IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Private First Class (E-3) **CHRISTOPHER CHRISTENSEN** United States Army, Appellant	)	Crim. App. Dkt. No. 20140372
	)	USCA Dkt. No. 17-0604/AR

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Granted Issue:

WHETHER APPELLANT WAS SUBJECT TO COURT-MARTIAL JURISDICTION.

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

Granted Issue

WHETHER APPELLANT WAS SUBJECT TO COURT-MARTIAL JURISDICTION.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b) [hereinafter UCMJ]. The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ.

Statement of the Case

On May 9, 2014, a military judge sitting as a general court-martial, convicted appellant, contrary to his pleas, of sexual assault in violation of Article 120, UCMJ (2012). (JA 162). The military judge sentenced appellant to reduction

to the grade of E-1, total forfeitures, eight years confinement, and a dishonorable discharge. (JA 165). The convening authority credited appellant with ninety days of confinement credit under Article 13, UCMJ. (JA 163-165). The convening authority approved the sentence as adjudged. (JA 2).

On September 15, 2016, the Army Court of Criminal Appeals ordered a *DuBay* hearing to develop facts relevant to the Army's personal jurisdiction over appellant. (JA 502-04). After the hearing, the *DuBay* military judge made several pertinent findings of fact in a ruling on December 15, 2016. (JA 734-41).

On June 15, 2017, the Army Court affirmed the findings and sentence, adopting the findings of fact made by the *DuBay* military judge. (JA 1-9). Appellant filed a request for reconsideration with the Army Court, which was granted. (JA 10). On July 31, 2017, the Army Court again affirmed the findings and sentence. (JA 11-12). Appellant petitioned this Court for review on September 25, 2017. This Court granted appellant's petition on January 16, 2018.

Statement of Facts

The Government adopts the findings of fact made by the military judge, as amended by the *DuBay* military judge, and adopted by the Army Court. (JA 307-308; JA 734-736; JA 5).[1] "There is no dispute between the parties . . . that

[1] The military judge's findings of fact are found on JA 307-308. The *DuBay* military judge's adoption of and amendments to those findings appear at JA 734-738. The Army court's adoption of the *DuBay* military judge's findings appears at JA 5. Because appellant asserts that the

Appellant received his discharge certificate in the form of a DD 214 and that he underwent a sufficient 'clearing process.' The issue that was, and remains, in contention is the element requiring final accounting of pay." (JA 738). The findings of fact adopted by the Army Court and additional facts relevant to appellant's final pay and accounting are as follows:

1. Appellant's expiration of term of service [hereinafter ETS] date was January 9, 2015 at all times before and during his court-martial (JA 231).

2. On March 6, 2013, First Lieutenant (1LT) FR initiated an involuntary separation action against appellant under Army Regulation 635-200, Chapter 9 for Alcohol or Other Drug Abuse Rehabilitation Failure. (JA 527-28). This separation would have resulted in appellant's early discharge, prior to his ETS.

3. On March 8, 2013, appellant's duty status was changed from "present for duty" to "CCA (Civilian Confinement)" after he was arrested by law enforcement officials of Liberty County, Georgia. (JA 532; JA 75). On March 27, 2013, the

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conclusions of "the trial judge, *DuBay* judge, and Army court" are "clearly erroneous findings and flawed conclusions," (Appellant's Br. 28 n.10, 40), the facts in this brief cite to the sources of those findings, rather than to the opinions of the military judge, *DuBay* military judge, and the Army court. This court did not grant appellant's petition for review of the issue of the military judge's findings of fact. However, should this court readdress the military judge's findings of fact, it is notable that the Army court found, "While appellant argues at great length that the *DuBay* military judge's findings are erroneous and contradicted by various items in the record, we find the military judge's findings and conclusions are supported upon a reading of the entire record, especially concerning the key issues surrounding jurisdiction in this case." *United States v. Christensen*, ARMY 20140372, 2017 CCA Lexis 404, at *5, JA 5.

Chapter 9 involuntary separation was approved by the separation authority, LTC MT. (JA 537-538).

4. Sometime in April 2013 during appellant's civilian confinement, a civilian correctional officer turned over appellant's military identification card to SGT MD, a member of appellant's unit. (JA 427). At the *DuBay* hearing, appellant's counsel asked Ms. SD, lead technician of the separation section at the Fort Stewart finance office, "Army regulation requires that upon final pay a Soldier is to surrender their ID card. Isn't that right?" (JA 369). Ms. SD replied, "I have no idea about that. That doesn't have anything to do with finance." (JA 369).

5. On April 17, 2013, Ms. SD received appellant's separation documents including his DD 214, dated April 18, 2013. (JA 86-87, 557). On April 25, 2013, LTC AT, the Fort Stewart Chief, Military Justice, sent an email to Fort Stewart finance personnel to stop appellant's final pay and accounting. (JA 42-43, 674). On May 2, 2013, Ms. SD, received notification to stop processing appellant's final pay. (JA 87, 367).

6. On or about May 15, 2013, LTC JD, appellant's rear detachment battalion commander, made the command decision to halt appellant's Defense Finance and Accounting [hereinafter DFAS] out-processing in order to preserve options for the Army to prosecute the sexual assault allegation. (JA 317-318). This action ratified LTC AT's earlier action of stopping appellant's final

accounting of pay for action by the appropriate convening authority in accordance with the Secretary of Defense's April 20, 2012, withholding policy and the 3rd Infantry Division and Fort Stewart Command Policy Letter No. 04, para. 8b. (JA 43).[2]

7. A soldier may be in non-pay "confinement status" (K status) or "separation status" (T status), but they cannot separate while they are in "K status." (JA 91-92). Until a soldier is in "T status," final pay cannot be ready for delivery. (JA 91). When a soldier is in "K status," the local finance office has to send the soldier's separation documents to DFAS-Indianapolis so that he can be put into "T status" and his final pay can be computed. (JA 86). This process normally takes 45-90 days from the day the local office submits the separation paperwork to DFAS-Indianapolis. (JA 86, 89, 378).

8. An "NT line" is a computer calculation of what a soldier should be receiving based on all pay, entitlements, debts, taxes, allotments and other considerations. (JA 354, 375). A soldier must have an open "NT line" in order for the local finance office to compute his final pay. (JA 373). For soldiers who are not confined, the finance office must change their status to "T status," in order to

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[2] The Secretary of Defense's April 12, 2012 withholding policy withholds disposition authority from "all commanders within the Department of Defense who do not possess at least special court-martial convening authority and who are not in the grade of 0-6," with respect to allegations of rape, sexual assault, forcible sodomy and all attempts to commit those offenses. (JA 291).

compute their final pay based on their open "NT line." (JA 373-375). A soldier remains in "T status" for twenty days while his final pay is computed. (JA 373).

9. Appellant did not have an open "NT line" because he was in a non-pay "K status." (JA 355-356, 373-375). In appellant's case, no person at DFAS-Indianapolis or Fort Stewart conducted a computation for final accounting of pay, nor was the necessary process completed to make his final pay ready for delivery. (JA 87, 91, 357, 371-73).

10. For a Soldier in "K status" to receive final accounting of pay, whether there is money to be paid out or ultimately a debt owed, the following process must occur:

> 1) The soldier, or his representative, attends a group briefing given by the Fort Stewart separation section of finance.
>
> 2) The soldier, or his representative, attends a one-on-one briefing with the same section, where the soldier is given an estimate of what he will receive, but a final accounting of pay is not yet done.
>
> 3) The confined soldier's packet must be sent to DFAS-Indianapolis via the Case Management System for DFAS to take the soldier out of a confined status, "K status," and put in an active status so that the final accounting of pay ca be computed and paid. This process takes on average forty-five days, but it can take as long as ninety days to complete.
>
> 4) The case is transferred back to the Fort Stewart separation section of finance for computation of final pay.

> A finance clerk at Fort Stewart computes the final accounting of pay.
>
> 5) The computation is sent for audit to the military pay and review section to ensure accuracy of the final computation. On average, steps 4 and 5 take approximately one calendar week.
>
> 6) The final accounting of pay is then ready for delivery, and the Fort Stewart separation section of finance disburses any funds due through DFAS.

(JA 85-88, 365-66). Sergeant (SGT) MD completed the first two steps of the finance clearing process on behalf of appellant, who was in civilian incarceration. (JA 75, 101-103, 370-72, 427). During the one-on-one briefing (step 2 above), the local finance office provides an estimate of final pay, but the estimate is not final and may be different from the actual calculation of final pay. (JA 371-372).

11. On June 13, 2013, LTC AT emailed Mr. SK, Chief, Transitions Branch for Human Resources Command, requesting appellant's DD 214 be revoked. (JA 691-92). In July or August of 2013, 1ABCT redeployed from Afghanistan to Fort Stewart, including COL JC, appellant's brigade commander. (JA 141). On September 30, 2013, the Fort Stewart transition office published orders rescinding appellant's discharge orders and DD 214, pursuant to a request from COL JC. (JA 289-90).

12. After the Army Court ordered a *DuBay* hearing to further explore the issue of personal jurisdiction, the *DuBay* military judge determined:

> The Government has again demonstrated by a preponderance of the evidence that the computation necessary to make final pay ready for delivery was never started or completed. This process is not a minor or discretionary element of discharge. Rather, "Congress has spoken as to what constitutes a valid discharge," and final accounting of pay is "an explicit command set forth by Congress in 10 U.S.C. § 1168(a)." *King*, 27 M.J. at 329. Thus, as the law stood in 2014 and remains today, Appellant's early discharge never took effect to deprive the trial court of personal jurisdiction.

(JA 740). The Army court agreed. (JA 1-8).

Summary of Argument

The Army retained jurisdiction over appellant because appellant's final pay, or a substantial part of that pay, was never computed or made ready for delivery to him. This is true despite the fact that appellant owed a debt and was not to receive pay upon the delivery of his final pay and accounting. The case is analogous to *United States v. Hart*, as the plain language of 10 U.S.C. § 1168(a) was not met. Reason and policy do not demand that this case be distinguished from existing jurisprudence.

Standard of Review

This court reviews *de novo* questions concerning personal jurisdiction while "accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record." *United States v. Ali*, 71 M.J. 256, 260 n.7 (C.A.A.F. 2012) (quoting *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000).

When personal jurisdiction is challenged, it must "be decided by the military judge, with the burden placed on the [g]overnment to prove jurisdiction by a preponderance of the evidence." *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002) (citations omitted).

Law and Analysis

Pursuant to Article 2(a)(1), UCMJ, there is court-martial jurisdiction over "[m]embers of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment." 10 U.S.C. § 802(a)(1). Though the UCMJ does not define the point where discharge occurs, since 1985, "this court has turned to 10 U.S.C. § 1168(a). . . to assist in determining whether a discharge has occurred for UCMJ purposes." *United States v. Hart,* 66 M.J. 273, 276 n.4 (C.A.A.F. 2008). The statute states that:

> 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.

10 U.S.C. § 1168(a). This court has interpreted the statute to require three elements be satisfied in order to accomplish a service member's early discharge: (1) "delivery of a valid discharge certificate;" (2) "a final accounting of pay made;" and (3) the undergoing of "the 'clearing' process required under appropriate

service regulations to separate him from military service." *United States v. King*, 27 M.J. 327 (C.M.A. 1989).

The military judge correctly found that appellant "was never finally discharged from active duty service in the Army, as there was never a final accounting of pay." (JA 309). Therefore, the Army retained personal jurisdiction over appellant. (JA 309).

A military judge's findings of fact will be relied on unless they are clearly erroneous or unsupported by the record. *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007). In its *de novo* review of personal jurisdiction, this court should accept the *DuBay* military judge's findings and conclusions as they are supported by a reading of the entire record.

A. Appellant's case is analogous to *Hart.*

In *Hart*, this court held that there had been no final accounting of pay, and thus, appellant "remained subject to the court-martial jurisdiction." 66 M.J. at 277. Appellant's final pay was halted by the installation's legal office within a normal twenty-day window in which the local finance office would manually compute his pay and forward that computation to DFAS for disbursement. *Id.* The court highlighted that there was no evidence that finance was "deliberately trying to slow down the processing of [appellant's] pay," as the halting of his final pay occurred within the normal processing time based on workloads and manning. *Id.*

In the instant case, because appellant was in civilian confinement, the normal processing window for the local finance office had to include the additional step of forwarding the separation documentation to DFAS-Indianapolis so his status could be changed from "K status" to "T status" and his final pay computed. (JA 365-66). That step elongated the normal finance processing window to 45-90 days. (JA 86, 89, 378). The Chief of Justice halted appellant's final pay and accounting on April 25, 2013, just seven days after the date on his discharge paper work and DD 214. (JA 674). The local finance technician who was handling appellant's final pay closed appellant's case on May 2, 2013, fifteen days after the date on his DD 214, well within the normal 45-90 day window. Just as this court found in *Hart*, there is no evidence that either local finance or DFAS-Indianapolis acted to deliberately slow down the processing of appellant's final pay. The local finance office had to send appellant's separation paperwork to DFAS-Indianapolis to have his status changed from "K status" to "T status" before his final pay could be computed. That step is unnecessary for soldiers who are not confined while they are separated. Appellant's final pay took longer to process because of his civilian confinement, but that is true for any soldier separating while confined.[3]

[3] While it would have been prudent for appellant's command to revoke his DD 214 and separation orders sooner than September 30, 2013, their delay in doing so is immaterial to the question of whether appellant's final pay and accounting was ready for delivery to him. The date of the revocation does not affect when the government halted the computation of appellant's final pay. The timing of the revocation order was likely the result of 1ABCT redeploying from

In *Hart*, appellant unsuccessfully argued that "since the finance office had all the information they needed to compute the final pay, the § 1168(a) criteria were satisfied once his 'clearing process' was complete." 66 M.J. at 276. This court rejected that argument, instead holding,

> Only the initial DFAS, 'snap-shot' calculation had been accomplished. As such, critical calculations, reconciliations, and authorizations of final pay pursuant to DFAS regulations had not yet started. The lower court was correct to conclude that DFAS could not have issued separation pay to Hart under these circumstances so neither 'final pay' nor a 'substantial part of that pay' were ready for delivery within the meaning of 10 U.S.C. § 1168(a).

Id. Here, the *DuBay* military judge and the Army court correctly found that only two of the six steps necessary to complete appellant's final accounting of pay were completed before his early separation was halted. (JA 736, JA 8) Therefore, appellant's final pay was not ready for delivery and he was not early discharged. The Army retained personal jurisdiction over appellant.

B. The plain language of 10 U.S.C. § 1168(a) was not satisfied.

Before early discharge, a service member's final accounting of pay or a substantial part of that pay must be made ready for delivery to him. This requirement is not a judicially construed concept, but "an explicit command set

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Afghanistan in the late summer of 2013 and the command team returning and reassuming garrison responsibilities from the Rear Detachment command team. (JA 58, 69).

forth by Congress in 10 U.S.C. § 1168(a)." *King*, 27 M.J. at 329. "[T]he final pay that must be made ready for delivery is a process in which 'critical calculations, reconciliations, and authorizations of final pay pursuant to DFAS regulations' are done to compute accurate payments or debts." (JA 740). It is a multi-step process regardless of whether "an initial 'snapshot' indicates that a separating soldier owes a debt or is due a payment." (JA 740).

Appellant argues that because he owed a debt to the Army, the final accounting of pay element was met because there was no pay to issue. However, the computing of final pay is a process by which a service member settles his finances before departing; it is not simply a final paycheck. Congress requires every service member to go through final pay and accounting before separating so that both that service member and his or her respective service know which party owes money to the other, exactly how much is owed, and why that particular amount is the correct computation. It is immaterial whether that process results in determination of a final payment due a soldier or a computation of an exact debt he owes the Army. In this case, the process did not occur before appellant's separation was halted. This court should not distinguish this case from *Hart* simply because appellant owed a debt. The plain language of the 10 U.S.C. § 1168(a) was not satisfied.

To suggest that soldiers who probably owe a debt upon separation should be released earlier from UCMJ jurisdiction than soldiers who are due a final paycheck is illogical. Such a policy would allow a soldier to determine at his one-on-one briefing, (step two of the six-step finance clearing process) that because the local finance office estimates he likely owes a debt, he is no longer subject to UCMJ jurisdiction. The plain language of 10 U.S.C. § 1168(a) is not satisfied when a service member decides he is finished with the military because he owes a debt.

Appellant also argues that because Army Regulation 635-10, para. 3-13, "Final Pay," dictates that a soldier will surrender his identification card "immediately following final payment," and the appellant surrendered his identification card, his final payment must have been satisfied. (Appellant's Br. 43). This flawed syllogism does not establish that appellant was separated "by order of the Secretary of the Army." (Appellant's Br. 43). Whether it was proper for appellant's unit to collect appellant's identification card from a correctional officer during his confinement is a matter relevant to illegal pretrial punishment pursuant to Article 13, UCMJ.[4] *See* 10 U.S.C. § 813. Appellant's unit improperly collected appellant's identification card before his final pay had even been computed, but that miscommunication and failure to abide by regulation is

[4] Appellant was awarded 90 days of confinement credit for illegal pretrial punishment pursuant to Article 13, UCMJ. The military judge did address the missteps of appellant's command in bringing him back to the unit from an off-post rehabilitation program. (JA 163-165).

immaterial to whether his final pay was made ready for delivery. By the plain language of 10 U.S.C. § 1168(a) and based upon the facts in the record, he remained subject to court-martial jurisdiction.

C. Reason and policy dictate that court-martial jurisdiction over a service member cannot hinge on whether his final accounting is a debt owed or a payment due him.

Appellant argues that even if the plain language of 10 U.S.C. § 1168(a) is satisfied, "reason and policy dictate it is not binding in cases involving debts." (Appellant's Br. 41). Appellant urges this court to find 10 U.S.C. § 1168(a) not binding in his case, just as it did in *United States v. Nettles*. 74 M.J. 289 (C.A.A.F. 2015). This court declined to apply its established discharge jurisprudence in *Nettles* because appellant was a member of the reserve component. *Id.* at 291. "The discharge and delivery jurisprudence that has been created for active duty personnel is of questionable applicability to the reserves, and there are strong reasons for taking a different approach in this context." *Id*. In the context of a reservist who received a self-executing order of his discharge, this court found the requirement of physical delivery of his discharge defied reason. *Id.* at 292. In the instant case, there is no such reason why this court should not be guided by 10 U.S.C. § 1168(a), as it was in *Hart.*

Appellant argues he did not receive "any pay or benefits from the Army for nearly eight months, yet supposedly remained under its jurisdiction," which is "an

inexplicable and unconscionable result." (Appellant's Br. 31). There are difficulties associated with being subject to UCMJ jurisdiction but not in a pay status, but this scenario is not unique to appellant and does not demand that this court ignore 10 U.S.C. § 1168(a). Appellant is not the only soldier whose criminal misconduct has caused himself to be in a non-pay status while still subject to the UCMJ. Deserters and absentees in an absent without leave [hereinafter AWOL] status who return or are apprehended after their ETS are subject to UCMJ jurisdiction but are not entitled to pay. *See* Department of Defense, 7000.14-R, Financial Management Regulation, Volume 7A, Chapter 1, 010402, para. G. Other clear examples are soldiers whose ETS date passes while they are awaiting trial, and those whose ETS date passes while they are confined awaiting trial by court-martial. *Id.* None of those soldiers are eligible to be paid but they are subject to UCMJ jurisdiction and may be even be confined awaiting court-martial, unable to earn money in another capacity. While it was a difficult position in which appellant found himself, it was not an unconscionable result that demands this court abandon its separation jurisprudence.

Appellant cites to a footnote in the dicta of *United States v. Brevard*, which states that "[t]he Army cannot extend court-martial jurisdiction indefinitely simply by not calculating or not paying the soldier's final pay." 57 M.J. 789, 794 n.14 (A. Ct. Crim. App. 2002). The government agrees, but that is not what

occurred in appellant's case. In *Brevard* (like *Nettles*), jurisdiction over the soldier would have terminated due to the soldier's contractual ETS date, which passed before his case was referred to trial. *Id.* at 791. In *Brevard*, the general court-martial convening authority (GCMCA) served a memorandum on appellant which stated, "you are hereby retained beyond your expiration term of service until final disposition of the allegations of misconduct." *Id.*[5] In contrast, when LTC AT directed the Fort Stewart finance office to stop the processing of appellant's pay on April 25, 2013, appellant was not due to ETS until January 9, 2015. (JA 231).

Involuntary discharge under AR 635-200, Chapter 9, was the only reason that appellant was to be separated prior to his ETS date. Jurisdiction was therefore not "indefinitely extended" when the local finance office stopped calculating appellant's final pay. Appellant was not entitled to leave service (and UCMJ jurisdiction) earlier than January 9, 2015. Halting the finance office's final pay computation simply cancelled the command's decision to early discharge appellant.

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[5] Despite the GCCMA's indefinite order extending Brevard past his ETS date, the Army court still concluded that he had not received his final pay and accounting, having only been advised of his estimated final pay. Therefore, the Army court granted the appeal of the United States pursuant to Article 62, UCMJ, which sought to vacate the military judge's ruling that Brevard had been discharged (and a speedy trial violation committed by the United States). *Brevard*, 57 M.J. at 794.

Appellant owed the Army a debt because he was confined by civilian authorities following his arrest for the sexual assault of which he was convicted. Appellant's debt status was due to his confinement, a natural consequence of his crime. Both appellant's "K status" and his debt complicated his final pay and accounting and elongated the time it took for finance to complete the process. In short, the reason appellant's final pay was not ready for delivery to him before it was halted was appellant's arrest and confinement for commission of a sexual assault. *See United States v. King*, 42 M.J. 79, 80 (C.A.A.F. 1999) (appellant's discharge was not complete where his "final accounting of pay was not resolved due to [his] own misconduct in fraudulently attempting to obtain separation pay to which he was not entitled").

It satisfies neither reason nor public policy to release early from UCMJ jurisdiction those whose own actions have resulted in them owing a debt to their respective branch of service upon separation. Extending appellant's reasoning to its logical bounds, this court would incentivize going AWOL as a soldier is preparing to be involuntarily separated from service before his ETS. Being in an AWOL status would result in the soldier owing a debt rather than being owed a final paycheck, nullifying their final pay and accounting for discharge purposes and freeing them from UCMJ jurisdiction earlier than those who are owed a paycheck at the time of discharge. That is an irrational, foreseeable, and

undesirable result of distinguishing appellant's case because he owed a debt to the United States.

For these reasons, this court should affirm the findings and sentence as adjudged. Appellant's final pay and accounting was never computed, let alone made ready for delivery to him. And thus, the Army retained personal jurisdiction over appellant.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the decision of the Army Court.

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