United States Attorneys

Bulletin

Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.

VOL. 17 AUGUST 8, 1969 NO. 23

UNITED STATES DEPARTMENT OF JUSTICE

Vol. 17 August 8, 1969 No. 23

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POINTS TO REMEMBER

MILITARY SELECTIVE SERVICE ACT

HABEAS CORPUS RELIEF FOR SERVICEMEN DENIED DISCHARGE AS CONSCIENTIOUS OBJECTORS.

Although there is neither constitutional nor statutory authority requiring the release from military service of a person who becomes a conscientious objector after enlisting or being validly inducted into the Armed Forces, Department of Defense Directive 1300.6 provides for the release of those men found opposed to both combatant and non-combatant service, and for reassignment to non-combatant service duties of those found opposed only to combatant service. The Directive sets forth both the criteria, which closely parallel those applicable by statute to selective service registrants, and the procedures to be followed. The Departments of the Army, Navy, and Air Force have adopted implementing regulations.

Essentially, the regulations require a written application, similar to that filed by selective service registrants seeking conscientious objector classification. The applicant is then interviewed by a psychiatrist, by a chaplain, and by an officer versed in conscientious objector law. A recommendation is then made by the serviceman's commanding officer, and the application is thereafter reviewed by a Board in the Adjutant General's Office of the Army or the Air Force or in the Navy's Bureau of Naval Personnel, as the case may be. The decision is made by the Adjutant General, in Army and Air Force cases, and by the Chief of the Bureau of Personnel in Navy cases, on behalf of their respective Secretaries. This decision is characterized by the regulations as "final".

The Supreme Court has not yet had occasion to rule on whether the denial of discharge is subject to judicial review, the standards to be applied, or the relief to be afforded. However, the trend among the Courts of Appeals is to permit such review by petition for habeas corpus and to apply the procedural due process, legal error, and basis-in-fact tests employed in Selective Service cases. See, Hammond v. Lenfest, 398 F.2d 705 (C.A. 2, 1968); Brown v. McNamara, 387 F.2d 150 (C.A. 3, 1967); Brooks v. Clifford, 409 F.2d 700 (C.A. 4, March 20, 1969); but see, Minasian v. Engel, 400 F.2d 137 (C.A. 9, 1968), footnote 1, Ibid; Craycroft v. Ferrall, 408 F.2d 587 (C.A. 9, 1969); In re Kelly, 401 F.2d 211 (C.A. 5, 1968), and Noyd v. Bond, ___ U.S. ___ (1969). Objections to the court's subject matter jurisdiction should therefore be made, particularly where a court-martial is pending.

In Craycroft v. Ferrall, 408 F.2d 587 (C.A. 9, 1969), the Court of Appeals held that application for review to the Board of Corrections of Naval

Records, a civilian board established under regulations implementing 10 U.S.C. 1552 for the correction of errors and injustice, was a further administrative remedy which should be exhausted as a prerequisite to judicial relief. The Court also discussed the conditions under which the exhaustion requirement should be waived and further set forth the standards governing the grant or denial of interim relief pending application to and disposition by the Board. The decision was adhered to and expanded upon in an Army case, Krieger v. Terry, decided June 25, 1969. The Court of Appeals for the Fourth Circuit in Brooks v. Clifford (No. 13,275, March 20, 1969), however, held to the contrary in an Army case and reaffirmed its decision, specifically rejecting Craycroft on June 25, 1969. Petition for certiorari is contemplated. Since the Board of Corrections for Naval Records has, based on the legislative history of 10 U.S.C. 1552, continued to decline jurisdiction even after Craycroft, our litigation position is to urge the courts to abstain only in Army and Air Force cases as their Boards for Correction of Military Records accept jurisdiction.

PASSPORTS

SURRENDER OF PASSPORTS CONDITION PRECEDENT TO ISSUANCE OF BOND TO DEFENDANTS.

In all important cases where the United States Attorney has some basis for suspecting that the defendant will seek to flee the country, he should make as a condition precedent to the issuance of a bond, the requirement that the fugitive present his passport to the clerk of the court. Where the defendant has no passport or to avoid the issuance of a duplicate passport, the United States Attorney should forward to the Passport Office, Department of State, a copy of the warrant of arrest along with a request to withhold the issuance of a passport and all passport privileges.

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ANTITRUST DIVISION
Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

DAMAGE CASE FILED AGAINST DRUG COMPANIES.

United States v. Chas. Pfizer & Co., Inc., et al. (D.C. D.C., No. 1966-69; July 15, 1969, D.J. 60-21-139)

On July 15, 1969, a civil action was filed in the United States District Court for the District of Columbia against Chas. Pfizer & Co., Inc., American Cyanamid Company, Bristol-Myers Company, Olin Mathieson Chemical Corporation, Squibb Beech-Nut, Inc., E.R. Squibb & Sons, Inc., and The Upjohn Company.

Count I of the suit seeks cancellation of Pfizer's patent on the broad spectrum antibiotic "tetracycline". Count II seeks damages estimated to exceed $25 million from Pfizer and Cyanamid on behalf of the United States, in its capacity as a purchaser of broad spectrum antibiotics. Count III seeks to recover, pursuant to Section 4A of the Clayton Act (15 U.S.C. 15A), actual damages from all the defendants sustained as the result of an alleged conspiracy to monopolize the manufacture and sale of tetracycline.

The first count names only Pfizer and seeks cancellation of its tetracycline patent based on Pfizer's fraudulent representations to the Patent Office. The suit charges that Pfizer knowingly misrepresented to the Patent Examiner that tetracycline had not been inherently coproduced with chlortetracycline, an antibiotic which had been patented by Cyanamid and which had been in public use and on sale for at least three years prior to Pfizer's application.

The second count charges Pfizer and Cyanamid with common law deceit based on Cyanamid's assisting Pfizer in obtaining its patent by denying that coproduction had occurred although it knew otherwise. Cyanamid did this because it had previously agreed with Pfizer that whichever company was successful in obtaining the patent would license the other. This count asks for damages of approximately $25 million which the United States has sustained as a result of this fraud, but for which no patent would have issued. The damages are based not only on purchases of tetracycline but also on Government purchases of other broad spectrum antibiotics (particularly American Cyanamid's Aureomycin and Pfizer's Terramycin) since the very high price structure on the other patented antibiotics could only have

been maintained because a patent was obtained on tetracycline. Had other manufacturers not been foreclosed from producing and selling tetracycline by reason of the patent, competition would have forced a very substantial decline in the price of broad spectrum antibiotics.

The third cause of action names Chas. Pfizer & Co., Inc., American Cyanamid, Olin Mathieson Chemical Corporation, Squibb Beech-Nut, Inc., E. R. Squibb & Sons, Inc., Bristol-Myers Company and The Upjohn Company and seeks, under Section 4A of the Clayton Act, to recover damages sustained by the United States as a result of antitrust violations. It alleges that prior to the grant of the patent to Pfizer, Bristol began manufacturing and marketing tetracycline and sold it in bulk to Squibb and Upjohn who would in turn resell it in dosage form. Bristol, Squibb and Upjohn were aware that tetracycline was inherently coproduced with chlortetracycline but failed to bring this to the attention of the Patent Office. When Pfizer obtained the patent it brought infringement actions against Bristol, Squibb and Upjohn. After Bristol was refused a license, it, Squibb and Upjohn brought a declaratory judgment action asking that the patent be declared invalid. However, these lawsuits were settled under an agreement by which Pfizer would license Bristol to manufacture tetracycline if it would admit the validity of the patent and not sell tetracycline in bulk to anyone other than Squibb and Upjohn.

Count III charges that the effect of Pfizer's fraud upon the Patent Office and Cyanamid and Bristol's concealment thereof was that the manufacture of tetracycline was monopolized by Pfizer, Cyanamid and Bristol and the sale of tetracycline was monopolized by the three of them, plus Squibb and Upjohn.

Staff: Paul A. Owens (Antitrust Division);
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(Civil Division)

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CIVIL DIVISION

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COURTS OF APPEALS

ADMIRALTY

IN TORT ACTION ARISING OUT OF INJURY DURING INSTALLATION OF EQUIPMENT AT LIGHTHOUSE ON LAND-CONNECTED BREAKWATER, ADMIRALTY LAW NOT APPLICABLE.

Clifford Gowdy v. United States (C.A. 6, No. 18744; June 20, 1969; D.J. 157-38-53)

In an action against the United States by reason of a workman's fall from the roof of a building comprising part of a lighthouse, the district court held that admiralty law was applicable and that the workman's contributory negligence therefore would not be a total defense.

The Court of Appeals reversed, holding that admiralty law was not applicable. The Court stated that while the case would be a borderline case under the locality criterion--i.e., the question of whether the lighthouse was a mere extension of land or an admiralty-law locale--a further criterion must be applied, i.e., "a relationship between the wrong and some maritime service, navigation or commerce on navigable waters". Here the wrong, if any, involved the failure of a landowner, the United States, to provide a guardrail or some type of warning for business invitees using the property. The invitees were an electrical construction company and its employees engaged in the installation of new machinery in the machinery house. The company was not a maritime contractor, and its employees were not seamen, longshoremen or harbor workers. The Court held that the case did not present the necessary relationship and that the application of maritime law "would not, therefore, serve the purpose of uniformity in the area of maritime commerce". (Judge Edwards did not join the Admiralty portion of this decision.)

Staff: J. F. Bishop (Civil Division)

FEDERAL TORT CLAIMS ACT

SIXTH CIRCUIT REVERSES, AS CLEARLY ERRONEOUS, DISTRICT COURT HOLDINGS (1) THAT U.S. AS OWNER WAS UNDER DUTY TO MAINTAIN GUARDRAILS AROUND ROOF OF LIGHTHOUSE MACHINERY HOUSE, AND (2) THAT INDEPENDENT CONTRACTOR'S EMPLOYEE BALANCING AT ROOF EDGE IN OPERATING HOIST WAS NOT NEGLIGENT.

Clifford Gowdy v. United States (C.A. 6, No. 18744; June 20, 1969; D.J. 157-38-53)

In an action under the Tort Claims Act by an employee of an independent contractor injured in a fall, the district court held the United States negligent by reason of its failure to maintain guardrails around the roof of a machine house comprising part of a lighthouse, and entered judgment for $289,248.82. The district court held that despite the precarious balancing of the employee on the edge of the roof while operating a hoist, he was not contributorily negligent, this latter holding resting largely upon the testimony of safety engineers to the effect that the United States was possessed of greater expertise with respect to the possibility of a workman being lulled into forgetfulness of the danger.

The Court of Appeals reversed, filing an extensive opinion, of importance not only because of the amount involved but because of a square holding demonstrating that in an appropriate case the findings of a district court will be reversed as clearly erroneous.

The Court of Appeals relied upon the following elements: the workman's admission that he knew that the roof had no guardrail; the fact that the United States, in choosing the particular experienced and substantial independent contractor, had no knowledge of any alleged incompetency and that, in any event, the award of contractors involved a discretionary function exempt from liability under 28 U.S.C. 2671, and Dalehite v. United States, 346 U.S. 15, 42; the rule that the mere reservation of rights with respect to inspection of the work does not impose upon the United States a duty of inspection or control; the fact that the hoist in use at the time of the fall was not supplied by the Government but by the independent contractor; the inapposite nature of the Michigan decisions relating to the necessity of guardrails or warnings at points where persons might not be aware of the danger; assuming the unguarded roof to be a dangerous property, the rule that mere ownership of it would not subject the United States to liability under the Tort Claims Act (citing Dalehite v. United States, 346 U.S. at 45); the ability to operate the hoist without the negligent balancing on the roof by the workman; and the absence of any rule of law that possible superior knowledge of safety standards would subject the United States to more stringent standards than ordinary care.

Staff: J. F. Bishop (Civil Division)

STATUTE OF LIMITATIONS. 28 U.S.C. 2401(b).

Arvil M. Ashley v. United States (C.A. 9, No. 22,839; July 7, 1969; D.J. 157-8-255)

Ashley was injured by a Government physician on September 6, 1963. Although he was immediately aware that he had been injured, he did not realize that the injury would be permanent until three years thereafter

during which period he was undergoing therapy for the injury. Suit was filed July 18, 1967, almost four years after the alleged malpractice occurred. The district court granted summary judgment for the United States, holding that the action was barred by the statute of limitations, 28 U.S.C. 2401(b).

The Ninth Circuit affirmed, holding that the statute of limitations is to be strictly applied and that exceptions to its application must be established by Congress, not by the courts. The Court stated that Ashley's cause of action accrued at the time he was injured, not at the time he learned his injury would be permanent. The Court rejected Ashley's argument that as long as the relationship of doctor-patient continued, the statute of limitations did not begin to run, holding that the rationale underlying the "continuing treatment" rule was inapplicable in the circumstances of this case, and that in any event, the rule does not apply to medical malpractice suits instituted under the Federal Tort Claims Act.

Staff: Alan S. Rosenthal and Patricia S. Baptiste
(Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURTS OF APPEALS

MILITARY SELECTIVE SERVICE ACT

COURT HOLDS MILITARY SELECTIVE SERVICE ACT CONSTITUTIONAL - APPROVES CHARGES ON SPECIFIC INTENT AND UPHOLDS REFUSAL TO ADMIT CHARACTER EVIDENCE.

David Victor Harris v. United States (C.A. 9, June 10, 1969; D.J. 25-11-34)

Affirming the conviction of Harris for refusing to report for induction the Court of Appeals sustained the constitutionality of the Military Selective Service Act, citing United States v. O'Brien, 391 U.S. 367 (1968). Of particular interest is the Court's approval of the trial judge's charge, set forth at length in the opinion, on the specific intent required for violation of 50 U.S.C. App. 462, the meaning, in this context, of "bad purpose", and the distinction of motive from intent.

In essence the Court charged that despite defendant's alleged good motives (to protest an illegal war and test an unconstitutional statute) the violation was committed with "bad purpose" constituting the requisite "specific intent" if it was done deliberately.

The trial court's refusal to charge, as requested by defendant, that one is entitled to refuse to obey a statute he honestly believes unconstitutional in order to test its validity in court, was upheld by the Court of Appeals, in view of the fact that the law here involved had been previously tested and held constitutional. It found the decision in Warren v. United States, 177 F.2d 596, 600 (C.A. 10, 1949), cert. denied, 388 U.S. 947, more pertinent and persuasive than those in Keegan v. United States, 325 U.S. 478 (1945), and Okamoto v. United States, 152 F.2d 905 (C.A. 10, 1945), involving previously untested statutes.

The Court also, citing United States v. Garland, 364 F.2d 487, 489 (C.A. 2, 1966), cert. denied, 355 U.S. 978, upheld the judge's refusal to admit evidence of good character and reputation where defendant's veracity as a witness had not been attacked. As there was no question that he had refused induction and freely admitted it, evidence of good moral character was irrelevant to the issue of whether he had wilfully and knowingly disobeyed the order.

Staff: United States Attorney Cecil F. Poole; Assistant United States Attorneys Jerrold M. Ladar and F. Steele Langford (N.D. Calif.)

IT WAS PROCEDURAL ERROR BUT NOT PREJUDICIAL WHERE AFTER ISSUANCE OF ORDER FOR INDUCTION CLERK FAILED TO REFER REGISTRANT'S LETTER CONCERNING WIFE'S PREGNANCY TO LOCAL BOARD FOR CONSIDERATION; REGISTRANT'S POST-INDUCTION-ORDER RIGHTS TO REOPENING OF CLASSIFICATION NOT AFFECTED BY REGISTRANT'S DELINQUENCY.

John W. Battiste v. United States (C.A. 5, April 3, 1969, rehearing denied May 7, 1969, 409 F.2d 910; D.J. 25-19-802)

Defendant was declared delinquent by his local board for failing to report for a preinduction physical examination, and, on June 30, 1966, he was issued an order to report for induction. He reported on July 12 but determination of his acceptability was deferred pending issuance of a moral waiver necessitated by a disorderly conduct arrest in April, 1966. In August, 1966, he advised the board that he had married a woman with a child on June 26, 1966. The board clerk did not refer this communication to the board. In December, the Army issued the moral waiver, and on January 13, 1967, the board directed him to report for induction on January 26. On January 17 he advised the board that his wife was pregnant and expecting "within the next few weeks". The clerk again failed to apprise the board of this communication and responded that the "delinquency status relinquishes any rights or claim of a registrant for another classification". A transfer of induction was requested and granted, and defendant reported but refused to submit to induction.

In affirming defendant's conviction of violating 50 U.S.C. App. 462, the Court of Appeals held that the delinquency regulations, 32 C.F.R. 1642, do not deprive the registrant of any procedural rights to reopening he would be entitled to under 32 C.F.R. 1625, and that the clerk's failure to transmit the registrant's letters to the board for consideration was a clear procedural error. It nevertheless found that the errors did not result in prejudice to the registrant invalidating the order since the board was powerless to reopen under 32 C.F.R. 1625.2 in both instances because the matters reported did not involve a change in circumstances beyond the registrant's control occurring after issuance of the order. The second letter, reporting the advanced pregnancy, was filed after the issuance of the second induction order and was held untimely, Morgan v. Underwood, 5th Cir. 1969, February 7, 1969; the earlier letter reporting his marriage, after issuance of the first induction order, to a woman with a son, was deemed to report a change in circumstances not beyond his control, Porter v. United States, 334 F.2d 792, 794 (C.A. 7, 1964). The Court further held that 32 C.F.R. 1624.14 which provides that a classification under the delinquency provisions "may be reopened at any time without regard to the restrictions against reopening prescribed in Section 1625.2 of this chapter" controlled

only cases in which a registrant had lost a deferred classification because of the delinquency and not to a registrant such as the defendant who was already I-A before he was declared delinquent. It also rejected the argument that his conditional rejection by the Army pending the moral waiver processing effected a cancellation of the initial induction order. The Court deemed defendant's complaint of racial discrimination in the composition of his local board "foreclosed by Clay v. United States, 5th Cir., 1968, 397 F.2d 901, 911". Defendant has petitioned for certiorari.

Staff: United States Attorney John W. Stokes, Jr.; Assistant United States Attorney Charles B. Lewis, Jr. (N.D. Ga.)

ALLEGED ILLEGALITY OF WAR IN VIET NAM NO DEFENSE TO PROSECUTION FOR REFUSING INDUCTION.

United States v. Don Bertram Pratt and United States v. Joseph Thomas Mulloy (C.A. 6, June 10, 1969; D.J. 25-30-277; 25-31-503)

Defendants were convicted under 50 U.S.C. App. 462 of refusing to submit to induction and sentenced to five years imprisonment and a $10,000 fine. In affirming the convictions the Court sustained the constitutionality of the Military Selective Service Act of 1967, and held that the alleged illegality of the war in Viet Nam was no defense to a prosecution for refusing induction, United States v. Prince, 398 F.2d 688 (C.A. 2, 1968), United States v. Mitchell, 369 F.2d 323 (C.A. 2), cert. denied, 386 U.S. 1024 (1967). The Court remarked that the sentences "appear to us rather severe", although it conceded it did not have the presentence report "which may have justified it", and suggested a motion under Rule 35.

In Mulloy the refusal of the Board to reopen and reconsider a post-induction order claim of conscientious objection was sustained on the ground that there was a rational basis for the Board's decision that Mulloy had not made out a prima facie case of sincere objection crystallizing after issuance of the induction order, 32 C.F.R. 1625.2 and 1625.4. The Court, in this connection, held that the Board, in determining whether the claim made a prima facie case warranting reopening, was not restricted to review of the claim itself but properly considered the registrant's entire file.

Staff: United States Attorney Ernest W. Rivers; Assistant United States Attorney John L. Smith (Pratt); and Assistant United States Attorney Philip I. Huddleston (Mulloy) (W.D. Ky.)

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

DISTRICT COURT

ENFORCEMENT OF INTERNAL REVENUE SUMMONS

TAXPAYERS' FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION COULD NOT BE INVOKED TO BAR THEIR ATTORNEY'S TESTIMONY OR PRODUCTION OF HIS RECORDS; INVOCATION OF ATTORNEY'S FIFTH AMENDMENT PRIVILEGE WAS FRIVOLOUS.

United States & Special Agent Bernard J. Kosch v. Emmett J. Conte, Jr. (D.C. Del., Misc. No. 50; May 23, 1969, D.J. 5-15-321)

In the course of an Internal Revenue Service investigation a special agent of the Intelligence Division determined that an attorney had performed services for the taxpayers and had received money from them, the receipt and disbursement of which might reflect on their tax liabilities. The agent issued a summons requiring the attorney's testimony and production of his books and records reflecting fees and financial transactions with his clients, the taxpayers. The attorney refused to comply with the summons, asserting attorney-client privilege and invoking his clients' Fifth Amendment privilege against self-incrimination. This judicial summons enforcement proceeding was then initiated.

At trial the attorney correctly abandoned his assertion of attorney-client privilege, re-invoked his clients' privilege against self-incrimination, and asserted his own privilege against self-incrimination on the theory that compliance with the summons might render him liable to his clients or to the disciplinary committee of the bar.

Rejecting these defenses and ordering compliance with the summons, the court ruled that the taxpayers' privilege against self-incrimination would not extend to the summoned data because (1) the taxpayers were not parties to the proceeding; (2) no information was sought from the taxpayers; (3) the items demanded by the summons were concededly not protected by the attorney-client privilege; (4) the summoned material, including the attorney's testimony, was clearly the property of the attorney and not of the clients'; and (5) all the summoned data was in the attorney's possession and not the clients'. "It is clear that the Fifth Amendment does not bar a third party ... from testifying or producing his own unprivileged records simply because such evidence may tend to incriminate somebody else."

As to the attorney's personal invocation of the Fifth Amendment the court ruled that he was clearly mistaken in any fear of self-incrimination

and that it was "far-fetched for the respondent to argue that the Censor Committee might penalize him for his complying with a lawful Internal Revenue summons or order of this Court requiring his production of unprivileged items which are his property and in his possession".

Staff: Former United States Attorney Alexander Greenfeld; Assistant United States Attorney Norman Levine (D. Dela.); and James H. Jeffries, III (Tax Division)

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