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

APPELLANT'S REPLY BRIEF

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

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

Pursuant to Rule 19 of this Court's Rules of Practice and Procedure, Maj Pugh hereby Replies to the United States' Answer, filed on 28 August 2017.

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.

1. **The military judge's findings of fact are fairly supported in the record and not clearly erroneous.**

In a series of footnotes, the government challenges approximately five of the military judge's findings of fact as clearly erroneous. Govt. Br. at 4-7. Each of the facts contested are contained in the military judge's original ruling. During the motion to reconsider, the government did not challenge any the military

judge's findings of fact. JA at 286. At that hearing, the government had every opportunity to contest the facts in the military judge's initial ruling. They did not. *Id.* They cannot now challenge those fact as "clearly erroneous." However, Maj Pugh is able to point to evidence in the record that fairly supports each disputed fact found by the military judge. *See United States v. Baker,* 70 M.J. 283, 288 ("the question is not whether [this Court] might disagree with the trial court's findings, but whether those findings are fairly supported by the record.")

a) *The government challenges the military judge's finding that "hemp seeds make up roughly .001% of Strong & KIND bars.* Govt. Br. at 4 n. 2.[1]

The government's expert testified that there was .001% of hemp seed in the product. JA at 46.

b) *The government challenges the military judge's finding that "marijuana" and "hemp", are both derived from the cannabis sativa; however, the terms refer to different portions of the plant*. Govt. Br. at 5 n. 3.

The defense's expert testified hemp and marijuana "come from the same plant, the cannabis sativa plant. Marijuana is the leafy substance or the leafy plant material that comes from the plant. Hemp is the stalk, it is everything other than

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[1] To the extent there is any dispute regarding this finding of fact, it is an immaterial distinction. Testimony at trial was uncontroverted that KIND bars contain an "infinitesimally [small] amount, incredibly small amount of THC." JA at 253.

the leafy material you have the stalk, everything other than the leafy material, that is hemp." JA at 259.

> c) *The government challenges the military judge's finding that legally available food products sold in the United States, which contain hemp seeds, contain so little TCH as to be below the limits of detection of even Gas Chromatography/Mass Spectrometry (GC/MS) – the "gold standard of drug testing programs."* Govt. Br. at 6 n. 5.

The government challenges this finding based on a 2008 Armed Forces Institute of Pathology (AFIP) study which "detected varying levels of THC" in popular and commonly available" food products. However, the defense expert testified that there is not enough THC in commercially available hemp products to be detectable by the GCMS and the drug testing. JA at 260. "It would be indistinguishable from a negative urine. You could not tell at all if someone had eaten a washed product containing hemp seed seeds, a washed hemp seed product on a drug test, none whatsoever." *Id.*

The AFIP study referenced by the government does not refute this testimony or the military judge's finding of fact. The government's own expert testified about the AFIP study and stated that "[the study] was to show that nowadays the commercially available products, they don't have a large amount of THC in them." JA at 291. The expert agreed with the conclusions of the study that consumption of hemp seeds is not a legitimate excuse for a positive drug test. JA at 297.

d) *The government challenges the military judge's findings that THC concentrations in commercially available products are so low as to be below the detection limits of the program, that use of these products in conjunction with other forms of THC would not cause a positive result, and that these products cannot interfere with the Air Force drug testing program.* Govt. Br. at 7 n. 8.

The government's intimation that passive inhalation combined with the consumption of a hemp product could "push you up over the DoD cut-off" mischaracterizes the defense expert's testimony. Govt. Br. at 7, n. 8*;* JA at 256. When the defense's expert testified that such a combination could "push you over the DoD cut-off," he was not referring to legal, commercially available food products containing hemp seeds. JA at 256. Later, when asked specifically, "[w]ould a person, if they ate a KIND bar, in any situation whatsoever, ever test positive as a result of eating the KIND bar under any circumstances whatsoever[,]" the expert answered, unequivocally, "No." JA at 258.

e) *The government challenges the military judge's findings that legally available commercial food products containing hemp cannot interfere with the Air Force drug testing program.* Govt. Br. at 7, n. 9.

The military judge's finding is fairly supported because there is not enough THC in commercially available hemp products to be detectable by the GCMS and the drug testing. JA at 261. There is no situation, whatsoever, where a person could test positive on a drug test as a result of eating a KIND bar. JA at 258.

According to the government, the military judge's finding is clearly erroneous because it does not contemplate the consumption of pure processed hemp seeds.[2] Govt. Br. at 7, n. 9. However, this argument fails for two reasons: (1) pure, or "unwashed," hemp seeds are already illegal in the United States (JA at 260, 271), and (2) the lawfulness of the prohibition on unwashed hemp seeds was not the question before the trial court, nor is it the question before this Court. The question before this Court is whether a prohibition on legally available commercial food products is reasonably necessary to effectuate the stated purpose of Air Force Instruction 90-507, paragraph 1.1.6. In other words, is a ban on these products reasonably necessary to prevent interference with the drug testing program? The military judge's finding that legally available commercial food products cannot interfere is a finding of fact necessary to determination of whether the prohibition in the Air Force Instruction (AFI) bears a sufficient nexus to military duty and this finding is fairly supported in the record.

2. Prohibiting the consumption of legally available commercial food products is not reasonably necessary to protect the integrity of the drug testing program.

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[2] Undersigned counsel is unclear what the government is referring to as "pure processed hemp seeds." There are processed ("washed") hemp seeds, which contain an undetectable level of THC (JA at 261) and there are unprocessed ("unwashed") hemp seeds, which are currently illegal under Federal law (JA at 260, 271). Unwashed hemp seeds do not exist in commercially available products. JA at 259.

The parties agree that the military duty in question is the necessity to protect the reliability and integrity of the drug testing program. App. Br. at 6; Govt. Br. at 20. Thus, the question for this Court is whether banning legally available commercial food products sold in the United States is reasonably necessary to protect the reliability and integrity of the drug testing program. *See* Para. 14c(2)(a), Part IV, MCM (2012 ed.) (regulation of activities *reasonably necessary* to accomplish a military mission) (emphasis added). In other words, is it reasonably necessary to criminalize eating a candy bar or a yogurt, commonly sold on military installations, in order to prevent the possibility of that an accused might later challenge the validity of a positive drug test? JA at 45. It is not.

To justify a broad ban, the government advances two arguments. Govt. Br. at 21. First, that the consumption of all hemp products, including the consumption of legally available commercial food products, must be banned to eliminate doubt, either real or perceived, regarding the drug testing program. *Id.* Second, a broad ban is consistent with the Air Force's prohibition on the use of illegal drugs. *Id.* Although AFI 51-907, para 1.1.6, exists under the auspices of advancing these goals, it is neither necessary to them nor is it narrowly tailored so as not to unnecessarily interfere with the private rights of servicemembers. *See United*

States v. Womack, 29 M.J. 88, 90 (C.M.A. 1989) (an order "may not be overly broad in scope or impose an unjust limitation on personal rights").

There are two scenarios where a servicemember tests positive for THC. In one scenario, the servicemember knowingly and wrongfully ingests a product containing THC. In the second scenario, the servicemember unknowingly ingests a product containing THC. In the first scenario, AFI 51-907, para 1.1.6 becomes superfluous because no matter the method of ingestion – smoking marijuana, eating brownies baked with illegal hemp seed oil, or the consumption of unwashed hemp seeds – the conduct would be prohibited by Article 112a, UCMJ. *See* Article 112a, UCMJ (criminalizing the knowing and wrongful use, possession, manufacture, distribution and introduction of marijuana). In the second scenario AFI 51-907, para1.1.6. is not applicable because it is not a crime to unknowingly consume THC or any other drug.

The government cannot eliminate the second scenario by banning lawfully available commercially produced food products that contain hemp seeds. As the military judge points out, it is possible that food products sold in unregulated venues (i.e. a farmer's market) could, illegally, contain unwashed hemp seeds and a purchaser would have no way of knowing. JA at 436. Similarly, a restaurant may, unbeknownst to a diner, elect to use hemp seed oil rather than canola or olive oil. The only way to completely eliminate the risks of innocent ingestion and false

positives would be to regulate all food consumed by servicemembers. However, the Air Force does not subject its members to such regulation. As the defense expert pointed out, the Air Force does not regulate servicemembers' consumption of poppy seeds, despite knowing that poppy seeds contain a measurable amount of morphine, which might theoretically give rise to a false positive drug test result. JA at 254. Because the Air Force does not dictate all foods that a servicemember consumes, there will always be some risk of false positives and some amount of doubt inherent to the drug testing process.

The government spends a large part of their argument advancing the military's substantial interest in preventing drug abuse by members. Maj Pugh concurs that this is a substantial interest and acknowledges that Court has recognized the disastrous effects of illegal drug use on military readiness. *See Murray v. Haldemann,* 16 M.J. 74, 79 (C.M.A. 1983). However, this case is not about illegal drug use. There is nothing about the consumption of washed hemp seeds that is harmful to military readiness; a member is still able to perform their duties if they eat a KIND bar. *See* JA at 124 (Expert testimony that it would be impossible to eat enough KIND bars to test positive.)

This case is about whether a prohibition on the consumption of a lawfully available commercial food product is reasonably necessary because of concerns that those products can interfere with the Air Force's drug testing program. In

reaching his determination that such a prohibition is not reasonably necessary, the military judge properly considered evidence that unwashed hemp seeds and derivative products are already illegal (JA at 260, 271); there are no lawfully available commercial food products that contain unwashed hemp seeds sold in the United States (JA at 259); there has never been a recall of commercially available products due to a regulatory failure (JA at 299); the THC in commercially available products is so low as to be beyond detection of drug testing equipment (JA at 260-61); and under no circumstance can a servicemember test positive on a drug test having consumed lawfully produced commercially available products (JA at 124). Because there is no risk of interference, the military judge properly concluded that there was not a sufficient military nexus and properly concluded that AFI 51-907, para 1.1.6, was overbroad in its attempts to regulate lawfully produced commercially available food products.

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

Respectfully Submitted,

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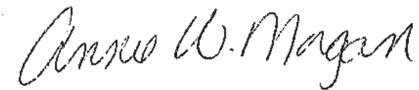

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CERTIFICATE OF FILING AND SERVICE

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 5 September 2017.

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