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**DECISION**



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

*[Claim of Discharged Military Member for Unpaid Pay and Allowances]*

FILE: B-194481

DATE: February 15, 1980

MATTER OF: Calvin L. Graham

DIGEST:

1. Person enlisted in the Navy at age of 12 during World War II. Subsequently when the under-age enlistment was discovered he was sent home without payment of transportation, unpaid pay and allowances or mustering-out pay. In the case of an enlistment which is void because at the time the individual enlisted and at the time the defect is discovered the individual is under a disability which renders him without legal capacity to acquire military status, neither the Government nor the individual may waive the defect.
2. Normally an individual is not entitled to pay and allowances under a void enlistment except that by an analogy to a de facto officer he may retain payments received prior to the determination that the enlistment is void. However, further payments of pay and allowances to the individual terminate.

The issue presented here upon an appeal of a settlement of our Claims Division is whether an individual whose enlistment in the Navy was void because it was fraudulent in that the individual was underage, may be paid any pay and allowances after a certificate of honorable discharge is issued. The answer is no.

Mr. Calvin L. Graham filed a claim with this Office for unpaid pay and allowances relative to his service in the United States Navy from August 16, 1942, to April 5, 1943. He enlisted in the United States Naval Reserve - 196C00381 on August 16, 1942, at the Naval Recruiting Station,

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Houston, Texas. An age certificate submitted at the time of his enlistment shows that he was born on April 5, 1925, at Vanover, Texas. This certificate was signed by Nora Gentry Wingate, the mother of Mr. Graham. After receiving recruit training at the U.S. Navy Training Station, San Diego, California, Mr. Graham was transferred for duty to the U.S.S. South Dakota.

By letter dated January 21, 1943, Nora E. Wingate certified that she did willingly and knowingly sign consent papers and age certificate to the effect that Calvin Leon Graham was born in Vanover, Texas, on the 3rd day, April 1925, whereas in fact he was born on April 3, 1930, in Canton, Texas, and that at the time of his enlistment on April 16, 1942, Calvin Leon Graham was only 12 years old. Notice to this effect was transmitted by the Navy Recruiting Station, Houston, Texas, by letter dated January 21, 1943, to the Chief of Naval Personnel with a copy to the U.S.S. South Dakota, c/o Fleet Postmaster, New York, New York, together with a request from his mother that he be discharged from the Navy.

On February 23, 1943, the U.S.S. South Dakota reported that Calvin Leon Graham had been absent over leave since 8:15 a.m., February 20, 1943, and that he had missed the ship when she sailed from the United States. In a message dated March 1, 1943, the Navy Recruiting Station, Houston, Texas, reported to the Chief of Naval Personnel that Calvin Leon Graham had turned himself in at that station on February 27, 1943. On the same day, Mr. Graham was ordered to report to the Commanding Officer, U.S. Naval Air Station, Corpus Christi, Texas. By letter dated March 17, 1943, the Chief of Naval Personnel directed that the records of Calvin Leon Graham be corrected to show his true date of birth to be April 3, 1930, and that his enlistment be canceled.

The enlistment was determined to be void inasmuch as he was under the minimum age for enlistment in the Navy at the time of execution of enlistment papers and was still underage at the time that fact was discovered.

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Thereupon on April 5, 1943, the enlistment of Calvin Leon Graham was canceled. Since the enlistment was considered void, upon cancellation of his enlistment and release from the Navy he was paid no accrued pay and allowances and no travel allowance. Also, since his enlistment was considered void, he was given no credit for the military service for the period August 16, 1942, to April 5, 1943 (7 months and 13 days including 4 months and 16 days of foreign and/or sea service), and no mustering-out pay.

On May 26, 1943, Mr. Graham wrote to the Bureau of Naval Personnel regarding 36 days' pay he considered to be due him at the time of his release from the Navy. Sometime prior to February 14, 1944, Mr. Graham also filed an application with the Chief of Naval Personnel for mustering-out payment. On October 4, 1944, he again wrote to the Chief of Naval Personnel requesting a discharge certificate. Each of Mr. Graham's requests were denied upon the basis that his enlistment was void and therefore canceled. In such circumstances the Navy determined that he was not entitled to payment of arrears of pay, payment of mustering-out pay, or issuance of a discharge certificate.

It also appears that sometime in October 1946, Mr. Graham's claim for arrears of pay and mustering-out pay was presented to the General Accounting Office. There exists in the personnel file of Mr. Graham an instrument dated December 3, 1946, which appears to be a response from the Navy to a request for information from GAO concerning a claim for arrears of pay due Mr. Graham.

Mr. Graham enlisted in the United States Marine Corps on November 6, 1950, and served until August 1, 1951, a total of 8 months and 29 days. None of the Marine Corps service was outside the United States. In November 1952 he applied for mustering-out pay from the Marine Corps and was certified for payment of \$200. At the time of Mr. Graham's enlistment in the Marine Corps, inquiry was made of the Navy by the Marine Corps concerning his naval service. That inquiry was answered on March 8, 1951. The next entry in Mr. Graham's personnel

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file did not occur until 25 years later when on September 20, 1976, he again made inquiry about an honorable discharge from the Navy.

On May 1, 1978, the General Counsel of the Navy informed the Secretary that authority existed on April 5, 1943, for the issuance of an honorable discharge for World War II naval service to Calvin Graham. This determination was predicated on 34 U.S.C. 162, 192 and 203 (1940) which are considered to permit issuance of an honorable discharge in the circumstances of Mr. Graham's case (fraudulent enlistment falsification of age). Thereupon, on May 2, 1978, the Secretary of the Navy authorized the issuance of an honorable discharge to Mr. Graham. The honorable discharge was accomplished by administratively reissuing a form DD 214N to show an honorable discharge effective April 5, 1943, issuance of a certificate DD 256N and showing Calvin Leon Graham as having active service credit of 7 months and 13 days with 4 months and 16 days of foreign or sea service. The administrative action by the Chief of Naval Personnel was taken on May 5, 1978.

On November 15, 1978, Mr. Graham's claim for back-pay due him from World War II was received in the General Accounting Office. By settlement dated February 14, 1979, the claim was denied on the basis that the claim was barred by the act of October 9, 1940, since the claim was first received in the General Accounting Office more than 6 years after the date of his discharge from the service and that the administrative action in issuing the honorable discharge on May 5, 1978, in no way changed the fact that his discharge was by reason of a void enlistment nor did it toll the statute of limitations. The existence of the earlier claim was not known by the Claims Division when the settlement of February 14, 1979, was issued.

We have also been informed that Mr. Graham filed a petition for correction of his naval records with the Board for Correction of Naval Records (BCNR). On January 10, 1980, the BCNR determined not to take any action on Mr. Graham's petition.

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Since Mr. Graham's personnel file reflects that a claim by him involving his service in World War II was presented to the General Accounting Office sometime in 1946, the barring act is not for application in this case.

An individual who on entry into the service fraudulently conceals or misrepresents a material fact which would disqualify him from enlistment, is subject to discharge upon discovery by the Government of the fraud. That discharge constitutes an avoidance of the contract of enlistment. Upon such avoidance the person is not entitled to pay or allowances for any period served under the fraudulent enlistment except as may be specifically authorized by statute. See 8 Comp. Dec. 655 (1902), 1 Comp. Gen. 511 (1922), 9 id. 436 (1930), 31 id. 562 (1952), 36 id. 439 (1956), 47 id. 671 (1968), and 54 id. 291 (1974). However, by analogy to the rule applicable in the case of a de facto officer, he is permitted to retain the pay paid to him currently while serving, if the payments were otherwise proper. See 31 Comp. Gen. 562, supra, and decisions cited.

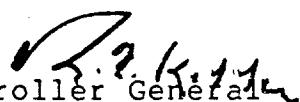
An individual is entitled to the pay and allowances of a member of the Armed Forces, only if he has achieved a military status. Where the minimum statutory age for enlistment is 17 years, enlistment prior to attaining that age creates no military status. 39 Comp. Gen. 860 (1960). This rule is applied by the courts in determining whether an individual is subject to court-martial jurisdiction. Hoskins v. Pell, 239 F. 279 (1917). Thus, in United States v. Blanton, 23 C.M.R. 128 (1957), it was held that a minor below the statutory age when he enlisted could not achieve military status as a member of the Army and not having that status could not, while still below that age, be court-martialed for desertion. In so holding, the court said that an enlistment is predominantly a matter of status and not of contract and that Congress having set a minimum age limit for enlistment, no one could achieve the status of Army membership who was below that age and that such enlistment would be void and of no effect. See also In re Grimley, 137 U.S. 147 (1890), In re Morrissey,

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137 U.S. 157 (1890), Hoskins v. Pell, 239 F. 279 (1917).  
United States v. Graves, 39 C.M.R. 438 (1968), and  
United States v. Williams, 39 C.M.R. 471 (1968).

In the present case, since Mr. Graham's enlistment was void due to the under-age enlistment and he was released from service before reaching the minimum statutory age, we are without authority to make any payment of pay and allowances which except for the void enlistment might otherwise be due to him. The action of the Secretary of the Navy in giving him an honorable discharge did not change the legal effect of Mr. Graham's void enlistment and the failure of the BCNR to take action on Mr. Graham's petition for correction of his naval record precludes any further authority of this Office to consider his claim for unpaid pay and allowances. B-192210, July 17, 1979.

Accordingly the disallowance of the claim by our Claims Division is sustained.

  
Deputy Comptroller General  
of the United States