

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Technical Sergeant ROBERT J. RAMOS
United States Air Force**

Misc. Dkt. 2006-07

24 January 2007

GCM convened at Beale Air Force Base, California on 5 September 2006.
Military Judge: Nancy J. Paul.

Appellate Counsel for the United States: Colonel Gerald R. Bruce,
Lieutenant Colonel Robert V. Combs, Captain Daniel J. Breen, and Captain
Jefferson E. McBride.

Appellate Counsel for Appellee: Colonel Nikki A. Hall and Philip D. Cave,
Esq.

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACOBSON, Judge:

After extensive motions practice, the military judge prohibited the government from using certain portions of a witness' deposition as substantive evidence to support charges preferred against the accused several months after the deposition took place. The government appealed the military judge's ruling to this Court under Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862. We find the military judge's factual determinations to be supported by the record and her conclusions of law to be correct, and that she did not abuse her discretion in making her ruling regarding exclusion of the deposition evidence.

The United States may appeal an order or ruling of the military judge “which excludes evidence that is substantial proof of a fact material in the proceeding” in cases in which a punitive discharge may be adjudged. Article 62(a)(1)(B), UCMJ, 10 U.S.C. § 862(a)(1)(B). The alleged offenses in this case carry a maximum punishment that includes a punitive discharge. *See, e.g., Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 96e (2005 ed.).

Despite our factfinding powers under Article 66(c), UCMJ, 10 U.S.C. § 866(c), in ruling on issues raised under Article 62, UCMJ, we “may act only with respect to matters of law.” Article 62(b), UCMJ, 10 U.S.C. § 862(b). On matters of fact, we are bound by the trial judge’s factual determinations unless they are unsupported by the record or clearly erroneous. *United States v. Plants*, 57 M.J. 664, 665 (A.F. Ct. Crim. App. 2002) (citing *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985)). We review matters of law de novo. Article 66(c), UCMJ. Additionally, both parties to this appeal agree, and we concur, that the standard of review of a military judge’s decision to exclude evidence is limited to whether she abused her discretion. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

The military judge made detailed findings of fact, which we adopt as our own and will not repeat here. Essentially, the military judge pointed out that Article 49, UCMJ, 10 U.S.C. § 849, and Rule for Courts-Martial 702 authorize depositions only after preferral of charges. She expressed the concern that using the deposition of Mr. John Kozakos, a foreign national, as the only evidence of the subsequently-preferred charges deprived the appellee of effective cross-examination in regard to those charges. She concluded that the 3 November 2005 deposition of Mr. Kozakos “meets the requisite for admissibility as to the initial charges, but does not do so as to the additional charges as such charges were not in existence at the time the deposition was taken.” Therefore, she ruled that the deposition could not be used in support of the additional charges, all of which were preferred on 21 February 2006. We find the military judge’s findings of fact to be supported by the record and not clearly erroneous. We also agree with her conclusions of law as they relate to the specific circumstances of this case. Further, we find that the military judge did not abuse her discretion in deciding to prohibit the government from using the deposition of Mr. Kozakos as substantive evidence in support of the additional charges. While we are not unsympathetic to the difficulties inherent in securing testimony from foreign witnesses, we note that the government had ample means by which the testimony of Mr. Kozakos could have been obtained after preferral of the additional charges but inexplicably chose to forgo those opportunities. The situation in which the government now finds itself in regard to the additional charges cannot be remedied by violating the appellee’s right to confrontation.

We also considered the additional matters raised by the appellee. We find the appellee’s claim that the government, for various technical reasons, has forfeited its right to appeal, to be wholly without merit. While all parties might have benefited by a little

more clarity in their communications, we find that the document provided by trial counsel to the military judge on 7 September 2006 entitled “Notice of Article 62 Appeal,” along with subsequent discussions on the record and via e-mail, served as a timely filing of notice of appeal.

As to the appellee’s purported “cross-claim,” we find no controlling authority that authorizes us to consider the assertion of error, much less compels us to do so at this stage of the proceedings. The cases to the contrary, cited by the Appellee, are all post-conviction cases. We decline the appellee’s invitation to attempt to expand our statutory authority at this time, but will thoroughly consider any and all assertions of error he might wish to raise at a later date pursuant to Article 66(c), UCMJ, should the occasion arise.

Decision

Applying the Article 62, UCMJ, standard of review, we conclude the military judge did not err in holding that the deposition of Mr. Kozakos cannot be used in support of the additional charges that were preferred against the appellee on 21 February 2006. Her factual determinations are supported by the record, her conclusions of law are correct, and she did not abuse her discretion in making her evidentiary rulings. We also find the appellee’s first assignment of error to be without merit, and his third to be untimely. Accordingly, the appeal by the United States is denied. The appellee’s purported cross-appeal is dismissed without prejudice.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator