

**Personal Jurisdiction: What Does It Mean for Pay to be “Ready for Delivery”
in Accordance with 10 U.S.C. § 1168(a)?**

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Our review of the military judge’s factual findings compels the conclusion that neither final pay nor a substantial part of that pay were ready for delivery within the meaning of the plain language of 10 U.S.C. § 1168(a).¹

I. Introduction

It is Friday afternoon at 1745 and in walks one of your commanders. As a new trial counsel you are about to learn that all bad news comes to your office on Friday afternoons after the close of business. The commander tells you that one of your pre-preference court-martial suspects has been discharged from the Army. He goes on to inform you that the Soldier received a Department of Defense (DD) Form 214² and that the Soldier has signed out of the unit. You immediately jump into action, knowing that it is possible the Army may no longer have court-martial personal jurisdiction over the Soldier. You turn to your trusty Uniform Code of Military Justice (UCMJ) and look up Rule for Courts-Martial (RCM) 202(a), and you discover the rule to be extremely vague and lacking specificity.³ After some case law research, you realize the facts of your case will determine whether the Army has personal jurisdiction over the Soldier.

On Monday morning you visit the post transition center and discover the following: (1) the Soldier has received his DD Form 214; (2) he has completed all unit and post clearing and out-processing requirements; and (3) he has met with the finance office, but his pay has not been certified.⁴ You inform the finance office supervisor that the Soldier is pending court-martial and that they should immediately cease processing of his final accounting of pay. Now it is up to you to figure out whether the Army still has personal jurisdiction over the Soldier.

This article is intended for practicing trial attorneys or chiefs of justice who need to determine whether the Army has personal jurisdiction over a Soldier for court-martial purposes. The article is specifically tailored to discuss what it means for a servicemember’s “final pay” to be “ready for delivery”⁵ in accordance with 10 U.S.C. § 1168(a). The article will demonstrate that the facts of an individual’s situation are vital to the analysis of this issue.

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¹ United States v. Hart, 66 M.J. 273 (C.A.A.F. 2008).

² U.S. Dep’t of Def., DD Form 214, Certificate of Release or Discharge from Active Duty (1 Aug. 2009).

³ Rule for Court Martial (RCM) 202 lays the foundation for which persons are subject to the jurisdiction of court-martial. The discussion section for RCM 202 states, “Court-martial jurisdiction over active duty personnel ordinarily ends on delivery of a discharge certificate or its equivalent to the person concerned issued pursuant to competent orders.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 202 (2008) [hereinafter MCM].

⁴ DEF. FIN. & ACCOUNTING SERV., INDIANAPOLIS CTR. REG. 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION glossary 14 (Mar. 2003) [hereinafter POLICY IMPLEMENTATION] (“Certifying Officer: An individual authorized to certify the availability of funds on any documents or vouchers submitted for payment and/or indicates payment is proper. (S)he is responsible for the correctness of the facts and computations, and the legality of payment.”); *see id.* para. 311304, at 31-7. The finance technician will then

[p]ost pay affecting transactions received on the separating soldier and monitor the account until DOS plus 20 days. Perform a Post Separation audit of the account at DOS plus 20 days. Verify all transactions are posted properly and the payment computed for the soldier is the same as the information on the What-If and manual changes. Make corrective inputs for data not posted properly or require input. After ensuring that no other pay affecting documentation is due on the soldier then pay the soldier any residual pay due using the available system (use SRD1 until the programs are changed for “V” status accounts). The EFT payment is sent to the soldier’s bank address on the MMPA, using the LH entry. The payment will be processed using the procedures for local payment via EFT.

Id.

⁵ 10 U.S.C. § 1168(a) (2006) (Discharge or release from active duty: limitations).

This article is organized into three sections. The first section provides a background analysis of personal jurisdiction using authority from the *Manual for Courts-Martial (MCM)*, 10 U.S.C. §§ 1168(a) and 1169, as well as case law precedent. The second section focuses on what it means for the final accounting of pay to be “ready for delivery.” The third and final section consists of an analysis of the current understanding of the concept “ready for delivery,” followed by the outcome of the introduction case.

II. Background

A. MCM

When determining whether personal jurisdiction exists over a Soldier, Article 2, UCMJ, and RCM 202 should be consulted. Article 2⁶ and RCM 202(a) describe who is subject to court-martial jurisdiction.⁷ The discussion of RCM 202(a) explains that “[c]ourt-martial jurisdiction over active duty personnel ordinarily ends on delivery of a discharge certificate or its equivalent to the person concerned pursuant to competent orders.”⁸ However, as illustrated later, this interpretation of RCM 202(a) lacks the specificity needed to comply with 10 U.S.C. § 1168(a).

B. 10 U.S.C. §§ 1168(a) and 1169

According to *United States v. Howard*, “[i]t is black letter law that *in personam* jurisdiction over a military person is lost upon his discharge from the service, absent some saving circumstance or statutory authorization.”⁹ Title 10 U.S.C. § 1168(a) specifies the requirements that must be met before a Soldier may be legally discharged from active duty service. Specifically,

(a) 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

Title 10 U.S.C. § 1169 further establishes what law controls when a Soldier must be discharged from military service early, stating

[n]o regular enlisted member of an armed force may be discharged before his term of service expires, except—(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court martial; or (3) as otherwise provided by law.¹¹

Section 1169 relies on § 1168(a) to provide the specific requirements necessary to legally discharge a Soldier from his active duty service obligation. These two statutes, read together, provide the starting point for judicial analysis of the personal jurisdiction issue.

⁶ UCMJ art. 2 (2008). The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it

Id.

⁷ MCM, *supra* note 3, R.C.M. 202(a) (“*In general*. Courts-martial may try any person when authorized to do so under the code.”).

⁸ *Id.* R.C.M. 202(a) discussion.

⁹ *United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985); *see United States v. King*, 42 M.J. 79, 80 (C.A.A.F. 1995) (quoting *Howard*, 20 M.J. at 354).

¹⁰ 10 U.S.C. § 1168(a) (Discharge or release from active duty: limitations).

¹¹ *Id.* § 1169 (Regular enlisted members: limitations on discharge).

C. Case Law and Policy Interpreting the Application of 10 U.S.C. § 1168(a)

1. *United States v. Howard: Are the Delivery of Pay and the DD Form 214 Enough to Terminate Personal Jurisdiction?*

In *United States v. Howard*, the Court of Military Appeals (COMA) addressed the meaning of “delivery” under 10 U.S.C. § 1168(a).¹² Although the court focused on the delivery of the appellant’s discharge certificate (DD Form 214), and not specifically on the delivery of the appellant’s final accounting of pay, the court established that the term “delivery” has legal significance.¹³ The appellant, Private (PV2) Claude Howard, Jr., had been pending separation for an administrative discharge under the provisions of Army Regulation (AR) 635-200¹⁴ when he was ordered to the Separation Transfer Point at Fort Devens, Massachusetts.¹⁵ The same morning he received his orders, the transfer point “issued him a General Discharge Certificate and a DD Form 214.”¹⁶ Howard “proceeded to the finance section to collect his travel pay and turn in his military identification card. . . . He then signed out of the command and was on his way home.”¹⁷ Later that day, the Criminal Investigation Division (CID) notified Private Howard’s commander that the Soldier was under investigation for wrongful possession of a military identification card.¹⁸ The commander directed that Howard’s orders be revoked.¹⁹ However, Howard “was not notified of this action until August 31, 1984, when he was located in Detroit, Michigan.”²⁰ Private Howard was subsequently returned to his former duty station and was prosecuted for wrongful possession of a military identification card, false swearing, larceny, and forgery in violation of Articles 134, 121, and 123, UCMJ.²¹

At trial, the trial court judge held that “personal jurisdiction to try appellant had been lost when the Government gave him a discharge certificate, processed him for separation, permitted him to leave Fort Devens, and did not notify him of the revocation until 9 days later.”²² However, the U.S. Army Court of Military Review (CMR) reversed the trial court’s decision and found that personal jurisdiction did exist over the appellant.²³ Appellant appealed to the COMA.

The issue before the COMA in *Howard* involved identifying the point at which a Soldier’s “moment of discharge” from military court-martial jurisdiction becomes effective.²⁴ The court looked to 10 U.S.C. § 1168(a) to determine when the appellant was effectively discharged.²⁵

Our examination of the statutory language and the legislative history of 10 U.S.C. § 1168 shows no indication that Congress intended to change the longstanding historical precedent for delivery of the discharge certificate to the time when a service member is released from active duty and court-martial jurisdiction terminates. The discussion to RCM 202, Manual for Courts-Martial, United States, 1984, supports this finding. ‘Delivery’ in this context has significant legal meaning. It shows that the transaction is complete, that full rights have been transferred, and that the consideration for the transfer has been fulfilled.²⁶

¹² *Howard*, 20 M.J. 353.

¹³ *Id.*

¹⁴ Army Regulation (AR) 635-200 is the Army’s active duty enlisted administrative separations regulation. U.S. DEP’T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005). Private Howard was being separated from the Army under Chapter 13, which provides the authority to discharge a Soldier for unsatisfactory performance. *Howard*, 20 M.J. 353.

¹⁵ *Howard*, 20 M.J. at 353.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 354.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 353.

²⁴ *Id.* at 354.

²⁵ *Id.*

²⁶ *Id.*

The court concluded that “[d]ischarge is effective upon delivery of the discharge certificate.”²⁷ Although the court did not specifically say the issue of delivery of pay influenced the outcome of the case, it is reasonable to assume that the court found that the final pay had been delivered since it cited 10 U.S.C. § 1168(a) in its analysis. In the end, the COMA reversed the CMR and held that the court-martial “no longer had *in personam* jurisdiction to try appellant for the charged offenses”²⁸ because the commander had authorized the appellant “to pick up his discharge certificate, as well as his DD Form 214 and travel pay”²⁹ While the COMA focused on the legal significance of “delivery” as the foundation of its analysis in *Howard*, later courts would interpret exactly what the three elements of 10 U.S.C. § 1168(a) mean.

2. United States v. William King (King II)³⁰: *Interpreting 10 U.S.C. § 1168(a)*

In *King II*, the COMA specifically addressed what a servicemember needs to effectuate a valid discharge in accordance with 10 U.S.C. § 1168(a).³¹ Prior to the expiration of his current service obligation, the appellant in the case, Boatswain’s Mate First Class William King, submitted a request for an early reenlistment. On the day of King’s reenlistment ceremony, the appellant received a discharge certificate and refused to complete the reenlistment ceremony.³² “Appellant then accompanied Ensign Vendrzyk, the reenlistment officer, to meet with a superior officer, Lieutenant Craig.”³³ After explaining his family problems to his superior officer, “some discussions regarding leave ensued.”³⁴ King then “returned to his ‘boat,’ retrieved his personal effects, and departed.”³⁵ At trial, King was charged with Desertion under Article 85, UCMJ, and Fraudulent Separation under Article 83, UCMJ.³⁶ The trial judge “granted appellant’s motion for dismissal of the desertion charge on the basis of lack of court-martial jurisdiction” but denied the motion as to the Article 83 offense.³⁷ The trial judge found that “[o]n 3 July, a discharge certificate was delivered to the accused with the intent, by the government, that it operate as a discharge in order that the accused be qualified to reenlist.”³⁸ King “accepted the discharge certificate with the intent and understanding that it terminated his status in that he was discharged.”³⁹ Even though the accused did not “check with his command or Disbursing [sic],” the trial judge found both matters to be “more administrative in nature and not conditions precedent to a discharge.”⁴⁰

During an earlier hearing of the case (*King I*),⁴¹ the Navy-Marine Corps Court of Military Review (NMCMR) reversed the decision of the lower court⁴² holding that “[t]he discharge, if any, was a nullity.”⁴³ Because the discharge certificate was “delivered for the sole purpose of effecting a reenlistment,” the actual delivery of the certificate lost its legal significance.⁴⁴

²⁷ *Id.*

²⁸ *Id.* at 355.

²⁹ *Id.*

³⁰ *United States v. King (King II)*, 27 M.J. 327 (C.M.A. 1989).

³¹ *Id.*

³² *Id.* at 328.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 327.

³⁷ *Id.* at 328.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *United States v. King (King I)*, 1987 CMR LEXIS 514 (N-M.C.M.R. July 13, 1987).

⁴² *King II*, 27 M.J. at 328.

⁴³ *King I*, 1987 CMR LEXIS 514.

⁴⁴ *Id.*; see *United States v. Howard*, 20 M.J. 353 (C.M.A. 1985).

“Therefore, delivery of the discharge certificate for the purpose of reenlistment did not terminate the military status of the accused and jurisdiction over his person.”⁴⁵

Eventually, King appealed, and the COMA upheld the NMCMR decision, finding that “court-martial jurisdiction existed over appellant.”⁴⁶ The court held that the “physical transfer of a discharge certificate to appellant under the latter circumstances did not deprive military authorities of court-martial jurisdiction over him.”⁴⁷ The court stated, “Congress has spoken as to what constitutes a valid discharge” in 10 U.S.C. § 1168(a) and 10 U.S.C. § 1169.⁴⁸ The court further explained,

We read these statutes as generally requiring that three elements be satisfied to accomplish an early discharge. First, there must be a delivery of a valid discharge certificate. . . . Second, there must be a final accounting of pay made. This is an explicit command set forth by Congress in 10 U.S.C. § 1168(a). . . . Third, appellant must undergo the ‘clearing’ process required under appropriate service regulations to separate him from military service.⁴⁹

The three-element test developed by the court in *King II*⁵⁰ established the theoretical framework that is still used to determine whether a military court has personal jurisdiction over an accused. Finding that King had not satisfied any of the elements of the congressional mandate⁵¹ and that the “mere physical transfer of the discharge certificate to appellant was not ‘delivery’ of the discharge as required by law,” the court affirmed the decision of the NMCMR and held that court-martial jurisdiction had not been lost.⁵² Although the three-element test is useful in defining when a discharge is effective, understanding the substance of each element is critical. For example, interpreting how the second element of *King II* may be met requires an understanding of how a local finance office processes a servicemember’s final accounting of pay prior to the individual’s discharge from active duty service.

3. Finance Policy and Payment Procedures

Understanding the payment procedures used by an installation finance office is important in determining whether a Soldier’s final pay was “ready for delivery.”⁵³ Defense Finance Accounting Services (DFAS) Manual 37-1 provides the framework for calculating a Soldier’s final pay. According to paragraph 311304, the finance technician will “[p]ay the soldier a separation payment on the soldier’s DOS [date of separation].”⁵⁴ The DOS is “[t]he date a Soldier is released from active duty; expiration term of service date.”⁵⁵ However, the servicemember’s “payment will be processed using the procedures for local payment by EFT (Electronic Funds Transfer).”⁵⁶

The final pay processing procedure at the local level is one factor courts consider when determining whether final pay is “ready for delivery.”⁵⁷ Although, the Defense Finance and Accounting Office (DFAO) provides the standard operating procedures (SOP) for installation finance offices, most offices have their own local SOP.⁵⁸ Recently, courts have considered

⁴⁵ *King I*, 1987 CMR LEXIS at 514.

⁴⁶ *King II*, 27 M.J. at 328.

⁴⁷ *Id.* at 329.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ 10 U.S.C. § 1168(a) (2006) (“Discharge or release from active duty: limitations”).

⁵⁴ POLICY IMPLEMENTATION, *supra* note 4, at 31-7.

⁵⁵ U.S. DEP’T OF DEF., STANDARD OPERATING PROCEDURE FOR ARMY MILITARY PAY OPERATIONS 4 (Nov. 2007).

⁵⁶ *Id.*

⁵⁷ *United States v. Hart*, 66 M.J. 273 (C.A.A.F. 2008).

⁵⁸ E-mail from Jenni Yacub, Lead Military Pay Technician, Defense Military Pay Office (Separations)–Fort Hood, Tex., to author (Jan. 13, 2009, 09:48 CST) (on file with author).

both the DFAO and local SOPs in their analysis, highlighting why trial counsel should understand these policies and procedures.⁵⁹ Without an understanding of these SOPs, trying to apply the case law interpreting 10 U.S.C. § 1168(a) to a particular case is pointless. As the next section will explain, these basic finance policies and procedures are used to interpret what delivery of the “final accounting of pay” means under 10 U.S.C. § 1168(a).

III. Interpreting What Delivery of the “final accounting of pay” Means IAW 10 U.S.C. § 1168(a)

A. *United States v. Joel S. King*

Prior to 2008, the courts failed to address specifically what “delivery” of the final accounting of pay meant under 10 U.S.C. § 1168(a). In *United States v. King*, decided in 1995, the Court of Appeals for the Armed Forces (CAAF) recognized this oversight but still failed to answer the question.⁶⁰

The appellant in *King*, Sergeant Joel S. King, was scheduled to be discharged on 30 July 1992.⁶¹ Because his orders stated he was not entitled to any separation pay, the appellant persuaded one of his fellow Soldiers to prepare a false amendment to his discharge orders stating he was entitled to separation pay.⁶² King then submitted the fraudulent amendment to the finance office.⁶³ When King arrived at the transfer point for out-processing, someone noticed the false amendment and alerted CID.⁶⁴ King was apprehended, prosecuted, and subsequently convicted of “unauthorized absence (29 days), presenting a false claim, and conspiracy to make a false claim, in violation of Articles 86, 132, and 81, Uniform Code of Military Justice.”⁶⁵ On 15 April 1993, “the Court of Military Review affirmed the findings and sentence”⁶⁶ of the lower court.

On appeal, the CAAF granted review of the case to determine whether “appellant’s court-martial lacked personal jurisdiction.”⁶⁷ Using the same analysis the court used in *King II*,⁶⁸ the CAAF found that King had not “picked up his paycheck nor undergone the required ‘clearing process’ prior to his apprehension.”⁶⁹ Because of the appellant’s fraudulent misconduct in “attempting to obtain separation pay to which he was not entitled, . . . the second and third prongs of the *King* requirements for a valid discharge from the armed forces were not met prior to appellant’s apprehension.”⁷⁰

Focusing on the second prong of the *King II* analysis, appellant’s counsel argued that the “picking up of appellant’s final paycheck is not a required step to the completion of a final accounting of pay.”⁷¹ The court refused to address the issue stating that answering the contention “is not necessary. . . here” because “[a]ppellant’s final accounting of pay was not

⁵⁹ *Hart*, 66 M.J. 273; see *United States v. Coker*, 67 M.J. 571 (C.G. Ct. Crim. App. 2008).

⁶⁰ *United States v. King*, 42 M.J. 79 (C.A.A.F. 1995).

⁶¹ *Id.* at 80.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 79.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ The *King II* court stated,

We read these statutes as generally requiring that three elements be satisfied to accomplish an early discharge. First, there must be a delivery of a valid discharge certificate. . . . Second, there must be a final accounting of pay made. This is an explicit command set forth by Congress in 10 U.S.C. § 1168(a). . . . Third, appellant must undergo the ‘clearing’ process required under appropriate service regulations to separate him from military service.

United States v. King (King II), 27 M.J. 327, 329 (C.M.A. 1989).

⁶⁹ *King*, 42 M.J. at 80.

⁷⁰ *Id.*

⁷¹ *Id.*

resolved due to appellant's own misconduct in fraudulently attempting to obtain separation pay to which he was not entitled."⁷² Thirteen years later, the CAAF would directly tackle this issue in *Hart*.⁷³

B. *United States v. Hart*

In a three to two decision in *Hart*, the CAAF finally answered the question of what it means to have a final accounting of pay "ready for delivery" under 10 U.S.C. § 1168(a). However, the dissent by two of the five judges left open the potential for future litigation on the issue.

In *Hart*, the appellant, Airman First Class Dustin Hart, "confessed to various drug offenses during an interview with the Air Force Office of Special Investigations (AFOSI) on January 2, 2004."⁷⁴ "Following his confession he worked with AFOSI for several months as a confidential informant gathering information about illegal drug use by active duty members."⁷⁵ No charges were ever preferred during this time period; however, "on January 8, 2004, a Medical Evaluation Board found Hart physically unfit for military service."⁷⁶ The Office of the Secretary of the Air Force notified the separation section of Hart's unit that Hart was to be administratively separated with a disability discharge.⁷⁷ Hart then began out-processing from the Air Force, which included completing a "separate 'finance' checklist and a final interview with finance personnel."⁷⁸ After completing all the finance checklists, Hart "met with a finance technician on February 24, 2004, and provided the information necessary for the calculation of his final pay."⁷⁹ Hart's section commander, "unaware that [Hart] was personally implicated in criminal activity," cleared Hart for final out-processing that same day.⁸⁰ "Two days later, the initial calculation of Hart's separation pay was entered into the computer system of DFAS,"⁸¹ and "[o]n 3 March 2004, the separations section issued Hart his DD Form 214 reflecting that date as the effective date of separation."⁸²

On 5 March, "Hart's squadron commander, AFOSI, and the legal office learned that Hart had received his DD Form 214."⁸³ The legal office "directed the finance office not to take any further action in calculating Hart's final pay" and the squadron commander issued a memorandum asking that Hart's DD Form 214 be revoked.⁸⁴ On 9 March, Hart was reported absent without leave and was eventually "arrested by civilian authorities on March 18, 2004."⁸⁵ Charges were preferred on the appellant on 23 March.⁸⁶

The trial judge denied appellant's motion to dismiss for lack of personal jurisdiction, and the appellant was "convicted of wrongful use, possession and distribution of various controlled substances."⁸⁷ The U.S. Air Force Court of Criminal Appeals affirmed the trial court's holding and "concluded that '[a]bsent a final accounting of pay, the appellant's early discharge was not legally effectuated and he remained subject to military court-martial jurisdiction."⁸⁸ The appellant then appealed to the

⁷² *Id.*

⁷³ *United States v. Hart*, 66 M.J. 273, 274 (C.A.A.F. 2008).

⁷⁴ *Id.* at 274.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 275.

⁸⁸ *Id.*

CAAF, which heard the case in order to determine “whether a valid discharge occurred which would deprive the Air Force of *in personam* jurisdiction over Hart.”⁸⁹

The CAAF began its analysis by looking at 10 U.S.C. § 1168(a), § 1169, and *King II*⁹⁰ for guidance “as to what is required to effectuate discharge.”⁹¹ The court then narrowed its focus to determine whether the appellant’s final pay was ready for delivery “within the meaning of the plain language of 10 U.S.C. § 1168(a).”⁹² “Based on the DFAS manual and the procedures of the base finance office” the trial court judge found that “critical calculations, reconciliations, and authorizations of final pay pursuant to DFAS regulations had not yet started.”⁹³ The facts of appellant’s case did not support the proposition that possession by the finance office of all the documents required to compute his final pay was enough to satisfy 10 U.S.C. § 1168(a).⁹⁴ Based on the lower court’s findings, the CAAF held that “Hart was not effectively discharged and remained subject to court-martial jurisdiction pursuant to Article 2(a)(1), UCMJ.”⁹⁵ Hart’s final pay was not ready for delivery within the meaning of 10 U.S.C. § 1168(a).⁹⁶

In their dissent, Judge Effron and Judge Stucky concluded that “Hart’s military status terminated on the date that the command delivered the discharge certificate to him.”⁹⁷ They argued that the three-element test established in *King II* was only “the general practice applicable in most instances” when determining whether an early discharge by a servicemember had been accomplished.⁹⁸ They found that the majority’s application of 10 U.S.C. § 1168 in Hart’s case to be overly broad stating,

Under the majority opinion’s interpretation of § 1168, the effective date of separation set forth in a discharge document, such as a DD-214, must be disregarded if personnel in the finance office have overlooked or failed to make sufficient progress in calculating a departing servicemember’s pay at the time of separation.⁹⁹

The dissent further stated that the majority’s holding allows the services to keep a servicemember on “active duty until an uncertain future time, the date on which his or her ‘final pay or a substantial part of that pay’ becomes ‘ready for delivery.’”¹⁰⁰ This would in time “remove the certainty of an effective date on the DD-214 . . . and replace it with the necessity of determining on a case-by-case basis the date on which an individual’s pay was ‘ready for delivery.’”¹⁰¹ Although disagreeing with the majority opinion, the dissent illustrates that determining whether an individual’s pay is “ready for delivery” in accordance with 10 U.S.C. § 1168(a) must be done on a “case-by-case basis.”¹⁰² Following *Hart*, courts have continued to rely on this “case-by-case” analysis.

⁸⁹ *Id.*

⁹⁰ *United States v. King (King II)*, 27 M.J. 327 (C.M.A. 1989).

⁹¹ *United States v. Hart*, 66 M.J. 273, 275 (C.A.A.F. 2008).

⁹² *Id.* at 276.

⁹³ *Id.* at 277.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 280.

⁹⁸ *Id.* (“In noting that the discharge statutes ‘generally’ require three steps, the opinion sought to describe the general practice applicable in most instances, rather than set forth an absolute rule.”).

⁹⁹ *Id.* at 279.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

C. *United States v. Coker*

In a unanimous decision in *United States v. Coker* the U.S. Coast Guard Court of Criminal Appeals (CGCCA) relied on the precedent established in *Hart*.¹⁰³ It is important to note, however, that the court saw the issue as a “question of subject matter jurisdiction over certain offenses” and that personal jurisdiction to try the appellant was not contested in the case.¹⁰⁴

Lieutenant Junior Grade Jay Coker was a reserve officer in the Coast Guard who was serving on active duty under an “extended active duty agreement beginning 4 August 2003 and ending 3 August 2006.”¹⁰⁵ Prior to the expiration of his agreement, Coker asked to extend his service agreement past 3 August.¹⁰⁶ However, “in May of 2006 he requested to be released from the new obligation and his request was approved.”¹⁰⁷ On 29 June a separation authorization was issued stating that his last day of active duty service would be 3 August 2006.¹⁰⁸ Before Coker could receive his DD Form 214, he was required to complete a “check-out sheet.”¹⁰⁹ “Under local procedures, Appellant should not have received his DD-214 until he had completed” this check-out sheet.¹¹⁰ Nevertheless, on 3 August, appellant received his DD Form 214 showing a separation date of 3 August 2006.¹¹¹ Prior to 3 August, the Personal Services Center (PSC) received notice that appellant would be leaving active duty the next day and had requested “to sell back fifty-five days of leave.”¹¹² On this date the “PSC had all the information they needed to calculate Appellant’s final pay”¹¹³ and “[a]ppellant’s final pay calculation occurred on 8 August 2006.”¹¹⁴

After being “convicted of misconduct on eight separate occasions involving six different four- and five-year-old boys,”¹¹⁵ some of which occurred after 3 August 2006, Coker appealed the decision claiming that the

court-martial did not have jurisdiction over Charge I, Specification 2, or over Charge V, Specification 7, because Appellant was not on active duty when those offenses were committed; he had received notice of final intent to release him from active duty, and his final pay was ready for delivery.¹¹⁶

Coker argued that “he had been separated on 3 August 2006 and therefore there was no court-martial jurisdiction to try him for alleged offenses occurring on 4 August 2006.”¹¹⁷ The trial court held that the U.S. Coast Guard did have subject matter jurisdiction over the above listed offenses because the delivery of the DD Form 214 was not “effective because the person who delivered it did not have authority to do so since Appellant had not completed the check out process.”¹¹⁸ Regarding the final accounting of pay issue, the trial court judge concluded that “[a]ppellant’s final pay or a substantial portion of it was ready for delivery.”¹¹⁹

¹⁰³ *United States v. Coker*, 67 M.J. 571 (C.G. Ct. Crim. App. 2008).

¹⁰⁴ *Id.* at 574 n.2.

¹⁰⁵ *Id.* at 573.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 574.

¹¹⁹ *Id.*

However, the CGCCA disagreed and found the trial court's finding on the issue of the DD Form 214 to be erroneous. The court resolved the subject matter jurisdiction issue by looking specifically at whether Coker's final pay had been ready for delivery. More specifically, the court looked at *Hart* to determine this issue. The court found that the final calculation of pay was not complete until 8 August 2006 and that the appellant's "final pay would have been deposited . . . on the mid-month payday."¹²⁰ Based on these findings, the court held that "[s]ince no part of Appellant's final pay was ready for delivery on 3 August 2006," Coker was not "truly released from active duty on that date, and his actions on 4 August could provide the basis for charges against him at a court-martial."¹²¹ The court based its holding on the trial court's findings of fact, stating that the facts did "not meet the plain language of 10 U.S.C. § 1168(a)."¹²² Although, the *Coker* case is not directly on point with the subject matter of this primer because it covers subject matter jurisdiction versus personal jurisdiction, the case demonstrates, once again, that facts matter when determining whether a servicemember's final accounting of pay was ready for delivery.

IV. Conclusion

In May 2008, *United States v. Hart*¹²³ finally answered what it means for a Soldier's pay to be "ready for delivery"¹²⁴ in accordance with 10 U.S.C. § 1168(a). *Hart* established that determining whether a Soldier's final pay was "ready for delivery" is a factual determination and not a determination as a matter of law. When faced with this issue, counsel must know the jurisdictional facts of their case and, more specifically, the policies and procedures of their local finance office. They must also ensure that these facts are included in the trial judge's findings on the record.

The introduction to this primer introduced an actual case resembling the facts of *United States v. Hart*. In line with *Hart*, the trial judge held that the Government had personal jurisdiction over the accused for court-martial purposes because the accused's pay was not "ready for delivery." Because the accused's pay had not been certified by the finance clerk and had not been sent to DFAS for final payment, the accused was prosecuted for his offenses. In the end, the facts of the case and the policies and procedures of the local finance office allowed the U.S. Army to prosecute this Soldier for his crimes.

¹²⁰ *Id.* at 575.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *United States v. Hart*, 66 M.J. 273 (C.A.A.F. 2008).

¹²⁴ 10 U.S.C. § 1168(a) (2006) (Discharge or release from active duty: limitations).