31 December 2014

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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**UNITED STATES,**
Appellee,

v.

**KIRKLAND C. NETTLES,**
Captain (0-3), USAF
Appellant.

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Crim. App. No. 38336
USCA Dkt. No. 14-0754/AF

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***GRANT BRIEF ON BEHALF OF APPELLANT***

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| **UNITED STATES**<br>*Appellee,*<br>v.<br><br>Captain (0-3)<br>**KIRKLAND C. NETTLES,**<br>USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **GRANT BRIEF ON BEHALF OF APPELLANT**<br><br>USCA Dkt. No. 14-0754/AF<br><br>Crim. App. Dkt. No. 38336 |

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

## Issue Granted

**WHETHER THE AIR FORCE HAD PERSONAL JURISDICTION OVER APPELLANT AT THE TIME OF HIS TRIAL.**

## Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c). This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

## Statement of the Case

On 19 October 2012, Appellant was arraigned on the charges and specifications listed below. On 28 January – 2 February 2013, he was tried by a general court-martial composed of officer members at Maxwell Air Force Base, Alabama. The charges and specifications he was arraigned on, his pleas, and findings of the court-martial were as follows (JA 11-14):

| Chg | Art | Spc | Summary of Offense | P | F |
|---|---|---|---|---|---|
| I | 81 | | | NG | G |
| | | 1 | Did, a/n Jacksonville, Florida, btw o/a 8 May 07 and o/a 20 May 07, conspire with Lt Col Coburn to commit an offense under the UCMJ, to wit: rape MS, and in order to effect the object of the conspiracy the Appellant did remove MS's clothing. | NG | NG |
| | | 2 | Did, a/n Jacksonville, Florida, btw o/a 8 May 07 and o/a 20 May 07, conspire with Lt Col Coburn to commit an offense under the UCMJ, to wit: wrongfully commit an indecent act with MS by engaging in sexual intercourse in the presence of a third person, which conduct was of a nature to bring discredit upon the armed forces, and in order to effect the object of the conspiracy the Appellant did remove MS's clothing. | NG | G |
| | | 3 | Did, a/n Jacksonville, Florida, btw o/a 8 May 07 and o/a 20 May 07, conspire with Lt Col Coburn to commit an offense under the UCMJ, to wit: wrongfully commit an indecent act with WMM by engaging in sexual intercourse and oral sodomy in the presence of a third person, which conduct was of a nature to bring discredit upon the armed forces, and in order to effect the object of the conspiracy the Appellant touched WMM with his hands on her body. | NG | G |
| II | 120 | | Did, a/n Jacksonville, Florida, btw o/a 11 May 07 and o/a 20 May 07, rape MS. | NG | NG |
| III | 128 | | Did, a/n Jacksonville, Florida, btw o/a 11 May 07 and o/a 20 May 07, unlawfully remove MS's clothing. | NG | NG |
| IV | 133 | | | NG | G |
| | | 1 | Did, a/n Jacksonville, Florida, btw o/a 11 May 07 and o/a 20 May 07, wrongfully commit an indecent act with MS by engaging in sexual intercourse with MS in the presence of another person, which conduct was unbecoming an officer and gentleman. | NG | G |
| | | 2 | Did, a/n Jacksonville, Florida, btw o/a 11 May 07 and o/a 20 May 07, wrongfully commit an indecent act with WMM by engaging in | NG | G |

| | | | | | |
|---|---|---|---|---|---|
| | | | sexual intercourse and oral sodomy with MS in the presence of another person, which conduct was unbecoming an officer and gentleman. | | |
| | | 3 | Did, a/n Jacksonville, Florida, btw o/a 11 May 07 and o/a 20 May 07, willfully and wrongfully confine and hold MS, against her will, which conduct was unbecoming an officer and gentleman. | NG | NG |

Appellant was sentenced to a dismissal, two months of confinement, and a reprimand. JA 187-89. The convening authority approved the sentence as adjudged. JA 182-86.

On 21 April 2014, the Air Force Court affirmed the approved findings and sentence. JA 1-9. On 3 December 2014 this Court granted Appellant's petition to review whether the Air Force had personal jurisdiction over him at the time of his trial.

**Statement of Facts**

Appellant served in the Alabama Air National Guard from September 1992 until September 1998 and between September 1999 and May 2000. JA 62. He served on active duty in the United States Air Force from September 2001 until August 2007, at which time he entered the United States Air Force Reserves, where he served until March 2011. *Id*. In March 2011, Appellant was placed in the inactive ready reserves. *Id*. On 14 March 2012, the Air Force Reserve Personnel Center (ARPC) notified Appellant he had been twice passed over for promotion, and as a result, his mandatory separation date was set for 1 October 2012. *Id*; *see also* JA 34.

On 8 May 2012, the charges referenced above (and others) were preferred against Appellant. JA 11. Instead of activating Appellant for the duration of the court-martial process, the government chose to activate him as necessary, and accordingly, activated him in May 2012 for preferral, in July 2012 for his Article 32 hearing, in October 2012 for arraignment, and then again for the actual court-martial. JA 62-63.

On 25 September 2012, Reserve Order (RO) CB-001669 was generated, by direction of the President, honorably discharging Appellant from the United States Air Force, effective 1 October 2012. JA 63, 41. However, the Order and Appellant's DD Form 256 were never mailed to him because ARPC ran out of the card stock they used to print the DD Form 256. JA 63. The government provided defense a copy of the discharge Order on 19 November 2012.[1] JA 43.

Prior to the generation and mailing of Appellant's DD Form 256, but after 1 October 2012, the effective date of RO CB-001669, the legal office contacted ARPC and asked them to take steps to retain Appellant. JA 63. Accordingly, on 8 November 2012, ARPC issued RO CB-9, which purported to rescind RO CB-001669, and Appellant was thereafter placed on administrative

[1] In the original petition brief, counsel incorrectly stated that ARPC sent the discharge Order to Appellant. Further review of the record makes clear that ARPC did not send the Order or the DD Form 256 to Appellant. Of course, Appellant would have received it on 19 November 2012, when it was provided to his counsel by the government. As will be argued below, however, receipt of the discharge Order is of minimal relevance.

hold. *Id*. But for RO CB-9, Appellant's DD Form 256 would have been delivered to him.

**Summary of the Argument**

There are four arguments for why the government lacked personal jurisdiction in this case. First, a DD Form 256, unlike a DD Form 214, is not a "discharge certificate" as that term is understood under the law. Rather, it is a ceremonial certificate, suitable for framing, signifying an Honorable service characterization. Thus, receipt of a DD Form 256 is not required to give effect to a discharge from the inactive ready reserves.

Second, delivery of a discharge certificate is not required to give effect to a discharge from the inactive ready reserves, for purposes of jurisdiction, because orders transferring a member to the inactive ready reserves are the equivalent of a discharge certificate. Accordingly, there is no such thing as a "discharge certificate" from the inactive ready reserves. Rather, there is simply an Order releasing one from the inactive ready reserves.

Third, if this Court finds delivery of a DD Form 256 was required, the requirement is inapplicable to this case because RO CB-001669 was a self-executing order that became effective by operation of law on 1 October 2012, and, per RCM 202(1)(B)(i), action taken by the government to rescind RO CB-001669, after

the fact, by publishing order RO CB-9, was untimely and unlawful, and as such, void.

Fourth, if this Court finds delivery of a DD Form 256 was required, under the specific facts of this case, and in accordance with 10 U.S.C. § 1168(a), Appellant's DD Form 256 was in fact "ready for delivery," as required by statute, on 1 October 2012.

## Argument

### THE AIR FORCE DID NOT HAVE PERSONAL JURISDICTION OVER APPELLANT AT THE TIME OF HIS TRIAL.

*Standard of Review*

Questions of personal jurisdiction are questions of law the court reviews *de novo*. *United States v. Fry*, 70 M.J. 465 (C.A.A.F. 2012).

*Law & Analysis*

"It 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). Courts-martial may try any person when authorized to do so by the code. Rule for Courts-Martial (RCM) 202(a). Normally, all active duty members are subject to jurisdiction, and only the delivery of a valid discharge certificate terminates court-martial jurisdiction. RCM 202(a), Discussion (1)(B). However,

"[o]rders transferring a person to the inactive reserve are the equivalent of a discharge certificate for purposes of jurisdiction." RCM 202(a), Discussion (2). Although the government may hold someone past their scheduled time of separation, the action must be "initiated before discharge or **the effective terminal date of self-executing orders."** RCM 202(a), Discussion (1)(B)(i) (emphasis added).

Self-executing orders are those that "by their own terms automatically become effective on the specified effective date without any further action being required." *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006) (citing *United States v. Smith,* 4 M.J. 265, 266 n.3 (C.M.A. 1978)). A pretrial discharge terminates court-martial jurisdiction over an accused. *Smith v. Vanderbush*, 47 M.J. 56, 59 (C.A.A.F. 1997).

10 U.S.C. § 14505 states that a Captain in the reserve component of all services who has been passed over twice for promotion will automatically be discharged from military service in accordance with 10 U.S.C. § 14513. Discharge is mandatory under 10 U.S.C. § 14513 unless the discharge is delayed under some other provision of the law. Air Force Instruction (AFI) 33-328, *Administrative Orders*, 16 January 2007, allows published orders to be rescinded, amended, and/or revoked. *See* paragraph 3.2. Normally only the organization that published the orders may take such actions (paragraph 3.3), orders are rescinded when

no longer needed (paragraph 3.5), and orders may only be revoked prior to their taking effect (paragraph 3.6.). Orders go into effect on the date they are effective. *Id*. at p. 20.

In accordance with AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Reserve Members*, dated 14 April 2004, incorporating changes through 20 September 2011, at paragraph 1.5.2:

> Orders directing separation or discharge become effective at 2400 on the date specified if the member receives actual or constructive notice on or before the effective date specified in the orders. If a member intentionally avoids receipt of the notice or if the delivery cannot be made through normal postal channels, the effective date specified in the orders will be considered to be the date official notification was received. A member continues to be a member until the discharge becomes effective.

**A. A DD Form 256 is not a discharge certificate**

The military judge cited *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989) for the proposition that in order for Appellant to have been validly discharged his DD Form 256 had to be delivered to him. JA 65. Since it was not delivered, his discharge was not effective. The military judge failed to take into account the crucial distinction between an active duty member and a member of the inactive ready reserves, along with the distinction between a DD Form 214 and a DD Form 256.

The discharge Order that was generated (RO CB-001669), discharging Appellant from the inactive ready reserves, stated

he would receive a DD Form 256, as opposed to a DD Form 214. A DD Form 256 is not a release or discharge from active duty certificate. Rather, a DD Form 256 is a ceremonial certificate signifying an Honorable service characterization, suitable for framing (which is why ARPC needed proper card stock prior to sending the certificate to Appellant). JA 75. A DD Form 214 is a certificate of release/discharge from active duty. Appellant would have already received his DD Form 214 when he was placed in the inactive ready reserves, and would receive the DD Form 256 once he was released from the inactive ready reserves, simply as a certificate showing his Honorable service characterization. *See* 32 CFR 45, 54 FR 7409 (1989).

**B. Appellant was not required to receive his DD Form 256 to effect his separation.**

The requirement for delivery of a discharge certificate, along with an accounting of final pay and out-processing, was established in *King*, which set forth the requirements based on 10 U.S.C. § 1168(a). However, by its plain language, 10 U.S.C. § 1168(a) applies to members being discharged or released from active duty, not the inactive ready reserves. Again, the government did not activate Appellant from the inactive ready reserves onto active duty for the duration of his investigation and court-martial. Rather, they activated him piecemeal, as

needed. JA 62-63. Thus, once he went off orders, he reverted back to being a member of the inactive ready reserves.

The Manual for Courts-Martial addresses this issue directly. RCM 202(a), Discussion (2) says that delivery of a discharge certificate for members of the inactive ready reserves is not required because orders transferring a member to the inactive reserves are the equivalent of a discharge certificate. AFI 36-3209 also states delivery of a discharge certificate is not necessary when it states categorically that a discharge for a reservist is effective at 2400 hours on the date of the discharge order. This makes sense, as members of the inactive ready reserves have already been discharged from active duty.

AFI 36-3209 states that members of the reserves do not even have to receive their discharge Order to give effect to their discharge. It states, at paragraph 1.5.2, "if the delivery cannot be made through normal postal channels, the effective date specified in the orders will be considered to be the date official notification was received." Thus, in accordance with AFI 36-3209, the effective date of Appellant's discharge was 1 October 2012, which is consistent with RCM 202.

There is no case law, rules or regulations, or statutes requiring members of the inactive ready reserves to receive a DD Form 256, or even discharge Orders, in order to give full effect to their discharge. In accordance with RCM 202(a), Discussion

(2), Appellant's orders transferring him to the inactive ready reserves were the equivalent of a discharge certificate for purposes of jurisdiction, and the self-executing discharge Order, relieving him from the inactive ready reserves, took effect on 1 October 2012, at which time jurisdiction was lost. Receipt of a ceremonial DD Form 256 was irrelevant.

**C. The government failed to timely stop Appellant's self-executing discharge order.**

Even if the Court finds receipt of a DD Form 256 was required to give effect to the discharge Order, it was inapplicable in this case because the only reason Appellant's DD Form 256 was not delivered was because the government unlawfully interfered with the delivery of his DD Form 256. The order by the President of the United States, published as RO CB-001669, discharging Appellant from the inactive ready reserves for failure to promote, effective 1 October 2012, was a self-executing order that became effective, by operation of law, on 1 October 2012.

There was absolutely nothing that needed to be done to give effect to this order—it became effective by statute, by operation of law, on 1 October 2012. The government took steps, after 1 October 2012, to invalidate this Order, in an attempt to secure jurisdiction over Appellant and proceed with the court-martial. They did this by having ARPC publish RO CB-9, on 8

November, which purported to rescind RO CB-001669. The reason the government chose the option to "rescind" the order as opposed to "revoke" the order was because AFI 33-328 specifically forbid revoking orders once they became effective (para 3.6).

AFI 33-328, however, does not say whether you may rescind orders after they become effective, but any fair reading of the Instruction indicates that the mechanism of rescission was not intend to apply to discharge orders. Rather, rescission was meant to apply to things like travel orders, which can be rescinded whenever no longer needed. Here, Appellant's discharge order was not only still needed but more than that was required by law. Thus, rescission of the order, after it became effective, was an inappropriate and unlawful action that had no legal effect.

Appellant's discharge Order, releasing him from the inactive ready reserves, was generated on 25 September 2012, it was a self-executing order, with an effective date of 1 October 2012. Prior to 1 October 2012, no action was taken to delay or modify the order. Therefore, in accordance with AFI 36-3209 and RCM 202, it went into effect on 1 October 2012 and could not be revoked or rescinded.

The government, the military judge, and the Air Force Court took the position that since Appellant never received his

ceremonial DD Form 256 (delivery) that allowed the government to go back in time and make changes to RO CB-001669, which they did on 8 November 2012, by publishing RO CB-9, which rescinded RO CB-001669. First, Appellant contends this action is impossible. You cannot rescind a self-executing, final order after the effective date. Second, for purposes of the validity and effective date of the discharge Order, the delivery of the discharge certificate to the Appellant is irrelevant and has no bearing on the discharge Order. On 1 October 2012, the discharge Order was effective, and it could not be altered, and at that point, the government did not have any option other than to deliver Appellant's DD Form 256. RCM 202(1)(B)(i). The only reason Appellant did not receive his DD Form 256 was because the government unlawfully stopped that from happening by publishing RO CB-9, to rescind Appellant's already executed and effective discharge Order.

**D. In accordance with 10 U.S.C. § 1168(a), Appellant's DD Form 256 was "ready for delivery"**

In the alternative, Appellant invites this Court to re-evaluate its interpretation of 10 U.S.C. § 1168(a), at least as it applies to members of the inactive ready reserve, and as it applies to DD Form 256s, verses DD Form 214s. DD Form 256s are not discharge certificates, as that term was envisioned by 10 U.S.C. § 1168(a). Moreover, 10 U.S.C. § 1168(a) does not say

the discharge certificate must be delivered. Rather, it says it must be "ready" for delivery. Appellant submits in this case his DD Form 256 was ready for delivery. All the legal and administrative paperwork required to generate the DD Form 256 was accomplished and no action was taken prior to the effective date of his discharge to delay his discharge. But for a clerical issue related to a short supply of the appropriate card stock for printing the DD Form 256, it would have been done.

"Ready for delivery" under 10 U.S.C. § 1168(a) simply means that all the legal and official administrative matters required to be accomplished to "authorize" delivery of the certificate is what is meant by "ready for delivery" under 10 U.S.C. § 1168(a). That is a simple and straightforward reading of the plain language of the statue that would result in consistent and clearly application of the law.

**Conclusion**

Appellant was not required to receive his DD Form 256 to give effect to his discharge because a DD Form 256 is not a discharge certificate or even the equivalent of a discharge certificate. Moreover, in accordance with AFI 36-3209, Appellant was not even required to receive his discharge Order in order to give effect to his discharge. To the extent receipt of a DD Form 256 was required, it is inapplicable in this case because the only reason Appellant did not receive his DD Form

256 was because of the unlawful actions of the government, in their attempt to go back in time and alter the self-executing Order discharging Appellant from the inactive ready reserves. Finally, to the extent 10 U.S.C. § 1168(a) is applicable, Appellant's DD Form 256 was, as required by the statute, "ready for delivery."

Respectfully Submitted,

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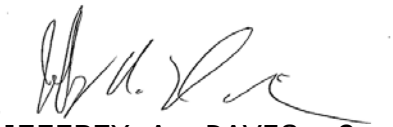
**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 31 December 2014.



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