

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20220195

Private First Class (E-3)

GLEN R. SPITZ,
United States Army,

Appellant

Tried at Fort Riley, Kansas, on 16
December 2021 and 19 April 2022,
before a general court-martial
convened by the Commander,
Headquarters, 1st Infantry Division,
Colonel Steven C. Henricks, military
judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error

**WHETHER THE MILITARY JUDGE ERRED BY
ADMITTING A COMPANY GRADE ARTICLE 15
IN THE GOVERNMENT'S PRESENTENCING
CASE.**

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, in
accordance with his pleas, of two specifications of aggravated assault with
substantial bodily harm inflicted upon a child under the age of sixteen years and
one specification of assault consummated by battery upon a child under the age of
sixteen years, in violation of Article 128, Uniform Code of Military Justice, 10

U.S.C. §928 (2019) [UCMJ]. (Statement of Trial Results; R. at 16).¹ The military judge sentenced appellant to confinement for thirty-six months and a dishonorable discharge. (R. at 107). On 3 May 2022, the convening authority approved the sentence. (Convening Authority Action). The military judge entered judgment on 4 May 2022. (Judgment).

Statement of Facts

On 19 April 2022, appellant pleaded guilty in accordance with his plea agreement. (R. at 16). At the close of the prosecution's presentencing case, the trial counsel offered Prosecution Exhibit (PE) 6 for identification into evidence. (R. at 85). Prosecution Exhibit 6 is a record of non-judicial punishment (NJP) under Article 15, UCMJ, dated 13 September 2021, for disrespect in deportment toward a warrant officer where appellant raised his voice in an aggressive manner. (Pros. Ex. 6). Page one of PE 6 is a Memorandum for Record (MFR) from a

¹ The government initially charged appellant with two specifications of aggravated assault with grievous bodily harm inflicted upon a child under the age of sixteen years and one specification of assault consummated by battery upon a child under the age of sixteen years; one specification of maiming; and one specification of wrongful abuse of an animal of a nature to bring discredit upon the armed forces, in violation of Articles 128, 128a, and 134, UCMJ. (Charge Sheet). In accordance with the pretrial agreement, appellant pleaded not guilty to Charge II and its Specification and to Charge III and its Specification; the government dismissed those charges and specifications. (R. at 81). For Specifications 1 and 2 of Charge I, in accordance with the pretrial agreement, appellant pleaded to excepted and substituted language, which changed the charged offense from grievous to substantial bodily harm. (App. Ex. IX; R. at 29).

paralegal attesting that she is a custodian of records for appellant's brigade legal office. (Pros. Ex. 6). The paralegal further attested that the Article 15 contained in PE 6 is a true and accurate copy of the original record, and that the record was kept in accordance with Army Regulation (AR) 25-400-2, Information Management: The Army Records Information Management System (2 October 2007), and AR 27-10, Legal Services: Military Justice [hereinafter AR 27-10] (20 November 20). (Pros. Ex. 6).

The defense objected to PE 6 on the grounds of authentication because the paralegal specialist was not the proper records custodian of the underlying Article 15. (R. at 85-86). The defense stated that AR 27-10, in the context of records retention for PE 6, applied to military justice record keeping and not to appellant's local file, which was maintained by appellant's unit personnel office. (R. at 86). The government did not clarify, nor did the military judge ask, whether the Article 15 was pulled from the legal office's records, or from appellant's local or permanent file. (R. 85-87). The military judge noted that a deployed paralegal specialist has a secondary duty in a personnel office, an inaccurate assertion explicitly contradicted by AR 27-10. "Unless approved by a Supervisory [Judge Advocate] or Chief/Command Paralegal . . . in the technical chain of supervision, paralegal Soldiers will perform only professional paralegal duties for which they

are trained. They should not perform non-paralegal duties....”² *Id.* at para. 3-8c. Furthermore, appellant was with a rear detachment and *not* deployed when he received the Article 15. (R. at 86-87). Nevertheless, the military judge the overruled the defense objection and admitted PE 6. (R. at 87).

Standard of Review

This court reviews a military judge’s admission of evidence during sentencing for an abuse of discretion. *United States v. Carter*, 74 M.J. 204, 206 (C.A.A.F. 2015) (citing *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009)). If the military judge abused his discretion, this court must then determine whether the admission of the evidence “substantially influenced the adjudged sentence.” *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005).

Law and Argument

Because PE 6 was a unit paralegal copy and not obtained from a “file in which the record is properly maintained” in accordance with AR 27-10, para. 5-37a(4), the exhibit constituted impermissible presentencing evidence.

Accordingly, the military judge erred by admitting it. *See United States v. Frasur*,

² Battalion paralegal soldiers are sometimes physically located with their respective S-1 personnel sections, both in garrison and while deployed. However, this is to facilitate legal support to battalion commanders, and not to conduct S-1 related tasks. Much more frequently, however, paralegal soldiers are consolidated at the brigade level, where they primarily perform duties of a legal nature under the supervision of the Brigade Judge Advocate. *See* Dep’t of Army, Field Manual 1-04, Legal Support to Operations, ch. 3 (Jun. 2020).

ARMY 20210420, 2022 CCA LEXIS 401 (Army Ct. Crim. App. 8 Jul. 2022) ([mem. op.](#)).

A. An Article 15 as Presentencing Evidence

Rule for Courts-Martial [R.C.M.] 1001(b)(2) permits the prosecution “[u]nder regulations of the Secretary concerned . . . [to] introduce from the personnel records of the accused evidence of the accused’s . . . character of prior service,” which includes punishment under Article 15, UCMJ. Rule for Courts-Martial 1001(b)(2) defines personnel records to include “records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused.”

Army Regulation 27-10 provides further guidance for the authorization and limitation of admission of records of NJP under Article 15, UCMJ, as presentencing evidence. A record of NJP may be admissible at courts-martial “from any file in which it is properly maintained by regulation.” AR 27-10, para. 3-44b. If a soldier at or below the rank of specialist or corporal receives NJP, he or she will have the original Article 15 “filed locally in the unit NJP or unit personnel files . . .” AR 27-10, para. 3-37b(1). Regarding introduction of records of the accused's prior service for sentencing, AR 27-10 states:

For purposes of [Rules for Courts-Martial] 1001(b)(2) and (d), trial counsel and defense counsel may, at the counsel’s discretion, introduce to the court-martial copies of any personnel records that reflect the past conduct and

performance of the accused, made or maintained according to departmental regulations.

AR 27-10, para. 5-37a. Records of NJP may be admitted as a record of the accused's prior service for purposes of sentencing, so long as the NJP is not a summarized Article 15, and the record comes "from any *file* in which the record is properly maintained by regulation." AR 27-10, para. 5-37a(4) (emphasis added); *see also* R.C.M. 1001(b)(2). A copy of the Article 15 can be substituted for the original if properly authenticated. *See* AR 27-10, para. 5-37b and Mil. R. Evid. 901.

B. The Admission of PE 6 Was Clearly Erroneous

Here, although appellant received an Article 15 within two years of his court-martial while assigned to the same unit, there was insufficient evidence to show that the record introduced at trial was pulled from a "file in which the record is properly maintained by regulation." AR 27-10, para. 5-37a(4). The MFR attached to the Article 15 states that the undersigned paralegal specialist is a custodian of records at a *legal* office, not at a *unit personnel* office. Trial counsel did not establish the record was pulled from appellant's local or permanent Official Military Personnel File.

Military Justice Online [MJO] is the Army-wide system for legal offices to monitor and record processing records of NJP, and this court recently held in *Frasur* that a unit paralegal copy of NJP in MJO does not constitute a "file in

which the record is properly maintained by regulation” within the meaning of AR 27-10, para. 5-37a(4). 2022 CCA LEXIS 401 at *5. According to AR 27-10, para. 14-1a, the purpose of MJO is to be the primary tool for: (1) “creating, processing, and managing administrative reprimands, administrative separation, NJP, and courts-martial[;]” and, (2) “for generating data and conducting analysis related to the execution of administrative actions and the practice of military justice.” The MJO application is not a personnel file but rather an application for creating and processing actions, to include records of NJP. A paralegal specialist must maintain the information contained in MJO for the enumerated reasons above for a period of two years. It is clear from the language of AR 27-10 and R.C.M 1001(b)(2) that the admission of prior records of service are to be obtained from an accused's personnel file, either the local or permanent Official Military Personnel File, and not a paralegal database designed for record keeping.

The paralegal specialist stated she was a custodian of records at a legal office, not a personnel office. (Pros. Ex. 6, pg. 1). The record is unclear as to whether the Article 15 was pulled from a personnel file or MJO. However, in admitting the Article 15, the military judge relied on his own mistaken and unsupported assertion that paralegal specialists on deployment [always] have a secondary duty at a unit personnel office and, presumably, have access to a soldier’s personnel file. (R. at 86). The government, however, produced no


evidence to show that *this* paralegal specialist worked in the personnel section performing secondary duties, much less that the record was pulled from a personnel file. In addition, defense counsel highlighted that the Article 15 was imposed while appellant was on rear detachment and not on deployment. (R. at 87). Accordingly, the military judge abused his discretion when he determined PE 6 constituted permissible presentencing evidence under R.C.M. 1001(b)(2) and allowed its admission.

C. Prosecution Exhibit 6 Substantially Influenced the Adjudged Sentence


Appellant's Article 15 was for disrespect in deportment to a warrant officer in that appellant raised his voice in an aggressive manner. The disrespect is alleged to have occurred two months after the conduct to which appellant pled guilty; appellant received the maximum punishment allowed under Article 15, UCMJ, with no suspension of punishment. (Pros. Ex. 6 and Charge Sheet). The prospect of appellant's rehabilitative potential, particularly given that the plea agreement required the military judge to impose a dishonorable discharge, was central to any amount of confinement to be adjudged. (App. Ex. I). The erroneous admission of PE 6, which along with appellant's enlisted record brief, constituted the entirety of the government's characterization of appellant's military service, substantially influenced the adjudged sentence.

Conclusion

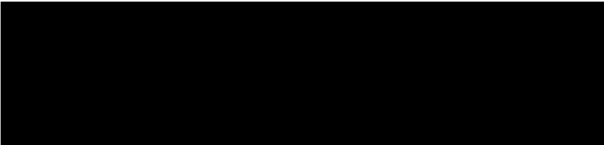
For the foregoing reasons, appellant respectfully requests this court reassess the sentence.




JUSTIN L. WATKINS
CPT, JA
Appellate Defense Counsel
Defense Appellate Division



RACHEL P. GORDIENKO
MAJ, JA
Branch Chief
Defense Appellate Division



DALE C. McFEATTERS
LTC, JA
Deputy Chief
Defense Appellate Division



MICHAEL C. FRIESS
COL, JA
Chief
Defense Appellate Division

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on October 27, 2022.



MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division