

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,)	BRIEF ON BEHALF
)	OF THE UNITED STATES
<i>Appellee,</i>)	
)	
v.)	Crim. App. No. ACM 37755
)	
Senior Airman (E-4),)	USCA Dkt. No. 13-0518/AF
JORDAN C. PASSUT, USAF,)	
<i>Appellant.</i>)	

BRIEF ON BEHALF OF THE UNITED STATES

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**TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:**

ISSUE PRESENTED

**WHETHER A STATEMENT MADE TO AN AAFES
EMPLOYEE FOR THE PURPOSE OF CASHING A
WORTHLESS CHECK SATISFIES THE "OFFICIAL"
ELEMENT OF A FALSE OFFICIAL STATEMENT.**

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2006). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2008).

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF THE FACTS

On 2 November 2009, Appellant went to the MacDill AFB Shopette, a division of the Army and Air Force Exchange Service (AAFES), to purchase groceries and get some cash back. (J.A. at 57, para. 6.) Appellant picked out two items and proceeded to

check out with the cashier, Ms. Brenda Braaten, an employee of AAFES. (Id. at para. 6, 9.) Appellant told Ms. Braaten he wanted to pay with a check. (Id. at para. 6.) When Appellant handed Ms. Braaten his ID card, she asked why the bar code and SSN were scratched off the back of the card. (Id.) Appellant told her that it had gone through the washer and dryer, or something to that effect. (Id.) He gave her a SSN that was not his own but instead was the SSN of a member of his unit. (Id. at para. 8.) He wrote a check for \$296.00 and Appellant received \$291.52 cash back. (Id. at para. 6.) On 5 November 2009, Appellant went to the Shoppette, and Ms. Braaten was again his cashier. (Id. at para. 7.) This time, he just wrote a check with the incorrect SSN on it and received cash back. (Id.) Appellant also lied to another AAFES employee, Mr. William Rosenblatt, on numerous occasions between 25 October 2009 and 5 November 2009, when he wrote an incorrect SSN on his checks to pay for items and receive cash back at the Shoppette. (J.A. at 58, para. 10-12.) Appellant was charged with three specifications of making false official statements in violation of Article 107 of the Uniform Code of Military Justice. (J.A. at 30, 32.) Appellant pled guilty to these specifications. (J.A. at 41.)

Both parties agreed in a Stipulation of Fact that Appellant's statements to Ms. Braaten and Mr. Rosenblatt were

"official." (J.A. at 57-58, para. 9, 13.) The Stipulation stated that both individuals were employees of "AAFES, a military organization." (Id.) On the record, the military judge stated "[t]he stipulation said that AAFES is a military organization. It really is not quite so much a military organization. But it certainly is an organization that exists on every Air Force base to provide services to military members and their dependents." (J.A. at 52.) The military judge asked Appellant if he agreed, and Appellant himself replied in the affirmative. (Id.) The following exchange then occurred,

MJ: And would you further agree that one of their duties is to ensure that the person for whom they cash a check doesn't have a bunch of other bad checks and that sort of thing, with the BX?

ACC: Yes, sir.

MJ: And since they work closely with and provide services to the military, are you satisfied in your own mind that in requesting that information from you that they were performing a governmental-like function?

ACC: Yes, sir.

(Id.) Additional facts necessary to the disposition of the case are set forth in the argument below.

SUMMARY OF THE ARGUMENT

The military judge did not abuse his discretion by accepting Appellant's guilty plea because his conviction under

Article 107, UCMJ is legally sufficient where the hearer is a civilian necessarily performing a military function when the statement is made. In this case, the hearers were employees of AAFES. AAFES is an instrumentality of the United States and is entitled to the immunities and privileges enjoyed by the Federal Government under federal statutes. By providing services in base exchanges controlled by the installation commander pursuant to military regulations, the AAFES civilians were performing military functions.

ARGUMENT

APPELLANT'S GUILTY PLEA WAS PROVIDENT BECAUSE FALSE STATEMENTS MADE TO EMPLOYEES AT THE MACDILL AFB SHOPPETTE, A DIVISION OF AAFES, WERE OFFICIAL UNDER ARTICLE 107, UCMJ.

Standard of Review

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea -- an area in which we afford significant deference." United States v. Nance, 67 M.J. 362, 365 (C.A.A.F. 2009) (citing United States v. Inabinette, 66 M.J. 320, 321-22 (C.A.A.F. 2008) (citations omitted)). Questions of legal sufficiency are reviewed de novo. United States v. Winckelmann, 70 M.J. 403, 406 (C.A.A.F. 2011).

Law and Analysis

A conviction for signing a false official statement requires proof beyond a reasonable doubt that: (1) the accused signed a certain official statement; (2) the statement was false in certain particulars; (3) the accused knew it to be false at the time of signing it; and (4) the false statement was made with the intent to deceive. Manual for Courts-Martial, United States part IV, para. 31.b. (2012 ed.) (MCM). "Official documents and official statements include all documents and statements made in the line of duty." Id. at para. 31(c)(1).

A statement is "official" within the meaning of Article 107 where the false statement is made concerning any matter within the jurisdiction of any department or agency of the United States, as interpreted liberally by the federal courts, consistent with 18 U.S.C. § 1001 (2006). United States v. Day, 66 M.J. 172, 174 (C.A.A.F. 2008)(citing United States v. Jackson, 26 M.J. 377, 378 (C.M.A. 1988)). This Court has recognized that the scope of Article 107, UCMJ is even more expansive than its civilian counterpart because the primary purpose of military criminal law—to maintain morale, good order, and discipline—has no parallel in civilian criminal law. United States v. Tefteau, 58 M.J. 62, 68-69 (C.A.A.F. 2003). The purpose of Article 107, UCMJ, is to protect the authorized functions of the military from the perversion which might result

from deceptive practices. United States v. Spicer, 71 M.J. 470 (C.A.A.F. 2013.) Under Spicer, "[t]his includes statements based on the standpoint of the speaker, where either the speaker is acting in the line of duty or the statements directly relate to the speaker's official military duties, and statements based on the position of the hearer, when the hearer is either a military member carrying out a military duty or the hearer is a civilian necessarily performing a military function when the statement is made." Spicer, 71 M.J. at 470. It is the relationship of the statement to a military function at the time it is made, and not the offense, that determines whether the statement falls within the scope of Article 107, UCMJ. United States v. Capel, 71 M.J. 485 (C.A.A.F. 2013.)

This Court in Day held that statements made to civilian on-base firefighters were "official, in so far as they were made to civilian personnel who were members of the base fire department charged with performing an on-base military function. These personnel were providing on-base emergency services pursuant to the commander's interest in and responsibility for the health and welfare of dependents residing in base housing over which he exercised command responsibility." Day, 66 M.J. at 175. The Court reasoned that there are determinations made outside of a service member's duties that still implicate official military functions. Id. at 174.

AAFES is an instrumentality of the United States. (J.A. at 83.) It is entitled to the immunities and privileges enjoyed by the Federal Government under the Constitution, federal statutes, federal legal precedents, established principles of international law, and international treaties and agreements. (Id.) As such, a false statement made to an AAFES employee such as Ms. Braaten or Mr. Rosenblatt would be "official." This comports with Spicer, Capel, and Day and is logical when considering the importance of AAFES's mission. "AAFES has a dual and enduring mission of providing quality merchandise and services to its customers at competitively low prices and of generating earnings which provide a dividend to support morale, welfare, and recreation (MWR) programs." (J.A. at 82.)

As importantly, the AAFES Board of Directors is comprised of staff from the Air Force and Army and is responsible to the Secretary of the Army and the Secretary of the Air Force. (J.A. at 79-80.) AAFES's structure and mission underscore its military function - a concept broadly defined in Day. Furthermore, by regulation, commanders are required to "[e]nsure disciplinary actions, when appropriate, are taken against persons who violate patron privileges." (J.A. at 86.) Adopting Appellant's view would ignore the realities of AAFES, its organizational structure, and the importance of its mission. AAFES is weaved into the fabric of every Air Force base

performing services that keep morale and welfare of military personnel high. Protecting AAFES and its mission from the perversion which might result from deceptive practices is well within the purpose of Article 107, UCMJ. Spicer, 71 M.J. at 470.

This comports with this Court's ruling in United States v. Ruiz, where a civilian AAFES store detective was deemed to have acted as "an instrument of the military" when stopping a military member suspected of shoplifting, and required to give Article 31 rights warnings. 54 M.J. 138, 140-41 (C.A.A.F. 2000); see also United States v. Baker, 30 M.J. 262, 266 (C.M.A. 1990); United States v. Quillen, 27 M.J. 312, 314 (C.M.A. 1988). This Court found that AAFES "was under the control of military authorities," because base "exchanges . . . are arms of the government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, [and] share in fulfilling the duties entrusted to it." Quillen, 27 M.J. at 314 (omission in original) (citing Standard Oil Co. of California v. Johnson, 316 U.S. 481, 485 (1942)). Importantly, this Court focused on the fact that the base commander controlled the exchange pursuant to applicable regulations. Id. (citing Standard Oil Co., 316 U.S. at 484-85). Therefore, the AAFES detective's position "was not private, but

governmental in nature and military in purpose." Id. (citing Standard Oil Co., 316 U.S. at 484-85).

Nothing has changed since Quillen and the rationale is equally applicable in this case. As noted by AFCCA, "[t]he regulation promulgated by the military to set AAFES policy includes specific provisions governing the cashing of checks, the handling of dishonored checks, and requiring patrons to provide identification when writing checks. United States v. Passut, 72 M.J. 597 (A.F. Ct. Crim. App. 16 April 2013)(citing AR 215-8/AFI 34-211, para. 6-11, 6-12, 7-4, and 7-6.) By collecting the information in compliance with the regulations, the cashiers were acting in "military functions" at the time Appellant made false statements to them. Additionally, AFCCA highlighted that one of the responsibilities of the installation commander was to act on reports about patrons who violate their privileges, including by bouncing checks. Id. (citing AR 215-8/AFI 34-211, para. 2-4.) Accordingly, the AAFES cashiers were civilians performing "military functions" at the time of the false statement.

Appellant tries to draw a distinction between an AAFES cashier's duties and the loss prevention personnel. (App. Br. at 10.) However, AAFES cashiers are following military regulations requiring patrons to provide identification when writing a check. (J.A. at 86.) In fact, both employees are

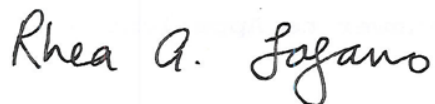
performing their duties in pursuant of the same goal - loss prevention at AAFES installation.

While Appellant argues that this is akin to "military property," his argument fails because it compares apples and oranges. (App. Br. at 11.) The fact the military property is a discreet class of property is distinct from whether a civilian employee is acting in a military function. Furthermore, the case cited by Appellant, United States v. Schelin, does not foreclose a finding that retail merchandise from an exchange could serve a military function, because "it is either the uniquely military nature of the property itself, or the function to which it is put, that determines whether it is "military property" within the meaning of Article 108." 15 M.J. 218, 220 (C.A.A.F. 1983.) So, in so far as military property can be equated with civilian employees, it is consistent. As argued supra, the AAFES employees were performing a military function which is consistent with this Court's rationale in Schelin regarding exchange property put to a military function. Regardless, this situation is akin to Day because in both cases, civilian personnel were providing on-base services in accordance with commander's interests and responsibilities under military regulations. Accordingly, this Court should find that the

statements made to AAFES employees were official and satisfy the element of Article 107, UCMJ.¹

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court uphold AFCCA's ruling affirming that the military judge did not abuse his discretion and that these statements are official under Article 107, UCMJ.



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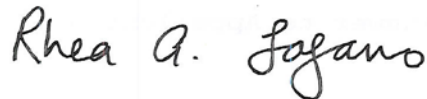
¹ Despite enjoying the protections of his pretrial agreement with the convening authority that resulted in the dismissal of other criminal allegations (J.A. 54; App. Ex. III.), Appellant now seeks to escape the obligations of his agreement and a windfall by asking this Court to set aside the specifications and order a sentence rehearing. Assuming *arguendo*, Appellant's guilty plea is improvident, this case should be remanded for a full rehearing on findings and sentence. See United States v. Finch, USCA Dkt. No. 13-0353AF and 13-5007/AF.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, and to Appellate Defense Division, on 16 September 2013.



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