IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Captain (O-3)
KIRKLAND C. NETTLES,
UNITED STATES AIR FORCE,
Appellant.

Crim. App. No. 38336

USCA Dkt. No. 14-0754/AF

Appellant’s Reply Brief

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9 February 2015

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UNITED STATES, Appellee	)	APPELLANT'S REPLY BRIEF
v.	)	Crim. App. No. 38336
CAPTAIN (O-3) **KIRKLAND C. NETTLES,** United States Air Force, Appellant.	)	USCA Dkt. No. 14-0754/AF

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

COMES NOW Appellant, pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, and replies to the Government's brief, which was filed on 30 January 2015.

Argument

Although there are some points of law Appellant does not concede (discussed briefly below), based on the Court's personal jurisdiction jurisprudence, it appears the central issue in this case is whether or not the government validly rescinded Appellant's discharge.

Law Not Conceded

This Court has held that a valid discharge requires (1) delivery of a discharge certificate, (2) final account of pay, and (3) completion of out-processing. *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989). The *King* Court did not invent

these requirements from whole cloth. Rather, the Court found these elements were required because Congress mandated as such in 10 U.S.C. § 1168(a). That statute states "[a] member of an armed force may not be discharged or released from active duty until…." By its own terms and its plain meaning, the statute applies only to members separating from active duty, not members separated from any other component of the Armed Forces.

Appellant had been discharged from active duty in August 2007, at which time he was provided with his DD Form 214, discharge certificate, and presumably at that time, also completed all the other requirements of 10 U.S.C. § 1168(a). JA 30. At the time the President of the United States ordered Appellant separated (JA 41), he was not a member of the active duty component and he was not being separated from active duty. As such, both 10 U.S.C. § 1168(a) and *King* are inapplicable.

In the absence of mandatory guidance from Congress, Air Force Regulations should control. Air Force Instruction (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, is directly on point:

> 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.

The 12 March 2012 letter Appellant received notified him that effective 1 October 2012 he would be discharged from the reserves. Thus, in accordance with the AFI cited above, Appellant's discharge was effective 1 October 2012 and receipt of his DD Form 256 is not dispositive.

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. 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.

As a final argument, Appellant would focus on the language from *King*, explaining that the requirements of delivery, final accounting of pay, and discharge processing apply to "early" discharges. *King*, 27 M.J. at 329. Appellant would concede that factually speaking, his discharge was early, from the perspective that it was prior to the natural expiration of his reserve commitment. However, Appellant's discharge was not legally early because his discharge was required by law, by federal statute, by Order of the President, and initiated by the Government. The Court has never explicitly explained what the

term “early” meant for discharge purposes, but in almost all the cases cited by the government, the Appellant’s were themselves attempting to separate from the service prior to the expiration of their term of service, as opposed to being forced to separate early in accordance with the law.

The Central Issue: Rescinding Appellant’s Discharge

The Court has consistently held the Services may choose to regulate discharge processing as they see fit and this Court will give effect to the plain language and meaning of said Service regulations. *United States v. Watson*, 69 M.J. 415, 420-21 (C.A.A.F. 2011) (citations omitted). In *Watson*, the Appellant was sentenced to a dismissal at a general court-martial, and while her case was pending appellate review, she was placed in the Reserves. *Id*. at 416. At some point prior to completion of the Appellate process and the execution of her dismissal, Appellant was discharged from the Army with an honorable service characterization. *Id*.

As a result, before the Army Court of Criminal Appeals (Army CCA), Watson sought to preclude enforcement/execution of her dismissal, since prior to its execution, she was honorably discharged. *Id*. Upon the filing of this issue with the Army CCA, the Army took steps to revoke Watson’s honorable discharge, place her back in the Reserves, and continue processing her case, with the intent of executing the dismissal at the end of

Appellate proceedings. *Id*. The Army CCA took no issue with these actions, and denied her assignment of error relating to the revocation of her honorable discharge. *Watson*, 69 M.J. at 416. This Court overturned the Army CCA, holding that the Army, pursuant to its own regulations, did not have the authority to revoke the honorable discharge. *Id*. at 419-21.

The main focus of the Court's opinion in *Watson* was two-fold: (1) Pursuant to Army regulations, was Watson's honorable discharge validly issued, and (2) if it was, did the Army, pursuant to its regulations, have the authority to revoke the honorable discharge. *Id*. The Court held, based on a *de novo* review of the meaning of the Army regulations, that the discharge certificate was validly issued in accordance with Army regulations and the Army had no authority on which to revoke it. *Id*. at 420-21. No member of the Court considered the fact that Watson had received the discharge certificate to be case dispositive or even the primary relevant issue. The issue presented in this case is similar, and the Court's analysis should be similar as well.

Setting aside that *Watson* dealt with post-trial jurisdiction to execute a dismissal, the central difference between *Watson* and Appellant's case is that Watson received her discharge certificate, whereas Appellant did not receive his DD Form 256. Receipt of the discharge certificate, however, is a

red herring to the more fundamental analysis. The central question in Appellant's case is the same as in *Watson*: (1) Was the discharge Order validly issued, and if so, (2) did the Air Force have authority, pursuant to Air Force regulations, to revoke the Order. Receipt of the DD Form 256 is a red herring because if the discharge Order was validly issued, and the Air Force did not have authority to revoke it once it was published, then Appellant failed to receive his DD Form 256 because of unlawful actions by the Air Force, and but for the unlawful actions, he would have received his DD Form 256.

The validity of Appellant's discharge Order seems to be beyond dispute. 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. Appellant met the requirement of § 14505, and in accordance with § 14513, he was processed for mandatory separation.

On 14 March 2012, Appellant received notice by mail that he would be discharged in accordance with § 14505, and his mandatory separation date would be 1 October 2012. JA 34, 62. On 25 September 2012, Reserve Order CB-001669 was published, which discharged Appellant from the United States Air Force by

the Direction of the President, effective 1 October 2012. JA 41. No action was taken prior to 1 October 2012 to revoke or rescind the Order, and accordingly, at 2400 hours on 1 October 2012, the Order took effect, and as of 1 October 2012, Appellant was discharged from the Air Force.

Due to the unavailability of card stock for printing Appellant's DD Form 256, delivery of his DD Form 256 was delayed. JA 63. During this delay, the legal office contacted ARPC and asked them to take steps to revoke Appellant's discharge. JA 43. ARPC complied with this request by issuing Reserve Order CB-001669 on 8 November 2012, which purported to Rescind Appellant's discharge Order, which was published on 25 September 2012, effective 1 October 2012. JA 63.

The AFI dealing with the issuance of Orders is AFI 33-328, *Administrative Orders*, 16 January 2007. AFI 33-328 gives the option to amend, rescind, and revoke Orders:

> **3.4. When to Amend an Order.** Publish an amendment to add, delete, or change pertinent data to read as originally intended. Functional OPRs for specific order instructions will provide specific instructions and guidance on when their orders will be amended, and when an amendment is inappropriate.
>
> **3.5. When to Rescind an Order.** Rescind an order when it is no longer needed; for example, if an individual has blanket or repeated travel orders but now has a change in duty assignment.
>
> **3.6. When to Revoke an Order.** Revoke an order before it goes into effect or before any funds are expended.

AFI 33-328 gives the following additional information:

> **3.7.3.** When an order is revoked, it no longer exists as an official document. A rescinded order is still an official document, although it can no longer be used. Do not revoke a revocation or rescission; publish a new order.

The government obviously chose the option to "rescind" the order as opposed to "revoking" the order because AFI 33-328 specifically forbid revoking orders once they became effective (para 3.6).

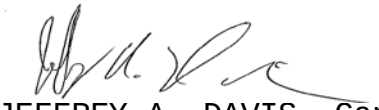
AFI 33-328, however, does not say whether you may rescind orders after they become effective, but any fair reading of the Instruction indicates that the mechanism of rescission was not intend to apply to discharge orders. Rather, rescission was meant to apply to things like travel orders, which can be 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.[1]

It is important to note that at the time Appellant's discharge Order was published, 25 September 2012, and effective 1 October 2012, Appellant was not on active duty. Although the government issued a special order, authorizing Appellant to be

[1] *See generally United States v. Christian*, 22 C.M.R. 780 (Air Force Board of Review, June 28, 1956).

recalled to Active Duty, the order did not recall him, but rather, simply gave his command the authority to recall him and release him, as they saw fit. JA 40. Appellant was only recalled four times: in May 2012 for preferral, in July 2012 for his Article 32 hearing, on 19 October 2012 for arraignment, and then finally in January 2013 for his trial. JA 62. Thus, at the time his discharge Order became effective, he was not on active duty.

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 9 February 2015.

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