

PLM-IA



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548



OFFICE OF GENERAL COUNSEL

IN REPLY REFER TO: B-194265

APR 2 1979

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The Honorable Barbara Allen Babcock
Assistant Attorney General Do not make available to public reading
Civil Division
Department of Justice *AG-00039*

Attention: LeRoy Southmayd, Jr., Attorney
Commercial Litigation Branch

Dear Ms. Babcock:

Personal name
Subject: Paul C. Cappella v. United States
Court of Claims No. 70-79

Reference is made to letter dated February 28, 1979 (file refer-
ence DMC:LS:amc 154-70-79), requesting a report on the petition
filed in the above-entitled case, wherein the plaintiff, ^{contending} that
~~nonjudicial punishment was improperly imposed upon him in Janu-~~
ary 1979 by ~~Navy~~ authorities, seeks judgment for backpay in the
amount of \$564.30, plus \$31.50 per month since February 1, 1979,
and attorney's fees.

There is no record of any claim having been filed by the plaintiff
with the General Accounting Office on account of the matters set forth
in the petition, and we have no information as to the facts in the case
other than the allegations contained therein. We assume that you
will receive a full report regarding this matter from the Department
of the Navy.

→ Plaintiff, a Navy enlisted man, alleges in substance that in Janu-
ary 1979 he was subjected to nonjudicial punishment pursuant to
Article 15 of the Uniform Code of Military Justice (UCMJ), 10 U. S. C.
§ 815 (1976). He was accused of possessing a narcotic substance at
the China Fleet Club in the British Crown Colony of Hong Kong, in
violation of a general regulation. His punishment included a reduc-
tion in grade and forfeiture of one-half of his pay for a period of
2 months.

Plaintiff asserts that the nonjudicial punishment proceedings were
unlawful in several respects. In what is styled as his "First Cause
of Action" he contends, in essence, that military authorities lacked
jurisdiction for the reason that the offense was not committed on a

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United States military installation. He also contends that the offense was not "minor" and was therefore not within the purview of Article 15, UCMJ. In his "Second Cause of Action" he contends that he was not allowed to inspect all of the evidence against him, and that he was therefore denied his rights under subparagraph 133(b) of the Manual for Courts-Martial and a provision of Navy regulations, 32 C.F.R. § 719.101(d)(1). In his "Third Cause of Action" he contends he was denied the assistance of legal counsel and the opportunity to confront the witnesses against him, and that he was therefore denied his rights under the Sixth Amendment to the United States Constitution.

With respect to plaintiff's contention that military authorities lacked jurisdiction over the offense, it has been held that a service member who commits a civil offense is not subject to trial by court-martial if the offense is committed off-post and is otherwise not service-connected, and if the member could be prosecuted for the offense by American civil authorities. O'Callahan v. Parker, 395 U.S. 258 (1969). However, an off-post offense committed by a service member overseas is presumed to be service-connected, and the member is therefore subject to trial by court-martial for such offenses committed in foreign countries. Gallagher v. United States, 191 Ct. Cl. 546 (1970), cert. denied, 400 U.S. 849 (1970); Wimberley, v. Laird, 472 F. 2d 923 (7th Cir. 1973), cert. denied, 413 U.S. 921 (1973). Hence, it appears that plaintiff was subject to punishment under the UCMJ on account of any offense he committed at the off-post club in Hong Kong.

With regard to plaintiff's contention that his offense was not "minor" and was therefore not within the purview of Article 15, UCMJ, it has been held that serious crimes may not properly be made the subject of nonjudicial punishment. Hagarty v. United States, 196 Ct. Cl. 66 (1971). However, the UCMJ provides no definition as to the distinction between "major" and "minor" offenses, and it has been recognized that military command authorities may exercise broad discretion in determining whether an offense should be disposed of administratively through nonjudicial punishment or summary court-martial, or should be referred to trial at the general or special court-martial level. Middendorf v. Henry, 425 U.S. 25 (1976); Parker v. Levy, 417 U.S. 733, 737 (1974). Hence it appears there is little merit in plaintiff's contention that military authorities may not lawfully dispose of drug-related offenses, or offenses involving the disobedience of regulations, through nonjudicial punishment under Article 15, UCMJ.

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As to plaintiff's contention that his constitutional rights were violated due to the Navy's failure to provide him with legal counsel or to afford him an opportunity to confront the witnesses against him, it has been held that nonjudicial punishment actions and summary courts-martial are administrative proceedings in which the accused has no constitutional right to counsel, etc. Middendorf v. Henry, supra. And with respect to the other matters complained of, it has been held that in a suit for backpay in the Court of Claims based upon irregularities in military justice proceedings, the plaintiff in order to prevail must make a clear showing, not merely an allegation, that he has been subjected to constitutional unfairness. Flute v. United States, 210 Ct. Cl. 34, 38 (1976).

We note that the petition contains no allegation that plaintiff exhausted his administrative remedies prior to initiating suit in the Court of Claims. The petition indicates the nonjudicial punishment was imposed aboard ship, so that plaintiff had no right to demand trial by court-martial. 10 U.S.C. § 815(a). Also, the Court of Military Appeals has no jurisdiction to review nonjudicial punishment proceedings, and Navy members are not entitled to contest nonjudicial punishment by filing a Complaint of Wrong under Article 138, UCMJ. (Stewart v. Stevens, 5 M.J. 220 (C.M.A. 1978); Navy JAGMAN § 1104e. However, Article 15 of the UCMJ specifically provides for an appeal of nonjudicial punishment, and there is some authority for the proposition that an aggrieved Navy member who knowingly waives his right to appeal nonjudicial punishment imposed upon him, is thereby barred from contesting the propriety of that punishment in the Court of Claims. Hagarty v. United States, supra.

10 USC. 815
10 USC. 1938
Finally, plaintiff's claim for legal fees may not be allowed in the absence of statutory authority. Yee v. United States, 206 Ct. Cl. 388, 394 (note) (1975).

No record has been found in this Office of any claim or demand which might furnish the basis for a cross-action against the plaintiff in this case.

Further information concerning this matter may be addressed to Mr. Donald A. Guritz, telephone 275-5422.

Sincerely yours,

Edwin J. Monsma

Edwin J. Monsma
Assistant General Counsel