

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

**Before
W.L. RITTER, J.W. ROLPH, E.S. WHITE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**AARON WILLIAMS
LIEUTENANT JUNIOR GRADE (O-2E), U.S. NAVY**

**NMCCA 200700447
GENERAL COURT-MARTIAL**

Sentence Adjudged: 07 February 2007.

Military Judge: LtCol Paul Ware, USMC.

Convening Authority: Commander, Navy Region Hawaii, Pearl Harbor, Hawaii.

Staff Judge Advocate's Recommendation: LCDR E. Korman, JAGC, USN.

For Appellant: Maj Brian Jackson, USMC

For Appellee: CAPT F.E. Matthews, JAGC, USN; LT David H. Lee, JAGC, USN

13 March 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

ROLPH, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, in accordance with his plea, of one specification of conduct unbecoming an officer and a gentleman for wrongfully using his Government computer and email account to send inappropriate emails to a male enlisted Sailor in violation of Article 133, Uniform Code of Military Justice, 10 U.S.C. § 933. Thereafter, and contrary to his pleas, officer members also found the appellant guilty of an additional offense of conduct unbecoming an officer and a gentleman for wrongfully

looking at the penis of an enlisted Sailor while in a public restroom and asking him questions regarding his sexual orientation, and of indecent assault upon a male officer assigned onboard the appellant's ship by touching his genitals with the intent to gratify his sexual desires, in violation of Articles 133 and 134, UCMJ, 10 U.S.C. §§ 933 and 934, respectively.¹ The members sentenced the appellant to six months confinement, total forfeitures, and dismissal from the naval service.

After carefully considering the record of trial, the appellant's three assignments of error,² and the supporting briefs submitted by counsel for the appellant and the Government, 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. Articles 59(a) and 66(c), UCMJ.

Legal and Factual Sufficiency of the Evidence

In his first and third assignments of error (AOEs), the appellant asserts that the evidence presented at his court-martial was legally and factually insufficient to convict him of indecent assault (Charge II, Specification) in violation of Article 134, UCMJ, and of conduct unbecoming an officer and a gentleman (Charge I, Specification 2) in violation of Article 133, UCMJ. We disagree.

This court has a duty under Article 66(c), UCMJ, to affirm only those findings of guilty that we find to be correct in both law and fact. The long established test for assessing the legal

¹ The appellant was found not guilty of a specification alleging conduct unbecoming an officer and a gentleman onboard USS CHUNG-HOON by wrongfully and dishonorably looking into the bathroom stall occupied by a male lieutenant. See Charge Sheet, Charge I, Specification 1.

²

I. THE EVIDENCE WAS FACTUALLY AND LEGALLY INSUFFICIENT TO PROVE THAT THE APPELLANT ACTED WITH THE INTENT TO GRATIFY HIS LUST OR SEXUAL DESIRES.

II. THE APPELLANT WAS DENIED DUE PROCESS BECAUSE HE DID NOT HAVE REASONABLE NOTICE THAT THE QUESTIONS HE ASKED PETTY OFFICER [P] WERE PROHIBITED UNDER ARTICLE 133, UCMJ, AND SUBJECT TO PUNITIVE SANCTION.

III. THE EVIDENCE WAS FACTUALLY AND LEGALLY INSUFFICIENT TO PROVE THAT THE APPELLANT'S BEHAVIOR WITH PETTY OFFICER [P] CONSTITUTED CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN.

sufficiency of the evidence is whether, considering all the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Art. 66(c), UCMJ. The test for assessing the factual sufficiency of the evidence is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the fact finder, this court is nevertheless convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. Our reasonable doubt standard does not require that the evidence presented be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). Further, this court may properly believe one part of a witness' testimony while disbelieving other aspects of the testimony, or chose to believe one witness' testimony over that of another. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

To convict the appellant for conduct unbecoming an officer and a gentleman in violation of Article 133, UCMJ, as alleged in Charge I, Specification 2, the Government had to prove the following elements beyond a reasonable doubt:

- 1) That the accused did certain acts (i.e., wrongfully and dishonorably look at the penis of Petty Officer [P] while in a public restroom and wrongfully and dishonorably ask sexual questions of him); and
- 2) That, under the circumstances, these acts constituted conduct unbecoming an officer and a gentleman.

To convict the appellant for indecent assault in violation of Article 134, UCMJ, as alleged in the Specification under Charge II, the Government had to prove the following elements beyond a reasonable doubt:

- 1) That the accused did bodily harm to Ensign [D];
- 2) That the accused did so by touching Ensign [D]'s genitals;
- 3) That the touching was done with unlawful force and violence;
- 4) That Ensign [D] was not the spouse of the accused;
- 5) That the accused' acts were done without the consent of Ensign [D] and against his will;
- 6) That the acts were done with the intent to gratify the sexual desires of the accused; and

- 7) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 59 (conduct unbecoming an officer and gentleman)), and ¶ 63 (indecent assault). See also Military Judges' Benchbook, Dept of the Army Pamphlet 27-9 at 593 (15 Sept 2002)(listing expanded elements for indecent assault).

Indecent Assault Offense

In regard to the appellant's indecent assault conviction, the appellant asserts that the evidence was legally and factually insufficient to prove that he acted with the specific intent to gratify his sexual desires. See AOE I. We disagree.

The evidence established that in January 2005, on his very first day onboard the USS CHUNG-HOON, Ensign [D] was approached by the appellant, a fellow wardroom member, who engaged him in unusual and disturbing questioning concerning Ensign [D]'s frequency of masturbation and whether Italians have large penises (Ensign [D] is of Italian heritage). Ensign [D] was later assigned to a four-man berthing area where the appellant also resided. In June 2005, after being on duty and awake for almost 24 hours, Ensign [D] had lunch and proceeded to his berthing area where he intended to take a nap. Ensign [D] was soon fast asleep in his bunk wearing just his boxer shorts and a T-shirt, and with his bunk curtains closed. He recalled being awakened from his deep sleep 2 or 3 times by something, but not knowing what it was. Ensign [D] suddenly realized that something was going on in his boxer shorts. He rolled over onto his stomach, noticing at the same time that the lighting in the berthing had been completely turned off.³ The next thing he realized was that there was a hand down his shorts feeling his penis and moving around his entire genitalia. He immediately swatted the hand away and stuck his head outside of the closed bunk curtains to see who was groping him. In the dim lighting coming in from the berthing hatch, he was able to see the appellant running away. When he yelled out to him, "What the f--- is going on!" the appellant turned back towards Ensign [D], began to laugh, and claimed that he was only "playing a practical joke" on him. He claimed that he was trying to put toothpaste on Ensign [D]'s testicles, a prank he said he played on others while attending boot camp as an enlisted Sailor. Ensign [D] found no toothpaste on his body, clothing, or in his bunk, saw none in the appellant's possession or in the surrounding area, and saw no one else around or participating in the "prank." There was no history of practical jokes being played among members of the wardroom, or between the appellant and Ensign [D]. Finally, when Ensign [D] confronted

³ Ensign [D] found this unusual as it was mid-day, and even at night the red lighting in the berthing area was always illuminated.

the appellant later that same day about him touching his penis while he slept, the appellant tersely replied, "That's your opinion" but then implored Ensign [D] to "keep this between you and me because it would really ruin my career."

We believe the evidence of record is both legally and factually sufficient to establish that the appellant clandestinely placed his hand into Ensign [D]'s boxer shorts and on his genitalia with the specific intent of gratifying his sexual desires. The evidence also strongly refutes the appellant's claim that he was simply participating in an innocent prank; establishes clearly the appellant's prurient interest in his fellow wardroom member; and proves beyond a reasonable doubt that appellant was seeking sexual gratification when he touched Ensign [D] in such an untoward manner.

Conduct Unbecoming an Officer and Gentleman

The appellant next challenges the legal and factual sufficiency of the evidence leading to his conviction of Charge I, Specification 2, conduct unbecoming an officer and gentleman flowing from his interactions with Petty Officer [P] in a public restroom on the island of Saipan in March 2006. Again, we disagree with the appellant's assertions.

The evidence supporting this conviction came primarily from Petty Officer [P], also a crewmember assigned to the USS CHUNG-HOON. During port call liberty in Saipan, Petty Officer [P] and two shipmates toured the island and eventually visited two clubs and a restaurant. At the last club they visited - a strip club called "Body Motion" - they ran into the appellant and various other crewmembers from the CHUNG-HOON. Petty Officer [P] greeted the appellant and those at his table, and spoke with them for a while. Eventually, he excused himself to go to the restroom. The appellant followed him into the restroom and assumed a position at the urinal next to the one Petty Officer [P] occupied. As Petty Officer [P] attempted to urinate, he noticed that the appellant was staring at his penis (groin area). This unnerved Petty Officer [P] to the extent that he could not urinate, and he eventually washed his hands and departed the restroom. He went back to the appellant's table and began speaking again with various shipmates present.

Approximately 10 to 15 minutes later, still having to urinate badly, Petty Officer [P] again excused himself to go to the restroom. As before, the appellant followed Petty Officer [P] into the restroom and again occupied the urinal next to him. Similarly unnerved by the appellant's conduct, Petty Officer [P] left the urinal and began washing his hands. The appellant then approached [P] and said, "Can I ask you a few questions?" When Petty officer [P] replied "sure" the appellant closed the bathroom door and began engaging [P] in a conversation concerning a former shipmate and friend of Petty Officer [P] who had recently been separated from the Navy for having "homosexual

feelings" towards [P]. The appellant asked Petty Officer [P] if he "felt the same way," to which [P] replied, "No, I'm straight." The appellant then asked [P] if he "would ever try it" (i.e., homosexual conduct), to which [P] replied firmly, "No, it's not my way . . . I'm straight . . . I'm not homosexual" or words to that effect. The appellant then asked [P], "Well, how would you know you wouldn't like it [homosexual conduct] if you've never tried it?" Petty Officer [P] repeated that he was not homosexual, and then left the restroom. Petty Officer [P] reported this conversation to his shipmates during a cab ride back to the ship that night, and then formally reported the matter to his chain of command the following day.

The appellant claims that this conversation -- though it may have been intrusive, exhibited poor judgment, and "violated men's room etiquette" -- did not constitute conduct unbecoming an officer and gentleman under Article 133, UCMJ. Once again, we disagree.

The military justice system has long recognized that, because commissioned officers "have special privileges and hold special positions of honor, it is not unreasonable that they be held to a high standard of accountability." *United States v. Isaac*, 59 M.J. 537, 538 (C.G.Ct.Crim.App. 2003)(quoting *United States v. Means*, 10 M.J. 162, 166 (C.M.A. 1981)). Our own court has recognized that commissioned officers "enjoy a unique, special position of trust and duty" that allow them to be held to higher standards than others not similarly situated. *United States v. Tedder*, 18 M.J. 777, 781 (N.M.Ct.Crim.App. 1984), *aff'd*, 24 M.J. 176 (C.M.A. 1987). The ruling in *United States v. Free*, 14 C.M.R. 466, 468 (N.B.R. 1953), articulated well the unique obligation officers have in relation to their personal conduct:

It is not at all difficult for the reasonably prudent officer to discriminate between what circumstances justify a particular act and what render the act so curtailing of the dignity required by an officer's obligations as to make it an offense against good order and discipline. True, discrimination must be exercised, but the nature of an officer's commission demonstrates that he has been selected from among the populace as a whole to hold a position of trust and honor and has been trained to exercise the nice discrimination required. It is likewise true that a degree of judgment is required of an officer which is not required of the enlisted member of the service or of a civilian. It follows that a different standard of conduct is required in law of an officer than is required of others. This, in effect, puts him in a

different legal status than the enlisted man or the civilian.

Under Article 133, UCMJ, there is no requirement that the conduct of the officer itself constitute a criminal offense under other provisions of the Manual for Courts Martial. See *United States v. Bilby*, 39 M.J. 467, 470 (C.M.A. 1994). It is sufficient if the officer's conduct in an official capacity dishonors and/or disgraces the individual as a naval officer to the extent that it "seriously compromises the officer's character as a gentleman." See M.C.M., Part IV, ¶ 59c(1). It also includes conduct in a private and/or unofficial capacity which, "in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer." *Id.* at ¶ 59c(2). Having examined the record of trial carefully, including the totality of the circumstances surrounding this offense, we believe the appellant's conduct and words directed towards Petty Officer [P] in the public restroom at the "Body Motion" strip club clearly violated Article 133, UCMJ.

Having weighed all the evidence in the record of trial and recognizing that we did not personally see or hear the witnesses, as did the finders of fact, we are convinced of the appellant's guilt of Charge I, Specification 2, and of Charge II and its sole Specification beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. In our opinion, the direct and circumstantial evidence of the appellant's guilt on each offense was compelling and highly persuasive.

We are similarly convinced that the members, considering all the evidence in a light most favorable to the Government, could have found the elements of each offense beyond a reasonable doubt, and, therefore, that the evidence of the appellant's guilt is legally sufficient.

Remaining AOE

We have also carefully considered AOE II and have determined that it lacks merit. See *Parker v. Levy*, 417 U.S. 733 (1974); *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987); *United States v. Adames*, 21 M.J. 465 (C.M.A. 1986). Accordingly, it will not be addressed further. See *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Conclusion

The findings of guilty and the approved sentence are affirmed.

Chief Judge RITTER and Senior Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court