

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

**BEFORE**

**E.E. GEISER**

**F.D. MITCHELL**

**J.G. BARTOLOTTA**

**UNITED STATES**

**v.**

**Tobias CHAPPELL  
Lieutenant (O-3), Supply Corps, U.S. Navy**

NMCCA 200602354

Decided 14 August 2007

Sentence adjudged 18 November 2005. Military Judge: B.W. MacKenzie. Staff Judge Advocate's Recommendation: LCDR E. Korman, USN. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Hawaii, Pearl Harbor, HI.

LT ANTHONY YIM, JAGC, USN, Appellate Defense Counsel  
Capt JAMES WEIRICK, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of three specifications of fraternization, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. Contrary to his pleas, officer members also convicted the appellant of two specifications of maltreating a subordinate, larceny, failure to report an offense, and endeavoring to impede an investigation, in violation of Articles 93, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 893, 921, and 934. The appellant was sentenced to confinement for 12 months, forfeiture of all pay and allowances, and a dismissal. The convening authority approved the sentence as adjudged.

The appellant raises four assignments of error. First, he asserts that the military judge improperly granted a Government challenge for cause against a prospective court member. The appellant's second and third assignments of error allege that the evidence was legally and factually insufficient to support findings of guilty to Specifications 1 and 2 of Charge I

(maltreatment). Finally, the appellant avers that the military judge erred when he denied the appellant's request for a military character witness on the merits.

We have examined the record of trial, the assignments of error, and Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

### **Challenge for Cause**

Lieutenant (LT) Paul R. Darling, USN, was detailed to the appellant's general court-martial. During individual voir dire, LT Darling revealed that he was on terminal leave after having twice failed to select for promotion. When asked whether he had ill feelings towards the Navy as a result of his forced departure, he responded that he did. Record at 379. Neither counsel nor the military judge inquired further.

The trial counsel subsequently challenged LT Darling for cause arguing that LT Darling "stated very candidly that he does have ill feelings towards the Navy [and]... both sides are entitled to a fair trial." *Id.* at 390. The defense objected arguing that, while LT Darling had some "ill feelings" towards the Navy because he's "losing not only his employment but [the] possibility of retirement," there was nothing else in the questionnaire that stated he couldn't look at the entire trial and be a fair and impartial juror. *Id.* After re-reviewing LT Darling's questionnaire, the military judge granted the Government's challenge for cause, out of an "abundance of caution." *Id.* at 391.

We will not overturn a military judge's determination regarding a challenge for cause except for a clear abuse of discretion. *United States v. McLaren*, 38 M.J. 112, 118 (C.M.A. 1993). RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), permits excusing a potential court member for cause if he "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." On appeal, the appellant focuses his argument on whether the military judge applied the correct legal standard and on whether LT Darling expressed an "inelastic attitude" that would render him unable to yield to the evidence presented and the military judge's instructions. *United States v. McGowan*, 7 M.J. 205, 206 (C.M.A. 1979).

Having carefully reviewed the record, we find no evidence that the military judge utilized the "liberal grant" standard attributed to him by the appellant. *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005). We specifically decline to adopt the appellant's speculation that the military judge's statement that he was granting the Government challenge out of an "abundance of caution" somehow equates to his having applied a

"liberal grant" standard. Absent evidence to the contrary, we presume a military judge knows and correctly applies the law.

The appellant's second assertion that LT Darling didn't evidence an "inelastic attitude" towards findings or sentencing, while arguably accurate, is misplaced. Having an "inelastic attitude" is not the only grounds for removal and it is not the ground the military judge relied upon. The Discussion following R.C.M. 912(f)(1)(N) provides several examples of matters other than having an inelastic attitude which can be grounds for a challenge for cause. Among these is whether a potential member has "a decidedly friendly or hostile attitude toward a party." We observe that use of the word "party" implies that both the Government and the accused have the right to a "court-martial free from substantial doubt as to ... fairness." R.C.M. 912(f)(1)(N).

It is axiomatic that a military judge who enjoys the opportunity to personally observe and listen to responses during voir dire is in a superior position to evaluate the demeanor of potential court members. *James*, 61 M.J. at 138. While the defense is correct that none of LT Darling's other responses indicated that his antipathy towards the Navy would necessarily manifest itself and affect his decision-making as a court member, we find that LT Darling's circumstances and candid response during individual voir dire were sufficient to justify the military judge's discretionary decision to excuse LT Darling for cause. We find, therefore, that the military judge did not clearly abuse his discretion in doing so.

### **Legal and Factual Sufficiency**

#### 1. Specification 1 of Charge I.

Beginning in July 2004, the appellant fraternized with SK2 TSY. Record at 263. When the fraternization began, the appellant was the pre-commissioning supply officer onboard USS CHUNG-HOON (DDG 93), located in Pascagoula, Mississippi. TSY was the Assistant Leading Petty Officer (ALPO) in the appellant's S-1 workcenter onboard the CHUNG-HOON. There were two intermediate supervisors (SK1 Crawford and then-SKC Clair<sup>1</sup>) in the chain of command between the appellant and SK2 TSY. The relationship blossomed during the following months as the ship completed its precommissioning work and sailed from Mississippi to its permanent homeport in Hawaii. Ultimately, in December 2004, the appellant and SK2 TSY were secretly married. *Id.* at 268.

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<sup>1</sup> Then-SKC, now SK1 Clair was fraternizing with an SK3 onboard USS CHUNG-HOON during the same time period the appellant was fraternizing with SK2 TSY. The appellant's knowledge of Clair's conduct and his subsequent failure to take appropriate action forms the gravamen of Specification 1 of Charge III (failure to report an offense).

As the appellant's relationship with SK2 TSY developed, her immediate supervisor, SK1 Crawford, was becoming increasingly frustrated with her routine disappearances during normal working hours and her circumvention of the chain of command by taking issues directly to the appellant. He attempted to resolve his concerns verbally with SK2 TSY on at least one occasion but her conduct did not change. *Id.* at 551. Finally, on 15 September 2004, SK1 Crawford had enough. Having been unable to locate SK2 TSY for a substantial portion of the day, he finally located her at the end of the workday and issued her a formal written counseling sheet. The counseling specifically directed her to keep him informed of her whereabouts at all times during the workday.

When presented with the counseling sheet, SK2 TSY angrily tore it up in front of SK1 Crawford and stormed off to tell the appellant. SK1 Crawford contacted the ship's MA1 to make sure she didn't leave the ship and then proceeded up to the supply office. When he arrived, the appellant and SK2 TSY were on their way out the door after telling then-SKC Clair to "handle it." The following day, the appellant, SK2 TSY, SK1 Crawford, and then-SKC Clair met to discuss the matter. The appellant informed SK1 Crawford that SK2 TSY was the financial petty officer and had to work with the appellant personally throughout the day. The SK1 was told he'd have to learn to deal with her.

On 28 September 2004, SK1 Crawford departed the ship on pre-arranged leave for one and one-half weeks. Upon his return, he was informed that he was no longer the S-1 LPO. During his absence, the appellant arranged to have the SK1 assigned off-ship as barracks petty officer. Record at 555. The appellant elevated SK2 TSY to the LPO position. There were three other SK2's senior to TSY at the time. Record at 557. This alteration of the chain of command forms the gravamen of Specification 1 of Charge I (maltreatment of SK1 Crawford).

There are two elements to the offense of cruelty and maltreatment: (1) that a certain person was subject to the orders of the appellant, and (2) that the appellant was cruel toward, or oppressed or maltreated that person. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2005 ed.), Part IV, ¶ 17b. The appellant does not contest evidence of the first element. With respect to the second element, the appellant argues that his decision to remove SK1 Crawford from his LPO position was a legitimate exercise of department head discretion. He cites to MCM, Part IV, ¶ 17c(2), which provides that "the imposition of necessary or proper duties and the exaction of their performance does not constitute [the offense of maltreatment] even though the duties are arduous or hazardous or both."

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S.

307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

Evidence adduced at trial revealed that the barracks petty officer position was designated as an E-6 collateral billet which would rotate from department to department on an approximately 90-day cycle. On the date of SK1's assignment as barracks petty officer, the billet was being filled by STG1 Kirschner from the weapons department. Record at 606. While the supply department was next in line to provide a barracks petty officer, on the date the appellant arranged for SK1 Crawford to assume the billet, STG1 Kirschner had been in the position for approximately 10 days. *Id.* at 544.

Both STG1 Kirschner and the weapons officer, LCDR Shedd, testified that the offer to let Kirschner come back early originated with the appellant and was not driven by any internal weapons department priorities. In fact, in September 2004, the weapons department onboard USS CHUNG-HOON was overmanned with first class petty officers. *Id.* at 607. SK1 Crawford remained as barracks petty officer for the next 5 months until, following a meeting with the commanding officer, he was returned to his S-1 LPO position.

Notwithstanding the appellant's assertion, SK1 Crawford's assignment as barracks petty officer, far from being a "necessary" duty, actually served to significantly degrade the pool of experienced leadership within S-1. Record at 557. There is no evidence of any legitimate compelling personnel needs within the supply department to justify the appellant's extraordinary exertion to get the SK1 off the ship. Evidence of the conflict between SK1 Crawford and SK2 TSY and the appellant is overwhelming. Evidence of the appellant's willingness to frustrate the chain of command in order to advance his own romantic interests with SK2 TSY is equally overwhelming. That he could construct a strained rationale to justify his abuse of SK1 Crawford does not alter this fact. It is clear that the primary, if not the only, motivating factor behind the appellant's decision to move SK1 Crawford off the ship was the appellant's frustration with SK1 Crawford's continuing unwillingness to look the other way and ignore his responsibilities as the S-1 LPO.

## 2. Specification 2 of Charge I

In May 2005, the department heads and leading chief petty officers onboard USS CHUNG-HOON sat as a ship-wide board to provide comparative E-5 ranking input to the executive officer for use in upcoming annual evaluations. Initially, each department met internally and created a list of their top 3 E-5's. These selected individuals could count on receiving the lion's share of the department's advocacy at the ship-wide ranking meeting in an effort to secure for one or more of them a very limited number of "early promotion" or EP recommendations.

The supply department's initial internal rankings were (1) CS2 Koogler, (2) SK2 TSY, and (3) CS2 Vanderhorse, respectively. At the first ship-wide meeting, it became apparent that each department was using a different subjective standard in their internal rankings. A collective decision was made to adopt a more objective standard whereby all E-5's on the ship would be comparatively evaluated by all 12 department heads and departmental leading chief petty officers and placed on a master ranking-list based on objective or at least consistent criteria. Following this process, the top-ranked E-5 in supply was SH2 Zepeda. CS2 Koogler dropped to a 15 or 16th ranking, ship-wide, and SK2 TSY dropped to number 29. Record at 609.

After the ranking board arrived at their final master list, the evaluations and recommendations were sent to the administrative office for final smoothing and proofing. As this final administrative review was ongoing, the appellant approached Chief Personnelman Malloy who was responsible for finalizing the board's inputs. The appellant requested that the relative rankings of SK2 TSY and SH2 Zepeda be switched. He provided two new reports to replace the reports already submitted. *Id.* at 620. The PNC didn't make the requested switch but rather notified his department head, LT Cole, what had happened. It is this attempted unilateral alteration of the ranking committee's recommendations that forms the gravamen of Specification 2 of Charge I (maltreatment of SH2 Zepeda).

Adopting a stance similar to his argument regarding the first maltreatment specification, the appellant does not contest evidence of the first element. With respect to the second element, the appellant summarily argues that he did not successfully complete any criminal act. While this might be true, successful completion of the intended maltreatment is not an element of the offense. Regarding maltreatment of a subordinate, our superior court observed that "[i]t is only necessary to show, as measured from an objective viewpoint in light of the totality of the circumstances," that the appellant's action reasonably could have caused physical or mental harm or suffering. *United States v. Carson*, 57 M.J. 410, 415 (C.A.A.F. 2002). Had the appellant been successful in switching SH2 Zepeda's ranking from #7 or 8 to #29, we have no doubt that the victim would have suffered mental harm.

Considering the evidence adduced at trial in the light most favorable to the Government, we find that a rational trier of fact could have found the elements of Specifications 1 and 2 of Charge I beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19; *Turner*, 25 M.J. at 325; *Reed*, 51 M.J. at 561-62; *see also* Art. 66(c), UCMJ. In addition, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt to both specifications beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

### **Conclusion**

The approved findings and sentence are affirmed.

Judge MITCHELL and Judge BARTOLOTTA concur.<sup>2</sup>

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>2</sup> The appellant's remaining assignment of error is without merit. The appellant's request for oral argument is denied.