UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ANDREW S. DORNON
United States Air Force

ACM S31144 (f rev)

28 May 2008

Sentence adjudged 16 June 2006 by SPCM convened at Bolling Air Force Base, District of Columbia. Military Judge: Donald A. Plude (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months and 20 days, forfeiture of $849.00 pay per month for 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major John N. Page III, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Ryan N. Hoback.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

SOYBEL, Judge:

This case is before our Court for further review because the original action was set aside. *United States v. Dornon*, ACM S31144 (A.F. Ct. Crim. App. 19 Dec 2007) (unpub. op.). This Court returned the case to The Judge Advocate General for remand to the convening authority for new post trial processing because the original action by the convening authority was ambiguous. On 10 March 2008, a new action and Special Court-Martial order that complied with our holding were completed and we find this Court has jurisdiction over this case. We now consider the two issues raised by the appellant that we held until the jurisdictional question was resolved. Because these two issues are intertwined, we will resolve them together.

In accordance with his pleas, the appellant was found guilty of violating a lawful general regulation by wrongfully espousing ideals of white supremacist organizations on his personal web page; failure to obey a lawful order by disobeying a no contact order; wrongfully using marijuana; and communicating a threat, in violation of Articles 92, 112a, and 134, UCMJ, 10 U.S.C. §§ 892, 912a, and 934. He was sentenced to a bad conduct discharge, confinement for nine months, forfeiture of $849.00 pay per month for nine months, and reduction to the grade of E-1.

The first issue raised by the appellant is that Specification 1 of Charge 1, alleging a violation of a lawful general regulation, Air Force Instruction (AFI) 51-903, *Dissident and Protest Activities*, ¶ 5 (1 Feb 1998), fails to state an offense. He asserts that the specification merely alleges he wrongfully published remarks and symbols on his personal web page that espouse ideals of white supremacist organizations. He claims this specification fails to state an offense because it did not allege the appellant participated in an organization. According to the appellant, "participation in an organization is a predicate to criminality, thus his conduct was legal."

This issue is intertwined with the appellant's second issue, which asserts his guilty plea was improvident because there was no evidence that he belonged to an organization that espoused supremacist causes.[1]

We recognize that this was a guilty plea case and that the specification at issue is being challenged for the first time on appeal and not at trial. Had the challenge first arose at trial it would normally be viewed more critically. *See United States v. French*, 31 M.J. 57 (C.M.A.1990). Since these issues involve questions of law, i.e., the interpretation of an Air Force instruction, our standard of review is de novo. *See United States v. Padgett*, 48 M.J. 273 (C.A.A.F. 1998); *United States v. Meeks*, 41 M.J. 150 (C.M.A. 1994). As we interpret the instruction, we are mindful that well settled statutory construction rules use an interpretation which gives purpose to the regulation; for penal statutes are construed in that sense which best harmonizes with their context and purpose. *Gooch v. United States*, 297 U.S. 124 (1936); *United States v. Ortiz*, 24 M.J. 164 (C.M.A. 1987). *See also United States v. Wade*, 15 M.J. 993 (N.M.C.M.R. 1983); *United States v. Padilla*, 5 C.M.R. 31, 35 (C.M.A. 1952).

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[1] Issue II reads: IF THIS HONORABLE COURT DETERMINES IT HAS JURISDICTION OVER THE APPELLANT'S CASE, WHETHER SPECIFICATION 1 OF CHARGE 1 FAILS TO STATE THE OFFENSE OF FAILING TO OBEY A LAWFUL GENERAL REGULATION WHEN THE REGULATION CLEARLY PERMITS THE CRIMINAL CONDUCT ALLEGED IN THE SPECIFICATION.

Issue III reads: IF THIS HONORABLE COURT DETERMINES IT HAS JURISDICTION OVER THE APPELLANT'S CASE AND SPECIFICATION 1 OF CHARGE 1 STATES AN OFFENSE, WHETHER THE APPELLANT PROVIDENTLY PLED TO VIOLATING A LAWFUL GENERAL REGULATION PROHIBITING PARTICIPATION IN "ORGANIZATIONS THAT ESPOUSE SUPREMACIST CAUSES" WHEN NO EVIDENCE ADMITTED AT TRIAL INDICATED APPELLANT BELONGED TO *ANY* ORGANIZATION THAT ESPOUSED SUPREMACIST CLAUSES.

Key to both issues is whether the law requires formal membership or participation in an organization in order for a service member to be found guilty of violating paragraph 5 of AFI 51-903. We hold it does not. It is the participation in certain activities associated with these organizations, that are undertaken in furtherance of the objectives of those organizations which are prohibited, regardless of ones membership status in the organization.

Paragraph 5 of AFI 51-903, which governs certain prohibited activities by Air Force members, reads:

> 5. Prohibited Activities. Military personnel must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in the effort to deprive individuals of their civil rights.
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> 5.1. Active participation, such as publicly demonstrating or rallying, fund raising, recruiting and training members, organizing or leading such organizations, or otherwise engaging in activities in relation to such organizations or in furtherance of the objectives of such organization that the commander concerned finds to be detrimental to good order, discipline, or mission accomplishment, is incompatible with military service and prohibited. Members who violate this prohibition are subject to disciplinary action under Article 92, in addition to any other appropriate articles of the Uniform Code of Military Justice.
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> 5.1.1. Mere membership in the type of organization enumerated is not prohibited, however, membership must be considered in evaluating or assigning members (AFI 36-2701, *Social Actions Operating Procedures*; AFI 36-2403, *The Enlisted Evaluation System*; AFI 36-2402, *Officer Evaluation System*; and AFI 36-2706, *Military Equal Opportunity and Maltreatment Program*).
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> 5.2. Commanders are authorized to use the full range of administrative procedures, including separation or appropriate disciplinary action against military personnel who actively participate in such groups.
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> 5.3. It is a function of command to be vigilant about the existence of the type of activities enumerated above. Active use of

investigative authority to include a prompt and fair complaint process, and the use of administrative powers, such as counseling, reprimands, orders, and performance evaluations should be used to deter such activities.

Analysis

The appellant's argument that membership or active participation in an organization is an essential element needed to establish a violation of paragraph 5 is without merit. Paragraph 5.1 of the instruction also prohibits certain *activities* related to these types of organizations or which further their objectives, even without membership. The appellant's interpretation would render the very purpose of the above instruction meaningless.

Participation and "engaging in activities" are different than membership. Certainly, one can participate or engage in prohibited activities and not be a member of an organization. Paragraph 5.1 gives examples of active participation. These include "publicly demonstrating or rallying, fund raising, recruiting and training members, organizing or leading such organizations, or otherwise engaging in activities in relation to such organizations or in furtherance of the objectives of such organization." Thus, membership in an organization or participation as a member is not a requirement if one nonetheless engages in active participation in these prohibited activities.

The above interpretation is the only one that makes sense given the purpose of the AFI, which is to "provide prohibitions and guidance regarding dissident and protest activities involving Air Force installations or Air Force members."[2] If one follows the appellant's argument to its logical conclusion it would not be a crime for an Airmen to attend a KKK rally or a Neo-Nazi demonstration, raise funds for these organizations, or even recruit and train members if he did not formally belong to either organization, but it would be a crime to do these things if he were a member. Assuming the conduct in each instance were identical, the only distinguishing factor between the two cases would be the membership status of the individual. Such an interpretation would contradict paragraph 5.1.1 of the AFI, which specifically states that mere membership is not prohibited. The only thing that would criminalize one individual but not the other would be membership in the organization.

Suppose we envision two Airmen, one a member of a prohibited organization and one not, but both posting racist propaganda on their web page and identifying themselves as Air Force members. If this activity is detrimental to good order, discipline or mission accomplishment and is incompatible with military service, (AFI 51-903 para 5.1) it is so regardless of one's membership in the organization. We do not believe that the intent of

[2] See introductory paragraph for Air Force Instruction (AFI) 51-903, *Dissident and Protest Activities* (1 Feb 1998).

the AFI 51-903 was to prohibit a member of the organization from publicly posting such material while allowing the non-member to freely engage in the same conduct.

During the *Care*[3] inquiry, the appellant admitted he was furthering the objectives of such organizations. Although the appellant stated he never joined the neo-nazi movement, he knew he was espousing their white supremacist views and using certain symbols to further their cause. For example he posted the following on his website: "14[4]/88[5];" "Nigger I hate your face, don't try to mess with the master race;" "dude, fuck niggers man;" "Live for death metal, kill for our race;" "UAO/23. [6]" As part of his internet posting, he also identified himself as an Air Force member who was assigned to the Honor Guard at Bolling Air Force Base, in Washington, DC. It is without question that the appellant's posting would have the same detrimental affects on mission accomplishment and good order and discipline regardless of his actual membership status in the Neo-Nazi party or some other white supremacist organization. The detrimental effects to good order and discipline are caused by his activities that further the views of these organizations, regardless of his actual membership status.

Thus, we hold that membership in a prohibited organization is not a requirement in order to find a violation of AFI 51-903. That instruction prohibits activities that further the objectives of certain prohibited organizations regardless of the membership status of the accused. As such, we find that specification 1 of charge 1 states an offense because the regulation prohibits the criminal conduct alleged in the specification. Accordingly, the appellant's plea of guilty to the specification was provident because there is no requirement that the appellant actually belong to an organization that espoused supremacist causes in order to violate AFI 51-903, ¶ 5.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

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[3] *United States v. Care,* 40 C.M.R. 247 (C.M.A. 1969).

[4] During the *Care* inquiry the appellant explained that "14" stood for a 14 word saying, which is a reference to the white supremacist movement. The appellant quoted it as follows; "We must secure the existence of our people and a future for our white children." (The fact there are actually 15 words in the sentence does not escape us).

[5] 8 refers to the eighth letter of the alphabet, H. The appellant explained that 88 is code for HH or Heil Hitler.

[6] "UAO" stands for "United As One" and "23" refers to the letter W which the appellant explained is shorthand for White Nation." He also acknowledged that these symbols were posted to espouse the views of white supremacists organizations.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court