

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

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

**SAHEED A. LAWANSON
ENGINEMAN THIRD CLASS (E-4), U.S. NAVY
v.**

UNITED STATES OF AMERICA

**NMCCA 201200187
Review of Petition for Extraordinary Relief in the Nature of a
Writ of *Mandamus***

Military Judge: CDR Aaron C. Rugh, JAGC, USN.
Convening Authority: Commanding Officer, Naval Submarine
Base New London, Groton, CT.
For Petitioner: LT Kevin Quencer, JAGC, USN.
For Respondent: Maj Crista Kraics, USMC.

31 August 2012

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

WARD, Judge:

The petitioner stands accused at a general court-martial of rape and aggravated sexual assault, violations of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. Prior to trial, he moved to dismiss all charges and specifications for lack of personal jurisdiction based on his discharge and resulting DD 214. Following the motion hearing, the military judge denied the motion, ruling that the Navy did not validly discharge the petitioner and, even if his discharge was valid, that the petitioner constructively reenlisted prior to court-martial jurisdiction attaching. The petitioner now seeks a Writ

of *Mandamus* from this court dismissing the charges and specifications for lack of personal jurisdiction.¹

After carefully considering the parties' pleadings, the portions of the record produced, and oral argument, we agree with the petitioner that he was validly discharged on 1 February 2012 and that he did not constructively enlist following his discharge. Accordingly, we grant his requested relief for a Writ of *Mandamus* dismissing all charges and specifications.

Factual Background

On 2 February 2004, the petitioner enlisted in the Navy for a period of four years. He reenlisted on 28 February 2008 for four more years, which adjusted his End of Active Obligated Service (EAOS) date to 28 February 2012. For reasons unclear in the record, he was later reduced in rank (RIR) one pay grade to E-4 with 22 July 2009 as the effective date of his reduced pay grade. His RIR did not affect his EAOS, but it did change his High-Year Tenure date (HYT) to 1 February 2012.

In May of 2011, the petitioner began preparations for his separation. He initially completed a pre-separation counseling checklist in which he listed his date of separation as 28 February 2012. In July 2011, he went to Personnel Support Detachment New London (PSD) for his pre-separation counseling interview. During this interview, PSD informed him that his separation date was his HYT date of 1 February 2012 since that date preceded his EAOS of 28 February 2012. The PSD representative then issued him separation travel orders with a date of separation of 1 February 2012.

In September of 2011, "NG" reported to Naval Criminal Investigative Service (NCIS) that the petitioner had raped her in his barracks room on board Naval Submarine Base (NAVSUBASE) New London. Although NG only knew the petitioner by a nickname, NCIS initiated an investigation which, by mid-October, identified the petitioner as NG's alleged assailant. NCIS agents notified the NAVSUBASE staff judge advocate (SJA), LT F, and the NAVSUBASE commanding officer, CAPT D, both of the investigation and the petitioner as the subject.

¹ On 2 May 2012, we stayed the court-martial proceedings and ordered the United States ("respondent") to produce portions of the record and show cause as to why we should not grant the petitioner's requested relief. After the respondent filed an answer and the petitioner filed his reply, we heard oral argument.

In October, while the NCIS investigation continued, LT F received a PSD spreadsheet listing the petitioner's date of separation as 1 February 2012. LT F checked with the NAVSUBASE admin officer, Mr. W, who informed LT F that the petitioner's date of separation was actually 28 February 2012 according to the Enlisted Distribution and Verification Report (EDVR). LT F did not contact PSD to investigate the discrepancy with the petitioner's separation date.

On 30 October 2011, the petitioner submitted a special request chit for terminal leave. The chit listed a terminal leave period from 29 November 2011 to 2 February 2012 and a date of separation of 1 February 2012. Senior Chief Petty Officer (SCPO) W, the petitioner's division chief petty officer, called the NAVSUBASE command master chief (CMC), CMC V, to advise him of the petitioner's terminal leave request. At the time, CMC V was aware of the pending NCIS investigation but was unaware of the specific allegations. The petitioner's department head, LT C, approved the request and later contacted the SJA, LT F, to advise that he had granted the petitioner's terminal leave request.

Between late October and mid-November 2011, the petitioner completed his check-out from NAVSUBASE. On the check-out sheet in the space for the CMC appear the initials "TV" and a notation that all enlisted personnel require check-out by the CMC. CMC V later testified that he was authorized to check out all NAVSUBASE personnel in grade E-6 or below and the initials on the petitioner's check-out sheet appear to be his own. Appellate Exhibit III at 27; Record at 76-77. On 16 November 2011, the appellant received his final evaluation, signed by LT C, with a period ending date of 1 February 2012. SCPO W forwarded a copy of the evaluation to CMC V for his review.

On 18 November 2011, the petitioner went to PSD and received his copy of his DD 214. The DD 214 lists the following: a separation date of 1 February 2012; the separation authority as MILPERSMAN² 1910-104, the separation code as JBK and the reason for separation as "completion of required active service".³ AE IV at 65. Personnel Specialist Second Class (PS2)

² Naval Military Personnel Manual, Art. 1910-104 (Ch-11, 20 Jun 2005).

³ MILPERSMAN, Art. 1910-104, grants commanding officers separation authority for separation by reason of expiration of active obligated service. The Separation Program Designator (SPD) "JBK" designates involuntary discharge with no board entitlement and is also used in cases where the member is separated due to HYT. MILPERSMAN, Art. 1160-120, ¶ 9 (Ch-37, 29 Oct 2011).

D signed in block 22a, "Official Authorized to Sign" and next to his signature is the abbreviation "BY DIR" indicating by direction authority.

In December 2011, NCIS contacted the NAVSUBASE SJA, LT F, for assistance in arranging an interview with the petitioner. After consulting with CMC V and LT F, CAPT D ordered the petitioner recalled from terminal leave in order to facilitate the interview. CMC V called the petitioner and informed him that he was recalled to base. Following his recall, the petitioner was reassigned to the 1st Lieutenant's Division. He remained working there and did not depart again for terminal leave. On 15 December 2011, NCIS Special Agents NOC and PM interviewed the petitioner at the local NCIS office at NAVSUBASE.

By mid-January 2012, the only investigative item remaining was NCIS' final interview of the petitioner. The SJA, LT F, was under the impression that CAPT D had already decided to place the petitioner on legal hold, prefer charges, and direct an Article 32 investigation. However, in mid-January CAPT D was still undecided and wanted to wait until after this final interview. As he later explained at the motion session:

the NCIS investigation had not been 'finalized' and . . . everything we had up until then was leaving me at just a 50-50 on whether he was guilty so I didn't know if anything else--or not guilty but worthy of preferring charges and if there was anything else out there. So, the investigation was still ongoing.

Record at 23-24.

Later during his testimony, CAPT D again explained that it was his intent to wait until the investigation was complete before issuing a legal hold letter because "we didn't have a complete investigation . . . [and] I wanted to see if there was anything out there, have all the facts." *Id.* at 26. In the meantime, LT F drafted a charge sheet, legal hold letter, and a letter directing an Article 32 investigation for CAPT D's signature. He also thought that the command had until 28 February 2012 to place the petitioner on legal hold.

On 1 February 2012, PSD electronically submitted a separations pay worksheet to the Defense Finance and Accounting Services (DFAS) for approval. That same day, DFAS verified the calculation and authorized PSD to pay the petitioner his final

pay settlement. The following day, 2 February, PSD "pushed the button" and electronically released the funds to the petitioner's bank account. The petitioner's final settlement did not include payment for the unused days of terminal leave after his recall in December, since no one informed PSD of this recall prior to 2 February 2012.

On the morning of 1 February 2012, NCIS interviewed the petitioner. During the interview, the petitioner admitted to having sexual intercourse with NG in his barracks room, but asserted that the intercourse was consensual. Later that day, LT F obtained a copy of the petitioner's NCIS statement and placed it, along with a draft copy of a charge sheet, legal hold letter, and letter directing an Article 32 investigation in CAPT D's office for his review. The following morning, 2 February, CAPT D approved the package and LT F preferred the charges against the petitioner, signed a legal hold letter, and directed his assistant to deliver the letter to PSD. Later that morning, LT F's assistant returned and informed LT F that PSD would not accept the legal hold letter as the petitioner had been discharged on 1 February 2012. LT F, CAPT D, the NAVSUBASE executive officer, CDR P, and CMC V then met to discuss the situation. Ultimately, LT F asked CMC V to contact the petitioner, "sit [him] down" and "get a feel for which direction [the petitioner] was looking at." *Id.* at 86.

On the morning of 2 February 2012, the petitioner did not muster for work. He was called on his cell phone and directed to report to the SJA's office for a meeting. *Id.* at 81-82, 89, 167-72, 249.⁴ Upon arrival at the SJA's office, the petitioner first met with LT F's assistant, who informed him of the preferred charges. The petitioner next met with CMC V, LT F, and Chief Master-at Arms (MAC) C, the leading chief petty officer (LCPO) of the 1st Lieutenant's Division. CMC V explained to the petitioner that if the case against him was

⁴ There was conflicting testimony at the motion session as to who called the petitioner and directed him to come to a meeting in the SJA's office and when this phone call was made. CMC V testified that he called the petitioner either on the 2nd or 3rd of February, either mid-morning or afternoon. He also testified that it was either later that day or the following day when he met with the petitioner in the SJA's office along with LT F and Chief Master-at-Arms (MAC) C. *Id.* at 89-91. In contrast, MAC C testified that he called the petitioner on his cell phone on the afternoon of the 1st and told him to report to the SJA's office the following day. *Id.* at 163-66. The petitioner testified that he received a call from MAC C on the 2nd and MAC C told him to report to the SJA's office that day. *Id.* at 248-49. As no one was aware that the petitioner had been discharged until the morning of the 2nd, we find that either CMC V or MAC C called the petitioner on the 2nd and this meeting occurred later that day.

handled by the local authorities, it could become costly for him to retain civilian counsel. He also explained that there was some confusion over the petitioner's discharge and legal hold situation, but that in his opinion, it was in the petitioner's best interest to remain at NAVSUBASE and face the charges. Throughout this 45 minute meeting, the petitioner remained mostly quiet and asked few questions. Afterward, the petitioner commented to MAC C that he thought he had been discharged the day prior, to which MAC C responded that he "needed to talk to his lawyer." *Id.* at 164.

At the motion hearing, CMC V testified how he explained his concerns to the petitioner during this meeting and the military judge queried him as follows:

MJ: All right. Now it was during that meeting that you talked about his options?

WIT: Yeah, I just kind of sat down and explained to him, again, I started with what I told him was my personal opinion and what was in the best interest for him and just kind of played out some scenarios for him. . . .

MJ: You played out some scenarios. Explain that to me.

WIT: Well, I told him, because he was not placed on legal hold at this time, there was still some questions about how do we get him on legal hold, can we put him on legal hold and there was some concerns from not only the JAG but [MAC C] and myself that hold on here, he's been discharged from the Navy. Is he going to come to work tomorrow?

MJ: Did you share these concerns with him? Did you tell him there was some confusion about his legal hold?

WIT: I did, yes, sir, absolutely at this meeting and that's when I discussed with him that I felt it was in his best interest to try to resolve everything while he was currently here and not to leave in the event that he did have to be called back out of pocket, all the expenses that were going to happen on that.

MJ: You mean expenses of moving back to ---

WIT: Yes, sir, like what he had talked about is hey, you know, he was looking to get a job I believe it was in Chicago. He had relatives in Virginia. He had

relatives in Rhode Island. That it was in his best interest to stay here and try to resolve everything while he was still on the base so he wasn't having to pay for all these expenses.

MJ: All right, so let me try to restate this to make sure that I understand. Correct me if I am incorrect. You really provided him two different options. Option one, because of the confusion over whether or not he was discharged he could go home but he might be recalled back here at some future point to face trial or two, your recommended course of action for him that he stay here so that he could resolve things here and not get in danger of incurring additional costs or moving everything back home and then having to come back, is that accurate?

WIT: Yes, sir.

Id. at 92-93.

On Monday, 6 February 2012, CAPT D, in a letter to the Director, PSD New London, requested that the petitioner be retained on active duty for legal hold. His letter then advised that since the petitioner's pay account was never closed, he remained on active duty and the DD 214 previously issued was erroneous. AE IV at 118. On the 7th of February, the Director, PSD New London, wrote to Commander, Navy Personnel Command, requesting that the petitioner's previously issued DD 214 be voided as it was prepared, issued, and distributed in error. AE IV at 120.⁵

Authority to Issue Extraordinary Writs

The All Writs Act, 28 U.S.C. § 1651(a), grants all courts established by Act of Congress the power to issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law. As a court created by Act of Congress, this court has the authority to issue the writ requested in this case. *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998); *Dettinger v. United States*, 7 M.J. 216, 219 (C.M.A. 1979).

Principles of Law for Consideration of Extraordinary Writs

⁵ The Director, PSD New London, did not testify at the motion hearing. However, both the head of PSD's separations and retirement section and the assistant director at PSD New London testified that this letter was submitted only at the direction of higher headquarters and that the DD 214 was not prepared, issued, or distributed in error. Record at 126, 155.

The petitioner has the burden of showing that he has a clear and indisputable right to the requested extraordinary relief. *Ponder v. Stone*, 54 M.J. 613, 616 (N.M.Ct.Crim.App. 2000); *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993). See also *Will v. United States*, 389 U.S. 90, 96 (1967).

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) (citations and internal quotation marks omitted).

We find that the petitioner has met the first and second conditions and we are satisfied that the writ is appropriate under these circumstances. See *Smith v. Vanderbush*, 47 M.J. 56 (C.A.A.F. 1997).

The Validity of Petitioner's Discharge

We review questions of personal jurisdiction *de novo* and accept the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000). Having reviewed the military judge's findings of fact, except as noted below, we do not find them clearly erroneous or unsupported in the record and we adopt them accordingly.

Under Article 2(a)(1), UCMJ, "[m]embers of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment" are subject to court-martial jurisdiction. However, "[i]t is black letter law that *in personam* jurisdiction over a military person is lost upon his discharge from the service, absent same saving circumstance or statutory authorization." *United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985) (footnote omitted).

Whether someone has been validly discharged is governed by 10 U.S.C. § 1168(a). *United States v. Hart*, 66 M.J. 273, 275-76 (C.A.A.F. 2008); *Howard*, 20 M.J. at 354. In applying this statute, we must determine whether three elements have been

satisfied 1) there was delivery of a valid discharge certificate; 2) final accounting of pay was made; and 3) the petitioner underwent the "clearing" process required under appropriate service regulations to separate him from military service. *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989). The military judge ruled that there was no delivery of a valid discharge. AE X at 4. He also concluded that the Government failed to carry its burden as to the second and third *King* requirement. *Id.* at 8 n.12. It was undisputed both at trial and before us now that the petitioner completed the necessary administrative steps for separation. We do not find any indication to the contrary in the record, and we therefore adopt the military judge's conclusion that the petitioner completed the clearing process required for separation. Consequently, we will only address the first and second *King* elements.

The Validity of the DD 214

A DD 214 is valid when it is issued by a competent discharge authority and complies with applicable service regulations. *United States v. Wilson*, 53 M.J. 327, 333 (C.A.A.F. 2000). On this point, the military judge concluded that the DD 214 was invalid because: 1) the discharge authority did not intend for the petitioner to be discharged, and 2) the DD 214 did not comply with the provisions of MILPERSMAN Article 1160-120. AE X at 5-6. We disagree on both points and instead conclude that the petitioner received a valid DD 214.

To address the military judge's first conclusion, we must determine who is a "competent discharge authority". As a commanding officer and a special court-martial convening authority, CAPT D was a separation authority for Sailors separating by reason of reaching their EAOS. This authority included those separated due to HYT. However, as his command was serviced by a PSD, the authority for actually issuing the DD 214 was delegated to PSD. See Bureau of Naval Personnel Instruction 1900.8D, ¶ 5(b) (11 Jun 2010). Under that authority, the Director, PSD New London, properly delegated by direction authority to PS2 D to sign and deliver the petitioner's DD 214. *Id.* at ¶ 5(a); Record at 118.

This is not to say that PSD could unilaterally discharge any member. The actual authority to direct separation and the underlying basis for separation rested with the cognizant commander. If CAPT D intended to place the petitioner on legal hold, PSD received no notice of any such intent. To the contrary, everything PSD received indicated that the commanding

officer fully intended that the petitioner be separated. First, the petitioner brought a completed check-out sheet from NAVSUBASE with all appropriate sections completed. Second, no one from the NAVSUBASE staff notified PSD that the petitioner was under investigation or may be placed on legal hold prior to his separation. Although members of the NAVSUBASE staff may have assumed a different separation date based on the EDVR, they had ample notice that PSD was operating under a different date. Last, the petitioner fit all necessary criteria for separation at HYT. Consequently, we conclude that PSD was a competent discharge authority and issued the petitioner's DD 214 with the imputed authority of the commanding officer. We find no evidence that the commanding officer suspended, revoked, or otherwise affected PSD's authority to issue the petitioner a self-executing DD 214 with an effective date of 1 February 2012.

We also find that the military judge's conclusion that CAPT D fully intended to place the petitioner on legal hold prior to 1 February 2012 unsupported in the record. While that may have been LT F's assumption and he prepared the paperwork accordingly, CAPT D testified that he had not made up his mind as he wanted to wait until the final NCIS interview of the petitioner so as to "have all the facts." Record at 26. Only after he reviewed the final interview did CAPT D direct LT F to issue the legal hold letter, prefer charges, and appoint an Article 32 investigation. Simply put, the record fails to support the conclusion that CAPT D, prior to the effective date of the petitioner's self-executing DD 214, intended that the petitioner be placed on legal hold.

We also disagree with the military judge's conclusion that the petitioner's DD 214 was issued contrary to applicable service regulations. The military judge concluded that PSD failed to comply with MILPERSMAN Article 1160-120 in using the petitioner's HYT date as the date of separation. Paragraph (9)(c)(1)-(2) of this Article states:

(1) Personnel reduced in rate are *authorized* to complete an enlistment properly entered into prior to reduction even if the enlistment expires after HYT gates of the new pay grade. Members in this category must separate at current expiration of [EAOS] if the new HYT gate is met or exceeded, unless they are granted a HYT waiver or are subsequently advanced or reinstated. . . .

(2) Members who elect not to remain on active duty until their normal EAOS may request early separation, if desired, from NAVPERSCOM (PERS-8354) via their CO.

(Emphasis added).

In subparagraph (1), the first sentence is permissive; a member can, but is not required, to serve beyond the HYT date until the end of his or her enlistment. Second, if a member chooses to serve past the HYT date until the end of enlistment, he or she must separate at EAOS unless granted a waiver, advanced in pay grade, or reinstated to the previous pay grade from which reduced. This second sentence is mandatory. Subsection (2) then requires command endorsement and NAVPERS approval for those facing HYT who desire "early separation". But subsection (2) does not define the phrase "early separation". Relying on his own interpretation of this sentence, the military judge concluded that the lack of a command endorsement and NAVPERS approval for the petitioner's separation at HYT invalidated his DD 214. AE X at 7.

We do not agree with this conclusion for several reasons. First, we find this interpretation unsupported by the record as it runs counter to the only testimony offered at trial.⁶ Second, at trial the defense submitted in evidence 33 pages of emails between various members of the NAVSUBASE command staff, PSD New London, the Region Legal Service Office handling the prosecution of the case, and officials at the Navy Personnel Command. AE III at 36-72. These emails all pertain to the steps taken by PSD and the validity of the petitioner's discharge at his HYT date. However, these emails are devoid of any reference to a missing command endorsement and NAVPERS approval. Last, this interpretation raises the illogical scenario where a Sailor needs no endorsement or approval to serve past HYT until the end of an enlistment; but if opting instead to separate at HYT, a date that Navy policy already mandates separation, that same Sailor must obtain command endorsement and NAVPERS approval. Instead, we conclude that subparagraph (2) applies to Sailors who, reduced in rank and facing HYT, decide to seek early separation before reaching their HYT date. While we disagree with the military judge on this point, we do note that PSD apparently failed to explain or present the petitioner with the option to serve past his HYT date for an additional 28 days

⁶ In his ruling, the military judge did not explain how he reconciled his interpretation with the contrary testimony of the two PSD witnesses, both of whom testified that PSD followed all applicable regulations.

until his EAOS. However, under the facts of this case, we do not find this error significant.⁷

In summary, while the commanding officer may have contemplated placing the petitioner on legal hold, the record before us indicates that no such intent was presented to PSD prior to the effective date of the petitioner's self-executing DD 214. Additionally, we conclude that PSD issued the petitioner's DD 214 in compliance with appropriate service regulations. Accordingly, the petitioner received a valid discharge certificate. We now turn to the second *King* element.

The Petitioner's Final Accounting of Pay

A member has not been validly discharged until "his final pay or a substantial part of that pay, are ready for delivery to him" 10 U.S.C. § 1168(a); see also *Hart*, 66 M.J. at 275.

Since the law only requires that a substantial portion of final pay is made ready for delivery, we find unpersuasive the Government's argument that a miscalculation in payment due to the unused days of terminal leave invalidates the petitioner's discharge. While this may impact the final calculation of pay due to the petitioner, it does not change the fact that a substantial portion of the petitioner's final pay was made ready for delivery on 1 February 2012 and only awaiting PSD's "push of the button." Accordingly, we agree with the military judge's conclusion that this second element of the *King* test is met.

Having concluded now that all three *King* elements are satisfied and the petitioner was validly discharged on 1 February 2012, we turn to the question of whether he constructively reenlisted thereafter.

⁷ We highly doubt that if the PSD representative had correctly presented the petitioner with the option of separating on either 1 February or 28 February 2012, he would have chosen the latter date. Regardless, her error is a far cry from the error committed in *United States v. Wilson*, 53 M.J. 327 (C.A.A.F. 2000), the case relied upon by the Government. See Government Answer of 24 May 2012 at 14. In *Wilson*, not only did the official who signed the DD 214 lack any authority to do so, but he also misinterpreted the applicable regulation by issuing a complete discharge from military service instead of simply removing the appellant from unit rolls as the regulation required. *Wilson*, 53 M.J. at 333. There is no dispute that PSD New London, specifically PS2 D, had the authority to issue the DD 214 or that separation at HYT was authorized under the MILPERSMAN. The only discrepancy is that no one presented the petitioner with the option of serving past his HYT date until his EAOS.

Constructive Reenlistment

To determine whether a member constructively reenlisted, "[t]he threshold question is whether the person is "serving with an armed force." *United States v. Fry*, 70 M.J. 465, 469 (C.A.A.F. 2012).⁸ If that can be established, we then look to the four-part test laid out in Article 2(c) of the UCMJ which provides:

Notwithstanding any other provision of law, a person serving with an armed force who -

- (1) submitted voluntarily to military authority;
- (2) met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;
- (3) received military pay or allowances; and
- (4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

Serving with the armed forces is a case-specific analysis of the individual circumstances of the person's relationship with the military and "means a relationship that is more direct than simply accompanying the armed forces in the field." *United States v. Phillips*, 58 M.J. 217, 220 (C.A.A.F. 2003) (citations omitted). Under the facts and circumstances of this case, we find that the petitioner was serving with the armed forces. Following 1 February 2012, he reported for duty, regularly performed military duties, received military pay and allowances, and met the mental competence and minimum age qualifications. The only question is whether he voluntarily submitted to military authority.

The legislative history of Article 2(c) indicates that the primary purpose of the amendment was to "ensure that court-martial jurisdiction would not be defeated by assertions that military status was tainted by recruiter misconduct." *Id.* at 219 (citing S. Rep. No. 96-197, at 121-22 (1979)). The Senate report observed that this section is "intended only to reach those persons whose intent is to perform as members of the

⁸ As this question is also one of jurisdiction, we apply the same standard of review as before when we addressed the validity of the petitioner's discharge.

active armed services." *Id.* at 219 (quoting S. Rep. No. 96-197 at 122-23). A voluntary decision is one that is done "by design or intention" or "unconstrained by interference." *Fry*, 70 M.J. at 469 (quoting Black's Law Dictionary at 1710-11 (9th ed. 2009)) (internal quotation marks omitted). We determine whether a decision is voluntary by looking at the totality of the circumstances, including the individual's mental state. *Id.*

Looking at the totality of the circumstances, we conclude that the petitioner did not voluntarily submit to military authority. First, he did nothing proactively to demonstrate any intent or desire to continue active service. He neither signed a new enlistment contract or extension of service, nor unilaterally sought to void his DD 214 or avoid its effect. Rather, all actions which may tie him to continued service were done in submission to overt military authority. For example, he did not report to work on 2 February 2012, instead the CMC or his LCPO called him on his cell phone and directed him to report to the SJA's office. Once there, the petitioner was first informed of formal charges brought against him and that he was placed on legal hold--an unmistakable message that the Navy was attempting to extend his active service, with or without his assent. Next, the CMC, in the presence of the SJA and the petitioner's LCPO, attempted to explain the ramifications of the Navy's attempt to retain him on active duty for prosecution. The CMC repeatedly encouraged him to remain present at NAVSUBASE and face the charges.⁹ To characterize the petitioner's submission to military authority as wholly voluntary¹⁰ under these circumstances ignores the inherent inequities present with an accused service member receiving legal advice from direct representatives of the party-opponent--the same party-opponent seeking to prosecute him.¹¹

⁹ CMC V described how he twice told the petitioner during this conversation that "it was in [the petitioner's] best interest" to remain at NAVSUBASE and face the charges. Record at 92.

¹⁰ AE X at 10.

¹¹ No one advised or afforded the petitioner an opportunity to consult counsel before this conversation where CMC V, in the presence of the convening authority's legal advisor, ostensibly advised the petitioner on his options regarding his discharge and the command's efforts to retain him for prosecution. Similarly, no one reduced this advice to writing or asked the petitioner to memorialize his decision in writing. Had this conversation devolved into the subject of the underlying offenses, the Government would have likely violated MILITARY RULE OF EVIDENCE 305(d)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) (accused must be advised of right to counsel prior to post-preferred questioning about the subject offenses). See *United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985).

Even viewing CMC V's testimony in the best light, we conclude that the petitioner did not voluntarily submit to military authority. Aside from the inconsistencies and vagaries in CMC V's testimony, the setting in which this conversation took place and the respective interests amongst the parties, we note that the petitioner's testimony directly contradicted CMC V's version of this conversation. Furthermore, although LT F and MAC C both testified at the hearing, the Government chose not to corroborate CMC V's description of this conversation during their testimony.¹² In essence, the military judge's conclusion rests solely on a two-word affirmative response from CMC V to the military judge's summarization of his testimony.

In summary, we conclude that the Government failed to carry its burden of demonstrating that the petitioner voluntarily submitted to military authority. We hold that the petitioner was validly discharged on 1 February 2012 and he did not constructively reenlist thereafter. The Petition for Extraordinary Relief in the Nature of a Writ of *Mandamus* is granted. The charges and specifications are dismissed.

Chief Judge PERLAK and Senior Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court

¹² Neither the Government, trial defense counsel, nor the military judge questioned LT F or MAC C about what was discussed during this meeting.