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

Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CALEB P. HOHMAN
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201000563
Review Pursuant to Article 62(b), Uniform Code of Military Justice, 10 U.S.C. §862(b)

Military Judge: LtCol T.J. Sanzi, USMC.
Convening Authority: Commanding General, 1st Marine Division (REIN), Camp Pendleton, CA.
For Appellant: LT Kevin Shea, JAGC, USN.
For Appellee: LT Michael Torrisi, JAGC, USN.

31 January 2011

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MAKSYM, Senior Judge:

This case is before us on an interlocutory appeal by the United States, filed pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 and RULE FOR COURTS-MARTIAL 908, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The Government alleges the military judge erred in abating the court-martial proceedings until the appellee's previously detailed military defense counsel is returned to the defense team. Subsequent to the Government's filing of the interlocutory appeal, the appellee filed a Motion to Dismiss for Lack of Jurisdiction. On 1 December 2010, we heard oral argument on the Motion to Dismiss and the interlocutory appeal.

After considering the record of trial and the parties' pleadings, we deny the appellee's motion to dismiss and conclude that good cause exists to sever the attorney-client relationship. The Government's appeal is granted.

Factual Background

The appellee is charged, *inter alia*, with involuntary manslaughter in violation of Article 119, UCMJ, for allegedly shooting another Marine in October 2006 while participating in a training exercise, during which he utilized live ammunition rather than blanks. The appellee retained civilian counsel in November 2006 and charges were preferred on 18 April 2007.

After releasing other detailed military counsel, the appellee was detailed Capt M, USMC, on 17 April 2009. At that point, Capt M had declined career designation and his End of Active Service (EAS) was set for 1 October 2009. As the date approached, Capt M requested an extension of his EAS until 31 December 2009 in order to continue working on this case. His first request was supported by the Officer in Charge, Legal Service Support Section (OIC LSSS), Camp Pendleton, CA and was granted by Lieutenant Colonel (LtCol) D.D., USMC, at Manpower Management Officer Assignments Branch (MMOA-3), but his EAS was only extended until 1 December 2009.

On 23 November 2009, one week prior to the expiration of his extension, Capt M requested a second extension which, like the first, was supported by the OIC LSSS. MMOA-3 denied the second request on 27 November 2009 without a stated reason.[1] Capt M left active duty on 1 December 2009. The appellee objected to Capt M's removal from his case. Capt M's work on the case had been representing his client in court sessions litigating the release of the Naval Safety Center investigation of the incident for which the appellee was on trial. On 3 December 2009, Capt K was detailed as defense counsel to replace Capt M -- a role in which he has served to date.

Jurisdiction

Article 62, UCMJ, permits the Government to appeal "[a]n order or ruling of the military judge which terminates the proceedings with respect to a charge or specification . . . ." While a lower court's orders to abate proceedings may be appealed, the test is whether the substance of the ruling has the practical effect of terminating the proceedings. *See United States v. True*, 28 M.J. 1, 4 (C.M.A. 1989); *United States v. Horowitz*, 622 F.2d 1101, 1104-05 (2d Cir. 1980).

[1] MMOA-3 later explained that it was Marine Corps policy to deny extension requests for officers who had declined career designation. Appellate Exhibit XLVIII at 9.

In this case, the military judge has abated the proceedings until, Capt M (now an inactive reservist) is returned to the defense team. Appellate Exhibit XLVIII. Following the trial judge's imposition of abatement, the Government has advanced an option of compliance involving Capt M accepting Active Duty Operational Support (ADOS) orders and voluntarily returning to active duty to represent the appellee. Capt M has stated, however, that he will not voluntarily accept such orders. AE XXXVI at 1-4. Alternatively, Capt M proposes that the Government pay him an hourly rate to represent the appellee as civilian counsel. The Government has essentially refused this offer, and the military judge has abated the proceedings. The appellee argues that abatement does not amount to termination in this case, as a determination should be made as to whether the Government can pay for Capt M as a contract attorney. We disagree. Even if the Government can pay (and it clearly has the ability), the issue is similar to abatement after the Government refuses to pay for judicially ordered expert assistance for the defense team. Accordingly, where intractability has set in, abatement is less like a continuance and more like a dismissal. *See True*, 28 M.J. at 4. We therefore find that, under the specific facts of this case, the abatement has the practical effect of terminating the proceedings and the Government's interlocutory appeal is properly before this court.

Article 62 Standard of Review

In reviewing an interlocutory appeal by the Government, we "may act only with respect to matters of law." Art. 62(b), UCMJ; R.C.M. 908(c)(2). This Court is "bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous" and we lack the "authority to find facts in addition to those found by the military judge." *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). However, "[w]e conduct a *de novo* review of [the military judge's] conclusions of law." *United States v. Stevenson*, 52 M.J. 504, 505 (N.M.Ct.Crim.App. 1999), *rev'd on other grounds*, 53 M.J. 257 (C.A.A.F. 2000); *see also United States v. Greene*, 56 M.J. 817, 822 (N.M.Ct.Crim.App. 2002).

Discussion

"The right to effective assistance of counsel and to the continuation of an established attorney-client relationship is fundamental in the military justice system." *United States v. Baca*, 27 M.J. 110, 118 (C.M.A. 1988)(citation omitted). Absent the accused's consent or an approved application of withdrawal by counsel, the attorney-client relationship can only be severed when good cause is shown on the record. *United States v. Allred*, 50 M.J. 795, 799-800 (N.M.Ct.Crim.App. 1999); R.C.M. 505(d)(2)(B)(iii). "'[G]ood cause' includes physical disability, military exigency, and other extraordinary circumstances which render the . . . counsel . . . unable to proceed with the court-martial within a reasonable time. 'Good cause' does not include

temporary inconveniences which are incident to normal conditions of military life." R.C.M. 505(f).

This court found in *United States v. Hutchins*, 68 M.J. 623 (N.M.Ct.Crim.App. 2010), *rev'd and remanded*, 69 M.J. 282 (C.A.A.F. 2011), that the appellant's attorney-client relationship had been wrongfully severed when his detailed military counsel abruptly departed on terminal leave without withdrawing from the case only weeks before commencement of the general court-martial, when the military judge failed to make a good cause determination on the record, and when the Government counsel failed to request an affirmative determination of counsel's status. In assessing whether good cause existed for the severance of the attorney-client relationship, we determined that good cause is measured on a sliding scale which considers the contextual impact of the severance on the client.[2] *Id.* at 629.

Expounding further, the Court rationalized that "EAS, standing alone, cannot be used as a basis to sever an existing attorney-client relationship *in this case* after nearly a year of preparatory work and mere weeks before commencement of a general court-martial for murder." *Id.* at 629 (emphasis added). To be clear, good cause remains a fact specific determination which considers the impact of the severance on the client and the circumstances under which the relationship is extinguished. *Id.*

On 11 January 2011, the Court of Appeals for the Armed Forces issued its opinion relative to *Hutchins* and while reversing this Court's determination as to assumed prejudice, otherwise concurred with our primary substantive holdings. "For the reasons set forth below, we conclude that: (1) the first detailed military assistant defense counsel did not follow the appropriate procedures with respect to the termination of his participation in the case; (2) the record of trial does not establish a valid basis for such termination under the circumstances of this case; (3) any procedural deficiencies concerning the termination and replacement of the first detailed military defense counsel did not result in prejudice to Appellee under applicable constitutional and statutory standards of law; and (4) the circumstances require return of the case to the Court of Criminal Appeals for the completion of review under Article 66, UCMJ, 10 U.S.C. § 866 (2006)." *Hutchins*, 69 M.J. 282, 2011 CAAF LEXIS 25 at 5-6.

In this case, good cause exists for the severance of the attorney-client relationship. Unlike *Hutchins*, the appellee's counsel left the case under "extraordinary circumstances that

[2] "Severance of an attorney/client relationship early in a case will have significantly less impact on an accused's representation rights than severance after work has been done on the defense case. A severance on the eve of trial after nearly a year of defense strategizing and preparation has even greater impact." *Hutchins*, 68 M.J. at 629.

rendered virtually impossible the continuation of the established relationship." *United States v. Iverson*, 5 M.J. 440, 442-43 (C.M.A. 1978)(footnote omitted). Capt M twice requested to remain on the case and left the case only after his second request was denied because of manning and budgeting constraints. Even then, Capt M remained until his final day of active duty. Also important to note is the appellee's case remained more than a half year from trial at best, not mere weeks -- minimizing the contextual impact of Capt M's severance. Accordingly, under the facts of this case, we find that good cause existed to sever the attorney-client relationship between the appellee and Capt M. As such, we determine that the trial judge abused his discretion in determining to impose abatement under the specific circumstances of this case.

We wish to state clearly that our decision to grant the Government's appeal in this matter is based solely upon the failure of the trial judge to properly construe our fact-specific determination in *Hutchins* in reaching his case determination. The significant interregnum between Capt M leaving active duty and the imposition of abatement eradicated any prejudice to the appellee. During this interregnum, substitute counsel – fully qualified – has been given more than sufficient time to prepare the most aggressive possible defense. To be clear, the facts of this case and a misapprehension of the law by the military judge compel the result we have reached. However, nothing in this analysis should be construed as curtailment of the considerable, inherent powers of the trial judge, to include the use of abatement as a proper means of judicial enforcement. *See Gore*, 60 M.J. at 178.

Conclusion

Accordingly, the Government's appeal is granted and the case is remanded for further proceedings not inconsistent with this opinion. R.C.M. 908(c)(3).

Judge PERLAK and Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court