings and the Federal Government has made itself subject to those proceedings, it remains a function of our Office to determine the propriety of Government disbursements and the validity of claims against the Government. Thus it would be our function to determine whether the Government actually has a legal obligation to the principal debtor. Whether this function has been made subject to the jurisdiction of State courts as a result of the enactment of section 659, however, need not be answered for purposes of resolving the issues in this case.

In determining the validity of claims such as the one in this case, we have held that since the right to retired pay of a member of the armed services terminates upon his death, a claimant must show the existence of the missing member as a condition precedent to the disbursement of retired pay that may be owed to that member. 48 Comp. Gen. 706 (1969); 43 *id.* 503 (1964). We note, however, that Federal courts have permitted disbursement of retired pay to a missing member's wife by finding the requisite showing of his continued existence (and consequent continued entitlement) in the legal presumption that, in the absence of affirmative evidence of his death, the absent member remained alive for 7 years after the time of his unexplained disappearance. ____ v. United States, 162 Ct. Cl. 631 (1963). In the absence of a provision in Federal statutes under which the continued existence of a missing person may be determined the laws of the States and the determinations of State courts with regard to the existence of the individual are given great weight in our consideration of claims involving missing persons.

We have learned informally from the United States Attorney defending the garnishee, AFAFC, that the question of Sergeant _____ existence was put into issue in the garnishment hearing of April 8, 1976, when the United States asserted the defense that it would honor the garnishment provided that

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disbursement would be made only upon a showing that Sergeant was still in existence. In the absence of any evidence proving life or death, the court made a judicial determination, based upon the Tennessee rule that for at least 7 years following a person's disappearance death is not to be presumed from his mere absence, that Sergeant is still alive. Tenn. Code Anno. § 30-1801. See also the virtually identical provisions of Gen. Stat. of N.C. § 28A-1 (Repl. vol. 1966).

We conclude that the determination of the Tennessee court hearing this garnishment case that Sergeant continues to exist, made after the United States put the issue before the court, satisfies the requirement that the missing member's existence be shown before disbursement can be made. Accordingly, if otherwise correct, payment may be made on the voucher submitted.

R. F. McNe.

Deputy Comptroller General
of the United States