

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

C. L. CARVER

D.A. WAGNER

E.B. STONE

**Stars and Stripes
Petitioner**

v.

UNITED STATES

and

**Rear Admiral N.E. Preston, USN
Convening Authority**

and

**Lieutenant Commander K. McCormick, JAGC, USN
Investigating Officer
Respondents**

NMCCA 200501631

Decided 22 December 2005

PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF WRITS OF
MANDAMUS AND PROHIBITION AND APPLICATION TO STAY PROCEEDINGS

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Senior Judge

The petitioner, Stars and Stripes¹, through their 7 December 2005 filing before this court, sought extraordinary relief in the nature of writs of mandamus and prohibition, as well as an application to stay further proceedings under the All Writs Act, 28 U.S.C. § 1651(a). Specifically, the petitioner asked this court to (1) stay the pretrial proceedings below; (2) issue a writ of mandamus directing the convening authority to nullify the Article 32, UCMJ, investigation and comply with the

¹ Stars and Stripes describes itself as "a Department of Defense-authorized daily newspaper distributed overseas for the U.S. military community."

requirements of *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997), and *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977), in all future proceedings; and (3) issue a writ of prohibition preventing the convening authority or investigating officer from arbitrarily closing further proceedings to the public and press.

On 14 December 2005, the Government filed a Motion to Dismiss the petitioner's request for extraordinary relief as moot, stating that the charges that were the subject of the Article 32, UCMJ, investigation had been dismissed without prejudice. The petitioner then filed an Opposition to the Government Motion to Dismiss on 16 December 2005, asking this court to grant the following extraordinary relief on the basis that the issue is one that is capable of repetition, yet may still evade review: (1) a finding that the blanket closure order was unlawful and the Article 32 investigation was invalid; (2) an order directing Respondents to obtain a *Grunden* review of the Article 32 tapes and, after employing the scalpel to make only necessary redactions, release copies or transcripts of them to Petitioner; (3) a writ of mandamus directing the convening authority to nullify the Article 32 investigation and comply with the requirements of *ABC, Inc. v. Powell* and *United States v. Grunden* in all future proceedings; (4) a writ of prohibition preventing the convening authority or investigating officer from arbitrarily closing further proceedings to the public and press; and (5) such other and further relief as may in the circumstances be just and proper (citations omitted).

Facts Provided by the Petitioner²

On 14 November 2005, a reporter for the Stars and Stripes newspaper notified the Public Affairs Office (PAO) for Naval Support Activity, Naples, Italy, that she would be attending a hearing in an Article 32, UCMJ, investigation scheduled for 0900, 15 November 2005. The investigation had been ordered to consider charges of sexual harassment, fraternization, and indecent acts with a minor against a chief petty officer attached to the Naval Computer and Telecommunications Station, Naples, Italy. At 0815, 15 November 2005, the reporter was notified via telephone by the public affairs office (PAO) that a decision had been made to close the hearing to the public. The reporter stated her desire to protest the blanket

²The petitioner includes a multitude of facts not relevant to the issue of public access to Article 32, UCMJ, investigation hearings. In large part, these extraneous facts deal with the disclosure of information by the armed forces to the public and are not germane to the issue at hand. Such matters are the rubric of the various statutes and regulations governing the release of information by the armed forces.

closure on the record before the investigating officer and indicated that she would be present to do so.

The two-day hearing was conducted in closed session and the reporter was not made privy to any session where closure was discussed. Neither was she permitted to place her objection to the closure on the record before the hearing began. After the hearing began, the reporter was told she could put her objection in writing. The reporter complied, although continuing to request that the objection be conducted in person before the investigating officer and before the taking of evidence in the hearing. After submitting the written objection, the reporter was informed that the investigating officer had upheld her earlier decision to close the hearing in its entirety.

After the taking of evidence had concluded on the 15th, the reporter was again contacted and asked if she still desired to make her objection on the record to the investigating officer. After consulting with her editor, she indicated that the chief operating officer and general counsel (COO/GC) for the newspaper would make the objection on behalf of Stars and Stripes. At 1800 that evening, the COO/GC, located in Washington, D.C., was permitted, by telephone, to place the objection to the closure on the record. Subsequently, the investigating officer decided to continue the hearing on 16 November 2005 and that the hearing would remain closed to the public. No detailed rationale for the blanket closure was provided. Apparently, both the Government and the accused joined in the request to close the hearing.

Meanwhile, an appeal of the investigating officer's ruling had been made to the appointing authority by a member of the newspaper's editorial staff. In responding to this appeal, the PAO stated that the investigating officer had concluded, after a careful analysis and discussion with the parties at the beginning of the hearing, that the expected testimony of the witnesses and discussion of evidence would, if released to the public, adversely affect the rights of the accused and/or the alleged victims, one of whom is a minor child, or discourage the complete testimony of an embarrassed or timid witness. The PAO also stated that the hearing was recessed on two additional occasions to reconsider the request of Stars and Stripes and to consider new matters. The convening authority declined to overturn the decision of the investigating officer.

The investigating officer submitted her report under Article 32, UCMJ, on 23 November 2005. Further action on the case was unknown to the petitioner at the time of their filing before this court. The appointing authority dismissed the charges on 14 December 2005, stating that the

Article 32, UCMJ, investigation was procedurally defective. The appointing authority stated, in dismissing the charges without prejudice, that this action was taken "...to ensure that the interests and rights of both the accused and the public and media are given due regard..." and that the charges could be repreferred in the future.

Law

Our superior court has stated that, "absent 'cause shown that outweighs the value of openness,'" the military accused has a Sixth Amendment right to a public Article 32, UCMJ, investigative hearing. *Powell*, 47 M.J. at 365 (quoting *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 509 (1984)). In addition, "the press enjoys the same right and has standing to complain if access is denied." *Id.* (citing *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596 (1982)).

The right to a public hearing, however, is not an absolute one. *Id.* (citing *United States v. Brown*, 22 C.M.R. 41, 46 (C.M.A. 1956)); *Grunden*, 2 M.J. at 120; *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985). As a statutory matter, there is discretion to properly limit the public's access to Article 32, UCMJ, hearings. RULE FOR COURTS-MARTIAL 405(h)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), states that either the investigating officer or the commander who directed the investigation can restrict access to all or part of the proceeding. The Discussion of the Rule provides: "Closure may encourage complete testimony by an embarrassed or timid witness. Ordinarily the proceedings of a pretrial investigation should be open to spectators." The determination of whether to close part or all of an Article 32, UCMJ, hearing "must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis." *Powell*, 47 M.J. at 365 (citing *Globe*, 457 U.S. at 609 and *Hershey* 20 M.J. at 436).

In addressing the issue of the potential release of classified information during public court-martial proceedings, our superior court stated that "the exclusion of the public was narrowly and carefully drawn. The blanket exclusion of the spectators from all or most of a trial . . . has not been approved . . . nor could it be absent a compelling showing that such was necessary to prevent the disclosure of classified information." *Grunden*, 2 M.J. at 121 (footnote omitted).

The Government now argues, however, that, by dismissing the charges and, in essence, agreeing with the petitioner that the Article 32, UCMJ, investigation was defective, their actions have mooted the issue before the court.

Discussion

If the charges had not been dismissed, and this court were asked to apply the stringent requirements of *Powell* and *Grunden* to the present case, we would find it necessary to first examine the proceedings themselves in order to determine whether the closure of the hearing was a violation of the petitioner's claim of right under the Sixth Amendment. While we agree with our sister court's observation that closing the hearing "even before Petitioner's counsel was allowed to address the matter on the record" is an error "obvious on its face," we are mindful that the facts presented to us in support of the petition were incomplete and provided solely by the petitioner.

Now, we are faced with a Government action that, on its face, appears to be in agreement with the thrust of the petitioner's request for extraordinary relief from this court. The appointing authority has nullified the Article 32, UCMJ, investigation, which the petitioner asked this court to order him to do. There is no longer a proceeding for us to stay, as the petitioner also requested. Finally, the court will not issue orders of prohibition regarding future cases that may or may not come within the jurisdiction of the court.

In their Opposition to the Government's Motion to Dismiss the petition, the petitioner asks this court to order the release of the tapes or transcripts of the proceedings of the Article 32, UCMJ, investigation. We decline to do so. Congress has provided legislation governing the handling and release to the public of Government information. See, Freedom of Information Act of 1966, 5 U.S.C. § 552 (as amended by the Intelligence Authorization Act for Fiscal Year 2003, Pub. Law No. 107-306, 5 U.S.C.A. § 552(a)(3)(A), (E) (West Supp. 2003)). Without charges preferred against an accused, or restraint imposed on an accused, we would exceed our authority by issuing such an order. See Article 66, UCMJ.

Conclusion

Accordingly, we hereby grant the Government's motion to dismiss the petition. The petition is dismissed.

Senior Judge CARVER and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court