

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

**Before
J.F. FELTHAM, E.E. GEISER, F.D. MITCHELL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**KIMBERLY L. COLLIER
AVIATION MACHINIST'S MATE THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200601218
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 02 December 2004.

Military Judge: LCDR Christopher Connor, JAGC, USN.

Convening Authority: Commanding Officer, Helicopter Combat Support Squadron EIGHT, Norfolk, VA .

For Appellant: LT Janelle Lokey, JAGC, USN.

For Appellee: Maj James Weirick, USMC.

21 February 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Senior Judge:

The appellant was convicted, contrary to her pleas, by officer and enlisted members, sitting as a special court-martial, of larceny of military property of a value of more than \$500 and wrongfully endeavoring to influence the testimony of a witness, in violation of Articles 121 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 934. The convening authority approved the adjudged sentence of confinement for six months, reduction to pay grade E-1, and a bad-conduct discharge. In an act of clemency, he suspended the bad-conduct discharge for six months from the date of his action.

The appellant now raises seven assignments of error.¹ We have reviewed the record of trial, the appellant's brief and assignments of error, and the Government's answer. We conclude that the findings and the 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.

Facts

At the time of the offenses, the appellant was a member of Helicopter Combat Support Squadron EIGHT (HC-8), Norfolk, Virginia, and served as the command's tool custodian. While in this billet, she removed tools worth approximately \$2,700.00 from the command, and took them to an apartment she shared with Hospitalman Second Class (HM2)[C]. The appellant and HM2 [C] subsequently had a falling out, and the appellant moved out of the apartment, leaving some of her personal belongings behind. She later asked her command's legal officer to help her get them back.

Rather than resort to legal proceedings, the legal officer suggested working through HM2 [C]'s chain of command. He asked the appellant to send him a list of the items she wanted to retrieve, and forwarded it to HM2 [C]'s command. The list included a television set, jewelry, uniform items, papers, books, and tools.

After the list was forwarded, HM2 [C] called the appellant's command, HC-8, saying she had found some tools in her apartment that she believed to be the command's property. She was told to

¹ The appellant's assigned errors are as follows:

I. WHETHER THE MILITARY JUDGE ERRED WHEN HE GRANTED THE GOVERNMENT'S MOTION TO EXCLUDE RELEVANT AND NECESSARY EVIDENCE, WHICH DENIED THE DEFENSE A CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE.

II. WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY FAILING TO REQUIRE THE GOVERNMENT TO PRODUCE MR. [B], SENIOR CHIEF ENGLE, MS. [S], AND MS. COLLIER AS WITNESSES FOR THE DEFENSE.

III. WHETHER THE MILITARY JUDGE ERRED WHEN HE FAILED TO *SUA SPONTE* EXCUSE THE SENIOR MEMBER.

IV. WHETHER THE MILITARY JUDGE ERRED WHEN HE ADMITTED PROSECUTION EXHIBITS 9, 10, AND 11, OVER DEFENSE OBJECTION.

V. WHETHER THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT TO CONVICT THE APPELLANT OF THE CHARGES AND SPECIFICATIONS.

VI. WHETHER THE CUMULATIVE EFFECT OF ERRORS IN THE CASE DENIED THE APPELLANT A FAIR TRIAL.

VII. WHETHER THE GOVERNMENT VIOLATED THE APPELLANT'S RIGHT TO SPEEDY POST-TRIAL REVIEW BY ALLOWING POST-TRIAL PROCESSING TO TAKE 628 DAYS.

bring the tools to the command and turn them in. When she did, several of the tools were found to have been marked with HC-8's squadron organizational code, indicating they were military property of that command. About a week later, HM2 [C] called HC-8 to report that she had found more tools in her apartment. She turned these additional tools in to HC-8, which then prepared an inventory of all the tools she had delivered to it.

Later, after the tools had been returned, but prior to the court-martial, the appellant slashed a tire on HM2 [C]'s vehicle. On 12 August 2004, the appellant pleaded guilty in the Virginia Beach, Virginia, Circuit Court, to damaging, destroying, or defacing private property, namely an automobile tire belong to HM2 [C], resulting in less than \$1,000.00 damage. She was sentenced to 12 months in jail (with 11 months suspended), put on two years' probation, and ordered to have no contact with HM2 [C].

Government Motion to Exclude Evidence

At trial, the military judge granted a Government motion *in limine*, preventing the defense from introducing evidence of an alleged sexual relationship between the appellant and HM2 [C], who was a witness in the case. The Government argued that the allegations of homosexuality were untrue, irrelevant, and intended to harass HM2 [C]. The Government further argued that the danger of unfair prejudice resulting from the admission of such evidence would substantially outweigh any probative value it might have. Appellate Exhibit VII.

Citing *Davis v. Alaska*, 415 U.S. 308 (1974), the appellant argued that the confrontation clause of the Sixth Amendment guaranteed her the right to cross-examine HM2 [C] in order to reveal bias, prejudice, or ulterior motives related to issues in the case. The appellant also argued that, under MILITARY RULE OF EVIDENCE 401, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), allegations of a romantic relationship between HM2 [C] and herself were relevant, and neither outweighed by the danger of unfair prejudice nor intended to embarrass or harass HM2 [C]. AE VIII.

After receiving testimony from the appellant on the motion, and hearing argument from counsel, the military judge granted the Government's motion *in limine*, ruling that evidence of a sexual relationship between the appellant and HM2 [C] was inadmissible. He specifically ruled that the defense could not ask any witness if the relationship was sexual, homosexual, intimate, or romantic. AE IX. On the other hand, he permitted the defense to ask, on cross-examination, if HM2 [C] would characterize the relationship as close, personal and/or emotionally close, or closer than ordinary friends. *Id.* Pursuant to MIL. R. EVID. 608(c), the military judge also permitted the defense to introduce extrinsic evidence about the nature of the relationship, including testimony or documents, if otherwise admissible. *Id.* The

appellant now claims the military judge erred by granting the Government's motion *in limine*. We disagree.

We review a military judge's decision to prevent the introduction of evidence for an abuse of discretion. *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006); *United States v. Khamsouk*, 57 M.J. 282, 286 (C.A.A.F. 2002)(citing *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000)). The military judge's findings of fact are reviewed under a clearly erroneous standard; legal conclusions are reviewed *de novo*. *Id.* "To reverse for 'an abuse of discretion involves far more than a difference in . . . opinion The challenged action must . . . be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' in order to be invalidated on appeal." *United States v. Mosley*, 42 M.J. 300, 303 (C.A.A.F. 1995)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)(citations omitted)). We further recognize that "[t]he military judge's exercise of discretion is reviewed on the basis of the facts before him or her at the time of the ruling." *United States v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000)(citing *United States v. Grant*, 49 M.J. 295, 297 (C.A.A.F. 1998)).

In ruling on the motion *in limine*, the military judge correctly noted that MIL. R. EVID. 401 defines "relevant evidence" as "any evidence that tends to make a fact of consequence to the determination of the action more or less probable." AE IX. He further noted that MIL. R. EVID. 402 makes evidence which is not relevant inadmissible, and that MIL. R. EVID. 403 prohibits the admission of relevant evidence if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or undue waste of time. *Id.*

Although the Government argued that the sexual nature of the relationship between the appellant and HM2 [C] was irrelevant, the military judge determined in his ruling that the defense must be able to explore the issue of bias or motive to misrepresent, under MIL. R. EVID. 608(c). AE IX at 2. He concluded that the defense had met its "preliminary burden that the break-up of the relationship between [HM2 [C]] and the [appellant] may relate to motive by [HM2 [C]] to make the false allegation of larceny of military property." *Id.* Therefore, he concluded that the nature of the relationship had some relevance to the members' determination of the issue of bias or motive to misrepresent. "However, balancing this relevance with M.R.E. 403 and M.R.E. 611, the court [found] that the sexual nature of this relationship [was] not sufficiently relevant." *Id.* Accordingly, the military judge prohibited the defense from "open[ing] the issue of any alleged sexual acts" between HM2 [C] and the appellant, and ordered the defense not ask any witness if the relationship was sexual, homosexual, intimate, or romantic. *Id.*

"A military judge enjoys 'wide discretion' in applying Mil. R. Evid. 403." *Phillips*, 52 M.J. at 272 (quoting *United States v.*

Rust, 41 M.J. 472, 478 (C.A.A.F. 1995)). "When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the evidentiary ruling will not be overturned unless there is a 'clear abuse of discretion.'" *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001)(quoting *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998)).

To determine if evidence of an alleged homosexual relationship between the appellant and HM2 [C] was relevant, "we must determine if a fact of consequence [would have been] made more or less probable" by evidence that the two shared an intimate relationship with each other. See *Phillips*, 52 M.J. at 272. The key fact of consequence the appellant sought to raise by introducing this evidence was bias, or motive to misrepresent, on the part of HM2 [C].

The military judge correctly determined that the defense must be allowed to explore these issues. MIL. R. EVID. 608(c); AE IX. Noting that the break-up of the alleged relationship between the appellant and HM2 [C] had "some relevance" to them, he permitted the defense to introduce evidence that the relationship was "close, personal and/or emotionally close." *Id.* He also ruled that the defense could ask HM2 [C] if the relationship was "closer than ordinary friends." *Id.* However, after conducting a balancing test under MIL. R. EVID. 403, he concluded that "the sexual nature of this relationship [was] not sufficiently relevant," and prohibited the defense from introducing evidence that the relationship was sexual, homosexual, intimate, or romantic. *Id.*

Reviewing the facts before the military judge at the time of his ruling, we conclude that he correctly balanced the probative value against the prejudicial impact of evidence that would have been of a particularly inflammatory nature in a trial by court-martial.

In the armed forces, homosexuality is different from any other form of sexual activity. There is no requirement to discharge servicemembers who engage in adultery, heterosexual sodomy, fraternization, sexual harassment, or child abuse. A person who engages in homosexual conduct, however, is subject to mandatory discharge, with very limited exceptions. Congress, in enacting this mandatory discharge requirement, specifically found that "the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards or morale, good order and discipline, and unit cohesion that are the essence of military capability."

The statutory findings underscore the high degree of antipathy to homosexuality in the armed forces. Under these circumstances, it is essential that

military judges ensure that evidence of homosexuality not be introduced into a court-martial unless it is clear that the probative value substantially outweighs the danger of unfair prejudice.

Phillips, 52 M.J. at 273 (Effron, J., with whom Cox, S.J., joins, dissenting)(internal citations omitted).

Having reviewed the record and the factors articulated in the military judge's ruling on the Government's motion *in limine*, we find that he did not abuse his discretion and decline to grant relief on this assignment of error.

Production of Witnesses

A. Legal Requirements

All parties to a court-martial "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Art. 46, UCMJ. Under RULE FOR COURTS-MARTIAL 703(b)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary."

"The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests." R.C.M. 703(c)(2)(A). With regard to witnesses whose testimony the defense considers relevant and necessary on the merits or an interlocutory question, the list shall include the name, telephone number, if known, and the address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity. R.C.M. 703(c)(2)(B)(i).

A list of witnesses requested by the defense "shall be submitted in time reasonably to allow production of each witness on the date when the witness' presence will be necessary." R.C.M. 703(c)(2)(C). "The military judge may set a specific date by which such lists must be submitted. Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown." *Id.*

"A military judge's ruling on a request for a witness is reviewed for abuse of discretion." *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000); *United States v. Rockwood*, 52 M.J. 98, 104 (C.A.A.F. 1999). "The decision on a request for a witness should only be reversed if, 'on the whole,' denial of the defense request was improper." *McElhaney*, 54 M.J. at 126 (quoting *United States v. Ruth*, 46 M.J. 1, 3 (C.A.A.F. 1997)). An appellate court will not set aside a judicial denial of a witness request "unless [it has] a definite and firm conviction

that the [trial court] committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *United States v. Houser*, 36 M.J. 392, 397-98 (C.M.A. 1993)(quoting Judge Magruder, *The New York Law Journal* at 4, col. 2 (March 1, 1962)).

"Factors to be weighed to determine whether personal production of a witness is necessary include: the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits or the sentencing portion of the case; whether the witness's testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as depositions, interrogatories, or previous testimony. *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978); *Ruth*, 46 M.J. at 4. Timeliness of the request may also be a consideration when determining whether production of a witness is necessary. R.C.M. 703(c)(2)(C); *United States v. Reveles*, 41 M.J. 388, 394 (1995)." *McElhaney*, 54 M.J. at 127.

B. Appellant's Requests for Production

During an Article 39(a), UCMJ, trial session to hear motions, the appellant's trial defense counsel made a written motion to compel the production of two witnesses—Ms. [S], the daughter of HM2 [C], and Ms. Danyel Collier, the appellant's sister. She also made an oral motion to compel the production of two additional witnesses—Mr. [B], HM2 [C]'s former boyfriend, and Senior Chief Hospitalman (HMCS) Joe Engle. The factual and legal considerations with respect to each requested witness are considered below.

1. Mr. [B] and HMCS Engle

Mr. [B] was HM2 [C]'s boyfriend at the time HM2 [C] discovered the stolen tools in her home. He later married her. When the military judge asked the trial defense counsel for a synopsis of Mr. [B]'s expected testimony, she said she had not spoken with him, but proffered that he would testify that he was present immediately after HM2 [C] discovered the stolen tools. Based upon conversations she had with HM2 [C], the trial defense counsel said she believed Mr. [B] would testify that HM2 [C] called him to her home after she found the tools, that it was he who deduced the tools were stolen from HC-8, and that he told HM2 [C] she needed to contact that command. Record at 79. The trial defense counsel further proffered that Mr. [B] could discuss matters pertaining to his relationship with HM2 [C], and about HM2 [C] and the appellant, and that this evidence would be relevant. *Id.*

In response to the military judge's request for a synopsis of HMCS Engle's expected testimony, the trial defense said he had been connected with the case before the charges were referred. She said he was involved in communications between the convening

authority and the legal officer at HC-8 concerning the return of the appellant's personal property from HM2 [C]'s home, the search for which ultimately led to the discovery of the stolen tools. The trial defense counsel proffered that HMCS Engle would discuss an e-mail in which he told HM2 [C] to go through her home and look for property belonging to the appellant, so that it could be returned to her. She argued that this testimony would be relevant because "prompting by the command specifically led to the alleged discovery of the tools." Record at 80.

When the military judge asked the trial defense counsel if she had provided the Government with a synopsis of Mr. [B]'s or HMCS Engle's expected testimony, she said she had not, because she "believed that they would be present per the [G]overnment's witness list of 30 July." *Id.* at 80. She explained her action as follows:

I was relying on the fact that the [G]overnment was calling them. I just learned this afternoon that, no, they were not intending on calling them. I put them on my witness list as of 12 November, obviously with the intention of calling them and having their testimony here, which is why we're here doing the oral motion, sir.

Id. at 80-81.

The military judge denied the oral motion to produce Mr. [B] and HMCS Engle. He ruled that the motion was untimely, adding, "And I just don't have sufficient evidence to show, by a preponderance of the evidence, that the witnesses are so relevant and necessary that, at this late hour, less than a week before trial, that I'm going to order the Convening Authority to produce them, or else a fair trial can't be conducted." *Id.* at 89.

We hold that the military judge did not abuse his discretion in denying the request for Mr. [B] and HMCS Engle. Although their names appeared on the Government Witness List of 30 July 2004 (AE XI), and the trial defense counsel thus assumed they would be called by the Government, the Government Witness Request clearly stated that the defense should not assume that all 11 of the potential witnesses listed would necessarily appear at trial. The disclaimer at the top of the list clearly stated that the individuals "may be called as witnesses" by the prosecution, and contained the following caveat: "The defense is on notice that it should not rely on the government's list for the production of witnesses for the defense case. All common witnesses desired by the defense must be requested in compliance with R.C.M. 703(c)." AE XI at 1 (emphasis added). Despite this warning, the defense submitted witness requests on 30 July and 12 November 2004 (see AE XII), neither of which asked the Government to produce these witnesses. Similarly, the defense Motion to Compel Production of Witnesses, dated 16 November 2004, did not request the production of either Mr. [B] or HMCS Engle. *Id.*

The trial defense counsel's oral proffer did not assert that Mr. [B] or HMCS Engle was present when HM2 [C] discovered the stolen tools in her home. Therefore, they had no personal knowledge of the discovery, and could not have testified about it. See MIL. R. EVID. 602. Although Mr. [B] might have been able to say he saw what HM2 [C] told him were the tools she had discovered earlier, and outside his presence, and HMCS Engle might have been able to explain that HM2 [C] was looking for the appellant's personal property at the behest of the appellant's command, it is doubtful whether such testimony would have tended to make the existence of any fact of consequence more or less probable than it would have been without the evidence. See MIL. R. EVID. 401.

In view of the minimal relevance of their anticipated testimony, and the untimeliness of the defense's oral motion to compel their production, we are not convinced that the military judge committed a clear error of judgment in denying the request to produce Mr. [B] and HMCS Engle upon weighing the relevant factors, including timeliness. See *McElhaney*, 54 M.J. at 127; R.C.M. 703(c)(2)(C).

2. Ms. [S]

The Defense Witness Requests of 30 July and 12 November 2004 asked the Government to produce Ms. [S] as a witness for the defense. The defense's synopsis of Ms. [S]'s testimony, as provided to the convening authority on 12 November 2004, was as follows:

The daughter of HM2 [C], this individual can discuss the relationship between AD3 Collier and HM2 [C] and the presence of tools in the home. AD3 Collier lived in HM2 [C]'s home; Ms. S. lived with her mother during this same time period. Defense believes Ms. [S] can provide exculpatory evidence. The personal appearance of the witness is necessary because the significance of live testimony outweighs the difficulties in producing the witness.

Appellate Exhibit XII at 10.

The trial defense counsel had not talked with Ms. [S], and had no direct knowledge of what she might testify to. The appellant, however, had spoken with Ms. [S], and was called to testify, for the limited purpose of discussing the Motion to Compel Production of Witnesses, as to what she believed Ms. [S] could testify to. The appellant testified that when Ms. [S] learned of the charges in this case, she asked the appellant, "Why is my mother doing that? Why is she doing this to you?" Record at 100. The appellant also testified that Ms. [S] told her she had seen Mr. [B] entering the home of HM2 [C] with bags that looked like they contained tools. *Id.* She further

testified that she believed Ms. [S] would lie to protect her mother, HM2 [C]. *Id.*

The military judge denied the motion to produce Ms. [S], finding that the defense request did not provide the convening authority with a sufficient synopsis of her expected testimony, and also finding that the defense failed to show that her presence as a witness was relevant and necessary.

In reaching his decision, the military judge considered the appellant's conflicting testimony with regard to Ms. [S]'s expected testimony in conjunction with Ms. [S]'s affidavit. In his written ruling on the motion, he noted that although the appellant testified that Ms. [S] told her she had seen someone other than the appellant bring a bag of tools into HM2 [C]'s home, Ms. [S]'s affidavit, which was offered as evidence by the Government, clearly stated that Ms. [S] never saw anyone bring tools to HM2 [C]'s home.

The military judge also noted that the defense did not ask to depose Ms. [S], and pointed out that the Government had offered to set up a conference call with Ms. [S], the trial counsel, and the trial defense counsel, in order to develop a stipulation of her expected testimony. Finally, the military judge considered the defense's burden, and whether Ms. [S]'s presence would have an effect on the trial. Having reviewed the record, we find that the military judge did not abuse his discretion by denying the defense motion to produce Ms. [S].

3. Ms. Danyel Collier

The Defense Witness Request of 12 November 2004 asked the Government to produce Ms. Collier as a witness for the defense. The defense synopsis of Ms. Collier's expected testimony stated that she was the appellant's sister, that she had direct personal knowledge of the events surrounding the slashing of HM2 [C]'s tire, which led to the Additional Charge of wrongfully endeavoring to influence the testimony of a witness, and that her personal appearance was necessary because the significance of her live testimony outweighed the difficulties of producing her.

The defense desired to call Ms. Collier to provide testimony about the appellant's intent at the time she slashed HM2 [C]'s tire, claiming she was on the phone with the appellant immediately prior to the incident. In his ruling denying the defense motion to compel production, the military judge "compared the synopsis of the testimony for Ms. Danyel Collier with the witness provided," and concluded that the witnesses were cumulative. AE XIV at 2. The military judge concluded that the defense failed to show that Ms. Collier was relevant and necessary, that he believed a fair trial could be conducted without her presence, and that the defense had failed to meet its burden. Having reviewed the record, and noting that a witness on the scene personally observed the appellant's demeanor prior to

her slashing HM2 [C]s' tire, we find that the military judge did not abuse his discretion by denying the defense motion to produce Ms. Collier.

Military Judge's Failure to Excuse the Senior Member *Sua Sponte*

The appellant argues that the military judge should have excused the senior member, Lieutenant Commander (LCDR) Copenhaver, *sua sponte*, for implied bias. In support of her argument, she notes that she was removed from her duties as tool custodian, and reassigned to the First Lieutenant's Division, when the investigation of the tool theft began. During voir dire, LCDR Copenhaver stated that he was the command's Administration Officer, and knew three of the witnesses in the case, including the leading petty officer (LPO) of the First Lieutenant's Division. He said he interacted with these witnesses on a daily basis, and was the reporting senior on two of the witnesses' fitness reports. Record at 249-51. However, he said he would judge the witnesses based solely on what he heard in court, and would not allow outside knowledge to influence him. *Id.* at 251. With regard to the appellant, LCDR Copenhaver said he had only recently returned to the command after being away on a cruise for seven months, that he recognized the appellant's name from reviewing personnel rosters, but had no idea why she had been transferred to his department. *Id.* at 254.

After voir dire, the Government challenged two members for cause, including LCDR Copenhaver. The military judge asked if the defense objected to either challenge. The trial defense counsel agreed with the challenge against the other member, but not the challenge against LCDR Copenhaver, stating, ". . . but with Commander Copenhaver, we feel that there's no problem with him. He's been on cruise and has no knowledge of any of that." *Id.* at 272.

The military judge then asked why the trial defense counsel disagreed with the Government's challenge against LCDR Copenhaver. Before the defense counsel could answer, the trial counsel interrupted, saying:

If they have no objection, we'll withdraw our challenge for cause, but our concern was more an appearance problem, that he was the Admin Chief, but he's only been at the unit for a month. He just came off a cruise. He had no idea who she even was, so I don't think there's an actual problem. We were more concerned with appearance. But, we'll withdraw our challenge for cause, if defense objects to that.

Id. at 272.

Because the defense did not object to the Government's challenge for cause against the other member, the military judge granted it. *Id.* at 273. The defense then challenged two members

for cause, but not LCDR Copenhaver. The military judge granted both defense challenges. *Id.* at 273-74. The appellant now claims the military judge should have excused LCDR Copenhaver *sua sponte*. We disagree.

There is no question that, in the interest of justice, a military judge may excuse a member *sua sponte* for actual or implied bias. R.C.M. 912(f)(4). Actual bias is a question of fact, reviewed subjectively through the eyes of the military judge, who is given great deference in such cases. A decision whether or not to excuse a member *sua sponte* is reviewed for an abuse of discretion. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000). "[T]he test for implied bias is objective, and asks whether, in the eyes of the public, the challenged member's circumstances do injury to the 'perception of appearance of fairness in the military justice system.'" *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (quoting *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006)). Therefore, we apply an objective standard which is less deferential than abuse of discretion but more deferential than de novo. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004).

Notwithstanding our less deferential standard, we will rarely invoke implied bias where there is no evidence of actual bias. Due process does not require us to order a new trial every time a court member is placed in a potentially compromising situation. Rather, we will find that implied bias exists when, regardless of a court member's individual disclaimer, we conclude that most people in the same circumstances would be biased. We look at the "totality of the factual circumstances" in making this determination. *See Strand*, 59 M.J. at 458-59.

In the instant case, LCDR Copenhaver's recitation of the facts surrounding his knowledge of the appellant was matter-of-fact and devoid of emotion. His knowledge of the appellant was minimal, and he stated that he would not allow his professional relationship with some of the Government's witnesses to influence his evaluation of their testimony. Finally, and perhaps most tellingly, the appellant's trial defense counsel objected when the Government challenged LCDR Copenhaver, stating, "[W]e feel that there's no problem with him. Record at 272.

Applying an objective standard, and considering the totality of the factual circumstances reflected in the record, we find that the military judge did not err by permitting LCDR Copenhaver to serve as a member at the appellant's court-martial. We decline to grant relief on this assignment of error.

Prosecution Exhibits 9, 10, and 11

We do not find error with the military judge's decision to admit Prosecution Exhibits 9, 10, and 11. The military judge ruled that Prosecution Exhibits 9 and 11 were admissible as

summaries under MIL. R. EVID. 1006, which allows for the introduction of summaries, charts, or calculations of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. Prosecution Exhibits 9 and 11 are summaries of this type, created by HC-8's tool room supervisor.

As he testified at trial, the tool room supervisor, who was charged with tool inventory, created the summaries by first using the inventories prepared by the command when it received the two batches of tools from HM2 [C]. These inventories were accepted by the military judge as business records in accordance with the requirements of OPNAV Instruction 4790, which required the command to account for, and report on, missing tools. To complete the summaries, the tool room supervisor used the FEDLOG and the GSA Manual, two documents used in the normal course of business to determine prices, which were accepted as business records by the military judge.

Separately, the military judge determined that PE 10, a list of items obtained from HM2 [C] by the legal officer of HC-8, was a business record under MIL. R. EVID. 803(6).

We decline to find error with the military judge's determinations regarding the admissibility of these three prosecution exhibits.

Legal and Factual Sufficiency

The appellant claims that "[t]he facts of this case were legally and factually insufficient to convict [a]ppellant of both charges," but, aside from reciting case law, offers no argument in support of this assertion.

The tests for legal and factual sufficiency are well known. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Having reviewed the record, we are convinced that a rational finder of fact would have found the appellant guilty of both offenses. We, too, are convinced beyond a reasonable doubt of her factual guilt of the two charges and the specifications thereunder.

Post-Trial Delay

The appellant asserts that she was denied speedy post-trial processing because it took 628 days from the date of trial to docket her case with this court. In light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming without deciding that the appellant was denied her due process right to speedy post-trial review and appeal, we conclude that any error in that regard was harmless beyond a reasonable doubt. Here, there is no evidence of any specific harm resulting from the delay. There is no appellate issue that would afford the appellant relief, no oppressive incarceration resulting from the delay, no particularized anxiety caused by the delay, and no rehearing has

been ordered which might be impacted by excessive post-trial delay. Because we find that the appellant has not suffered specific prejudice, we hold that any due process violation that may have occurred in processing this case was harmless beyond a reasonable doubt.

This does not end our inquiry, as we continue to examine the issue of post-trial delay pursuant to the authority contained in Article 66(c), UCMJ, in light of our superior court's guidance in *Toohy v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); and the factors we articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*). After examining the totality of the circumstances, we conclude that the delay in this case does not affect the findings and sentence that should be approved. We decline to grant relief on this assignment of error.

Conclusion

Having determined that the appellant does not merit relief on any of the six assignments of error discussed above, we reject her contention that the cumulative effect of errors in this case deprived her of a fair trial. We affirm the findings and the sentence, as approved by the convening authority.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court