IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant,

v.

JOSEPH W. PUGH,
Major (O-4), USAF
Appellant.

Crim. App. No. Misc. Dkt. No. 2017-11
USCA Dkt. No. 17-0306 /AF

GRANT BRIEF

David P. Sheldon
Law Offices of David P. Sheldon, PLLC
USCAAF Bar No. 27912
100 M Street SE, Suite 600
Washington, DC 20003
davidsheldon@militarydefense.com
(202) 546-9575 (w)
(202) 546-0135 (f)

ANNIE W. MORGAN, Major, USAF
Appellate Defense Counsel
USCAAF Bar No. 35151
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd, Ste 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
Ann.w.morgan2.mil@mail.mil

INDEX OF BRIEF

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

United States Supreme Court

Court of Appeals for the Armed Forces

Courts of Criminal Appeals

Other Authorities

Statutes

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	APPELLANT'S BRIEF
v.	)	USCA Dkt. No. 17-0306/AF
Major (O-4) **JOSEPH W. PUGH,** USAF, *Appellant.*	)	Crim. App. No. 2016-11

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

Granted Issue

WHETHER THE MILITARY JUDGE ERRED IN FINDING THAT AFI 90-507 SERVES NO VALID MILITARY PURPOSE AND DISMISSING THE ADDITIONAL CHARGE AND ITS SPECIFICATION.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 62(a), UCMJ, 10 U.S.C. § 862. This Court has jurisdiction to review this case pursuant to Article 67, UCMJ, 10 U.S.C. § 867.

Statement of the Case

Maj Pugh was charged with one charge and specification of wrongful use of marijuana in violation of Article 112a, UCMJ, 10 U.S.C. § 912, (Charge I) and one charge and specification of dereliction of duty by willfully violating Air Force

Instruction (AFI) 90-507 in violation of Article 92, UCMJ, 10 U.S.C. § 892 (Additional Charge). JA at 8-11. Maj Pugh pled not guilty to both charges and their specifications and was tried by a panel of officer members. JA at 21. On 28 April 2016, he was acquitted of Charge I, but convicted of the Additional Charge. JA at 244.

On 28 April 2016, prior to sentencing proceedings on 29 April 2016, the defense filed a motion to dismiss the Additional Charge for failure to state an offense. JA at 245, 332. In the motion, the defense asserted that the specification did not allege criminal misconduct, did not give fair notice to Maj Pugh, and the AFI cited within was not a lawful order. JA at 332. During a motions hearing on 29 April 2016, the military judge dispensed the first two defense complaints. JA at 246. The hearing focused on the lawfulness of the duty imposed by the AFI. *Id.* After receiving evidence and the arguments of counsel, the military judge took the motion under advisement, promising a decision prior to authentication of the record. JA at 276. The defense objected to proceeding with sentencing prior to a ruling and requested a continuance. JA at 277-78. That request was denied. JA at 278.

On 17 May 2016, prior to authenticating the record, the military judge provided a six-page written ruling, granting the defense motion. JA at 435. On 20

May 2016, the government filed a motion to reconsider. JA at 441. The defense provided a written response. JA at 456.

On 18 July 2016, an Article 39(a) hearing was convened. JA at 279. Evidence and argument was presented for the military judge's consideration. JA at 279-312. On 11 August 2016, the military judge entered into the record detailed findings of fact and conclusions of law, and granted the motion. JA at 514-16. On 13 August 2016, the government filed a notice of appeal. JA at 313-14.

On 10 March 2017, AFCCA granted the government appeal. *United States v. Pugh*, Misc. Dkt. No. 2016-11 (A.F. Ct. Crim. App. 10 March 2017) (unpub. op.). JA at 1-7. On 23 March 2017, Maj Pugh filed a Petition with this Court and a Motion to File the Supplement Separately. On 5 April 2017, this Court granted Maj Pugh's motion extending the time to file the supplement. On 19 July 2017, this Court granted Maj Pugh's petition for grant of review.

Statement of Facts

Maj Pugh was charged with dereliction of duty for eating a Strong & KIND bar (KIND bar) in violation of Air Force Instruction (AFI) 90-507, *Military Drug Demand Reduction Program*, dated 22 September 2014, Paragraph 1.1.6. KIND bars are manufactured by Kind LLC, a health food company based in New York

City, New York.[1] "KIND products are made from nutritionally-dense ingredients like whole nuts, fruits and whole grains - no secret ingredients and no artificial flavors, preservatives or sweeteners."[2] The products are marketed as high protein, low sugar, and nutrient-dense meal replacements. *Id.*

AFI 90-507, para 1.1.6., prohibits the ingestion of products containing or derived from hemp seed or hemp seed oil. JA at 346. KIND bars contain .001% hemp seed. JA at 47. The AFI purports that such products may contain varying levels of tetrahydrocannabinol (THC), which is detectable by the Air Force Drug Testing Program. JA at 346. The articulated military purpose behind AFI 90-507 paragraph 1.1.6., is to prevent the use of products that can interfere with the Drug Testing Program. JA at 439.

The government presented evidence that commercially available hemp products, such as KIND bars, could never interfere with the drug testing equipment (JA at 66, 124, 234, 260) because KIND bars do not contain any appreciable level of THC (JA at 295). Commercially available hemp products are subject to regulation by the Food and Drug Administration (FDA) and Drug Enforcement Agency (DEA). JA at 260. Hemp seeds used in these produces are

---

[1] https://en.wikipedia.org/wiki/Kind_ (company).
[2] Information relating to KIND bars can be found on the product website at https://www.kindsnacks.com/about-us.

washed to remove THC. *Id*. Unwashed hemp seeds are banned. *Id*. There are no lawfully available commercial food products that contain unwashed hemp seeds. JA at 259. Commercially available hemp products contain an "infinitesimally [small] amount…of THC." JA at 253. The THC in hemp products is undetectable by drug testing equipment. JA at 260-61.

Summary of Argument

The military judge did not err when he granted the defense motion to dismiss because Air Force Instruction (AFI) 90-507 serves no valid military purpose. The articulated purpose of AFI 90-507 is to prevent servicemembers from consuming products that might interfere with the integrity of the Air Force Drug Testing Program. It was unconverted at trial that the THC level in KIND bars is so low that it is below the detection limits of the drug testing equipment and therefore, cannot cause a "false positive" result or otherwise interfere with the drug testing program. Given the unique facts of Maj Pugh's case, which involves the consumption of a well-regulated, commercially produced food product, subjected to impeccable FDA and DEA regulation, that poses no risk of interference, a sweeping ban is overbroad and serves no valid military purpose. In granting the defense motion, the military judge provided a reasoned analysis and conclusions based upon the record. The military judge's findings and conclusions are properly founded in law, rely upon common sense, are reasonable, and are not

clearly erroneous. He did not abuse his discretion, and this Honorable Court should affirm his decision.

Argument

THE MILITARY JUDGE DID NOT ERR IN FINDING THAT AFI 90-507 SERVES NO VALID MILITARY PURPOSE AND DISMISSING THE ADDITIONAL CHARGE AND ITS SPECIFICATION.

Standard of Review

"In an Article 62, UCMJ, 10 U.S.C. § 862, petition, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the prevailing party at trial." *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (citing *United States v. Baker*, 70 M.J. 283, 287–88 (C.A.A.F. 2011).

"[A] military judge 'abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.'" *Wicks*, 73 M.J. at 98 (internal quotations omitted). The abuse of discretion standard "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citations omitted). The abuse of discretion standard recognizes that "when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a

clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993) (citations omitted). "When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." *Gore*, 60 M.J. at 185 (internal quotation marks omitted).

Law and Analysis

A charge or specification shall be dismissed at any stage of the proceedings if the specification fails to state an offense. *See*, R.C.M. 907(1)(B). Even after the members have sentenced an accused, "the military judge might dismiss a specification as to which he [or she] concluded the proof was legally insufficient to establish guilt." *United States v. Griffith*, 27 M.J. 42, 48 (C.M.A. 1988). "[U]ntil the military judge authenticates the record of trial, he may conduct a post-trial session to consider newly discovered evidence and, in proper cases, may set aside findings of guilty and the sentence." *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989).

Air Force Instruction 90-507 *Military Drug Demand Reduction Program*, dated 22 September 2014, paragraph 1.1.6 states that:

> 1.1.6. Studies have shown that products made with hemp seed and hemp seed oil may contain varying levels of tetrahydrocannabinol (THC), an active ingredient of marijuana, which is detectable under

> the Air Force Drug Testing Program.[3] In order to ensure military readiness, the ingestion of products containing or products derived from hemp seed or hemp seed oil is prohibited. **Failure to comply with the mandatory provisions of this paragraph by military personnel is a violation of Article 92, UCMJ. Violations may result in administrative disciplinary action without regard to otherwise applicable criminal or civil sanctions for violations of related laws.** (Emphasis in the original).

"The offenses of dereliction of duty and failure to obey a lawful order are so closely related that no significant difference exists between them." *United States v. Pate*, 54 MJ 501, 504 (A.C.C.A. 2000) (quoting *United States v. Green*, 47 C.M.R. 727, 728 (A.F.C.M.R. 1973)). "Article 92(2), UCMJ, includes all other lawful orders which may be issued by a member of the armed forces, violations of which are not chargeable under Article 90, 91, or 92(1). It includes the violation of written regulations which are not general regulations." *Manual for Courts-Martial* (MCM), United States, Part IV, Paragraph 16(c)(2)(a) (2012). The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. *Id.* at para. 14(c)(2)(a)(iii). To be a lawful order, the order must relate to military duty…The order may not, without such a valid

---

[3] Although the AFI asserts that tetrahydrocannabinol can be detected by the AFDTP, this fact is inconsistent with the facts presented to the military judge at

military purpose, interfere with private rights or personal affairs." *Id.* at para. 14(c)(2)(a)(iv); *See United States v. Padgett*, 48 M.J. 273, 276 (C.A.A.F. 1998) (an order purporting to regulate personal affairs is not lawful unless it has a military purpose).

The legality of an order or regulation is an issue of law that must be decided by the military judge. *United States v. New*, 55 M.J. 95, 101 (C.A.A.F. 2001). "[A]n order is presumed lawful, provided it has a valid military purpose and is a clear, specific, narrowly drawn mandate." *United States v. Moore*, 58 M.J. 466, 468 (C.A.A.F. 2003) (citing *United States v. Womack*, 29 M.J. 88, 90) (C.M.A. 1989). "A servicemember charged with a disobedience offense may challenge the lawfulness of the order on a variety or grounds," including a challenge of whether the order did not relate to a military duty or that it interfered with private rights or personal affairs without a valid military purpose. *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002). When the defense moves to dismiss a charge on the grounds that the alleged order was not lawful, the military judge must determine whether there is an adequate factual basis for the allegation that the order was lawful. *United States v. Deisher*, 61 M.J. 313, 318 (C.A.A.F. 2005).

---

trial. JA at 260, 295-97.

Analysis

The military judge heard from both parties regarding the appropriate test for the defense challenge. JA at 248-49, 268. All agreed that the underlying order must be lawful in order for the specification to state an offense. *Id.* Further, the parties agreed that a lawful order must have a sufficient nexus between military necessity and duty imposed. *Id.* The military judge then properly considered the presumption of lawfulness and invited the defense to rebut that presumption. JA at 249-50; *see United States v. Hughey*, 46 M.J. 152, 154 (C.A.A.F. 1997).

To rebut this presumption, the defense called their expert witness, who testified that the THC available in legal, commercially available food products would not impact or interfere the Air Force drug testing program. JA at 254. Further, the witness testified that there are no lawfully available commercial food products that contained unwashed hemp seeds. JA at 259. Unwashed hemp seeds are banned by the DEA. JA at 260.

Trial counsel did not present any additional evidence and did not cite to any source of law to the contrary. JA at 264. Instead, trial counsel argued that remote possibilities justified the broad ban. First, trial counsel argued the FDA and DEA regulations could fail. JA at 367-68, 309-11. However, the government's expert testified that she was unaware of any recalls to regulatory failure. JA at 299. Second, trial counsel argued other countries do not have similar regulations

concerning unwashed hemp seeds, therefore, Airmen stationed overseas might consume products that were unregulated. JA at 264-65. The military judge accurately pointed out that this scenario did not justify banning commercially available hemp products in the United States. JA at 268. The military judge was not persuaded by these arguments and granted the defense motion. JA at 435. Specifically, the military judge granted the defense motion because the order at issue was overbroad and because there was an insufficient relationship between the mandate and military duty, given the unique circumstances of this case. JA at 435-440.

During the hearing on the government motion to reconsider, the government conceded that the military judge applied the right law and the correct test when determining whether or not there was a lawful order. JA at 286. The challenge was only whether the government could establish an adequate factual basis for the proposition that the order was lawful. *Id.*; *see also Deisher,* 61 M.J. at 318.

I. The military judge did not err in determining that AFI 90-507 was not a lawful order because the blanket prohibition is overbroad and does not have sufficient nexus between military necessity and the duty imposed.

A lawful order requires: "(1) issuance by competent authority -- a person authorized by applicable law to give such an order; (2) communication of words that express a specific mandate to do or not do a specific act; and (3) relationship

of the mandate to a military duty." *Deisher*, 61 M.J. at 318. The first two prongs are not at issue. The issue before this Court is only the relationship of the mandate to a military duty. As this case arises on government appeal under Article 62(a), UCMJ, this Court must review the military judge's decision in the light most favorable to Appellee. *Wicks*, 73 M.J. at 98. Additionally, the question is not whether this Court agrees with the military judge's determination of the lawfulness of the order, but rather whether the military judge's ruling was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *Id.*

a. The order banning consumption of hemp seeds interferes with a personal right and is unrelated to the stated purpose of the AFI, which is to prevent the consumption of substances that might interfere with the Air Force's drug testing program.

In order to be legal the order must relate to a military duty. MCM, Part IV, Paragraph 14(c)(2)(c)(iv). The order may not, without such a valid military purpose, interfere with the private rights or personal affairs. *Id.* Appellee's consumption of commercially available legal food products is a personal affair. An order purporting to regulate personal affairs is not lawful unless it has a military purpose. *Padgett*, 48 M.J. at 276-277; *see also United States v. Milldebrandt*, 8 M.J. 635 (C.M.A. 1958) (striking down an order for a soldier to submit weekly reports on his financial status as invalid because the order "was not required to maintain the morale, discipline, or good order of the unit or to keep the

military free from disrepute"); *United States v. Wysong,* 9 M.J. 249 (C.M.A. 1958) (setting aside a conviction for disobeying an order not to talk to potential witnesses as too broad, vague, and indefinite); *United States v. Wilson,* 12 M.J. 165 (C.M.A. 1961) (setting aside a conviction for disobeying an order not to drink alcohol as "so broadly restrictive of a private right of an individual is arbitrary and illegal"); *cf. United States v. Byle,* 37 M.J. 92 (C.M.A. 1993) (upholding a conviction not to drink alcohol in pretrial confinement as a valid condition of confinement).

The articulated military purpose behind AFI 90-507 paragraph 1.1.6., is that these products can, in some manner, interfere with the Air Force's drug testing program. JA at 439; *See also* JA at 454 (AFMOA/CC affidavit acknowledging that products regulated by the FDA will not interfere and stating that the purpose of the AFI is to prevent Air Force member stationed around the world from consuming hemp products with unknown quantities of THC from testing positive).[4] The evidence presented during trial and the motions hearings conclusively refutes that purpose as it relates to legal hemp foods sold in the United States.

---

[4] The government expert testified that its "debatable" whether the Air Force has any valid reason for prohibiting the consumption of hemp product. JA at 136.

b. The sweeping prohibition on the consumption of hemp seeds is not narrowly tailored, as required, because it regulates the consumption of lawful food that could not interfere with the drug testing program and does not prevent Airmen from unknowingly ingesting unregulated products either in the United States or abroad.

Banning the ingestion of legal, well-regulated, commercially manufactured and sold food containing hemp seeds is so broadly restrictive that it constitutes an arbitrary and illegal infringement upon a private right. The order does not distinguish between legal hemp foods, which are well-regulated and commercially available, and illegal hemp foods. It does not limit the prohibition to geographic areas with a unique military duty. *Cf. United States v. McMonagle,* 34 M.J. 852 (A.C.M.R. 1992) *rev. on other grounds* (upholding an order prohibiting alcohol assumption in a certain geographic location during a deployment).

This regulation is overbroad because it fails to distinguish between legal, regulated hemp seeds and illegal hemp seeds. This prohibition does nothing to prevent Airman, serving domestically, from innocently ingesting illegally manufactured, non-commercially produced, and unlabeled products. As the military judge astutely points out, unregulated products would be illegal without this order and these products are unlikely to be labeled. JA at 439. This broad prohibition is reminiscent of the unlawful order prohibiting alcohol consumption in *Wilson* and is without limit as to "time or place or ... the reasonable

requirements" of military service. 12 M.J. at 166. If the order not to consume hemp seeds was narrowly tailored, as the government contends, it would be rationally connected to preventing the consumption of illegally manufactured products that may cause positive drug test. However, it is not.

Additionally, this prohibition is overly broad because of its lack of geographic specificity. The law requires orders to be clear, specific and narrowly drawn. *Moore,* 58 M.J. at 468. As the military judge addressed in the initial motions hearing, if the military is concerned about members stationed overseas, it may be reasonable to address that concern through local regulations to be narrowly tailored to those members. JA at 267-68. Local regulations are a typical way that the military handles conflict between domestic and foreign law. JA at 268. Perhaps an order stating Airmen stationed in Asia are prohibited from consuming hemp seeds would be appropriately tailored; however, a regulation that fails to differentiate between Airmen serving domestically, where food products are subject to intense regulation by the FDA and DEA, and Airmen serving abroad, where regulation may be less restrictive, is unnecessarily overbroad.

Finally, if the purpose is to maintain the integrity of the drug testing program by eliminating the ingestion of any amount of detectable or measurable narcotic, then the order is arbitrary. At trial, the defense expert testified that the order "makes no sense." JA at 254. He compared the military's regulation of

hemp seeds with poppy seeds. *Id.* Poppy seeds contain morphine. *Id.* The level of morphine is actually detectable by the drug testing equipment because it is present at a higher level than THC in washed hemp seeds. *Id*. However, the Air Force has not banned poppy seeds. *Id.* If the Air Force intended this order to serve the purpose of preventing ingestion of a controlled substance because of concerns about the integrity of the drug testing program, then it would also ban other food products which contain trace amounts of narcotics. It does not. The evidence admitted at trial is uncontroverted that lawfully available, commercially manufactured food products sold in the United States do not pose any risk of interfering with the Air Force's drug testing program and thus, any prohibition banning their consumption does not serve a valid military purpose.

The government, in its case-in-chief, disavowed any reasonable probability that consumption of legal hemp seeds could result in a positive drug test. JA at 124, 260. Rather the government's theory of criminality concerning Charge I was that Appellant must have knowingly ingested THC because KIND bars cannot cause this. JA at 224 (Trial counsel began findings argument, "Members, this accused used marijuana. Not Kind bars that contained hemp seed…" and continued, "The hemp seeds and the Kind bars, as you heard from the expert, is not going to cause, it is unreasonable that that would cause a positive urinalysis."). Prohibiting Airmen from consuming legal, labeled, well-regulated food products

does nothing to protect Airmen from innocently consuming unlabeled, unregulated food products.

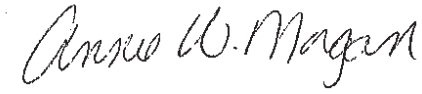
The military judge did not err when he granted the defense motion to dismiss. His findings that there is not a sufficient nexus between military necessity and the duty AFI 90-507 seeks to impose are grounded in fact and law. The military judge's ruling denying the government's motion for reconsideration is also grounded in fact and law. The military judge properly considered the evidence, modified his findings of fact accordingly, and correctly applied the law. His determination deserves considerable deference, given the standard applied to Article 62(a) appeals and the fact that government appeals are supposed to be "unusual, exceptional, [and] not favored." *Carrol v. United States*, 354 U.S. 394, 400 (1957).

WHEREFORE, Maj Pugh respectfully requests that this Honorable Court reverse the Air Force Court and affirm the military judge's ruling.

Respectfully Submitted,

David P. Sheldon
Law Offices of David P. Sheldon, PLLC
USCAAF Bar No. 27912
100 M Street SE, Suite 600
Washington, DC 20003

davidsheldon@militarydefense.com
(202) 546-9575 (w)
(202) 546-0135 (f)



ANNIE W. MORGAN, Major, USAF
Appellate Defense Counsel
USCAAF Bar No. 35151
Appellate Defense Division
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road
Joint Base Andrews NAF, MD 20762
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 8 August 2017.

ANNIE W. MORGAN, Maj, USAF
Appellate Defense Counsel
USCAAF Bar No. 35151
Appellate Defense Division
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road
Joint Base Andrews NAF, MD 20762
(240) 612-4770

Counsel for Appellant