

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

BEFORE

D.O. VOLLENWEIDER

J.E. STOLASZ

V.S. COUCH

UNITED STATES

v.

**Jeremiah J. ROBINSON
Corporal (E-4), U.S. Marine Corps**

NMCCA 200602201

Decided 6 June 2007

Sentence adjudged 2 November 2005. Military Judge: E.H. Robinson. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, MALS-13, Marine Aircraft Group 13, 3d Marine Aircraft Wing, MarForPac, Yuma, AZ.

LCDR LUIS LEME, JAGC, USN, Appellate Defense Counsel
LCDR C.C. BURRIS, JAGC, USN, Appellate Government Counsel
LT JESSICA HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

The appellant was convicted, pursuant to his pleas, by a military judge sitting as a special court-martial, of one specification of willfully disobeying a superior commissioned officer, one specification of indecent acts, one specification of adultery, and one specification of indecent assault, in violation of Articles 90 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 890 and 934. The appellant was sentenced to confinement for 120 days, forfeiture of \$823.00 pay per month for 4 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the findings and the sentence as adjudged, but suspended all confinement in excess of 60 days pursuant to the terms of a pretrial agreement.

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

The appellant was involved in an adulterous relationship with the wife of a fellow Marine who was deployed to Iraq. Upon learning of the illegal relationship, the appellant's commanding officer issued a Military Protective Order (MPO) on 5 August 2005, directing the appellant not to "call, email, enter the place of employment, or make any contact in any fashion with Mrs. [M]." Charge Sheet. Two days after receiving the MPO, the appellant violated his commanding officer's order by having sexual intercourse with Mrs. M in her on base residence. Record at 21; Prosecution Exhibit 1 at 2. The commanding officer who issued the MPO, Lieutenant Colonel (LtCol) Knapp, is also the convening authority in this case.

The appellant contends for the first time on appeal that because he violated LtCol Knapp's order to stay away from Mrs. M, LtCol Knapp's subsequent referral of charges to a special court-martial "raises at least the appearance that [LtCol Knapp] improperly influenced the court-martial proceedings, therefore disqualifying him" as a convening authority. Appellant's Brief of 26 Dec 2006 at 5.

Article 23, UCMJ, delineates those commanding officers or officers in charge who are authorized to convene a special court-martial. This codal provision, however, also provides:

(b) If any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered advisable by him.

See United States v. Voorhees, 50 M.J. 494, 499 (C.A.A.F. 1999). An accuser may not convene a special court-martial for the trial of the person accused. *United States v. Tittel*, 53 M.J. 313, 314 (C.A.A.F. 2000)(citing RULE FOR COURTS-MARTIAL 504(c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1955 ed.)). Article 1(9), UCMJ, defines an accuser as "any other person who has an interest other than an official interest in the prosecution of the accused." *See Tittel*, 53 M.J. at 314; *see also United States v. Rockwood*, 52 M.J. 98, 103 (C.A.A.F. 1999). The question of whether a convening authority is an "accuser" under Article 1(9), UCMJ, is a question of law that we review *de novo*. *United States v. Conn*, 6 M.J. 351, 354 (C.M.A. 1979). The test of a convening authority's status as an accuser is "whether, under the particular facts and circumstances... a reasonable person would impute to him a personal feeling or interest in the outcome of the litigation." *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992)(quoting *United States v. Gordon*, 2 C.M.R. 161, 166 (C.M.A. 1952)).

Upon our review of the record, we find no evidence that LtCol Knapp had "a personal feeling or interest in the outcome of the litigation" that would warrant his disqualification as a convening authority. LtCol Knapp's decision to issue the MPO, and later refer charges against the appellant when the order was

violated, reflect nothing more than an official interest in maintaining good order and discipline within his unit. Holding the appellant accountable for violating the MPO when he committed adultery with a fellow Marine's wife, while that Marine was deployed to a combat zone no less, was a legitimate and lawful exercise of LtCol Knapp's official command authority.

A personal order does not necessarily implicate a commander's personal interest such that he becomes an "accuser" and is disqualified as a convening authority. *Tittel*, 53 M.J. at 315 (Effron, J. concurring)(citing *Voorhees*, 50 M.J. at 494). The order that the appellant disobeyed was a routine, administrative type of order issued in response to the appellant's involvement with Mrs. M. No reasonable person would conclude that it represented any personal, versus official, interest of LtCol Knapp or that its violation was an act that a commander would take personally. *Id.* We conclude that LtCol Knapp was not an accuser, and that the appellant's assignment of error is wholly without merit.¹

Even if we were to conclude LtCol Knapp was an accuser, the issue was waived by the appellant's failure to raise it at his court-martial. *Tittel*, 53 M.J. at 314 (citing RULE FOR COURTS-MARTIAL 904(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.)), and *United States v. Shiner*, 40 M.J. 155, 157 (CMA 1994)); *see also United States v. Gudmundson*, 57 M.J. 493 (C.A.A.F. 2003).

Conclusion

Accordingly, we affirm the findings of guilty and the sentence as approved by the convening authority.

Senior Judge VOLLENWEIDER and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court

¹ We note that in the appellant's brief and assignment of error, appellate defense counsel fails to cite most of the pertinent case law regarding whether the convening authority in this case is an accuser. *See Jeter, Shiner, Voorhees, Rockwood, Tittel, and Gudmundson.* This is unacceptable. We remind all counsel that they are "not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities." Judge Advocate General Instruction 5803.1C, Rule 3.3, Comment 2 (9 Nov 2004).