UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2012-12**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Air Force Cadet (AFC)	)	
ROBERT M. EVENSON, JR.,	)	
USAF,	)	
Appellee	)	**Panel No. 1**

On 5 January, 16 February and 23 February 2012, charges were preferred against the appellee for violations of Articles 92, 120, 120a 128, and 133, UCMJ, 10 U.S.C. §§ 892, 920, 920a, 928, 933. At some time prior to the Article 32, UCMJ, 10 U.S.C. § 832, hearing, one of the alleged victims, a United States Air Force Academy (USAFA) cadet, expressed concern about testifying in front of other cadets. These concerns were forwarded from the Sexual Assault Response Coordinator's office to the vice commandant at the cadet wing for culture and climate at the USAFA. Thereafter, command authorities made the decision to move the Article 32, UCMJ, investigation to Peterson Air Force Base (AFB), Colorado Springs, Colorado, and to prohibit USAFA cadets from attending the hearing during the alleged victims' testimony.[1] An Article 32, UCMJ, investigation was held from 27 February 2012 to 5 March 2012.[2]

On 9 August 2012, the convening authority referred the charges for trial by general court-martial. At trial, the appellee made a motion for appropriate relief, pursuant to Rule for Courts-Martial (R.C.M.) 906, requesting a new Article 32, UCMJ, hearing. Among other things, it was the appellee's contention that he was denied his right to a public hearing. After taking testimony on the motion, the military judge concluded the hearing had been partially closed by command action without following the proper procedures of R.C.M. 405 and ordered the charges dismissed without prejudice. The Government appeals that ruling under Article 62, UCMJ, 10 U.S.C. § 862.

[1] The case involved allegations by two victims, although the second victim never expressed the same concern about testifying as the first alleged victim.

[2] At the defense counsels' request, the investigating officer (IO) at the Article 32, UCMJ, 10 U.S.C. § 832, hearing, noted in her report that "[C]adets were sitting in the hearing on 27 Feb[ruary 20]12, and it appeared they were asked to leave. The [G]overnment representative indicated those cadets had not completed the proper paperwork to miss class in order to attend the hearing." There is no further discussion by the IO in her report about the cadets' attendance at the hearing.

Standard of Review

Under Article 62, UCMJ, this Court may act only with respect to matters of law, and a military judge's conclusions of law are reviewed de novo. *See* R.C.M. 908(c)(2); *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008). Unless the military judge's findings of fact are clearly erroneous, we are bound by his determinations and may not find facts or substitute our own interpretation of the facts. *Terry*, 66 M.J. at 517. "An accused's right to a public Article 32 investigative hearing is a 'substantial pretrial right' protected by the Sixth Amendment to the Constitution."[3] *United States v. Davis*, 64 M.J. 445, 447 (C.A.A.F. 2007) (quoting *ABC Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997)); *see also United States v. Chuculate*, 5 M.J. 143, 144-45 (C.M.A. 1978). "[I]f an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial." *United States v. Mickel*, 26 C.M.R. 104, 107 (C.M.A. 1958).

The Evidence

The military judge took extensive testimony on the motion. The evidence shows that at least five USAFA cadets received permission from their teachers to attend the appellee's Article 32, UCMJ, hearing. They arrived at the hearing location and were seated. Just before the first witness testified, they were informed by the cadets' air officer commanding (AOC), Major PK, that he had received information "from higher up" that they were not allowed to attend the hearing. The cadets returned to the USAFA, where they were informed they needed to obtain a Scheduling Committee Action (SCA) to attend the hearing. That evening, two SCA's were approved for Cadets M and C, who traveled to the hearing the following day. Despite having all the proper permissions, those cadets were excluded from the hearing during the testimony of the alleged victim.

Colonel (Col) RA, the vice commandant of cadets, testified that Col PB, the staff judge advocate (SJA), contacted him from the hearing location on the second day of the hearing to question why cadets were in attendance with approved SCA's. Col RA assumed Col PB called primarily because "they didn't want cadets there when the victim testified." Col RA clearly understood that it was Col PB who did not want cadets present when the alleged victim testified. In response, Col RA contacted Col R, the vice commandant at the cadet wing for climate and culture, who was at the hearing, to "see how we could get them out of the courtroom." Col R informed him that the cadets had already left by then.

The SJA, Col PB, testified that the superintendent and commandant of cadets wanted to close the hearing because the alleged victim did not want to testify in front of other cadets, but Col PB told them that no legal basis existed to close the hearing. He

[3] U.S. CONST. amend. VI.

discussed the location of the hearing with them and "probably" suggested that they move the hearing venue from the USAFA to Peterson AFB. Col PB saw it as a "viable alternative," with the "purpose" being to "put some distance between the Academy and Cadet [W]'s testimony in front of her classmates."

Col PB equivocated in his responses to the military judge concerning whether he was involved in the decision to exclude cadets during the victim's testimony on the second day of the hearing:

> Military Judge: Do you recall having any conversations with [Col R] regarding essentially turning cadets away or placing those five versus two, or only when the victim's not testifying limitation on cadet attendance?
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> Col PB: You know, if they had asked me, certainly -- I mean, it was an open hearing. Anyone can attend at any time. When you're a service member, you just need permission of your organization to be absent from your duty location. So if I had a conversation with [Col R or Col RA] or an AOC, or anyone else, about when their cadets can attend, I mean, I don't have the authority to say they can't come into a public hearing.
>
> Military Judge: So at the end of the analysis, if someone told the cadets only two of you can show up and those two can only attend when the victim is not testifying, that would have been done without consultation with you?
>
> Col PB: Probably because that does not make sense to me, and I would have told them that you don't have the legal authority to tell service members -- as a matter of fact, I did go through this when we moved it to Peterson. I explained that service members on leave, it's their personal time. You don't have the authority to tell them they can't attend. So if someone takes leave so that they can go to the hearing, they're on leave. You can't order a military member on leave not to go into the hearing room, and it's explained to me that cadets don't get leave.
>
> Military Judge: And just to be clear: No one talked to you about the five cadets that had an SCA that would allow them to be away from the Academy for that Article 32 hearing?
>
> Col PB: Somebody might have said that they have an SCA; somebody might have said that they got permission from their AOC's. I don't recall specifically. But I do recall talking to one of the vice commanders at the Cadet Wing and reminding them that -- you know -- you can dictate the duty location of your service members.

When confronted with Col RA's testimony that Col PB had spoken with him and Col RA clearly understood that Col PB did not want cadets at the hearing, Col PB responded that his commanders went *against* his advice in moving the hearing to Peterson AFB to prevent cadets from attending, in contrast to his earlier testimony about him suggesting the move: "I wasn't for closing the hearing and I explained why, that we really couldn't close the hearing and I wasn't a proponent of moving it to Peterson either. But my commanders wanted to move it and so I executed it."

Arguing on the motion, trial counsel conceded that cadets were specifically excluded from attending the hearing for the specific reason "that their presence would interfere with the investigation; that they would intimidate" the alleged victim, and that the only reason for moving the hearing to Peterson AFB was out of concern that the alleged victim would be embarrassed or intimidated by the presence of cadets. Nevertheless, trial counsel argued that the hearing was not closed to spectators generally and, therefore, no specific findings for closure were required by R.C.M. 405. The Government essentially argued that prohibiting specific individuals from attending the hearing does not equate to a partial closure, and that their exclusion had no "impact on the case going forward." Defense counsel argued that the proceedings were partially closed without following the closure procedures of R.C.M. 405.

The Ruling by the Military Judge

The military judge's ruling on the motion sets forth extensive findings of fact, which are supported by the record and are not clearly erroneous. *Terry*, 66 M.J. at 517. Several cadets attempted to attend the first day of the Article 32, UCMJ, hearing, but they were not authorized to attend that day because they had not obtained the required SCA. After obtaining the proper SCAs that evening, five cadets were granted permission to attend the hearing. These five cadets were then informed, through their chain of command, that only two could attend the hearing and that even the two authorized to attend could not be present while the victims testified. When the SJA received word that the two cadets were in attendance on the second day of the hearing, he called the vice commandant, Col RA, to ask why they were in attendance and reminded him that the reason they were holding the hearing at Peterson AFB was so cadets could not attend. Other spectators who were not cadets were present throughout the entirety of the Article 32, UCMJ, hearing, and were not excluded during the victims' testimony. Based on this evidence, the military judge concluded the appellee's "rights were violated by what amounts to an intentional *de facto* partial closure of the Article 32 hearing." The "specific exclusion of the five cadets who were otherwise authorized under the SCA to attend the hearing . . . emphasizes the deprivation of the [appellee's] rights to a public hearing."

Discussion

Article 32, UCMJ, investigations "are public hearings and should remain open to the public whenever possible." R.C.M. 405(h)(3) Access by spectators may be "restricted or foreclosed" in the discretion of the commander who directed the investigation or the investigating officer (IO) when an "overriding interest exists that outweighs the value of an open investigation." *Id*. Before restricting or foreclosing access to the hearing, the commander or IO must conduct a "case-by-case, witness-by-witness, circumstance-by-circumstance analysis" of whether such restriction or foreclosure is necessary. *Id*. Specific written findings of fact must be included in the IO's report. *Id*. Despite the lack of any such analysis or findings by the commander or IO in this case and despite the SJA's testimony that no legal basis existed to restrict or foreclose access to the hearing, the evidence overwhelmingly shows that the convening authority and his SJA intended to and did in fact restrict access to the hearing during testimony of the alleged victims.

Restricting access, as opposed to completely foreclosing access, is analogous to a partial closure. "Closures have typically been described as 'partial' when select spectators or members of the press were barred from the courtroom, but others were allowed to remain." *United States v. Ortiz*, 66 M.J. 334, 341 (C.A.A.F. 2008) (citing *United States v. Osborne*, 68 F.3d 94, 99 (5th Cir. 1995) ("exclusion of codefendant's sister and 'new spectators' during testimony of one witness"). *See also United States v. Farmer*, 32 F.3d 369, 371-72 (8th Cir. 1994) (exclusion of all spectators except victim's family while victim testified); *Nieto v. Sullivan*, 879 F.2d 743, 753-54 (10th Cir. 1989) (exclusion of defendant's sisters and other unspecified relatives during one witness's testimony); *United States v. Sherlock*, 962 F.2d 1349, 1356-59 (9th Cir. 1989) (exclusion of defendants' unspecified family members during victim's testimony). Testimony of the SJA alone, as detailed above, is sufficient to establish the convening authority's intent to restrict public access to the Article 32, UCMJ, hearing during testimony of the alleged victims. The military judge described this restricted access as a "*de facto* partial closure." His conclusion is consistent with the foregoing cases and equates to a restriction of access as described in R.C.M 405(h)(3).

We find that the commander who ordered the investigation, by and through his SJA as executing agent, restricted access to the hearing, in violation of the requirements of R.C.M. 405(h)(3). Indeed, the SJA testified that no legal basis existed to do so, but he nevertheless executed the orders of his commander. We could "infer and glean from the record [of] findings" why there was restricted access by specific spectators at the hearing; however, "[w]e decline to engage in *post hoc* reconstruction of facts and findings," when the IO or commander who directed the investigation is required to do such analysis and the IO is "required to place [the] analysis [in the IO's report] to demonstrate that this balancing occurred." *See Ortiz*, 66 M.J. at 342. Under the circumstances, the appellee's right to a public Article 32, UCMJ, hearing was violated.

Accordingly, it is by the Court on this 27 day of February, 2013,

ORDERED:

That the United States appeal under Article 62, UCMJ is hereby **DENIED**.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist