UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ROBERT D. MCCURDY
United States Air Force

ACM S31157

15 October 2007

Sentence adjudged 19 June 2006 by SPCM convened at Keesler Air Force Base, Mississippi. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Karen L. Hecker, Captain John S. Fredland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Daniel J. Breen.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his plea, the appellant was found guilty of unlawful entry in violation of Article 134, UCMJ, 10 U.S.C. § 934. Contrary to his pleas, he was also found guilty of a second instance of unlawful entry. He pled not guilty to, and was acquitted of, conspiracy to commit larceny, larceny, and breaking and entering, in violation of Articles 81, 121, and 129, UCMJ, 10 U.S.C. §§ 881, 921, 929.[1] The military judge, sitting alone as a special court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 2 months, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

---

[1] The second unlawful entry conviction was the lesser included offense of this breaking and entering specification.

The appellant asserts two assignments of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). In his first assignment, he argues that the court-martial did not have jurisdiction to try him, and in the second, that the military judge erred by admitting certain letters of reprimand as evidence in aggravation during the sentencing phase. Finding no merit in either assignment, we affirm the findings and sentence.

Personal Jurisdiction

In regard to the appellant's first assignment of error, we review questions of personal jurisdiction de novo, "accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record." *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000) (citing *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999)). This issue was raised at trial and thoroughly explored by the military judge. His findings of fact are fully supported by the record and are not clearly erroneous. We adopt his findings of fact as our own, supplemented by our own careful review of the record. We specifically note that there is no record of the appellant ever being issued a DD Form 214. We agree with the military judge's conclusion that the government properly complied with Rule for Courts-Martial 202(c)(1), which allows a servicemember to be "held on active duty over objection pending disposition of any offense for which held." Further,

> A servicemember will not be considered to have been lawfully discharged, however, unless: (1) the member received a valid discharge certificate or a certificate of release from active duty, such as a Department of Defense Form (DD Form) 214; (2) the member's "final pay" or "a substantial part of that pay" is "ready for delivery" to the member; and (3) the member has completed the administrative clearance process required by the Secretary of the service of which he or she is a member.

Melanson, 53 M.J. at 2 (citing *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989)) (other citations omitted). We find nothing in the record to show any of the above-listed requirements for lawful discharge had been met at the time of trial. The appellant's first assignment of error is without merit.

Inappropriate Admission of Evidence

In his second assignment of error, the appellant complains that 4 of the 9 letters of reprimand admitted into evidence during the sentencing phase of the court-martial should have been excluded because they were not maintained in accordance with applicable regulations.

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004). We have reviewed the judge's findings of fact and conclusions of law on this issue and find no abuse of discretion in admitting the 4 documents. The military judge examined the applicable regulations governing issuance of administrative counselings and reprimands[2] and admission of administrative counselings and reprimands into evidence[3] and found that the government had complied with those regulations. We agree, and find the documents were properly admitted. Moreover, had we found error in admitting the documents, we would have found no prejudice to the appellant. Besides the 4 letters of reprimand that form the basis of the appellant's assignment of error, the appellant had 5 additional letters of reprimand and a nonjudicial punishment action under Article 15, UCMJ, 10 U.S.C. § 815. These were properly considered by the military judge during sentencing. We are convinced that the military judge would have adjudged at least a bad-conduct discharge, confinement for 2 months, and reduction to the lowest enlisted grade even if the 4 letters in question had not been considered. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986).

Conclusion

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

AFFIRMED.

OFFICIAL

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

---

[2] Air Force Instruction 36-2907, *Unfavorable Information File (UIF) Programs*, Chapter 3 (the military judge reviewed both the 1 May 1997 and the 17 Jun 2005 versions of this regulation).
[3] Air Force Instruction 51-201, *Administration of Military Justice*, Section 8C (26 Nov 2003).