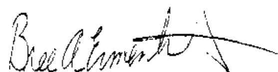
IN THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, **Appellee** **v.** **Derek L. DINGER** **Gunnery Sergeant (E-7)** **U.S. Marine Corps,** **Appellant**	**BRIEF AND ASSIGNMENT OF ERROR** **Case No. 201600108** **Tried at Marine Corps Base ,Quantico, Virginia, on 21 September and 17 December 2015, before a general court-martial convened by Commander, Marine Corps Installations, National Capital Region – Marine Corps Base Quantico.**

TO THE HONORABLE, JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS



Bree A. Ermentrout
CAPT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review
Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, D.C. 20374
202-685-7290

Issue Presented

Statement of Statutory Jurisdiction

Gunnery Sergeant (GySgt) Derek Dinger, U.S. Marine Corps, received an approved court-martial sentence that included a dishonorable discharge. Accordingly, his case falls within this Court's Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012), jurisdiction.

Statement of the Case

A military judge sitting as a general court-martial convicted GySgt Dinger, pursuant to his pleas, of two specifications of committing indecent acts in violation of Art 120, UCMJ, 10 U.S.C. § 920, one specification of possessing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934, one specification of attempting to produce child pornography in violation of Article 80, UCMJ, 10 U.S.C. § 880, and two specifications of wrongfully making a video recording of his spouse in violation of Article 120c, UCMJ, 10 U.S.C. § 920C. (R. at 102-3.) The military judge sentenced GySgt Dinger to nine years confinement and a dishonorable discharge. (R. at 140.) The convening authority approved the sentence as adjudged. (General Court-Martial Order No. 2-2016.) Pursuant to a pretrial agreement, confinement in excess of 96 months was suspended. (R. at 140; App. Ex. VII.)

Statement of Facts

After twenty years of honorable service GySgt Dinger transferred to the Fleet Marine Corps Reserve on 1 November 2003. (Pros. Ex. 1 at 1.) On 1 August 2013 he transferred to the Active Duty Retired List. (*Id.*) He was charged with offenses spanning the period January 2011 through September 2014. (Charge Sheet.)

Summary of Argument

The court had no jurisdiction over Appellant, a retired Marine who had not been recalled to active duty. Based on Civil war era precedent, military courts have assumed jurisdiction over retirees. But modern case law has undermined the basis for this jurisdiction. Even assuming jurisdiction, the military court had no authority to award a punitive discharge.

Argument

I

MILITARY COURTS HAVE HISTORICALLY ASSUMED JURISDICTION OVER RETIREES. HOWEVER, THE HISTORICAL RATIONALE FOR JURISDICTION NO LONGER EXISTS. RETIREES ARE LONGER CONSIDERED TO BE ON RETAINER PAY AND THEREFORE JURISDICTION OVER RETIREES DOES NOT EXIST.

Standard of Review

The maximum punishment authorized for an offense is a question of law, which is reviewed *de novo*. *United States v. Beaty*, 70 M.J. 39, 41 (C.A.A.F. 2011).

Discussion

Retirees are subject to the Uniform Code of Military Justice (UCMJ) after retirement.[1] Article 2, UCMJ, provides for jurisdiction over three classes of military retirees:

(1) "Retired members of a regular component of the armed forces who are entitled to pay;"

(2) "Retired members of a reserve component who are receiving hospitalization from an armed force;" and

(3) "Members of the Fleet Reserve and Fleet Marine Corps Reserve."[2]

However, there is limited case law and the services have different regulations. The Army prosecutes retired solders under "extraordinary circumstances." AR 27-10. The Air Force will not prosecute "unless the alleged misconduct clearly links them to the military or is adverse to a significant military interest of the United States." Air Force Policy Document 51-2, 4 November 2011. And even accepting jurisdiction, that leaves open the question of punishment. Unlike active duty members, retirees cannot be reduced by a court-martial as a matter of law.[3]

---

[1] 10 USC § 802 and discussion in Section 0123 of the JAGMAN.

[2] UCMJ art. 2(a)(4)-(6) (2012).

[3] 10 USC § 6332 completely bars any reduction of the member as part of an adjudged sentence or administrative consequence or conviction. "[B]ecause appellant was tried as a retired member, he could not be reduced for these offenses either by the court-martial or by operation of Article 58a." *United States v. Allen*, 33 M.J. 209, 215 (C.M.A. 1991).

10 USCS § 6332 states that when a person is placed in a retired status, this "transfer is **conclusive for all purposes."** (See Appendix) This statute precludes the award of a punitive discharge to a retiree. There is no explicit legal authority that sanctions the discharge of an individual on the retired list. 10 USC § 6332 makes the transfer of service-members to the retired list "Conclusive for all purposes." Read literally, "all" includes the individual's status as retiree on the retired list with an honorable discharge.

Court-martial jurisdiction over retirees has a long history dating from the Civil War and mired in the idea that retirement pay represents reduced pay for reduced services. In *United States v. Tyler*, 105 U.S. 244 (1882), the Supreme Court held that a retired officer was "in the service" for purposes of interpreting a compensation statute. In its decision, the Supreme Court accepted without analysis the idea that retired is pay is reduced pay for reduced services when it stated "compensation [retired pay] is continued at a reduced rate, and the connection [with the government] is continued." *Tyler* at 245. Although *Tyler* interpreted a pay statute, military courts have accepted it as authority to extend court-martial jurisdiction over retirees.

In *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958), a retired Navy Rear Admiral was convicted and dismissed from the service for post-retirement

misconduct violating Articles 125, 133 and 134 of the UCMJ. The accused, who was not recalled to active duty, was convicted more than seven years after his retirement.[4]

The United States Court of Military Appeals affirmed the conviction, rejecting Hooper's contention that a retiree had to be recalled to active duty before military jurisdiction could attach. The Court was persuaded, that a retired officer was part of the "land or naval forces" for purposes of the Fifth Amendment,[5] and rejected the contention that retired officers were "mere pensioners" without further military obligations.[6]

Hooper challenged the termination of his retired pay before the United States Court of Claims .He arguing that Article 2(4), UCMJ, was unconstitutional because "court-martial jurisdiction is strictly limited to those persons who bear such a proximate relationship to the Armed Forces and their functions as to be reasonably treated as 'in' the Armed Forces."[7] The court considered whether a retired officer was part of the land and naval forces in which case Article 2(4) would fall under Congress's authority, contained in Article I, section 8 of the Constitution, "[t]o make

---

[4] *Id.* at 419.

[5] *Id.* at 422. The pertinent portion of the Fifth Amendment states, "No person shall be held to answer for a[n] . . . infamous crime, unless on a presentation or indictment of a Grand Jury, *except in cases arising in the land or naval forces* . . . ." U.S. CONST. amend. 5 (emphasis added).

[6] *Id.*

[7] *Hooper v. United States*, 326 F.2d 982, 984 (Ct. Cl. 1964).

Rules for the Government and regulation of the land and naval Forces."[8] Although retaining "certain doubts," the court held that the court-martial's jurisdiction over Hooper was "constitutionally valid."[9] Hooper, as a retired admiral, was part of the land or naval forces "because the salary he received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies."[10]

In *McCarty v. McCarty*, the servicemember challenged a California law that treated his retirement pay as property subject to division in a divorce on the grounds that such treatment contradicted the idea that retirement is reduced compensation for reduced services:

> Appellant correctly notes that military retired pay differs in some significant respects from a typical pension or retirement plan. The retired officer remains a member of the Army, see *United States v. Tyler*, 105 U.S. 244 (1882), and continues to be subject to the Uniform Code of Military Justice, see 10 U. S. C. § 802 (4). See also *Hooper v. United States*, 164 Ct. Cl. 151, 326 F.2d 982, cert. denied, 377 U.S. 977 (1964). In addition, he may forfeit all or part of his retired pay if he engaged in certain activities. Finally, the retired officer remains subject to recall to active duty by the Secretary of the Army "at any time." Pub. L. 96-513, § 106, 94 Stat. 2868. These factors have led several courts, including this one, to conclude that military retired pay is reduced compensation for reduced current services. In *United States v. Tyler*, 105 U.S. at 245, the Court stated that retired pay is "compensation . . . continued at a reduced rate, and the connection is continued, with a retirement from active service only." 221-222.

---

[8] U.S. CONST. art. I, § 8, *quoted in Hooper*, 326 F.2d at 986.
[9] *Hooper*, 326 F.2d at 987.
[10] *Id*

Ultimately, the court avoided taking a position on the characterization of retired pay, finding other grounds to overturn California law. In response, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, in 1982.[11] "The USFSPA permits state courts to treat disposable retired pay as marital property when apportioning the marital estate between divorcing parties, and provides a method for enforcement of court orders through the Department of Defense." Its enactment reflects modern congressional intent that retired pay should be treated as a form of property divisible upon divorce according to state marital property laws, rather than reduced pay for reduced services.

In 1992, in *Barker v. Kansas*, the Supreme Court examined a Kansas state income tax provision that taxed military retired pay but not the retired pay of state and local government employees.[12] The Supreme Court unanimously agreed in *Barker* that military retired pay is *not* reduced pay for reduced services, but is deferred compensation.[13] The Court agreed that military retirees differ in many respects from

[11] Department of Defense Authorization Act, 1983, Pub. L. No. 97-252, 96. Stat. 718, 730 (1982).

[12] 503 U.S. 594 (1992).

[13] *Id.* at 605 ("[The characterization of] military retirement benefits . . . as current compensation for reduced current services does not survive analysis . . . .").

state and local retirees, but these differences do not "justify the differential tax treatment" imposed by the Kansas Income Tax Act.[14]

In concluding that military retired pay is not reduced pay for reduced services, the Supreme Court first examined the manner in which retired pay is calculated and paid. Because it is calculation on years of service on active duty and terminal rank, it resembles deferred compensation. In this respect, "retired [military] pay bears some of the features of deferred compensation."[15]

Second, the Court distinguished the *Tyler* and *McCarty* opinions. In *Tyler*, the Court addressed the issue of whether an Army Captain, retired due to war wounds, was entitled to the same pay increases that Congress intended for active-duty officers. In holding that certain retired officers were entitled to the increases in pay, the Court examined two different types of retirees, those severing all military connections who received a one-time payment upon retirement and those retiring with a continuing compensation, and continuing obligation with the former group did not have. "In interpreting the applicable statutory provisions, therefore, the "uniform treatment" of active-duty officers and the one class of retired officers was crucial to the decision;

[14] *Id.* at 599.
[15] *Barker*, 503 U.S. at 599 (citing *McCarty v. McCarty*, 453 U.S. 210 (1981))

thus, *Tyler* cannot be taken as establishing that retirement benefits are for all purposes the equivalent of current compensation for reduced current services." [16]

> The *Barker* Court further noted its discomfort expressed in in *McCarty* Moreover, although *McCarty* referred to Tyler, it did not expressly approve *Tyler*'s description of military retirement pay. To the contrary, by declining to hold that federal law forbade the States to treat military retirement pay as deferred income and resting our decision on another ground, we reserved the question for another case. [17]

Relief Requested

Appellant requests that this Court dismiss all charges because the Court lacked jurisdiction.

II

10 USCS § 6332 STATES THAT WHEN A PERSON IS PLACED IN A RETIRED STATUS, THIS "TRANSFER IS CONCLUSIVE FOR ALL PURPOSES." A DISCHARGE WOULD CONTRAVENE THE CLEAR STATUTORY LANGUAGE. ACCORDINGLY, A COURT-MARTIAL CANNOT DISCHARGE A RETIREE.

STANDARD OF REVIEW

This Court reviews questions of law *de novo*.[18]

DISCUSSION

[16] *Id* at 602.
[17] *Id.*
[18] *See* UCMJ art. 66(c), 10 U.S.C. § 866(c) (2012).

The Court of Military Appeals in *United States v. Sloan,* 35 M.J. 4, 11-12 (C.M.A. 1992) and *United States v. Allen,* 33 M.J. 209, 216-217(C.M.A. 1991) examined the available lawful punishments for retired servicemembers at court-martial.[19] In finding that a retiree could not be reduced by court-martial the Court found "a transfer of a servicemember to the retired list is conclusive in all aspects as to grade and rate of pay based on his years of service."[20] The Court found this determination was also supported by a Comptroller General opinion finding a sailor who was recalled, court-martialed, and reduced, should be paid at a higher rate. *Allen, 33* M.J. at 216 (citingB-10520, 20 Comp. Gen. 76, 78 (1940)). Further, the Court found support for this conclusion in a scholarly treatise concluding "forfeiture of pay (and by analogy reduction) was not necessary to satisfy the military interests" in court-martialing retirees. [21]

A punitive discharge is also an illegal punishment. While the C.M.A. in *Sloan* and *Allen* did not explicitly address discharge, the basis of the Court's

---

[19] *Sloan,* 35 M.J. at 11-12; *Allen,* 33 M.J. at 216-217.

[20] *Id.; see* 10 U.S.C. § 633210 U.S.C. § 6332 has not been amended since 1958. Thus Congress was fully aware of its implications prior to enacting updates to the UCMJ in 1968 and 1983. *Sloan* and *Allen* were decided in 1991-92. No legislative or presidential changes have been made to detract from their effect. And there are no recommended changes in punishments for retirees in recent proposals in the draft Military Justice Act of2016

[21] *Id.* (citing Bishop, *Court-Martial Jurisdiction Over Military- Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners,* 112 U.Pa.L. Rev. 317, 356-57 (1964)).

determination also precludes punitive discharges. First, the conclusiveness of 10 U.S.C. § 6332 is clear that "for all purposes" applies specifically to retirees and necessarily includes courts-martial.[22] A punitive discharge would necessarily end all entitlements and similar to reduction or forfeiture and satisfies little military interest not available by administrative discharge. However, no statute allows for the punitive discharge of a retiree.

Relief Requested

Appellant requests that the Court disapprove Appellant's discharge.

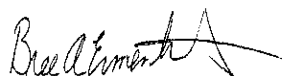
Conclusion

The lack of explicit legal authority governing the court-martial of retirees creates confusion. In addition, Congress' neglect to provide clear statutory guidance, and the paucity of clear case law or dicta addressing these issues, leaves courts and retirees in legal no-man's land as to the exact source of authority relied upon to punish convicted retirees. The Court may be permitted to adjudge fines or confinement based on inherent authority, and the authority to adjudge forfeitures is clear. Likewise, the prohibition on changing the retired status of a convicted retiree is also clear. The plain language of § 6332 is clear that a retiree's status on the retired list is conclusive in all respects. The absence of contrary case law or statutory authority on this point settles

[22] *See Sloan*, 35M.J. at 11-12; *Allen*, 33 M.J. at 216-217.

this issue. GySgt Dinger was not subject to military jurisdiction and may not be given a punitive discharge.

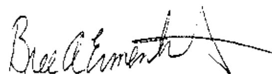
Appellant requests that this Court reassess Appellant's sentence.



Bree A. Ermentrout
CAPT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, D.C. 20374
202-685-7290

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and electronically filed on 3 June 2016.



Bree A. Ermentrout
CAPT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, D.C. 20374
202-685-7290

APPENDIX

10 USCS § 6332. Conclusiveness of transfers

When a member of the naval service is transferred by the Secretary of the Navy-

(1) to the Fleet Reserve;

(2) to the Fleet Marine Corps Reserve;

(3) from the Fleet Reserve to the retired list of the Regular Navy or the Retired Reserve; or

(4) From the Fleet Marine Corps Reserve to the retired list of the Regular Marine Corps or the Retired Reserve; the transfer is conclusive for all purposes. Each member so transferred is entitled, when not on active duty, to retainer pay or retired pay from the date of transfer in accordance with his grade and number of years of creditable service as determined by the Secretary. The Secretary may correct any error or omission in his determination as to a member's grade and years of creditable service. When such a correction is made, the member is entitled, when not on active duty, to retainer pay or retired pay in accordance with his grade and number of years of creditable service, as corrected, from the date of transfer.