

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

**Before
C.L. REISMEIER, F.D. MITCHELL, J.A. MAKSYM
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ELIJAH SCOTT
AVIATION BOATSWAINS MATE (FUELS) FIRST CLASS
(E-6), U.S. NAVY**

**NMCCA 200900322
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 19 February 2009.
Military Judge: CDR Mario De Oliveira, JAGC, USN.
Convening Authority: Commanding Officer, Center for
Information Dominance, Corry Station, Pensacola, FL.
For Appellant: LT Michael Maffei, JAGC, USN.
For Appellee: Capt Jonathan Nelson, USMC.

6 May 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of three specifications of violating a lawful general order in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. Contrary to his pleas, he was found guilty of willfully disobeying a lawful order, six additional specifications of violating a lawful general order, and indecent exposure, in violation of Articles 91, 92, and 120, UCMJ, 10 U.S.C. §§ 891, 892, and 920. The appellant was sentenced to confinement for ten months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant has submitted two assignments of error.¹ He first avers that the evidence was legally insufficient to sustain a conviction for disobeying a lawful order, and second, that the promulgating order is incorrect as it contains errors in the pleadings and findings of the court-martial. The Government concedes the second assignment of error.

We have examined the record of trial and the pleadings of the parties. 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. We do, however, agree with both parties' that the court-martial order contains errors that should be corrected and we will order appropriate remedial action in our decretal paragraph.

Background

The appellant was assigned to the Center for Information Dominance Detachment, Corry Station, Pensacola, Florida where he served as a battalion petty officer assisting in the training of junior Sailors at the cryptology technician "A" school. His responsibilities included conducting barracks inspections, group physical training, and other leadership responsibilities normally associated with senior petty officers assigned to "A" schools.

During his tenure at this Center, many of the female students complained to the Command Equal Opportunity Officer that they were being sexually harassed by the appellant. On 24 March 2008, in response to these complaints, the Center's Equal Opportunity Officer, Senior Chief Aviation Boatswain's Mate Aircraft Handling (ABHCS) Ybarra, spoke with the appellant, told him of the complaints, and ordered the appellant to stay away from the complaining students. The next day ABHCS Ybarra modified his order and told the appellant to "stay away from the students" in general. Although unclear from the record as to when, the appellant was subsequently relieved of his duties as Delta Battalion Petty Officer and reassigned.

Approximately one month after receiving this order, the appellant noticed one of the students who made a complaint against him in the passageway at the headquarters building. The appellant came out of an office, approached this student and tried to engage her in casual conversation. In addition to being charged with violating the sexual harassment instruction, the appellant was also charged with, *inter alia*, violating the

¹ Additionally, on 11 August 2009, the parties jointly filed a consent motion for an Order of this court for production of the post-trial recommendation and proof of its service on trial defense counsel. The court so ordered on 24 August 2009. On 31 August 2009, the Government provided the former document but asserted only indirect proof that service had occurred. Inasmuch as the appellant raised no further claims and the indirect proof of service is clear, we are satisfied this lack of formal proof of service is harmless.

aforementioned order. It is the finding of guilty on this orders violation that the appellant contends is legally insufficient.

Legal Sufficiency

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.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); see also Art. 66(c), UCMJ.

The charge which forms the basis of this assignment of error is Charge I on the Charge Sheet which alleges a violation of Article 91 in that the appellant disobeyed the order from ABHCS Ybarra, his superior noncommissioned officer. There are five elements to the offense of disobeying a lawful order: (1) that the accused was a warrant officer or enlisted member; (2) that the accused received a certain lawful order from a certain warrant, noncommissioned, or petty officer; (3) That the accused knew that the person giving the order was a warrant, noncommissioned, or petty officer; (4) That the accused had a duty to obey the order; and (5) That the accused willfully disobeyed the order.²

The appellant does not dispute that he was given the order by his superior noncommissioned officer or that he had a duty to obey it. The appellant contends, however, that the evidence adduced at trial was insufficient to find him guilty of violating ABHCS Ybarra's order. He argues that given the nature of his job and the geography of the center in which he was assigned, it would be virtually impossible not to come into contact with the students assigned to the "A" school. Simply put, the appellant contends that ABHCS Ybarra's order was impossible to follow and he thus should not be held accountable for violating it.

To support this position, the appellant points to the testimony of ABHCS Ybarra. The following question/answer exchange between ABHCS Ybarra and the civilian defense counsel on cross-examination occurred during trial:

Q: Your order didn't contain any geographic limits for where he could go or not go, did it?

A: No, sir, it did not.

Q: It just related to, I guess in the first instance certain students and then in the second instance, all students, correct?

A: Yes and no, sir. If I may expound a little bit?

² MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 15b(2).

Q: Go ahead.

A: Given the area and geographic location where we are located at, it is almost evident they are going to run into each other somehow or another being that the Exchanges are pretty close to each other.

Q: Right.

A: My order specific to everybody that I deal with any cases like this, is to stay away from each other whether they run into the Exchange or not, and if they do that, to make a beeline the opposite way (sic). And if they are approached either/or to let the chain of command know.

Q: Okay. Well, just, you know, quick background question or comment, you know, I was a student at Corry 25 years ago myself. It would seem almost impossible to avoid all students in that physical set up, is that correct?

A: That would be true, sir.

Record at 207-08.

We would tend to agree with the appellant that to avoid being in the same proximity of the "A" school students, given the testimony as to the geographical makeup of the center, would have been nearly impossible for appellant to accomplish. However, a reasonable interpretation of that order should be inferred from the context in which it was given. The appellant was given a specific order to "stay away from the students." The appellant was under investigation for sexual harassment and sexual misconduct with female students at the "A" school. We believe a reasonable interpretation of the words "stay away from the students," in a training command where all presumably were in close quarters, was that the appellant was to avoid students whenever possible and certainly to not seek any of them out, most certainly, not any of the alleged victims. The latter is precisely what the appellant did in this case. While in an office at the headquarters building, the appellant exited an office, saw one of the complainants/victims of the investigation in the passageway, consciously approached her and attempted to make small talk. We have little trouble concluding that the appellant willfully violated the order given to him one month earlier by ABHCS Ybarra and that the evidence adduced at trial was legally sufficient to support his conviction on that charge and specification, i.e., that a rational trier of fact could find him guilty beyond a reasonable doubt. We are unpersuaded by the appellant's impossibility defense and his reliance on *United States v. Pinkston* 21 C.M.R. 22 (C.M.A. 1956) and *United States v. Young* 6 M.J. 975 (A.C.M.R. 1979) is misguided. We find this assignment of error to be without merit.

Errors in the Court-Martial Promulgating Order

In his second assignment of error, the appellant correctly notes, and the Government concedes, that the court-martial promulgating order is deficient in failing to note that the appellant actually pleaded "not guilty" to Specifications 10 and 11 of Charge II; instead, the Order incorrectly repeats the abbreviation "W/D", for Withdrawn, as to not only the disposition of those specifications but also as to the pleas associated with them.

In addition, the Government noted that the Order reflects that the military judge imposed sentence on 24 February 2008 when, in fact, it was a year later, 24 February 2009, that he did so.

Although both parties concede that the former error is harmless and it appears the latter error is harmless as well, the appellant is nonetheless entitled to have his official records correctly reflect the results of his court-martial. *United States v. Crumpley*, 46 M.J. 538 (N.M.Ct.Crim.App. 1998).

Conclusion

The findings and approved sentence are affirmed. The supplemental court-martial promulgating order shall indicate that appellant pleaded "not guilty" to Specifications 10 and 11 of Charge II and that the date the sentence was adjudged was 24 February 2009.

For the Court

R.H. TROIDL
Clerk of Court