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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JAMES M. ELWOOD, :
 Petitioner, :
 : :
v. : : Civil Action No.-80-270-A
 : :
JOHN F. LEHMAN, JR., ET AL., :
 Respondents. :

M E M O R A N D U M

The petitioner, James M. Elwood, a Builder Second Class, E-5, in the United States Navy, filed an application for a writ of habeas corpus with this court on March 24, 1981. At the time of filing he was listed in the Navy as being on active duty at the Naval Station in Rota, Spain. He claimed he was being held illegally by the Navy past the expiration of his enlistment period. This court issued a Show Cause Order on March 24, 1981, and on April 1, 1981 ordered an evidentiary hearing which was held on April 8, 1981. As a part of the April 1 order, this court instructed the respondents to have the petitioner returned to this country for the hearing.

After considering the evidence adduced at the hearing as well as other evidence filed with the court and the arguments of counsel, it is the judgment of this court that petitioner's application for a writ of habeas corpus should be and is denied for the reasons set forth below.

I. FINDINGS OF FACT

Petitioner enlisted in the Navy with the enlistment to begin on February 4, 1977. The enlistment period was to run for four years, although at the time of his enlistment he agreed to a twelve-month extension in exchange for receiving a builderman rating, a rating he has received. Above the petitioner's signature on the extension contract is typed: "I understand that this extension becomes binding upon execution and may not be cancelled except as set forth in BUPERSMAN 1050150." BUPERSMAN refers to the Bureau of Naval Personnel Manual.

While in Spain with the Navy, Elwood and two other sailors were charged with murder and other related crimes by both the Spanish and United States authorities. Pursuant to the Agreement in Implementation of the Treaty of Friendship between the United States and Spain, the United States military authorities exercised primary jurisdiction over the matter and the Spanish authorities agreed to this exercise.

A military trial was held July 11, 1980 and the charges were dismissed by the judge on the ground that the defendants had been denied a speedy trial. Despite repeated requests, however, Naval authorities have refused to send the petitioner back to the United States but have kept him in Spain.

On January 20, 1981 the petitioner was informed that he was being held past the expiration date of his enlistment. In a document dated February 4, 1981--the day after the petitioner's initial four-year enlistment period would have expired and the day on which the extension would have become operative--a Naval officer in Spain attempted to cancel the petitioner's twelve-month extension.

This action was filed March 24, 1981. On April 1, 1981 Navy Captain J. E. Potosnak, an official who acts in the name of the Chief of Naval Personnel in enlistment contract disputes, reviewed the claim of this petitioner. He determined that the attempted cancellation of the extension was erroneous and directed the appropriate persons in Spain to correct Elwood's record to reflect the operative date for the twelve-month extension as February 3, 1981. (Although it would appear to this court that the operative date for the extension should have been February 4.) The record was corrected pursuant to this directive.

Neither the Chief of Naval Personnel nor Captain Potosnak approved a cancellation of the extension.

II. CONCLUSIONS OF LAW

The question for this court to decide is whether the petitioner is still legally a member of the Navy. If he is, the Navy is within its rights to keep him on active duty in Spain. If his enlistment period has expired however, the petitioner's application must be granted. Thus, whether or not the attempted cancellation is valid will determine the petitioner's claim.

In construing the enlistment contract, this court must apply traditional concepts of contract law. In Re Grimsley, 137 U.S. 147 (1890); Peavy v. Warner, 493 F.2d 748 (5th Cir. 1974).

The petitioner and the Navy entered into an agreement that the petitioner's initial four-year enlistment would be extended for twelve months. It was signed by the petitioner and by a representative of the Navy on February 4, 1977. The extension was to become operative February 4, 1981.

The extension provided that in order to cancel it BUPERSMAN 1050150 had to be complied with. That provision of the personnel manual provides that once an extension becomes operative it cannot be cancelled. BUPERSMAN 1050150(1)(c) and 1050150(8). The extension signed by the petitioner became operative after midnight February 3, 1981. Thus, a cancellation attempted February 4, 1981 would be ineffective because it came after the operative date. The petitioner takes the position that BUPERSMAN 1050150(1)(c) allows a cancellation the day it becomes operative, but not after that date. That section provides: "Extension agreements may not be cancelled after the operative date." BUPERSMAN 1050150(8), however, provides: "A valid extension of enlistment that has become operative cannot be canceled." Since (1)(c) is a definitional section and (8) is directly involved with procedures for canceling

extensions, this court has credited (8) over (1)(c) to the extent that they may conflict.

The cancellation, therefore, was attempted too late, coming on the operative date.

While this determination would normally be sufficient to dispose of this matter, the petitioner at the evidentiary hearing attempted to show that the February 4, 1981 date on the attempted cancellation was inaccurate, and that it could have been executed before the extension became operative.

If the attempted cancellation had been executed before February 4, 1981 it would have to be made for one of the reasons in BUPERSMAN 1050150(9)(a)-(g). After reviewing those provisions it is the judgment of this court that none apply to the case at bar. Petitioner claims that 1050150(g) is applicable. That section allows cancellation "when the extension is no significant benefit to a member no longer recommended for enlistment because of failure to meet the minimum reenlistment standards . . . or unsatisfactory performance of duty or conduct, and who, in the opinion of the commanding officer, lacks career potential." However, the petitioner has not established that he did not meet the minimum reenlistment standards or that his performance of duty or conduct was unsatisfactory. The procedures required under (g) were not followed also.

Petitioner claims that this failure to follow the (g) procedures should not be held against him, that these are internal procedures only. However, the evidence before this court is insufficient to conclude that (g) would apply even without the procedural irregularity.

Having concluded that none of the provisions of 1050150 (9)(a)-(g) apply, the attempted cancellation was improper and unauthorized. The government is not bound by the unauthorized acts of its agents. Federal Crop Insurance v. Merrill, 332 U.S. 380 (1947).

This coincides with the interpretation of the regulations made by the Navy, which the court believes is not "plainly erroneous" or "inconsistent with the regulation." United States v. Larionoff, 431 U.S. 864 (1977).

Therefore, the Navy is not improperly enforcing the contract with the petitioner and the extension is currently operative. The application for a writ of habeas corpus is denied and the action dismissed.

The Clerk is instructed to mail a copy of this memorandum to all counsel of record and to file it with the order entered April 20, 1981.

Richard L. Williams

UNITED STATES DISTRICT JUDGE

DATE: April 21, 1981