UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DUSTIN M. HART
United States Air Force

ACM 36253

30 November 2006

Sentence adjudged 20 December 2004 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Kevin P. Koehler.

Approved sentence: Bad-conduct discharge, confinement for 185 days, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jin-Hwa L. Frazier.

Before

ORR, THOMPSON, and FRANCIS
Appellate Military Judges

FRANCIS, Judge:

Pursuant to his pleas, the appellant was convicted of three specifications of divers wrongful use of controlled substances (marijuana, Diazepam, and Alprazolam), one specification of wrongful possession of Diazepam, and one specification of divers wrongful distribution of Alprazolam, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A general court-martial composed of officer members sentenced him to a bad-conduct discharge, confinement for 185 days, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority approved the sentence as adjudged.

The appellant asserts one assignment of error. Specifically, the appellant contends he was administratively discharged prior to trial and the court-martial therefore lacked personal jurisdiction to try him for the offenses *sub judice.* Finding no error, we affirm.

Background

On 28 November 2001, the appellant began a six-year term of enlistment. His Expiration of Term of Service (ETS) date for that enlistment was 27 November 2007. For the entire period encompassed by the events discussed below, he was assigned to the 437th Maintenance Squadron, 437th Airlift Wing, Charleston Air Force Base, South Carolina.

In the fall of 2003, the appellant became the subject of an Air Force Office of Special Investigations (AFOSI) drug investigation. In early January 2004, after being interviewed by AFOSI agents and confessing to the offenses of which he now stands convicted, the appellant began working as an AFOSI informant. In that capacity, he was scheduled to participate in an AFOSI drug investigation operation from 6-8 March 2004. The appellant's squadron commander was aware of the appellant's own drug offenses and that he was working for AFOSI. His squadron section commander knew only that the appellant was working for AFOSI. He did not know the appellant himself was the subject of an AFOSI drug investigation.

On 8 January 2004, Headquarters, Air Force Personnel Center (HQ AFPC) notified the separations section of the appellant's servicing base personnel office that the appellant, as the result of a Medical Evaluation Board (MEB), had been found physically unfit for continued military service and was to be administratively separated with a disability discharge.

On 9 January 2004, the base legal office sent a memorandum to the 437th Mission Support Squadron, requesting the appellant be placed on administrative hold for 120 days. The memorandum further provided that the appellant was not to be released from active duty without prior legal office coordination. The memorandum was sent to several offices in the servicing personnel flight, but was not seen by the superintendent of the separations section, who claimed he would have taken more interest in the appellant's situation if he had seen the letter.

On 23 January 2004, HQ AFPC sent a follow-up notification to the separations section, establishing 3 March 2004 as the appellant's effective date of separation. On 24 January 2004, separations forwarded a copy of the HQ AFPC message to the appellant and his unit orderly room, advising of the disability discharge determination. Shortly thereafter, the appellant started outprocessing, working from a checklist provided to him by the separations section. The appellant's squadron section commander knew the appellant was outprocessing. His squadron commander knew the appellant was the

subject of an MEB, but did not know the appellant was outprocessing the unit. The squadron commander intended to retain the appellant until completion of the AFOSI investigation into the appellant's own offenses and completion of any resulting disciplinary action. He believed the administrative hold memorandum issued by the legal office on 9 January 2004 was sufficient to preclude the appellant from separating administratively until these actions could be completed. The squadron section commander knew about the administrative hold, but believed the MEB determination took precedence over that action.

On 24 February 2004, as part of his outprocessing, the appellant met with the finance technician responsible for calculating his final pay. The technician took all of the required information but did not, at that time, make the final calculations required to determine the exact amount of pay due the appellant. That same day, the appellant's squadron section commander signed off on the appellant's outprocessing checklist, indicating he had completed all necessary outprocessing actions and was "cleared to final out-process."

On 3 March 2004, the separations section issued the appellant a DD Form 214, *Certificate of Release or Discharge from Active Duty.* The form reflected an effective separation date of 3 March 2004.

On 5 March 2004, the appellant's squadron commander, AFOSI, and the legal office learned of his disability separation. None were pleased. The legal office contacted the servicing finance office, discovered the appellant's final pay had not yet been calculated, and directed no further action be taken. Based on that direction, the noncommissioned officer in charge (NCOIC) of the pay section removed the appellant's paperwork from the desk of the finance technician responsible for calculating his final pay and stopped all further processing. The same day, the appellant's acting squadron commander issued a memorandum to the 437th Mission Support Squadron, stating the appellant's discharge was in error and asking that the DD Form 214 be revoked. In addition, the appellant's civilian attorney was contacted and told the appellant was required to return to his unit no later than 7 March 2004. The appellant did not do so.

On 9 March 2004, the appellant's unit reported him as absent without leave. On 18 March 2004, civilian authorities arrested the appellant. He was returned to Air Force control on 23 March 2004 and charges were preferred against him the same day. [1]

At the start of his trial, the appellant moved to dismiss the charge and specifications for lack of personal jurisdiction. The trial judge denied the motion. The appellant then unsuccessfully sought a Writ of Mandamus from this Court to force the

[1] The original charges included, *inter alia*, one Charge and Specification of AWOL, in violation of Article 86, UCMJ. That Charge and Specification were withdrawn at the order of the convening authority prior to entry of pleas.

trial judge to dismiss. When his Writ application was denied, the appellant appealed to the Court of Appeals for the Armed Forces. That appeal was also denied. The appellant now continues his jurisdictional challenge.

Discussion

Jurisdiction is a legal question which appellate courts review de novo. *United States v. Tamez*, 63 M.J. 201, 202 (C.A.A.F. 2006), *pet. denied*, 63 M.J. 471 (C.A.A.F. 2006). When conducting such a review, we accept the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000).

"In general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the armed forces." Rule for Courts-Martial (R.C.M.) 202(a), Discussion (2). 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).

"To effectuate an *early discharge*, there must be: (1) a delivery of a valid discharge certificate; (2) a final accounting of pay; and (3) the undergoing of a "clearing" process as required under appropriate service regulations to separate the member from military service." *Id.* (citing *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989)). The requirement for a final accounting of pay is not a creation of the courts, but is well grounded in statute. "A member of an armed force may not be discharged or released from active duty until his… final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative." 10 U.S.C. § 1168(a).

Both the appellate defense counsel and the appellate government counsel agree the appellant was issued a valid discharge certificate and that he completed the required "clearing" process. The record supports that conclusion. The sole issue is whether the appellant received a "final accounting of pay" within the meaning of relevant case law and the requirements of 10 U.S.C. § 1168(a). The appellant asserts this prong of the *King* test has been met. The government contends it has not, as further additional steps to calculate the appellant's final pay still remained to be done. We find there was no final accounting of pay. The appellant's early discharge was therefore incomplete and the court-martial retained jurisdiction. [2]

In ruling on the appellant's motion to dismiss for lack of personal jurisdiction, the trial judge made extensive findings of fact. The evidence of record supports his findings and we adopt them as our own.

[2] The government also argues the appellant's discharge was incomplete because his squadron commander never intended he be discharged at that time. Having concluded there was no required final accounting of pay, we do not address that additional argument.

On 26 February 2004, the Defense Finance and Accounting Service (DFAS) conducted an initial calculation of separation pay for the appellant. That calculation was not final, but was simply a point in time "snapshot" of the appellant's pay account as of that date. It was subject to change based on further input by base-level finance officials servicing the appellant's unit. DFAS regulations in effect at the time of the appellant's separation on 3 March 2004 required that base-level finance officials manually calculate the appellant's separation pay before DFAS could disburse it. The manual calculation was required to take into account items such as the member's basic pay and allowances, the amount of any special pay and allowances due, and the amount of any unused leave to be sold back. It was also required to account for any outstanding debts known to base-level officials that would not be visible to DFAS. Within the appellant's servicing finance office, a pay technician was responsible for conducting the required manual calculations for any member separating from the Air Force. The result then had to be reviewed by the NCOIC of the military pay section and quality checked by still a third individual before being entered into the DFAS pay system. Only after all of these steps were complete was DFAS authorized to disburse the pay.

Base-level officials had a 20-day window to complete their manual calculations and enter the results into the DFAS system. Although the base-level pay actions were supposed to be completed prior to a member's separation, that did not always occur. Depending on workload in the finance office, completion of the required calculations often extended beyond a member's effective separation date.

On 24 February 2004, the appellant provided the finance office with all the information needed to calculate his final separation pay. However, the finance technician responsible for making the required calculations did not complete them at that time. Further, the required manual calculations had not been completed, or even started, when the appellant was issued a DD Form 214 on 3 March 2004 or when the appellant's acting squadron commander initiated action on 5 March 2004 to revoke the discharge certificate. The information provided by the appellant was on the desk of the finance technician waiting to be worked and remained there until retrieved by the NCOIC of the pay section, who halted the payment process. As a result, no final calculations were ever entered into the DFAS pay system and DFAS could not and did not issue separation pay to the appellant. Under these circumstances, neither the appellant's "final pay" nor a "substantial part of that pay" were ready for delivery within the meaning of 10 U.S.C. § 1168(a). Accordingly, there was no final accounting of pay. Absent a final accounting of pay, the appellant's early discharge was not legally effectuated and he remained subject to military court-martial jurisdiction.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. §866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

Senior Judge ORR participated in this decision prior to his reassignment.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court