UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING,[1] and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Chief Warrant Officer Two ANDRE X. TATE
United States Army, Appellant

ARMY 20200590

Headquarters, 82nd Airborne Division
J. Harper Cook, Military Judge
Colonel Jeffrey S. Thurnher, Staff Judge Advocate

For Appellant: Captain Sean P. Flynn, JA (argued); Robert Feldmeier, Esquire (on brief); Carol Longenecker Schmidt, Esquire; Robert Feldmeier, Esquire (reply brief and answer to specified issues).

For Appellee: Major Pamela L. Jones, JA (argued); Colonel Christopher B. Burgess, JA; Captain Andrew M. Hopkins, JA; Major Pamela L. Jones, JA (on brief and brief on specified issues).

9 September 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

EWING, Judge:

Following appellant's conviction at a general court-martial, a military judge sentenced him to six months of confinement and a reprimand. Because this sentence fell below the threshold for us to otherwise review his case, appellant petitioned our court for review under Article 69, Uniform Code of Military Justice, 10 U.S.C. § 869 (2018) [UCMJ]. We now hold that we lack jurisdiction in this case, and dismiss appellant's appeal.

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[1] Judge Ewing decided this case while on active duty.

I. BACKGROUND

A. The Trial

In October 2020, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of failing to obey a lawful order or regulation, assaulting his wife, and conduct unbecoming an officer, in violation of Articles 92, 128b, and 133, UCMJ. The military judge sentenced appellant to six months of confinement and a reprimand. This sentence fell below our Article 66 threshold for automatic appellate review of appellant's court-martial by this court, because the sentence contained neither a punitive discharge nor at least two years of confinement. UCMJ art. 66(b)(3).[2] It also precluded appellant from filing a direct appeal to this court, as it did not include confinement for "*more than* six months." UCMJ art. 66(b)(1)(A) (emphasis added). Thus, following his court-martial, appellant had no direct path to appeal to our court.

B. The Article 65 Review

The process for reviewing such so-called "sub-jurisdictional" general courts-martial changed in several respects for cases referred on or after 1 January 2019.[3] Because, to our knowledge, no appellate court has yet discussed these changes in a written opinion, we do so here both by way of background and to explain the procedural posture of appellant's case.[4]

The first pertinent 2019 change provided that the initial review of appellant's court-martial was a "Review by [The] Judge Advocate General" (TJAG) under Article 65, UCMJ. UCMJ art. 65(d). Article 65 mandates that such reviews "shall be completed in each general and special court-martial that is not eligible for direct appeal" to this court under Article 66. UCMJ art. 65(d)(2)(A). The black letter of Article 65 gives TJAG the authority to delegate Article 65 reviews to attorneys "within the Office of the Judge Advocate General or another attorney designated

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[2] Unless otherwise specified, all references here to Articles 65, 66, and 69 refer to the versions of those Articles that took effect on 1 January 2019.

[3] The changes discussed here were part and parcel to the numerous changes included in the Military Justice Act of 2016.

[4] The Navy and Air Force appellate courts have issued short unpublished opinions, with no analysis, denying relief under the post-2019 Article 69. *See United States v. Howard*, No. 202000251, 2022 CCA LEXIS 193 (N.M. Ct. Crim. App. 29 Mar. 2022); *United States v. Csady*, No. ACM 39869, 2021 CCA LEXIS 516 (A.F. Ct. Crim. App. 30 Sep. 2021); *United States v. Farnum*, No. 202000120, 2021 CCA LEXIS 597 (N. M. Ct. Crim. App. 11 Nov. 2021).

under regulations prescribed by the Secretary concerned." UCMJ art. 65(d)(1). Article 65 requires that this review include a "written decision" addressing: (1) whether the court-martial's jurisdiction was proper; (2) whether the charges and specifications of conviction stated an offense; (3) a conclusion as to whether the sentence was within legal limits; and (4) "[a] response to each allegation of error made in writing by the accused." UCMJ art. 65(d)(2)(B). If the delegated attorney conducting the Article 65 review "believes corrective action may be required," the case is then forwarded to TJAG "who may set aside the findings or sentence, in whole or in part." UCMJ art. 65(e)(1).

In June 2021 Colonel CD, at the time a reserve member of the U.S. Army Trial Judiciary, performed the Article 65 review in appellant's case. This was in accordance with Article 65's express delegation provision, and the subsequent regulatory designation of officers like Colonel CD as individuals authorized to conduct Article 65 reviews. *See* Army Reg. 27-10, Legal Services: Military Justice, para. 5-60 (20 Nov. 2020) (delegating Article 65 review authority to attorneys in the Criminal Law Division of the Office of The Judge Advocate General (OTJAG-CLD), attorneys in the Office of the Clerk of Court of this court, any attorney in the U.S. Army Trial Judiciary, and appellate military judges). Colonel CD's Article 65 review found no irregularities with appellant's court-martial and provided appellant with no relief.

C. The Article 69 Review

Following Colonel CD's Article 65 review, a second 2019 change to the sub-jurisdictional review process—this time to Article 69—provided appellant with the ability to apply within one year of the Article 65 review to the Judge Advocate General for an *additional* review. UCMJ art. 69(b). Specifically, Article 69(c)(1)(A) provides that in cases reviewed under Article 65, TJAG:

> [M]ay set aside the findings or sentence, in whole or in part, on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

Id. Appellant, believing his court-martial contained multiple legal errors, presented a timely Article 69 petition to TJAG requesting relief under this provision.

Unlike Article 65, the post-2019 version of Article 69 contains no language authorizing TJAG to delegate Article 69 reviews to officers in OTJAG-CLD, or to anyone else. This lack of delegation language also stands in contrast to the *pre*-2019 version of Article 69, which provided for review of sub-jurisdictional general courts-martial "*in the office of* the Judge Advocate General." UCMJ art. 69(a)

(2012) (emphasis added). Notwithstanding this, TJAG delegated—by memorandum—the authority to *deny* relief under the post-2019 Article 69 to attorneys assigned to OTJAG-CLD, but withheld authority to *grant* relief to his personal level. Pursuant to TJAG's delegation, Lieutenant Colonel JR, an attorney assigned to OTJAG-CLD, conducted the Article 69 review in appellant's case. In November 2021, in a document entitled "Action Pursuant to Article 69," Lieutenant Colonel JR stated in pertinent part the following:

> I find that [appellant] has not established a proper and specific basis for relief under one or more of the enumerated statutory grounds. Accordingly, the Application for Relief is denied.[5]

D. Appellant's Application to This Court

Before 2019, Lieutenant Colonel JR's denial would have been the end of the road for appellant. This is because before 2019, unless TJAG personally certified a sub-jurisdictional case to our court for review, there was no mechanism for an appellant to further appeal TJAG's (or, more accurately, OTJAG-CLD's) decision. But in the *third* important 2019 change, Article 69 now allows for appellants themselves to apply to our court for further review following a qualifying TJAG "action" under Article 69. Specifically, Article 69(d)(1)(B) provides that the Courts of Criminal Appeals:

> [M]ay review the action taken by the Judge Advocate General under [Article 69(c)] . . . in a case submitted to the Court of Criminal Appeals *by the accused* in an application for review.

Id. (emphasis added).[6]

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[5] While the November document included the phrase "FOR THE JUDGE ADVOCATE GENERAL" above Lieutenant Colonel JR's signature block, the most natural reading of this document along with TJAG's blanket delegation of the authority to deny relief under Article 69 is that TJAG took no personal action regarding appellant's Article 69 application.

[6] In the Report of the Military Justice Review Group (MJRG)—the group responsible for the bulk of the changes Congress ultimately adopted in the Military Justice Act of 2016—the MJRG explained that the intended purpose of this change to Article 69 was to "improve the appellate process by providing an accused who believes that his case includes legal error with an opportunity to apply directly to a

(continued . . .)

On the same day in November 2021 that Lieutenant Colonel JR denied appellant's Article 69 application, he sent appellant a letter informing him both of the denial decision and appellant's right to petition our court for additional review "of the action taken by the Judge Advocate General . . . under Article 69(c)" within 60 days of TJAG's "action."[7] Appellant timely petitioned our court for further review, alleging multiple assignments of error. We granted review of appellant's case but specified the following question for briefing and argument:

> WHETHER THIS COURT HAS JURISDICTION TO REVIEW APPELLANT'S CASE FOR FURTHER REVIEW UNDER ARTICLE 69(d) WHEN THE JUDGE ADVOCATE GENERAL OF THE ARMY HAS NOT TAKEN AN ACTION OUTLINED IN ARTICLE 69(c).

See, e.g., Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) (courts have a "special obligation" to determine the question of jurisdiction, regardless of the parties' positions); *see also, e.g., Iasu v. Smith*, 511 F.3d 881, 891 (9th Cir. 2007) ("[C]ourts have jurisdiction to determine jurisdiction . . . ."). As explained below, we now hold that we lack jurisdiction to reach the merits of appellant's appeal because there has been no qualifying TJAG "action" under Article 69 in this case, which is a mandatory condition precedent to our jurisdiction.

II. LAW AND DISCUSSION

A. Legal Principles and Standard of Review

Our court, like our sister courts of criminal appeals, are Article I "courts of limited jurisdiction, defined entirely by statute." *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015). Thus, without an express statutory grant of jurisdiction, we "cannot proceed at all," because jurisdiction is the prerequisite to our "power to declare the law . . . ." *Roberts v. United States*, 77 M.J. 615, 616 (Army Ct. Crim. App. 2018) (cleaned up). As a court of limited jurisdiction, we "must exercise [our] jurisdiction in strict compliance with [our] authorizing statutes." *Ctr. For Constitutional Rights v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013). If we

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court for appellate review." *Report of the Military Justice Review Group, Part I: UCMJ Recommendations*, at 636 (last visited August 4, 2022), https://dacipad.whs.mil/reading/2-uncategorised/36-mjrg-report.

[7] In contrast to our normal Article 66 powers, Article 69(e) provides that, in cases where we grant review of appellant's petitions under Article 69(d), we "may take action only with respect to matters of law." UCMJ art. 69(e).

determine that we lack jurisdiction, our "only function remaining . . . is that of announcing the fact and dismissing the cause." *Roberts*, 77 M.J. at 616 (cleaned up).

We review questions related to our own jurisdiction de novo. *United States v. Hennis*, 75 M.J. 796, 804 (Army Ct. Crim. App. 2016); *see also, e.g., United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019).

B. Discussion

Lieutenant Colonel JR's November 2021 memorandum denying appellant's requested relief under Article 69 was not a qualifying TJAG action for the purposes of vesting this court with appellate jurisdiction. We reach this conclusion because neither the 2019 updated version of Article 69 nor any other source of law vested TJAG with the authority to delegate his power to take a qualifying "action" under Article 69 in appellant's case.

Multiple canons of statutory interpretation independently and collectively lead us to this result. First, as always, "we begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Where the text of a statute is "unambiguous," the "judicial inquiry is complete." *Id.* at 461-62 (cleaned up). The plain language of Article 69 includes no authority for TJAG to delegate the power to take action under Article 69 to attorneys in OTJAG-CLD or anyone else. Rather, the statute says plainly that "the *Judge Advocate General* may set aside the findings or sentence" or provide other relief.[8] UCMJ art. 69(c)(1)(A) (emphasis added).

To be sure, Article 69 does not expressly *prohibit* TJAG from delegating his authority to take a qualifying action under that rule. We further acknowledge both that TJAG sits atop a world-wide military justice enterprise and must be able to delegate duties generally to complete the mission, and that there are other instances in the UCMJ where "TJAG" is commanded to do something but routinely delegates that action. *See, e.g.*, UCMJ art. 70(b) ("Appellate Government counsel shall represent the United States before [the CCAs and the CAAF] when directed to do so *by the Judge Advocate General.*") (emphasis added). Nevertheless, we are aware of no other instance in the Code in which a similar *sub silentio*/inherent delegation authority not present in the operable statute directly relates to this Court's statutory

[8] At oral argument the government seized on the word "may" in Article 69 as authority for TJAG to delegate as he did in this case. While we agree that the term "may" provides TJAG with broad discretion, we believe the better reading of "may" in this context is that TJAG "may" provide relief under Article 69, or he "may" not—rather than that he "may" either take a qualifying action under the statute himself or delegate the power to take such an action to someone else.

jurisdiction. By way of comparison, general court-martial convening authorities also have serious and wide-ranging responsibilities, but may not delegate their Article 25 responsibilities under the Code. *See, e.g., United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) ("A convening authority's power to appoint a court-martial . . . may not be delegated."); *see also United States v. Newcomb*, 5 M.J. 4, 6-7 (C.M.A. 1978) ("[W]e find that whenever Congress conferred a power upon a particular authority in the court-martial system and intended that authority to give others the right to exercise the power, *it expressly provided for such designation.*") (emphasis added). We are unwilling to "read in" a delegation power to Article 69 when it is otherwise not there.

Rule for Courts-Martial [R.C.M.] 1201 is another possible front of authority for TJAG's ability to delegate under Article 69. But that rule also includes no express delegation authority, saying only that TJAG "shall provide procedures for considering" cases submitted under Article 69. R.C.M. 1201(h)(5). Particularly in light of the plain language of Article 69, the most natural reading of this phrase is that TJAG "shall provide procedures for [personally] considering" such cases. *Id.* And, at any rate, an R.C.M. cannot override a statute. *See In re Vance*, 78 M.J. 631, 634 (Army Ct. Crim. App. 2018) ("We concluded that to the extent that R.C.M. 1107 was in conflict with Article 60, we must give effect to the statute over the rule.") (cleaned up).

But to the extent the plain language of Article 69 and/or R.C.M. 1201 gives rise to any ambiguity about TJAG's delegation authority, that ambiguity is cleared away by looking at how Congress drafted both Article 65 and the pre-2019 version of Article 69. As explained *supra*, both of these statutes grant (or granted) TJAG with clear delegation authority that is absent in the 2019 version of Article 69. If TJAG possesses some inherent authority to delegate his Article 69 power in the way that he did in this case, it raises the question of why Congress would feel the need to spell out TJAG's delegation authority in both Article 65 and the prior version of Article 69. The most natural reading of these statutes together is that TJAG *has* delegation authority in the Article 65 context, and *had* it under the pre-2019 Article 69, but *does not have* that power under the 2019 version of Article 69. *See, e.g., Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315-16 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law.") (cleaned up); *see also United States v. Mooney*, 77 M.J. 252, 257 (C.A.A.F. 2018) (discussing the cannon of statutory construction *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others)); *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (applying *expressio unius* canon and finding that a statute that expressly authorized delegation to Coast Guard officials logically meant that Congress "intended to exclude" other delegation authorities).

Finally, it is far from an absurd result to hold that Article 69 requires personal TJAG action before jurisdiction in this court may vest. *See, e.g., United States v. McPherson*, 81 M.J. 372, 380 (C.A.A.F. 2021) (courts may refuse to "apply the literal text of a statute when doing so would produce an absurd result"). Rather, in light of the overall post-2019 statutory scheme for reviewing sub-jurisdictional cases, it would be odd if Article 69 *allowed* TJAG to delegate as he did here. Under this new scheme, Article 65 mandates an initial review of all sub-jurisdictional general and special courts-martial. UCMJ art. 65(d)(2). TJAG may delegate this review to, *inter alia*, "an attorney within" OTJAG. UCMJ art. 65(d)(1). Thus, under the black letter of Article 65, he could have delegated the initial Article 65 review in this case to LTC JR. Then, after appellant petitioned for a second review under Article 69, if TJAG has the power to delegate as he did here, there would be nothing precluding him from delegating the action to . . . LTC JR again. This scenario points up the likelihood that the lack of delegation language in Article 69 was purposeful by Congress. Ultimately, whether the missing delegation language was purposeful or an oversight, our analysis leads to the same conclusion. *See Arness*, 74 M.J. at 447 (C.A.A.F. 2015) (Baker, J., concurring in the result) ("[W]here Article I courts are concerned, the tie goes to the narrow view of jurisdiction.").[9]

In summary, because there was no TJAG action under Article 69, we lack jurisdiction to hear appellant's appeal.

IV. CONCLUSION

For the reasons set forth herein, we DISMISS this appeal for a lack of jurisdiction. We further hold that our initial grant of appellate review in this case was *void ab initio*.

[9] There is a second jurisdictional question present in the post-2019 Article 69. Namely, Article 69(d) requires a TJAG "action" under Article 69(c) to vest this court with jurisdiction. But all of the "actions" listed in Article 69(c) are *favorable* to an appellant, giving rise to the question of whether a *denial* of relief (as here) constitutes a TJAG "action" under Article 69(c), even if personally acted on by TJAG. Because our answer to this question would have no effect on our holding here that we lack jurisdiction, anything we say on the subject would be in the nature of an "advisory opinion." *See, e.g., United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019) (declining to provide an "advisory opinion" on an issue "not necessary to the resolution" of the case).

Senior Judge WALKER and Judge PARKER concur.

FOR THE COURT:

JAMES W. HERRING, JR.
Clerk of Court