

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ALBERT R. KALLON
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 200900402
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 28 April 2009.

Military Judge: CDR Colleen Glaser-Allen, JAGC, USN.

Convening Authority: Commanding Officer, Headquarters and Service Battalion, Marine Corps Base, Quantico, VA.

Staff Judge Advocate's Recommendation: LtCol Stephen C. Newman, USMC; **Addendum:** LtCol Stephen M. Lyons, USMC.

For Appellant: LCDR Edward T. George, JAGC, USN.

For Appellee: LT Duke J. Kim, JAGC, USN.

15 December 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of unauthorized absence and one specification of wrongful marijuana use, violations respectively of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The convening authority (CA) approved the adjudged sentence of confinement for 150 days and discharge from the U.S. Marine Corps with a bad-conduct discharge.

The appellant now asserts that the military judge abused her discretion by not granting him substantial "other" credit for an admitted violation of RULE FOR COURTS-MARTIAL 305, MANUAL FOR COURTS-

MARTIAL, UNITED STATES (2008 ed.). We find no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

The facts giving rise to the appellant's assignment of error are undisputed. The appellant was placed in pretrial confinement at Marine Corps Base Quantico, Virginia for suspected violations of Articles 86 and 112a. As required by R.C.M. 305, his placement in confinement was considered by a neutral and detached hearing officer. On that officer's recommendation, the appellant remained in pretrial confinement until his trial date. Appellate Exhibit V at 8-11.

The parties agree that the hearing officer failed to prepare the memorandum required by R.C.M. 305(i)(2)(D). Record at 18-19. The trial defense counsel brought this to the CA's attention a little more than a week before trial, yet as of the trial date the memorandum still had not been prepared. *Id.* at 19.

The military judge granted the appellant 70 days of credit to remedy the violation of R.C.M. 305(i)(2)(D). The military judge denied additional "punitive" credit, however, for what the trial defense counsel styled the CA's abuse of discretion in not directing that a proper hearing occur and that the hearing officer produce a proper memorandum of decision after the CA had been notified of the discrepancy.

When a military judge is given discretion to operate within a certain range, we will not disturb her ruling absent an abuse of the granted discretion. *See, e.g., United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004). An abuse of discretion occurs when a military judge's ruling is based on factual findings that are clearly erroneous or is based on an incorrect view of the law. *E.g., United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). The military judge's factual findings in this case are based on matters of record and they are not clearly erroneous. As far as the military judge's view of the law is concerned, we note that she was required, not permitted, by R.C.M. 305(k) to assign administrative credit for the period during which the memorandum did not exist, and she was permitted, not required, to assign additional credit for a violation that involved an abuse of discretion or unusually harsh conditions. She clearly recognized this distinction. Record at 34-36. The required administrative credit, in the military judge's mind, was sufficient to vindicate the appellant's procedural rights and to instruct the command on the perils of nonobservance of the rules.

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court