

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

**Before
R.E. VINCENT, E.S. WHITE, B.G. FILBERT
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ROMMEL G. YTURRALDE
CHIEF HOSPITAL CORPSMAN (E-7), U.S. NAVY**

**NMCCA 200700250
GENERAL COURT-MARTIAL**

Sentence Adjudged: 12 October 2005.

Military Judge: CDR John Maksym, JAGC, USN.

Convening Authority: Commander, Navy Region Marianas,
Guam.

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

For Appellant: LT Gregory Manz, JAGC, USN.

For Appellee: Maj James Weirick, USMC.

31 July 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FILBERT, Judge:

A general court-martial, composed of members with enlisted representation, convicted the appellant, contrary to his pleas, of violating the Navy's general order prohibiting fraternization, in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892.¹ The appellant was sentenced to 30 days restriction, reduction to pay grade E-5, and a bad-conduct discharge. The convening authority disapproved the part of the

¹ The appellant was acquitted of making a false official statement, rape, and adultery, in violation of Articles 107, 120, and 134, UCMJ, 10 U.S.C. §§ 907, 920, and 934, respectively.

sentence extending to 30 days restriction, but otherwise approved the sentence as adjudged.

The appellant raises five assignments or error, claiming: (1) the evidence was not factually and legally sufficient to convict him of violating a general order by engaging in fraternization; (2) his sentence to a bad-conduct discharge is inappropriately severe; (3) his sentence is not uniform with sentences in other courts-martial for similar offenses and therefore should be reassessed; (4) his due process rights have been violated by excessive post-trial delay; and (5) excessive post-trial delay affects the sentence that should be affirmed under Article 66, UCMJ.

We have carefully examined the record of trial, the appellant's brief, and the Government's answer. We find merit in the appellant's contention that the evidence is factually insufficient to sustain his conviction for violating a general order by engaging in fraternization. As a result, we will set aside the finding of guilty and dismiss the charge in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ. Because we will dismiss the sole charge of which the appellant was convicted, it is unnecessary to address the remaining assignments of error.²

The Facts

In November 2004, the appellant and Hospital Corpsman Second Class (HM2) C were both assigned to Naval Hospital Guam. HM2 C had permanent change of station orders to San Diego, California. On 29 November 2004, HM2 C detached from the Naval Hospital, in execution of her transfer orders. That afternoon, HM2 C encountered the appellant in the Naval Hospital, and the appellant suggested they meet for a drink later that evening. Shortly thereafter, HM2 C invited her division officer, Lieutenant Commander (LCDR) K, and her assistant leading petty officer, Hospital Corpsman First Class (HM1) M, to join her and the appellant that evening. HM2 C did not think the appellant had asked her on a date and testified that the purpose of meeting that night was to bid her farewell.

At approximately 1700, the appellant and HM2 C met at an outdoor bar at the hotel where HM2 C was staying. LCDR K and HM1 M did not show up. The appellant and HM2 C stayed at the bar for two to three hours. During that time, they each consumed several beers. Their conversation covered a variety of topics. HM2 C testified that the appellant asked whether she would ever have sex with him.

² The appellant's 14 August 2007 motion for oral argument is hereby denied.

As it was raining when the appellant and HM2 C left the bar, they ran from the bar to inside the hotel. The appellant asked HM2 C if she had a towel he could use to dry off, and she said she had one in her room. They then both went up to her room. HM2 C testified that, once in her room, the appellant raped her. As the appellant left HM2 C's hotel room, he was observed walking down the hall by HM2 O, a friend of HM2 C's who was assigned to Naval Hospital Guam.

When later questioned about that evening, the appellant told the Naval Criminal Investigative Service (NCIS) that he stayed in HM2 C's room five to ten minutes.³ When confronted with the claim that hotel surveillance tapes indicated he had been in HM2 C's room for about 40 minutes, the appellant did not respond directly. He told the NCIS agent he had dried off and then was talking with HM2 C. When asked if anything more than talking had occurred, the appellant said, "I can't say what happened." When asked if it was "possible that Petty Officer [C] was giving you verbal and non-verbal messages that you misunderstood to mean that she wants to be intimate or have sex?," the appellant replied by nodding his head in the affirmative. Record at 1713. He was then asked if he might have made a mistake in judgment and acted on the spur of the moment, to which he again nodded in the affirmative. *Id.*⁴

Principles of Law

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Reasonable doubt does not, however, mean the evidence must be free of conflict. *United States v. Reed*, 51 M.J. 259, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). A fact-finder may believe one part of a witness' testimony and disbelieve another. *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999).

The elements of the sole specification under Charge I are:

- (1) There was in effect a certain lawful general order or regulation, to wit: Chief of Naval Operations Instruction (OPNAVINST) 5370.2B, dated 27 May 1999;
- (2) That the accused had a duty to obey that order or regulation; and

³ The appellant was charged with making a false official statement to NCIS on the basis of this statement that he spent only five to ten minutes in HM2 C's hotel room. He was, however, found not guilty of that charge.

⁴ As noted above, the appellant was acquitted of the charges of rape and adultery arising out of HM2 C's allegations.

(3) That, on or about 29 November 2004, at or near the Marriott Spa and Resort, Tumon, Guam, the accused violated or failed to obey the order or regulation, by engaging in an unduly familiar relationship with HM2 C.

Charge Sheet; MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 16 b (1). OPNAVINST 5370.2B states, in part:

5.b. Personal relationships between chief petty officers (E-7 to E-9) and junior personnel (E-1 to E-6), *who are assigned to the same command*, that are unduly familiar and that do not respect differences in grade or rank are prohibited Such relationships are prejudicial to good order and discipline, and violate long-standing traditions of the Naval service. (emphasis added).

5.c. When prejudicial to good order or of a nature to bring discredit on the Naval service, personal relationships . . . between enlisted members that are unduly familiar and that do not respect differences in grade or rank are prohibited. Prejudice to good order and discipline or discredit to the Naval service may result from, but are not limited to, circumstances which:

- (1) call into question a senior's objectivity;
- (2) result in actual or apparent preferential treatment;
- (3) undermine the authority of a senior; or
- (4) compromise the chain of command.

The instruction further explains:

Prejudice to good order and discipline and discredit to the Naval service may occur when the degree of familiarity between a senior and junior in grade or rank is such that the senior's objectivity is called into question. This loss of objectivity by the senior may result in actual or apparent preferential treatment of the junior, and use of the senior's position for private gain of either the senior or junior member. The actual or apparent loss of objectivity by a senior may result in the perception the senior is no longer capable or willing to exercise fairness and make judgments on the basis of merit. An unduly familiar relationship that so undermines the leadership authority of a senior or that compromises

the chain of command (i.e., where there is a direct senior-subordinate relationship) is inappropriate and prohibited.

Id. at ¶ 6.c.

Pursuant to naval personnel regulations, service members traveling on PCS orders are considered to be attached to the command to which next ordered to report. Naval Military Personnel Manual (MILPERSMAN), Art. 1320-308 (Ch-5, 4 Dec 2003).

Analysis

We begin our analysis by noting that, at the time of the conduct in question, HM2 C had detached from Naval Hospital Guam and was in transit to her new command in San Diego. Record at 1396-1400, 1415, 1447. Once she detached from Naval Hospital Guam, HM2 C was no longer a member of that command. Rather, by regulation, she was considered to be part of her gaining command in San Diego. Consequently, the appellant's conduct with HM2 C falls under paragraph 5.c of OPNAVINST 5370.2B, which addresses personal relationships between enlisted members in different commands, rather than paragraph 5.b, concerning relationships between enlisted members of the same command.

To prove a violation of paragraph 5.c, the Government must prove, *inter alia*, that the appellant's conduct was prejudicial to good order and discipline, or of a nature to bring discredit to the naval service. Viewing the evidence in the light most favorable to the Government, we conclude the Government failed to meet this burden.

Given that the appellant was acquitted of rape, adultery and false official statement, the Government concedes the evidence supporting the fraternization charge is limited to the following facts.

The appellant and HM2 C met at a bar as part of a farewell get together. The appellant was married at the time of this meeting with HM2 C. The meeting did not have a romantic purpose. Record at 1399, 1448. The appellant and HM2 C had drinks at the bar for two to three hours. HM2 C testified, that during the course of their conversation at the bar, the appellant asked if she would ever have sex with him, and she laughed, saying she would not. It began raining, so the appellant went to HM2 C's room for the express purpose of using a towel to dry off. He stayed in her room for a few minutes

before leaving. He was observed walking down the hotel hall by HM2 Ortiz.⁵

The Government argues this conduct was prejudicial to good order and discipline because it undermined the appellant's authority and called into question his objectivity. This argument, however, fails. The Government presented no evidence at trial to prove the conduct at issue actually impacted the appellant's authority or called his objectivity into question. Nor does the Government even explain how the conduct at issue between an E-7 and E-5, not in the same command, would impact the chief petty officer's authority or perceived objectivity. The Government claims the appellant's authority and objectivity were negatively impacted because HM2 C was a "subordinate" of the appellant. We find this argument unpersuasive because, as explained *supra*, HM2 C was no longer in the appellant's command. Thus, we find the evidence insufficient to prove the conduct at issue was prejudicial to good order and discipline, as required by OPNAVINST 5370.2B.

Neither did the Government offer any evidence at trial to establish the conduct at issue caused, or would cause, anyone to hold the naval forces in lower esteem. Nor can we conclude beyond a reasonable doubt that the conduct described above would likely discredit the naval service in the eyes of the public at large. Consequently, we conclude the evidence was also insufficient to prove the conduct was service discrediting, as alternatively required by the OPNAVINST.⁶

⁵ As the Government's factual concession is favorable to the appellant, we accept it for the purposes of deciding this appeal, though by doing so, we mean to indicate no opinion as to whether or not the Government would, as a matter of law, be restricted to relying on that limited set of facts. We do note, however, that members' verdicts may be inconsistent. *United States v. Watson*, 31 M.J. 49, 53 (C.M.A. 1990).

⁶ Further, even if we did not restrict our evaluation of the sufficiency of the evidence to the limited facts relied on by the Government, we would still conclude the Government had failed to prove that the appellant's conduct, with a second class petty officer not in his command, was either, in fact, prejudicial to good order and discipline, or of a nature to bring discredit on the naval service.

Conclusion

Accordingly, the findings and the sentence are set aside. Charge I and its specification are dismissed. The record is returned to the Judge Advocate General for action in accordance with this decision.

Senior Judge VINCENT and Senior Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court