

DATE: December 4, 1997

In Re:

[Redacted]

Claimant

Claims Case No. 97012712

CLAIMS APPEALS BOARD DECISION

DIGEST

A service member, who was in confinement following a court-martial sentence at the time his term of enlistment expired, was properly paid pay and allowances through the expiration of his term of enlistment. He has no right to additional pay after that date where the sentence was affirmed on appellate review.

DECISION

This is in response to an appeal of DOHA's Settlement Certificate, DOHA Claim No. 96070135 (January 9, 1997), which denied the member's claim for pay and allowances at the E-6 rate for the period September 16, 1992, through July 28, 1995, and for retired pay after the member's discharge incident to his service in the U.S. Air Force.

Background

The record indicates that the member's enlistment in the Air Force was effective June 1, 1989, for 3 years, which placed his expiration term of service at May 31, 1992. On May 31, 1992, the member completed 20 years of military service for which he had applied for voluntary retirement. According to the Air Force, in December 1991, the member's term of enlistment was involuntarily extended to September 30, 1992, due to investigation of criminal charges pending against him.⁽¹⁾ On February 4, 1992, processing of his retirement application was suspended in accordance with Air Force Regulation 35-7(C3) Table 2-1, which states that if a member is under investigation the processing of his retirement application will be suspended until the investigation is completed. On August 29, 1992, by action of a general court-martial, the member was sentenced to 10 years confinement, dishonorable discharge, and a reduction to E-1 (from E-6), and he was subsequently placed in confinement.

Pay and allowances for the member terminated on September 30, 1992, the date of the expiration of his term of service, in accordance with the provision of Paragraph 10317(e) of the DoD Military Pay and Allowances Entitlements Manual (DODPAM), which states that if a member is confined serving court-martial sentence when the enlistment expires, pay and allowances end on the date the enlistment expires unless the sentence is completely overturned or set aside as specified in paragraph 70509. The convening authority approved the portion of the sentence of demotion to E-1 and 10 years confinement, effective December 15, 1992. No forfeiture of pay and allowances was included in the sentence because pay and allowances had already stopped in September. The appellate review of the general court-martial affirmed the sentence of the convening authority and ordered the final portion of the sentence to dishonorable discharge executed on July 28, 1995. The Air Force never certified that the member was eligible for retirement.

Our Settlement Certificate upheld the actions of the Air Force, stating that there is no basis for allowance of the claim for payment of pay and allowances subsequent to September 30, 1992, and no basis for allowance of retired pay in the absence of approval by the Department of the Air Force of the member's application for retirement.

On appeal, the member argues that some of the facts stated as being part of the record are false and the process of action described as being taken is illegal. In particular, the member contends that the claim cannot be settled because the regulations cited by the Air Force to extend his enlistment and rescind his retirement orders are contrary to law. The

member submits on appeal a copy of a Special Order dated July 20, 1991, which he states shows that the retirement application process was completed and his retirement approved; therefore, he claims, there is a basis for allowance of retired pay. He contends he should receive pay and allowances through July 1995 and retired pay after his discharge in September 1995. In addition, the member disputes that our Office has jurisdiction over his claim because his initial claim was filed in February 1995 at the U.S. General Accounting Office (GAO) and the effective date of our authority is June 30, 1996.

Discussion

Initially, we will address the issue of jurisdiction. Pursuant to the Legislative Branch Appropriations Act of 1996,⁽²⁾ the General Accounting Office's (GAO) authority to settle claims for military pay and allowances, including retired pay, was transferred to the Director, Office of Management and Budget. Effective June 30, 1996, the Director, OMB delegated his authority to the Secretary of Defense. The authority of the Secretary of Defense in this regard was subsequently codified in Section 202(n) of the General Accounting Office Act of 1996, Public Law No. 104-316, 110 Stat. 3826, 3843-3844, October 19, 1996. The Defense Office of Hearings and Appeals exercises the authority of the Secretary with respect to this authority. All such claims and accompanying files that were pending at GAO on July 1, 1996, were transferred to this Office. The service member's claim was initially filed at GAO in February 1995. His appeal was filed in March 1996 and was pending on July 1, 1996. We are aware of no provisions (and the claimant has provided no legal authorities) in either Public Laws No. 104-53 or 104-316, or in their legislative histories, indicating that the Comptroller General was to retain jurisdiction over any claim pending before him and not completed before June 30, 1996.⁽³⁾

Regarding the issue of the extension of the member's enlistment beyond May 31, 1992, the Air Force cites Table 7-1 of Air Force Regulation 35-16, Volume 1, July 18, 1991, which provides that an airman may request an extension of enlistment pending completion of an investigation of his activities. The member states he did not make such a request. However, we note that the member received the benefit of pay and allowances from June 1, 1992, through September 30, 1992, due to the extension. If the extension had not been granted, pay and allowances would have ceased on May 31, 1992. Additionally, the Comptroller General has held that a member's right to be discharged is subject to the paramount authority of the government to hold him beyond the normal date of expiration of his enlistment for the purpose of punishment for offenses committed, or for trial for offenses for which probable cause exists, and for punishment when convicted.⁽⁴⁾ Thus, the Air Force had authority to complete the criminal investigation, to court-martial and sentence the member even after his term of enlistment expired. When a member is held beyond the expiration of his term of enlistment, his right to pay ceases on that date, subject to subsequent possible acquittal or restoration to duty. See 40 Comp. Gen. 202 (1960) and cases cited therein. The member was paid at the E-6 rate through September 1992.

Concerning the member's claim that the Air Force regulations countermand the United States Code, we disagree. Section 871 of Title 10 of the U.S.C., cited by the claimant, defines the execution of sentences of courts-martial. Article 71 of the UCMJ, Section 871(c) of title 10 of the United States Code, states that the part of a sentence which extends to death, dismissal or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment by a service Court of Criminal Appeals (formerly, the Court of Military Review) as to the legality of the proceedings and no further action will take place in the Court of Appeals for the Armed Forces. The claimant cites the Notes of Decisions under Section 857 (7)⁽⁵⁾ and Paragraph 10316(a)(2) of the Department of Defense Military Pay and Allowances Entitlement Manual (DODPAM) in support of his contention that he is entitled to pay and allowances pending appellate review of his court-martial sentence. The annotation cited by the claimant refers to the decision Dickenson v. U.S., 163 Ct. Cl. 512 (1963), where the member's term of enlistment had expired prior to his trial on court-martial charges. The court ruled that he was held for the convenience of the government and was entitled to active duty pay during his confinement and until his right to pay was properly terminated by the convening authority's approval of the court-martial's sentence of dishonorable discharge and forfeiture of pay.

In the present case, the member's court-martial sentence did not include forfeiture of pay and allowances, but the term of enlistment ended. In accordance with Section 871(c), the execution of his dishonorable discharge did not take effect until after the appellate process ended in July 1995. Table 1-3-2 (9) of DODPAM states that when a member is absent from duty in military confinement (other than by civil authorities) awaiting trial by court-martial or serving a sentence

of confinement which does not include a forfeiture of pay, the member is entitled to otherwise proper credits of pay and allowances. Paragraph 10316a(3) states that pay and allowances accrue in confinement except when the term of enlistment expires. In other words, a service member may continue to receive pay and allowances throughout his term of enlistment even if he is serving a sentence of confinement until an applicable forfeiture is effective or until his enlistment expires. The member received pay and allowances through September 1992. The effect of Paragraph 10317 of the DODPAM is to ensure that a member receives pay and allowances for the period he is confined after his term of enlistment expires if his conviction is overturned or set aside. The court-martial sentence in this case was affirmed; thus, the member is not eligible for pay and allowances after the expiration of his enlistment.

Under Section 8914 of Title 10 of the U.S.C., a regular enlisted member of the Air Force who has at least 20, but less than 30, years of service may, upon his request, be retired. Voluntary retirement applications require the approval of the Secretary of the Air Force or his delegate. See Air Force Regulation 36-3203, paragraph 2.11 (August 10, 1994). Such approval is not documented in the file, therefore, the member is not entitled to retired pay. The Special Order submitted with the member's appeal was sent in anticipation that on May 31, 1992, he would be eligible for retirement after 20 years and 5 days of service. The retirement order was not fully executed and could not have been fully executed at the time it was issued because the member did not have 20 years of service until May 1992. The Air Force had the authority in February 1992 to rescind the processing of the member's retirement application pending the investigation of the criminal charges against him in accordance with Air Force Regulation 35-7, Rule 1 of Table 2-1. Without a fully executed retirement order, the member is not entitled to retired pay.

Conclusion

We affirm the Settlement.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board

1. The record does not include copies of the document which extended the term of enlistment.
2. Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (1995).
3. The Comptroller General has stated that as of June 30, 1996, the General Accounting Office no longer performs claims settlement functions. See B-275605, ar. 17, 1997.
4. Under Article 2 of the Uniform Code of Military Justice (UCMJ), Section 802 of Title 10 of the United States Code (U.S.C.), members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment are subject to the UCMJ. This Section emphasizes not only who is subject to the UCMJ, but also the distinction between the end of a term of enlistment and discharge. Eligibility for pay and allowances is defined by a term of enlistment. A service member's active duty status remains in effect until discharge. Under the UCMJ, a member may remain in active duty status awaiting discharge but not be eligible for pay and allowances if his term of

enlistment has expired. In the present case, it is not disputed that the member was not discharged on May 31, 1992.

5. The claimant appears to refer to Note 7 in the United States Code Annotated version of the United States Code. The annotations are the work of West Publishing Company, and, of course, are not law.