

DECISION

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

41453

FILE: B-186902

DATE: SEP 8 1976

MATTER OF: Mr. Jerry B. James

98069

DIGEST: Purported enlistment in Marine Corps of person convicted of felony was void notwithstanding fact that recruiter knew of the conviction since such enlistment is prohibited by 10 U.S.C. 504 (1970), and recruiter had no authority to nullify statutory prohibition. Since enlistment was void, the individual never achieved the status of a member of the Marine Corps and, therefore, his death prior to formal separation from the Marine Corps, does not result in his survivor's entitlement to payment of a death gratuity (10 U.S.C. 1475 (1970)).

This action is in response to letter dated June 18, 1976 (MCDO:AAQ:rl 7220), from A. A. Quebodeaux, Disbursing Officer, Headquarters United States Marine Corps, Washington, D. C., requesting an advance decision as to whether a death gratuity is payable in the case of Jerry B. James, 527 08 8432, who enlisted in the Marine Corps on December 5, 1973, and died on January 4, 1976, while in an unauthorized absence status from the Marine Corps Recruit Depot, San Diego, California. The request was assigned Control No. DO-MC 1257 by the Department of Defense Military Pay and Allowance Committee and was forwarded to this Office by Headquarters United States Marine Corps letter dated July 7, 1976 (FDD-mjs 7220/7).

The submission indicates that at the time of his enlistment, Mr. James was on parole after serving 6 months in the Industrial School at Fort Grand, Arizona, apparently as a result of having been convicted of a felony or a crime tantamount to a felony. Although enlistment of a person who has been convicted of a felony is proscribed by 10 U.S.C. 504 (1970), unless such proscription is waived by the Secretary concerned, the submission indicates that a Marine Corps recruiter who was aware of Mr. James' conviction, processed his enlistment into the Marine Corps without obtaining the required waiver.

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The submission further indicates that in September 1975, Mr. James was brought before a special court-martial on charges of violating Article 86 of the Uniform Code of Military Justice (10 U.S.C. 886 (1970)) for being absent without leave on several occasions. On September 11, 1975, the military judge granted a defense motion dismissing the charges on the ground of lack of jurisdiction of the court ("Catlow motion") apparently due to the erroneous enlistment of Mr. James. Compare United States v. Catlow, 48 C.M.R. 758 (1974).

Reportedly, Mr. James died on January 5, 1976, from a self-inflicted gunshot wound while in an unauthorized absence status while awaiting separation from the Marine Corps due to void enlistment. Mr. James had not been formally discharged from the Marine Corps at the time of his death.

Mr. James' widow has filed a claim with the Marine Corps for the 6 months' death gratuity payable under 10 U.S.C. 1475-1480 (1970). The disbursing officer has submitted the claim for advance decision indicating that he is in doubt as to whether payment would be proper since the charges against Mr. James were dismissed by the court on the ground of lack of jurisdiction of the court-martial due to his void enlistment. On the other hand, the disbursing officer notes that at the date of his death, Mr. James had not yet been formally discharged by the Marine Corps.

Under the pertinent provisions of 10 U.S.C. 1475(a)(1) the Secretary concerned shall have a death gratuity paid to or for the statutory survivor upon receiving official notification of the death of "a member of an armed force under his jurisdiction who dies while on active duty or while performing authorized travel to or from active duty." Thus, for a death gratuity to be paid incident to his death, Mr. James must have had the status of a member of the Marine Corps at the time of his death.

As is indicated above, 10 U.S.C. 504 prohibits the enlistment in an armed force of a person who has been convicted of a felony, except that in meritorious cases the Secretary concerned may authorize exceptions to such prohibition. Since no such Secretarial authorization was obtained to enlist Mr. James in the Marine Corps, his enlistment was prohibited by law and, therefore, was void.

Thus, Mr. James never achieved the status of a member of the Marine Corps. See 54 Comp. Gen. 291, 295 (1974), and cases cited therein. The fact that he never received a formal discharge from the Marine Corps would, therefore, have no bearing on the matter. Also, the fact that a Marine Corps recruiter may have knowingly participated in the unlawful enlistment of Mr. James would not, in our view, have any effect on Mr. James' status since the recruiter did not have the authority to nullify or contradict the prohibition in the statute. Compare Parker v. United States, 198 Ct. Cl. 661, 667 (1972). That view is in accord with the action of the military judge in dismissing the charges against Mr. James for lack of court-martial jurisdiction due to his erroneous enlistment and with the decisions of the United States Court of Military Appeals in United States v. Catlow, supra, and United States v. Russo, 50 C.M.R. 650 (1975).

Accordingly, since Mr. James did not achieve the status of a member of the Marine Corps and, therefore, was not in such a status at the time of his death, payment of the death gratuity is not authorized and the voucher received with the submission will be retained in this Office.

R.F. KELLER

~~Acting~~

Comptroller General
of the United States