

UNITED STATES)
)
V.)
)
CHARLES E. BUTTO)
SERGEANT)
UNITED STATES ARMY)

RESPONSE TO DEFENSE MOTION TO DISMISS
FOR LACK OF JURISDICTION

Comes now the United States, through counsel, in the above-styled case, to respond to the Defense Motion to Dismiss for lack of jurisdiction filed with this court on 2 November 1970.

I

THIS COURT-MARTIAL HAS JURISDICTION OVER THE PERSON OF THE ACCUSED.

A.

The defendant cites no authority and the government is aware of no authority for the defense contention that the defendant must be placed in jeopardy prior to passing of the defendant's expected discharge date for jurisdiction to attach. The authority herein cited clearly establishes that such a contention is without merit.

B.

An enlistment is not an ordinary contract but one which accomplishes a change in status. United States v. Grimley, 137 US 147 (1890), United States v. Downe, 3 U.S.C.M.A. 90, 11 C.M.R. 90 (1953), United States v. Blanton, 7 U.S.C.M.A. 664, 23 C.M.R. 128 (1957). Expiration of a period of enlistment alone does not change the status of one subject to the Uniform Code of Military Justice. United States v. Dickenson, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955). "The scheduled discharge date is not self-executing." United States v. Hout, 19 U.S.C.M.A. 299, 301, 41 C.M.R. 299, 301 (1970).

One's amenability to military law and court-martial jurisdiction does not necessarily close with the mere expiration of the period of enlistment. Certain formalities of discharge are distinctly contemplated, and, while a military person is awaiting their accomplishment, he is subject to military law. United States v. Christian, A.C.M. S-13074, 22 C.M.R. 780, 783 (1956).

It is well settled that the mere expiration of a person's term of service does not automatically terminate his military status. Rosen v. Critz, 291 F. Supp. 99, 102 (1968).

C.

The defendant has been lawfully retained beyond the expected expiration of his term of service pursuant to Army Regulation No. 635-200, paragraph 2-4 (Change No. 3, 22 December 1967), as investigation was commenced with a view toward trial by court-martial and action was taken under Army Regulation No. 600-31^{dated 1 July 1969} prior to expiration of the defendant's term of service. Charges were preferred against the defendant on 8 January 1970. Thus the defendant is subject to the jurisdiction of this court-martial as a person awaiting discharge after expiration of his term of enlistment, Article 2(1), Uniform Code of Military Justice and paragraph 11d, Manual for Courts-Martial, 1969 (Revised Edition).

He /is/ a soldier, subject to the rules, discipline and jurisdiction of the Army and squarely within the provisions of Article 2 of the Uniform Code of Military Justice. . . Dickensen v. Davis, 245 F. 2d 317, 319 (1957), cert. denied, 355 U.S. 918 (1958).

II

THIS COURT-MARTIAL HAS JURISDICTION OVER THE OFFENSES CHARGED.

Mere expiration of the accused's term of service does not change his status as one subject to the Uniform Code of Military Justice and preferment of charges after the passing of the defendant's anticipated discharge date does not affect court-martial jurisdiction. United States v. Shanesfield, A.C.M.R. 418532, 40 C.M.R. 393 (1968), reversed on other grounds, 18 U.S.C.M.A. 453, 40 C.M.R. 165 (1968). While the defendant is awaiting discharge, "he remains fully subject to the terms of the Uniform Code of Military Justice as specifically provided in its Article 2(1). . ." United States v. Klunk, 3 U.S.C.M.A. 92, 94, 11 C.M.R. 92, 94 (1953). Further, "/a/s a person subject to the Code, unquestionably he can be tried by a court-martial for violations of its provisions." United States

v. Dickensen, supra, at 164. Although the additional charge against the accused was preferred after the expected date of the accused's enlistment for an offense occurring prior to the anticipated discharge date, jurisdiction over this offense was not lost as the accused was a person awaiting discharge after the expiration of the term of his enlistment and is subject to the Uniform Code of Military Justice, United States v. Estrada, A.C.M. 10045, 18 C.M.R. 872, pet. denied, 19 U.S.C.M.A. 413, 19 C.M.R. 413 (1955). See also United States v. Hout, supra.

III

The generalized and unsupported allegations of violations of the defendant's constitutional rights and unconstitutionality of the Uniform Code of Military Justice are without merit and should not be considered by this court.

Wherefore the motion should be denied. Oral argument is requested.

Respectfully submitted,

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