

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,)	REPLY BRIEF ON BEHALF OF
Appellee)	APPELLANT
v.)	
)	Crim. App. Dkt. No. 20140014
)	
)	USCA Dkt. No. 19-0139/AR
Master Sergeant (E-8))	
ALAN B. GUARDADO,)	
United States Army,)	
Appellant)	

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE
ARMED FORCES:

Pursuant to Rule 19 of this Honorable Court’s Rules of Practice and
Procedure, Appellant hereby submits his reply to the government’s answer.

The government cannot rely on *Combs* and *Keys* to render the government’s
conduct non-punitive because those case deal with an appellant’s entitlement to a
specific cash award.

The government cannot rely on cases from the Court of Federal Claims or
from the Federal Circuit to determine whether appellant is entitled to Article 13,
UCMJ credit. The government concedes that this honorable court “is within its
statutory authority” to determine the meaning of Article 75, UCMJ. Gov. Br. at
14. It is not within the statutory authority of the Court of Federal Claims or the
Court of Appeals for the Federal Circuit to determine an Article 13, UCMJ issue
because Congress has placed that determination firmly within the military justice

system. Matters determined pursuant to the provisions of the code are within the jurisdiction of the military courts, whose determinations are binding upon the civilian courts. *Burns v. Wilson*, 346 U.S. 137, 142 (1953). Therefore, this court, and not any other, is the proper court to determine whether the government's action constituted unlawful pre-trial punishment.

The cases cited by the government deal with a petitioner's entitlement to a specific cash payment. They do not deal with the question of whether an appellant has been punished unlawfully by virtue of an unlawful withholding of pay. Therefore, these cases are not directly relevant to an Article 13, UCMJ issue.

This court has frequently noted that it does not have jurisdiction to determine the collateral effects of UCMJ actions on pay entitlement. *United States v. Dinger*, 77 M.J. 446, 454 (C.A.A.F. 2018). Similarly, neither the Court of Federal Claims nor the Federal Circuit have jurisdiction to determine whether an Article 13, UCMJ violation is the collateral result of a decision to withhold pay because this court has primacy in the interpretation of the UCMJ. The government therefore errs in relying on *Combs* and *Keys* to determine whether an Article 13 violation occurred in this case.

Selective obedience to adverse court decisions is not reasonable.

The DFAS General Counsel's decision to selectively obey court decisions was not reasonable. This court's finalized decisions "are binding upon all

departments, courts, agencies, and officers of the United States.” Article 76, UCMJ. Since the government concedes that the interpretation of Article 75(a) was a matter properly within this court’s jurisdiction, Gov. Br. at 10, this court’s decision in *Howell* was binding upon all officials of the Defense Finance and Accounting Service. Any question about a conflict with this court’s decision and that of any other court should be the subject of an action under the Declaratory Judgement Act. 28 USC 2201(a)(2019). Compliance with *Howell* or a Declaratory Judgement action were the two reasonable courses of action available to DFAS. Picking and choosing among caselaw was not a reasonable one. Therefore, this court should find that the DFAS General Counsel did not act reasonably in the course of action it took.

Appellant’s claim here does not implicate the Tucker Act because appellant is not requesting a specific cash award.

The government avers that an award of Article 13, UCMJ credit to appellant here would “render the Tucker Act devoid of meaning.” Gov. Br. at 15. The Tucker Act is not implicated here because the Tucker Act deals with claims against the United States for cash amounts. 28 U.S.C. 1491(a). Appellant is not seeking relief in the form of an order to the United States to pay him an amount of cash. Instead, he is seeking credit against his sentence, the calculation of which considers his pay in its calculation. The Tucker Act is therefore not implicated because Appellant makes no claim for a cash award before this honorable court.

In the alternative, even in the absence of an Article 13 violation, this honorable court should still award appellant credit to ensure that the sentence is correct in law.

Even if this court accepts the government contention that appellant is due no relief under Article 13, UCMJ, Gov. Br. at 16, this court should find that he is entitled to an administrative credit in the amount requested for Article 13 credit to ensure that the sentence is correct in law. This court may affirm only those sentences which are lawfully authorized and which include all credits due to an appellant. *United States v. Tardif*, 57 M.J. 219, 223-24 (C.A.A.F 2002). A violation of an appellant's substantive rights must have a remedy. *United States v. Ballan*, 71 M.J. 28, 30 (C.A.A.F. 2012). Here, this court has identified a right for an appellant to be paid at his prior grade while he is pending retrial. *Howell v. United States*, 75 M.J. 386, 391 (C.A.A.F. 2016). Other courts will not grant to appellant a remedy for violation of that right. This court cannot provide a cash remedy and appellant does not request one. This court may order administrative credits against the sentence to confinement to remedy a wrong to appellant's substantive rights. *United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1993). If this honorable court elects not to provide appellant with credit under Article 13, UCMJ, this court should instead provide appellant with an administrative credit to remedy the violation of his substantive rights present here in the same amount as requested under Article 13, UCMJ.

Conclusion

WHEREFORE, appellant respectfully requests that this Honorable Court grant to him the relief outlined above.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Guardado*, Crim. App. Dkt. No. 20140014, 19-0139/AR was delivered to the Court and the Government Appellate Division on July 24, 2019.



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