

J. Y. Interpretation No.459 (June 26, 1998) *

ISSUE: Does Interpretation Y.T. No.1850, which rules that a conscript or any of his family members who disagrees with the classification of the conscript's physical condition made by the *hsien* (county) magistrate in charge of conscription shall not file an administrative appeal, violate the constitutional protection of the people's right of instituting legal proceedings?

RELEVANT LAWS:

Article 16 of the Constitution (憲法第十六條) ; Articles 21, 26 and 27 of the Regulation on Conscription (徵兵規則第二十一條、第二十六條、第二十七條) ; Article 34 of the Conscription Act (兵役法第三十四條) ; Article 69 of the Enforcement Act of the Conscription Act (兵役法施行法第六十九條) .

KEYWORDS:

conscription (徵兵) , physical examination in connection with military services (兵役體檢) , administrative appeals (訴願) , administrative actions (行政訴訟) , *hsien* (county) magistrate (縣長) .**

HOLDING: Classifications of the physical conditions of conscripts in

解釋文：兵役體位之判定，係徵兵機關就役男應否服兵役及應服何

* Translated by BAKER & McKENZIE.

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connection with their military services are unilateral administrative acts of the conscription authorities. These administrative acts have direct legal effects on whether these conscripts will serve in the military and, if so, on the type of military services these conscripts will be subjected to. Such classifications have profound impacts on the rights of the conscripts and should be viewed as administrative decisions pursuant to the Administrative Appeal Act and Administrative Proceedings Act. In the event any of the conscripts who have been subjected to such classification considers that the classification is unlawful or improper, he is entitled to pursue an administrative appeal and administrative litigation. Interpretation Yuan-tze No. 1850 of the Judicial Yuan does not conform to the above principle and should no longer be cited as an authority, so that the constitutional right of citizens to litigate can be preserved. Article 69 of the Enforcement Act of Conscription Act -- which provides that waiver of, prohibition from and delayed conscription or calling up for, military services shall first be determined and then redetermined by the competent au-

種兵役所為之決定而對外直接發生法為，對役男在憲法上之權益有重大影響，應為訴願法及行政訴訟法上之行政處分。受判定之役男，如認其判定有違法或不當情事，自得依法提起訴願及行政訴訟。司法院院字第一八五〇號解釋，與上開意旨不符，應不再援用，以符憲法保障人民訴訟權之意旨。至於兵役法施行法第六十九條係規定免役、禁役、緩徵、緩召應先經主管機關之核定及複核，並未限制人民爭訟之權利，與憲法並無牴觸；其對複核結果不服者，仍得依法提起訴願及行政訴訟。

thority -- does not inhibit the right of citizens to litigate and does not contravene the Constitution. Anyone who disagrees with the redetermination is still entitled to pursue an administrative appeal and administrative litigation.

REASONING: Article 16 of the Constitution provides that citizens have the right to litigate and file administrative appeals, which right aims to protect the citizens from and provide them remedy for derogation of their rights by public administration through administrative appeals and procedures instituted under national laws, and to ensure that the administrative authorities which make administrative decisions or their superiors can self-rectify their illegal or improper decisions pursuant to the system of administrative appeals. Unilateral administrative acts of public authority by administrative authorities, to the extent they relate to particular public law matters which have legal effects, are not differentiated on the basis of the language or methodology used, of whether there are subsequent acts or of whether it is stated that an appeal

解釋理由書：憲法第十六條規定人民有訴願及訴訟之權利，旨在保障人民遭受公權力侵害時，可循國家依法所設之程序，提起訴願或行政訴訟，俾其權利獲得最終之救濟，並使作成行政處分之機關或其上級機關藉訴願制度，自行矯正其違法或不當處分，以維法規之正確適用及人民之合法權益。按行政機關行使公權力，就特定具體之公法事件所為對外發生法律上效果之單方行政行為，不因其用語、形式以及是否有後續行為或有無記載得聲明不服之文字而有異。凡直接影響人民權利義務關係，且實際上已對外發生效力者，如仍視其為非行政處分，自與憲法保障人民訴願及訴訟權利之意旨不符，業經本院釋字第四二三號解釋在案。

against the acts may be launched. It would be inconsistent with the constitutional right of citizens to litigate and file administrative appeals if acts, which directly affect the rights and obligations of the citizens and which have effects in reality, are still considered non-administrative acts. The above is supported by Interpretation No. 423 of this Judicial Yuan.

Article 34 of the Conscription Act provides that: "conscripts who have been physically examined shall be classified into classes A, B, C, D and E; conscripts classified under classes A or B are considered suitable for immediate military services and should serve in the active and supplementary forces, with some of those remaining (after troop levels have been met) serving in Type A National Service and the rest serving in Type B National Service; conscripts classified under class C should serve in Type B National Service; conscripts classified under Class D are absolved of the obligation to serve in the military; and conscripts classified under class E are those hard to classify and will be subject to a supplemental physical

經徵兵檢查之男子，應區分體位為甲、乙、丙、丁、戊五等，甲、乙等體位為適於服現役者，應服常備兵現役及補充兵現役，其超額者服甲種國民兵役，再超額者服乙種國民兵役，丙等體位服乙種國民兵役，丁等體位為不合格者免役，戊等為難以判定者，應補行體格檢查至能判定時為止，為兵役法第三十四條所明定。因此，兵役體位判定，係徵兵機關就役男應否服兵役及應服何種兵役所為之決定而對外直接發生法律效果之單方行政行為，此種判定役男為何種體位之決定行為，不問其所用名稱為何，對役男在憲法上之權益有重大影響，應為訴願法及行政訴訟法上之行政處分。從而，受判定之役男，如認其判定有違法或不當情事，自得依法提起訴願及行政訴訟。

examination to determine their classification.” For the above reasons, classifications on the physical conditions of conscripts are unilateral administrative acts of the conscription authorities. These administrative acts have direct legal effects on whether these conscripts will serve in the military and, if so, on the type of military services these conscripts will be subjected to. Such acts of classification, regardless of how they are named, have profound impacts on the rights of the conscripts and should be viewed as administrative decisions pursuant to the Administrative Appeal Act and Administrative Proceedings Act. In the event any of the conscripts who have been subjected to such classification considers that the classification is unlawful or improper, he is entitled to pursue an administrative appeal and administrative litigation.

Interpretation Yuan-tze No. 1850 of the Judicial Yuan, which ruled that “a conscript or any of his family members who disagrees with the classification of the conscripts made by the county chief shall not file an ordinary administrative

司法院院字第一八五〇號解釋認：「被徵服兵役之壯丁或其家屬，對於辦理徵兵事務之縣長，以徵兵官之資格，所為關於緩役或免役之裁決有不服者，在修正陸軍徵募事務暫行規則第三十三條至第三十五條，既有申訴之特別

appeal but shall find his remedy either pursuant to Articles 33 to 35 of the Provisional Regulation on Army Conscription or through an appeal to the immediate superiors of those in charge of the conscription,” should no longer be cited as an authority, as it is not in conformity with the above principle and so that the constitutional right of citizens to litigate can be preserved. Article 69 of the Enforcement Act of the Conscription Act — which provides that waiver of, prohibition from and delayed conscription or calling up for, military services shall first be determined and then re-determined by the relevant authority — does not inhibit the right of citizens to litigate and does not contravene the Constitution. Anyone who disagrees with the re-determination is still entitled to pursue an administrative appeal and administrative litigation.

Justice Chi-Nan Chen filed dissenting opinion

規定，則其救濟方法，自應依該規定，向其直接上級徵兵官為之，不得提起普通訴願」，與上開意旨不符，應不再援用，以符憲法保障人民訴訟權之意旨。至於兵役法施行法第六十九條係規定免役、禁役、緩徵、緩召應先經主管機關之核定及複核，並未限制人民爭訟之權利，與憲法並無牴觸；其對複核結果不服者，仍得依法提起訴願及行政訴訟。

本號解釋陳大法官計男提出不同意見書。