UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2012-11**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Airman First Class (E-3)	)	
BRENDAN D. PARK,	)	
USAF,	)	
Appellee	)	**Panel No. 2**

MARKSTEINER, Judge:

On 11 July 2012, the appellee was charged with one specification of disobeying a lawful order, one specification of stalking, two specifications of assault, and two specifications of intentionally restraining Ms. BP, in violation of Articles 92, 120a, 128, and 134, 10 U.S.C. §§ 892, 920a, 928, 934. The case was referred to a special court-martial on 13 July 2012.

Prior to entering pleas, the trial defense counsel submitted a motion to dismiss based on a lack of in personam jurisdiction. The military judge granted the motion and subsequently denied the Government's request for reconsideration. The Government filed a timely appeal of the military judge's ruling, pursuant to Article 62, UCMJ, 10 U.S.C. § 862.

Background

The appellee entered active duty in the United Sates Air Force on 26 August 2008 for a term of six years. His request for an early separation was approved on 30 April 2012, and an established date of separation was set for 2 July 2012. On 26 May 2012, Albuquerque civilian law enforcement personnel arrested the appellee for an off-base incident of domestic violence. Having learned of the incident, the mission support group (MSG) commander told the base staff judge advocate (SJA) on 28 May 2012, "[i]f the civilians are not going to proceed with this case then I want him to face a court-martial." Following a 4 June 2012 request from the SJA, the local district attorney's office waived jurisdiction on 5 June 2012.

On 6 June 2012, the SJA's office entered the appellee's case into the AMJAMS military justice database. Beginning that day and continuing through 2 July 2012, members of the SJA's staff interviewed witnesses, gathered evidence and information

from the district attorney's office as well as the responding civilian police authorities, and coordinated additional investigative measures with the Kirtland Security Forces Office of Investigations (SFOI). They also met with the appellee's commander and first sergeant and gathered documentation about the appellee in preparation for the preferral of charges (Personal Information File, Unfavorable Information File, and Training Records). Members of SFOI assisted with witness interviews, but SFOI did not formally open an investigation in its computer database.

On 6 June 2012, the MSG commander signed a "Commander-Directed Hold" memorandum prepared by the trial counsel that was issued to the appellee and the Force Support Squadron (FSS) on 7 June 2012. The memo stated the appellee was being placed on hold for completion of an Article 32, UCMJ, 10 U.S.C. § 832, investigation and that the hold would expire on 5 October 2012. The memorandum instructed the FSS to place the appellee "on commander-directed hold in accordance with [Air Force Instruction] AFI 36-2110, [*Assignments*,] Table 2.1, rule 14, code 17 [22 September 2009]."[1] It further directed the FSS to "[t]ake immediate action to ensure the individual does not depart this station pursuant to Permanent Change of Station (PCS) or Temporary Duty (TDY). If the individual currently has orders to depart, take action to revoke or hold the orders. Take no action to separate the individual from active duty for any reason without coordination with AFNWC/JA."

Despite the hold letter, the appellee had completed some of the items on his out-processing checklist by 2 July 2012, and his Department of Defense (DD) Form 214, *Certificate of Release or Discharge from Active Duty*, was posted on the Automated Records Management System (ARMS) the same day. The appellee received a paper copy of the DD Form 214 in the mail on 9 July 2012. The separation date listed on the DD Form 214 was 2 July 2012.

Meanwhile, Senior Airman (SrA) Harper, a pay and finance technician, computed the appellee's final pay and allowances. Her standard practice was to enter information into a spreadsheet to determine the member's pro-rated pay for the final month of active duty service and then provide the spreadsheet to her supervisor for review and any required corrections. Once she and her supervisor were satisfied that all calculations were correct, SrA Harper would enter the data into the Defense Finance and Accounting Services (DFAS) automated pay system. Her supervisor would then access the same system and approve the authorization for payment. In the case at bar, SrA Harper testified that she had performed the first two steps in this process by 5 July 2012; she computed the appellee's final pro-rated pay for the days he'd served in the month of July 2012 and provided a printed version of her calculations to her supervisor. However, her supervisor had not yet reviewed the document, the information had not been loaded into the DFAS computer system, and the appellee had therefore not received his final pay.

[1] Referenced wrong code. See discussion below.

On 5 July 2012, the appellee reported to his duty station in uniform. On 6 July 2012, the SJA and his staff were informed that the appellee had been – or was in the process of being – discharged from the Air Force. Legal office personnel determined that the 6 June 2012 commander-directed hold letter in fact referenced an assignment availability code that "only prevents a member from PCS-ing; it does not prevent a member from separating." At the direction of the trial counsel, the case paralegal, Airman First Class (A1C) Klenske, went to the Comptroller's office to determine if the appellee had received his final pay and, if not, to request the office stop the final payment. A1C Klenske spoke with SrA Harper, the pay and finance technician, and asked her "if she could hold on finishing the processing of [the appellee's] pay." SrA Harper replied that she could, and, at A1C Klenske's request, retrieved the appellee's pay calculations from her supervisor's desk. Those calculations were then shredded. The Comptroller's office took no further action to process the appellee's final pay.

Later that day, the base legal office sent an email to the Air Force Personnel Center (AFPC), confirming that the appellee had not received his final pay and requesting AFPC rescind the appellee's separation orders. AFPC canceled the separation orders and also revoked the previously-issued DD Form 214.

On 10 July 2012, the appellee was read his rights and interviewed by Security Forces Investigators concerning the 26 May 2012 incident. On 11 July 2012, charges were preferred against the appellee. A "court-martial hold" memorandum was accomplished by the SJA on 11 July 2012, pursuant to AFI 36-2110, Table 2.1, Rule 8.

On 28 August 2012, the military judge granted a defense motion to dismiss the charges for lack of in personam jurisdiction after he concluded the appellee had received a validly issued DD Form 214 and that his final pay was "effectively ready for delivery" to him at the time the SJA's office, in the military judge's view, improperly prevented that delivery through contact with the Comptroller's office.

Standard of Review

The United States may appeal an "order or ruling of the military judge which terminates the proceedings with respect to a charge or specification" in cases in which a punitive discharge may be adjudged. Article 62(a)(1)(A), UCMJ, 10 U.S.C. § 862(a)(1)(A); Rule for Courts-Martial (R.C.M.) 908(a) and (b). In ruling on Government appeals under Article 62, UCMJ, this Court "may act only with respect to matters of law." Article 62(b), UCMJ; R.C.M. 908(c)(2). We review jurisdictional challenges de novo, accepting the military judge's findings of fact unless they are clearly erroneous or are not supported by the record. *United States v. Webb*, 67 M.J. 765, 768 (A.F. Ct. Crim. App. 2009) (citing *United States v. Hart*, 66 M.J. 273, 276 (C.A.A.F 2008)). The military judge's ruling on the motion sets forth extensive findings of fact, the majority of which are supported by the record and are not clearly erroneous.

Accordingly, we accept all such findings except those specifically addressed in the discussion that follows.

Court Martial Jurisdiction

Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment are subject to court-martial jurisdiction. Article 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1). As the appellee correctly notes, "[i]t is black letter law that *in personam* jurisdiction over a military person is lost upon his discharge from the service, absent some saving circumstance or statutory authorization." *United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985). The mere expiration of a period of enlistment, alone, does not alter an individual's status under the UCMJ. *United States v. Hutchins*, 4 M.J. 190, 191 (C.M.A. 1978). Once attached, personal jurisdiction over the member continues until it is terminated through a proper discharge. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006).

As the UCMJ does not expressly define the exact point in time when discharge occurs, military courts have consistently turned to the provisions of 10 U.S.C. §§ 1168(a) and 1169 for guidance on what is required to effectuate discharge from active service. First, there must be a delivery of a valid discharge certificate and second, there must be a final accounting of pay such that the member's final pay or a substantial part of that pay is ready for delivery. [2] *United States v. Wilson*, 53 M.J. 327, 329 (C.A.A.F. 2000). For discharges taking effect before completion of the member's obligated term of service ("early discharges"), the member must also undergo the "clearing" process as established by service regulations. *United States v. Hart*, 66 M.J. 273, 276 (C.A.A.F. 2008). If these requirements have not been met, the member is not considered discharged from active duty and military jurisdiction over the person continues. *Id*. at 276.

If an individual commits an offense before his official discharge from the military, and the military initiates "action with a view to trial of that person," court-martial jurisdiction attaches and the individual may be retained in the service for trial. R.C.M. 202(c)(1). For purposes of this rule, R.C.M. 202(c)(2) specifies that actions taken "with a view toward trial" would "include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges." This list of examples is not exclusive, and other definitive actions taken by military authorities "with a view to trial" also trigger attachment of court-martial jurisdiction. *United States v. Self*, 13 M.J. 132, 138 (C.M.A. 1982) (quoting *United States v. Wheeley*, 6 M.J. 220, 222 (C.M.A. 1979)).

[2] According to 10 U.S.C. § 1168(a), "A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative."

Application

Applying the requisite standards to the case before us, we find as a matter of law that the appellee has not been discharged and remains subject to court-martial jurisdiction. As discussed above, the appellee's discharge could not have taken effect unless and until there had been a final accounting of his pay. Our review of the military judge's factual findings compels us to conclude that neither the final pay, nor a substantial part of that pay was ready for delivery to the appellee within the plain meaning of § 1168(a). We therefore disagree with the military judge's implied legal conclusion that the appellee was effectively discharged on 6 July 2012.

In his conclusions of law, the military judge held that the calculation of the appellee's final pay had been made and it was, or would have been, ready for delivery to the appellee "absent an unauthorized stoppage in the processing . . . . Were it not for the unjustified and informal actions by SrA Harper[], I conclude by a preponderance of the evidence, that the substantial likelihood is that this would have been received by A1C Park on or before the date of the eventual administrative hold placed on 11 July 2012." The military judge continued saying, "[T]his court cannot put its imprimatur on the concept that the whim of a member of the Comptroller Squadron, not acting on any official request and without any formal documentation, can result in invalidation of an otherwise valid discharge and such an important concept as continuing UCMJ jurisdiction over an accused." The military judge concluded that the appellee had been "effectively discharged" and therefore the Government lacked jurisdiction to prosecute him.

As our superior court noted in *United States v. Cossio*, 64 M.J. 254 (C.A.A.F. 2006), the military judge must be careful to restrict findings of fact to things, events, deeds, or circumstances that "actually exist" as distinguished from "legal effect, consequence, or interpretation." *Id*. at 257. The military judge's jurisdictional legal conclusion turns largely on his factual finding that "[o]n 6 July 2012, A1C Park's final pay was ready for delivery as that term is used in 10 United States Code § 1168." We hold this finding of fact to be unsupported by the record and clearly erroneous.

The evidence in the record establishes the following: (1) SrA Harper's supervisor never checked SrA Harper's worksheet calculations of the appellee's final pay; (2) the appellee's final pay was among the first such transactions she had processed after she began working in the separation pay section; (3) there is no way to now determine whether her calculation of the appellee's final pay was accurate or whether corrections would have been required; (4) even if SrA Harper's calculations were accurate and no corrections were required, she would still have been required to enter the data into the DFAS automated pay system after her supervisor returned the completed and checked worksheet to her; and (5), her supervisor would then have been required to confirm payment authorization in the DFAS system before payment could be made to the

appellee. Based on the totality of the record, we find as a matter of law that the appellee had not received his final pay as required by 10 U.S.C. § 1168(a). The military judge's ruling to the contrary is therefore erroneous.

This case is analogous to *United States v. Hart*, 66 M.J. 273 (C.A.A.F. 2008), wherein A1C Hart was placed on administrative hold in anticipation of a court-martial but was simultaneously processed for a medical discharge. Notwithstanding a legal office memorandum requesting that he be placed on administrative hold, A1C Hart was cleared for final outprocessing after completing the required checklists, received his discharge certificate, and finance technicians entered an initial calculation of his final pay into the DFAS computer system. *Id.* at 274. Prior to disbursement of his pay, a finance technician discontinued the processing of A1C Hart's final pay at the request of the base legal office. At trial, A1C Hart argued that he was no longer subject to court-martial jurisdiction because the finance office "had all the information they needed to compute the final pay." *Id.*

In denying A1C Hart's motion, the military judge found the DFAS entry to be a "snapshot" of his projected final pay based on the information in the system at the time, and thus was not a final pay calculation. *Id.* Our superior court agreed with the military judge's conclusions that "critical calculations, reconciliations, and authorizations of final pay pursuant to DFAS regulations had not yet started" and "that DFAS could not have issued separation pay . . . under these circumstances so neither 'final pay' nor a 'substantial part of that pay' were ready for delivery." *Id.* at 277. Therefore, A1C Hart was not effectively discharged and remained subject to court-martial jurisdiction. *Id.* We find the reasoning in *Hart* to be persuasive and controlling. As in *Hart*, the appellee's final pay was not ready for disbursement. Several important procedural steps remained before DFAS could issue the appellee his final pay.

The appellee urges this Court to find that the Government's actions in conferring with SrA Harper constituted an improper interference in the appellee's early discharge. We decline to do so. In the record before us, we do not find, nor did the military judge articulate any allegations of, bad faith on behalf of anyone involved in the investigation or processing of this case. After being informed that the appellee was in the process of being discharged, the trial counsel, and by extension the SJA, concluded that the 6 June 2012 commander-directed hold letter was not a "valid legal hold." After researching the issue, the trial counsel instructed A1C Klenske to speak with the Comptroller squadron to determine if the appellee had received his final pay. When A1C Klenske confirmed that the appellee's pay had not been processed, he appropriately asked the pay technician to stop further action on the payment. Such actions were in furtherance of the MSG commander's stated intent to retain court-martial jurisdiction over the appellee and were therefore warranted and authorized under the circumstances.

We also find as a matter of law that, prior to the appellee's early separation date, the Government took sufficient steps to trigger continuing jurisdiction under R.C.M. 202(c)(2). We decline to conclude, as the appellee urges, that the *formal opening of an OSI or SFOI investigation* – or the lack thereof – constitutes a litmus test for whether investigative activities will qualify as actions with a view to trial under R.C.M. 202(c)(2). Members of the SJA's staff undertook considerable investigative efforts (requesting and receiving a waiver of jurisdiction from civilian authorities, interviewing witnesses, reviewing evidence) with a view toward trial. Additionally, prior to 2 July 2012, SFOI conducted interviews of three witnesses, including the victim, took written statements, and provided those statements to the trial team, not insubstantial contributions and/or investments of time in the context of this case. In contrast, according to the lead SFOI investigator, it would have taken roughly five minutes to formally open an investigation by creating a case file in the online Security Forces Management System. In this case, the kind, class, or nature of investigative activities, from working with local authorities to secure Air Force jurisdiction, to gathering evidence, to conducting and documenting witness interviews, reflect all the hallmarks one would customarily associate with actions taken with a view toward trial, particularly when considered in combination with the 7 June 2012 commander-directed hold letter. We hold that it is the substance and nature of investigative activities undertaken by Government personnel (OSI, SFOI, members of the SJA's staff, or others), as opposed to the relatively brief ministerial task of formally opening an investigation in a database, that matters for purposes of R.C.M. 202(c) analysis.

We also find the 7 June 2012 Commander Directed Hold memorandum, while technically imperfect in form, nonetheless constitutes an unmistakable action taken with a view toward trial. The letter clearly conveys the MSG commander's intent to retain the appellee on active duty for purposes of prosecution. We find the error in the Commander Directed Hold memorandum to be one of form rather than substance and, based on the totality of the record, not fatal to the Government's assertion of continuing jurisdiction under RCM 202(c). *See Webb*, 67 M.J. at 769 (an administrative hold letter that cited to the incorrect paragraph of an AFI was an error in form rather than substance).

We need only briefly discuss the appellee's additional argument that the legal office acted without authority in preventing his approved administrative discharge from being carried out based on his belief that, according to AFI 36-3208, *Administrative Separation of Airman*, ¶ 3.5.1 (25 June 2009), *only* the discharge authority may withdraw such an approved discharge. We disagree. Although paragraph 3.5.1 states the discharge authority "may withdraw an approved voluntary separation that has not been executed when reasons exist that make withdrawal in the best interest of the Air Force," other language in the same AFI authorizes the SJA to take action resulting in the retention of Airmen beyond their established dates of separation.[3] The AFI not only vests SJAs with

[3] For example, Air Force Instruction 36-3208, *Administrative Separation of Airman*, ¶ 2.4 (25 June 2009), reads, in pertinent part, "[t]he SJA determines what type of appropriate action is sufficient to authorize retention pending the

considerable discretion to determine when and how military members may be retained beyond their established separation dates, it also contemplates situations where, because time is of the essence, that authority may be exercised verbally, with paperwork to follow. Accordingly, the appellee's argument in this regard is without merit.

Conclusion

We hold the military judge erred as a matter of law in granting the appellee's motion because no valid discharge occurred under the facts of this case, and the Government had initiated action with a view to trying him by court-martial. Accordingly, court-martial jurisdiction has attached over the appellee, and he can be lawfully retained in the Air Force for trial. We therefore set aside the military judge's decision and remand the case to the trial court for further proceedings.

On consideration of the United States appeal under Article 62, UCMJ, it is by the Court on this 10th day of January 2013,

ORDERED:

That the United States appeal under Article 62, UCMJ, is hereby **GRANTED**.

ROAN, Senior Judge, and HECKER, Judge, concur.

FOR THE COURT

OFFICIAL

STEVEN LUCAS
Clerk of the Court

---

preferring of charges. If there is sufficient time, the Staff Judge Advocate (SJA) or a member of the SJA's staff will notify the MPF separations unit in writing to involuntarily extend the member's ETS. . . . Verbally notify when time does not permit written notification, but written confirmation of the verbal notice should be provided the MPF within 5 work days."