UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2013-23**
Respondent	)	
	)	
v.	)	
	)	**ORDER**
Technical Sergeant (E-6)	)	
DOUGLAS A. TORO	)	
USAF,	)	
Petitioner	)	**Panel No. 2**

Petitioner, an Air Force reservist, has been charged with offenses under the Uniform Code of Military Justice (UCMJ). Following a pretrial hearing under Article 39, UCMJ, 10 U.S.C. § 839, trial is scheduled to commence on 4 November 2013.

In the pretrial hearing, Petitioner unsuccessfully moved to have all charges and specifications dismissed with prejudice, alleging that the Government lacked subject matter jurisdiction over Petitioner's case. In the alternative, he moved for the dismissal of all charges and specifications without prejudice, alleging that the Government lacked personal jurisdiction in the case. The military judge denied the motion, finding that jurisdiction existed. Petitioner now seeks an order staying the proceedings in this case, along with a "Writ of Mandamus or in the Alternative Prohibition Ordering the Military Judge to Dismiss all Charges and Specifications with or without prejudice as appropriate."

Petitioner alleges that the court-martial lacks jurisdiction in this case for a number of reasons, including: (1) Petitioner was validly discharged from the military via a Department of Defense (DD) Form 214, *Certificate of Release or Discharge from Active Duty*, and had completed his military service obligation; (2) The Government cited 10 U.S.C. § 12301(d) as the basis for its authority to recall Petitioner to active duty for the purpose of the court-martial, and Petitioner did not consent to his recall, as required by the statute; (3) Petitioner did not receive the notice required by 10 U.S.C. § 12301(d) before being recalled to active duty; 4) The orders recalling Petitioner to active duty were not properly served upon Petitioner; and 5) No evidence has been presented that officials who signed the orders "for the commander" had been delegated authority to do so.

The All Writs Act, 28 U.S.C. § 1651(a) (2006), authorizes "all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This Court, like Article

III tribunals, is empowered to issue extraordinary writs under the All Writs Act. *Denedo v. United States*, 556 U.S. 904, 911 (2009). The Supreme Court has held that three conditions must be met before a court may provide extraordinary relief in the form of a writ of mandamus: (1) the party seeking the writ must have "no other adequate means to attain the relief"; (2) the party seeking the relief must show that the "right to issuance of the relief is clear and indisputable"; and (3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380–81 (2004) (internal quotation marks omitted).

A writ of mandamus is "a drastic remedy to be used sparingly." *Morgan v. Mahoney*, 50 M.J. 633, 634 (A.F. Ct. Crim. App. 1999) (citing *Will v. United States*, 389 U.S. 90, 95 (1967)). "To justify reversal of a discretionary decision by mandamus, we must be satisfied that the military judge's decision amounted 'to a judicial usurpation of power or be characteristic of an erroneous practice which is likely to recur.'" *Id.* (quoting *Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983)). It is appropriate to consider the merits of a petition in three instances: (1) where the petitioner develops substantial arguments denying the right of the military to try him; (2) where prompt review will conserve time, energy, cost, and the ordeal of a trial; and (3) where the issues to be resolved are recurrent and will inevitably be faced by appellate courts in many future cases. *Id.* (citing *Murray*, 16 M.J. at 76-77).

We conclude that it is appropriate to consider the merits of Petitioner's arguments. Having done so, we hold that Petitioner is not entitled to the relief requested.

First, we reject Petitioner's claim that he has been validly discharged from the military and has completed his military service obligation. The DD Form 214 issued to Petitioner on 2 February 2011 came at the end of an extended active duty tour Petitioner performed. The form specifically lists the "type of separation" as "release from active duty" and notes that he maintained a reserve obligation service date of 15 April 2015. Petitioner applied for retirement before charges were preferred in this case, but he testified in motion practice that the retirement application was rejected, meaning he remains a member of a reserve component. Rule for Courts-Martial (R.C.M.) 204(d) addresses Petitioner's situation: "A member of a reserve component at the time disciplinary action is initiated, who is alleged to have committed an offense while on active duty or inactive-duty training, is subject to court-martial jurisdiction without regard to any change between active and reserve service or within different categories of reserve service subsequent to commission of the offense."

Petitioner next alleges that the Government improperly cited 10 U.S.C. § 12301(d) as the basis for his recall to active duty for the purposes of preferral, the Article 32, 10 U.S.C. § 832, investigation, and referral, and therefore the court-martial lacked personal jurisdiction over him. Article 2(d)(1), UCMJ, 10 U.S.C. § 802(d)(1),

provides that a member of a reserve component who is not on active duty may be involuntarily ordered to active duty for the purpose of an Article 32, UCMJ, investigation and court-martial. Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 2.4.9 (6 June 2013), states that a General Court-Martial Convening Authority (GCMCA) may order to active duty a reserve member who performed duty under the convening authority's command at the time of the offenses. AFI 51-201, ¶ 2.9.2, states that once jurisdiction attaches to the reserve member, he or she may either be retained on active duty pending disposition of offenses, or be released to reserve status and recalled as necessary for preferral of charges, pretrial investigation, and trial by court-martial.

The GCMCA properly ordered Petitioner's recall to active duty on 27 March 2013, citing 10 U.S.C. § 802 (Article 2, UCMJ) as his authority. The GCMCA specifically allowed Petitioner to be released to reserve status and recalled as necessary. Under this authority, the GCMCA three times recalled Petitioner through the Special Court-Martial Convening Authority (SPCMCA) for the purposes of preferral, Article 32, UCMJ, investigation, and referral, each time citing 10 U.S.C. § 802 as his authority. However, the orders promulgated by Air Force Reserve Command cited 10 U.S.C. § 12301(d) in one block as the authority for the orders. That statute requires the member's consent in order to effectuate the recall to active duty.[1] Another block properly cited 10 U.S.C. § 802 as the authority for each order. Each of the three promulgating orders was preceded by a written order from either the GCMCA or the SPCMCA recalling Petitioner, citing 10 U.S.C. § 802 as the authority. Finally, on 26 July 2013, the Acting Secretary of the Air Force approved Petitioner's recall, authorizing all past and future recalls and citing Article 2(d)(5), UCMJ, as his authority.[2]

We find no basis for extraordinary relief in this situation. The military judge reasonably concluded that Petitioner was properly ordered to active duty pursuant to 10 U.S.C. § 802(d), despite the incorrect references to 10 U.S.C. § 12301(d) in one block on each of the three promulgating orders. We are unwilling to hold that an apparently administrative mistake in one location of a promulgating order carrying out the otherwise clear intent of Air Force officials to properly recall Petitioner to active duty warrants the extraordinary relief Petitioner seeks. *Cf. United States v. Adams*, 66 M.J. 255 (C.A.A.F. 2008) (distinguishing between administrative and jurisdictional errors and finding no prejudicial error from administrative errors in the drafting of convening orders where convening authority's intent was apparent).

Petitioner's remaining issues are partially tied to his claim that the Government

[1] 10 U.S.C. § 12301(d) states, in relevant part: "At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member."

[2] Article 2(d)(5), UCMJ, 10 U.S.C. § 802 (d)(5), states that a member ordered to active duty under Article 2(d)(1) may not be sentenced to confinement or be required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive-duty training or active duty, unless the order to active duty was approved by the Secretary concerned.

cited the wrong statutory provision in ordering him to active duty. We have examined these issues, and find no basis for the extraordinary relief requested. As such, we conclude the matter is not appropriate for issuance of a writ of mandamus or other extraordinary relief.

Accordingly, it is by the Court on this 2nd day of October, 2013,

ORDERED:

That the Petition for Extraordinary Relief is **DENIED** without prejudice to Petitioner's right to raise these matters in the normal course of review under the UCMJ.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court