UNITED STATES ARMY COURT OF MILITARY REVIEW
Washington, D. C. 20315

Before
KELSO, NEMROW and TAYLOR
Appellate Military Judges

DATED, ENTERED AND FILED
CLERK OF COURT
US ARMY COURT OF MILITARY REVIEW
4 MAY 1970

CM 421456

U N I T E D S T A T E S	General Court-Martial Convened by Headquarters U. S. Army School/ Training Center and Fort Gordon, Fort Gordon, Georgia (R. W. Kennedy, Military Judge)
v.	
Specialist Four JAMES G. ENTREKIN, , U. S. Army, Headquarters and Headquarters Company, Student Brigade, United States Army Southeastern Signal School, Fort Gordon, Georgia	Sentence adjudged 22 April 1969 Approved sentence: Dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for two years, and reduction to the lowest enlisted grade.

Appellate Counsel for the Accused:
CPT Robert B. Harrison, III, JAGC
CPT Lee A. Rau, JAGC
LTC Charles W. Schiesser, JAGC

Appellate Counsel for the United States:
CPT James L. Rider, JAGC
MAJ William A. Pope, II, JAGC
MAJ Edwin P. Wasinger, JAGC
COL David T. Bryant, JAGC

OPINION OF THE COURT

PER CURIAM:

Appellant was tried by general court-martial for four offenses of "wrongfully open[ing] and secret[ing] mail matter" in violation of Article 134, Uniform Code of Military Justice, 10 USC §934. Contrary to his not guilty pleas, appellant was found guilty as charged of the first three offenses and guilty of the fourth offense excepting the words, "open and." He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for two years, and reduction to the lowest enlisted grade. The sentence was approved by the convening authority.

Panel No. 4 Comeback

MAY BE CITED AS
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Appellate defense counsel have assigned the following errors:

I

THE COURT-MARTIAL LACKED JURISDICTION TO TRY THE APPELLANT.

II

THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT WHEN HE FAILED TO VERBALLY INSTRUCT THE COURT-MARTIAL MEMBERS THAT WHEN VOTING ON PROPOSED SENTENCES IT SHOULD BEGIN WITH THE LIGHTEST PROPOSED SENTENCE.

III

THE APPELLANT WAS PREJUDICED IN THE MATTER OF THE APPROVED SENTENCE BY THE ABSENCE OF MENTION OF CERTAIN AWARDS AND DECORATIONS TO WHICH THE APPELLANT WAS ENTITLED IN EITHER THE PRETRIAL ADVICE OR THE POST-TRIAL REVIEW.

The primary basis for appellant's contention that the court-martial lacked jurisdiction to try him is that the instant case proceeded to trial after the expiration of appellant's term of service (ETS). In this regard, the military judge at trial made certain findings of fact germane to the issue:

"Accused enlisted in the Army for three years on 10 March 1965.

The normal ETS of the accused was 11 March 1968.

Accused had 141 days of bad time which extended the ETS until on or about 29 July 1968.

Accused extended his enlistment on various dates for the purpose of reenlistment; however, these dates are unimportant to this decision. The final adjusted ETS of the accused was computed to be 27 September 1968.

Accused was suspected of and investigated for mail offenses discovered on or about 13 September 1968.

Accused was held in the Army past his ETS for trial for the above offenses. Determination was made that the evidence was insufficient to proceed to trial and the accused was sent for discharge on 3 October 1968.

The mail offenses that comprise the instant charges were discovered on 8 October 1968.

> Accused was scheduled for discharge, the charges were preferred and the accused was administratively flagged, all on 9 October 1968."

The question of military jurisdiction over an accused who is charged with an offense under the Uniform Code of Military Justice after the term of his enlistment has expired was recently considered by the United States Court of Military Appeals in United States v. Hout, 19 USCMA ___, 41 CMR ___, decided 13 March 1970. In that case, Hout's term of enlistment expired on 14 January 1968. However, he was not released from active duty on that date and he was not formally charged with committing a crime until 30 September 1968. Similarly, in the instant case, the accused was not formally charged until after his ETS had passed.

As Chief Judge Quinn stated in the Hout case, supra, the relationship between a serviceman and the Government is not strictly contractual, but is defined in terms of "status." See United States v. Blanton, 7 USCMA 664, 23 CMR 128 (1957). Further, the mere passage of a serviceman's ETS date does not, ipso facto,

> "operate of its own force to effect a discharge. United States v. Klunk, 3 USCMA 92, 11 CMR 92 (1953); United States v. Dickerson, 6 USCMA 438, 20 CMR 154 (1955). In other words, the scheduled date of discharge is not self-executing [citations omitted]." United States v. Hout, supra; cf. United States v. Leonard, 19 USCMA _____, 41 CMR ____, decided 3 April 1970.

This principle is also consistent with Article 2(1) of the Code, supra, which subjects persons "awaiting discharge after expiration of their terms of enlistment" to trial by court-martial under the Uniform Code of Military Justice. Of course, if the Government fails to properly act to effect this discharge, affirmative action by an accused, coupled with unreasonable Governmental inaction, may lead to "the conclusion that his continued performance of duty was not consensual but involuntary." United States v. Hout, supra; see United States v. Johnson, 6 USCMA 320, 20 CMR 36 (1955); United States v. Overton, 9 USCMA 684, 26 CMR 464 (1958).

In the case sub judice, however, although appellant was "scheduled" for discharge on 9 October 1968, he was not so discharged on that date. Rather, he was administratively "flagged" and charges were preferred. Thus, although appellant was previously scheduled for discharge because of the expiration of his period of enlistment, "the filing of charges on [9 October] qualified his right to discharge. From that point on he could be retained, even over his protest, until the charges were disposed of by dismissal or trial." (United States v. Hout, supra [emphasis added]). Therefore, although appellant did --

approximately five months after charges were preferred -- seek habeas corpus relief in Federal District Court, 1/ such protestations were untimely vis-a-vis appellant's absolute entitlement to discharge. Accordingly, the court-martial was not divested of jurisdiction; therefore, Assigned Error I is deemed non-meritorious.

As for Assigned Error II, regarding the matter of written voting instructions on sentence, its disposition is also covered by a recent decision of the United States Court of Military Appeals in United States v. Pryor, 19 USCMA ___, 41 CMR ____, decided 6 March 1970. As in Pryor, "We cannot say . . . that the exhibits here were used as a substitute for the required oral instructions." Accordingly, the assigned error is meritorious. Accord, United States v. Gutierrez, No. 421452 (ACMR, en banc, ___ Apr 1970).

Assigned Error III does not warrant discussion as it is deemed to be without merit.

Accordingly, the findings of guilty are affirmed. The sentence is set aside and a rehearing thereon may be ordered. 2/

OFFICIAL:

WILLIAM O. MORRIS
Captain, JAGC
Clerk of Court

1/ On 18 April 1969, the United States District Court for the Southern District of Georgia (Augusta Division) dismissed appellant's petition for writ of habeas corpus, "without prejudice."

2/ It is noted that, pursuant to direction by the Secretary of the Army, appellant was released on Commandant's Parole in accordance with AR 633-21. Further, pursuant to the same direction, so much of appellant's sentence to confinement in excess of one year and six months has been remitted and that portion of his sentence which provided for dishonorable discharge has been changed to bad-conduct discharge. As for the resultant effect of this action by the Secretary of the Army, see United States v. Palozolo, 39 CMR 704 (ABR 1968); paragraph 81d(1), Manual for Courts-Martial, United States, 1969 (Revised edition).