DIGEST ~L~ 1144

D

DECISION

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

38

FILE: B-186639 DATE: SEP 1 1976

MATTER OF:

DIGEST: The claim of a former member of the Air Force for lost civilian earnings and promotion in his civilian job and lost flight training incident to his medical disenrollment from Air Force flight training due to excess height, is not legally payable. Further, the claim does not contain the requisite elements which would warrant submission to the Congress for consideration under the Meritorious Claims Act of 1928.

This is in response to a letter dated May 21, 1976, from Colonel William A. Martin, USAF, Chief, Claims and Tort Litigation Division, Office of the Judge Advocate General, United States Air Force, transmitting for our consideration the claim of , a former enlisted member (officer trainee) in the Air Force, under the provisions of the Meritorious Claims Act of 1928, 31 U.S.C. 236 (1970), arising from his medical disqualification for flight training and subsequent discharge from the United States Air Force. The claim is for $2,500 in lost civilian earnings and promotion and $8,000 for lost flight training.

The record indicates that in January 1975, prior to entry on active duty, Mr. was given a flight physical examination by the Air Force and found qualified for flying. During the physical, he was measured for height in the standing position only. In August of 1975 he was selected for navigator training and in October of 1975 he entered the Air Force Reserves on a delayed enlistment program. On October 31, 1975, he took a leave of absence from his civilian employment. In connection with his entry into the Reserve program, he was given an additional physical. He again was measured for height in the standing position only. On December 8, 1975, he was placed on active duty in the Air Force and was given a third physical examination. Again he was only given the height measurements in a standing position. Following his enlistment he was ordered to San Antonio, Texas, for Officer Training School (OTS) and was given an additional

ram

physical in early December 1975. During this physical, he was measured for height in both the sitting and standing positions, and it was determined that his sitting height was excessive for flight training. The following week he was measured in the T-37 and T-38 aircraft and as a result of this examination he was classified medically disqualified for flying without a possibility of waiver. Although he could have served out the remainder of his enlistment in an enlisted capacity, or as he indicates he was advised, apparently he may have been eligible to complete OTS and have been assigned to duty as an officer in a nonflying capacity, Mr. exercised his enlistment option and was discharged from the Air Force effective December 10, 1975.

In this regard the record shows that a supplement to Mr. enlistment agreement initialed by him contained the following provision:

> "I understand that if selected for a specific flying training course, should I become medically disqualified for that course or should I fail to successfully complete the Flight Screening Program, the needs of the Air Force and the recommendation of OTS will determine if I am allowed to continue in OTS leading to another course of training. Additionally, I understand that if I am eliminated from training leading to an AF commission for other than medical or unsuitability reasons, I may elect in writing to complete my four-year enlistment or to be immediately discharged * * *."

Mr. indicates in effect that his sole purpose for enlisting in the Air Force was to obtain flight training and serve as a flying officer. He indicated that when he was found to be too tall for Air Force flight training, he told Air Force personnel that he was in the Air Force to fly and that, if they would not let him fly, he "wanted out."

Mr. claim for $2,500 resulting from lost civilian wages and promotion in his civilian job is based on his assertion

that if the Air Force had discovered that he was too tall for flight training before he had enlisted, he would not have enlisted and would have earned additional salary and a promotion in his civilian job. His claim for $8,000 for flight training is based on the cost of such training at a civilian flight school, which training the Air Force would have provided him had he met the height requirements.

The Air Force considered Mr. claim and advised him that his claim was not found to be cognizable under any statutory claims authority available to the Air Force, including the Federal Tort Claims Act, 28 U.S.C. 2671-2680 (1970). The Air Force then forwarded the matter to this Office for consideration under the Meritorious Claims Act of 1928, 31 U.S.C. 236.

Mr. appears to have been legally discharged at his own request on December 19, 1975, ending his entitlement to military pay and allowances. His claim for loss of civilian earnings and promotion and for the cost of flight training appear to be in the nature of damages for breach of contract or tort. We find no legal authority under which this Office could authorize payment of his claim and, therefore, it may not be allowed.

Concerning the application of the Meritorious Claims Act of 1928, that act provides that when a claim is filed in this Office that may not be lawfully adjusted by use of an appropriation theretofore made, but which claim in our judgment contains such elements of legal liability or equity as to be deserving of the consideration of Congress, it shall be submitted to the Congress with our recommendations. The remedy is an extraordinary one and its use is limited to extraordinary circumstances.

The cases reported for the consideration of the Congress generally involve equitable circumstances of an unusual nature and which are unlikely to constitute a recurring problem, since to report to the Congress a particular case when similar equities exist or are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances. Undoubtedly other individuals, after enlisting in an armed force have been medically disqualified for various reasons, and have found themselves in situations similar to that of Mr. . Therefore, we find the claim to be neither unusual nor a nonrecurring situation.

B-186639

In addition, as to the portion of the claim sounding in tort, the Meritorious Claims Act has been generally interpreted as not applicable to tort claims. See 13 Comp. Gen. 406 (1934), 16 Comp. Gen. 642 (1937), and 34 Comp. Gen. 490 (1955).

For the reasons stated above, we do not find the requisite elements which would justify us reporting this claim to the Congress for consideration under the Meritorious Claims Act and no further action will be taken with respect to this claim.

R. F. Keller

Acting Comptroller General
of the United States