

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

**WILLIAM J. WIECZOREK JR.
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

v.

UNITED STATES OF AMERICA

**NMCCA 201100036
Review of Petition for Extraordinary Relief in the Nature of a
Writ of Mandamus**

Military Judge: LtCol M.D. Mori, USMC.
Convening Authority: Commander, Marine Corps Base,
Quantico, VA.
For Appellant: LT Michael Torrisi, JAGC, USN.
For Appellee: Maj Elizabeth Harvey, USMC.

24 March 2011

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

This case is before us pursuant to a petition for extraordinary relief in the nature of a writ of mandamus. See the *All Writs Act*, 28 U.S.C. §1651(a); *United States v. Denedo*, 66 M.J. 114 (C.A.A.F. 2008) *aff'd*, 129 S. Ct. 2213 (2009). Petitioner requests that this court order dismissal of all charges and specifications averring that the Government lacks *in personam* jurisdiction over him.

On 2 February 2011, we ordered the respondent to show cause why the requested relief should not be granted. Additionally, we ordered the military judge to produce his findings of fact and conclusions of law denying the petitioner's motion to dismiss for lack of jurisdiction, and the Government to produce an authenticated record of the proceedings. On 18 February 2011,

the respondent filed its response to our order to show cause, and on 28 February 2011 and 4 March 2011, the petitioner filed an answer to that response and a consent motion to attach exhibits, respectively. On 11 March 2011, oral argument was heard on the following issue specified by this court:

WHETHER THE UNITED STATES MAINTAINS *IN PERSONAM*
JURISDICTION OVER PETITIONER?

For the reasons set forth below, we deny the petition without prejudice to the petitioner's right to raise the issue anew during the normal course of appellate review.

Entitlement to Issuance of an Extraordinary Writ

An extraordinary writ is a drastic remedy that should be used only in extraordinary circumstances. *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993) (citing *United States v. Labella*, 15 M.J. 228 (C.M.A. 1983)). The petitioner bears the heavy burden to show he has a clear and indisputable right to the extraordinary relief requested. *Ponder v. Stone*, 54 M.J. 613, 616 (N.M.Ct.Crim.App. 2000); *Aviz*, 36 M.J. at 1028. While we need not wait until the court-martial process is complete to intervene, we will only do so when a truly extraordinary situation exists. Likewise, we should not be bashful about granting writs so as to protect service members against abuse of Government power disguised as *in personam* jurisdiction. In this particular case, the petitioner has failed to demonstrate that the military judge's factual findings were clearly erroneous, his legal conclusions wrong, or that any other exceptional circumstances are present that justify relief.

***In Personam* Jurisdiction**

The question of *in personam* jurisdiction in this case was thoroughly briefed by the parties and developed through the taking of testimony and evidence at the pretrial motions session. Under military law, a discharge is effective upon receipt of a valid discharge certificate, a final accounting of pay and completion of the clearing process. *United States v. Hart*, 66 M.J. 273, 276 (C.A.A.F. 2008); see also *United States v. King*, 27 M.J. 327, 329 (C.A.A.F. 1989). Based upon an examination of the record before us, we find that *in personam* jurisdiction exists over the petitioner.

In October 2009, while pending a medical separation in Hawaii, the petitioner came under investigation by the Honolulu Police Department (HPD) for child abuse. The Naval Criminal Investigative Service (NCIS) simultaneously opened their own investigation into the alleged misconduct. Once HPD decided not to pursue charges against the petitioner, NCIS solely worked the case and advised the petitioner's local command as to their progress. Although the petitioner was given a separation date of 29 November 2009, the petitioner's command made a decision 5-6

days prior to that date to keep him on legal hold as a result of the pending criminal investigation. When the legal hold decision was made, the petitioner had already completed the medical separation "clearing process," but had not received his final accounting of pay or his airplane tickets to return home. And, before his anticipated discharge date, the command gunnery sergeant advised the petitioner words to the effect "that he would probably be put on legal hold" and "that he could consider himself on legal hold." Additionally, the petitioner signed service record book entries wherein he was advised of his ineligibility for promotion due to the pending investigation.

Prior to the 29 November 2009 separation date, the petitioner's command tried to place the petitioner on legal hold utilizing the Marine Corps Total Force System (MCTFS) computer system. The MCTFS system rejected the entry because the command did not possess the authority to make that MCTFS entry. The command did not learn of the MCTFS rejection until 30 November 2009, when it returned from the Thanksgiving holiday weekend, after which time it took immediate steps to have the MCTFS entry made properly. On 4 December 2009, a DD-214 (Certificate of Release or Discharge from Active Duty) was mailed to the petitioner's home of record with an end of active service (EAS) date of 29 November 2009.

Although the petitioner completed his "clearing process" for separation, his disbursing paperwork used for the final accounting of his pay was negligently misplaced by an administrative clerk and not forwarded to the disbursing office until January 2010. The petitioner's pay was stopped due to the passing of his separation date, but was eventually restarted in the middle of December 2009 - no final accounting of pay having ever been accomplished. The petitioner has continued to receive pay and report for duty.

We find jurisdiction was not terminated over the petitioner, as he had not received his final accounting of his pay. We find no bad faith or deliberate action on the part of the Government in the mishandling of the petitioner's paperwork for the final accounting of pay. Perfection is not the standard by which we are to judge the Government's missteps. We note with concern that the Government certainly could have moved with greater alacrity in many phases of this case (investigation; preferral of charges; formal legal hold letter). We leave those matters for another day. Moreover, under the facts of this case we decline to view this case as one of first impression whereby Government delay taken alone could mandate relief¹ as we have concluded for purposes of initial review that the Government's conduct was not founded in bad faith.

¹ See *United States v. Hart*, 66 M.J. at 277, n.5.

Conclusion

The petition for extraordinary relief in the nature of a writ of mandamus is hereby denied. This court's order of 2 February 2011 staying the proceedings below is hereby dissolved.

For the Court

R.H. TROIDL
Clerk of Court