

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

**Before  
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**NICHOLAS A. TREAT  
HOSPITALMAN APPRENTICE (E-2), U.S. NAVY**

**NMCCA 200900665  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 9 October 2009.

**Military Judge:** CDR Mario De Oliveira, JAGC, USN.

**Convening Authority:** Commander, Navy Region Southeast,  
Naval Air Station, Jacksonville, FL.

**Staff Judge Advocate's Recommendation:** LCDR F.J. Yuzon,  
JAGC, USN.

**For Appellant:** LCDR Anthony Yim, JAGC, USN.

**For Appellee:** CDR Christopher L. Vanbrackel, JAGC, USN; LT  
Brian C. Burgtorf, JAGC, USN.

**22 April 2010**

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

PER CURIAM:

We have examined the record of trial, the appellant's assignment of error that his sentence is inappropriately severe, and his request that we "reassess the sentence to include a bad-conduct discharge." Appellant's Brief of 18 Feb 2010 at 3. We have concluded 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. See Arts. 59(a) and 66(c), Uniform Code of Military Justice, 10 USC §§ 859(a) and 866(c); *United States v. Baier*, 60 M.J. 382 (C.A.A.F.

2005); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

"[A] court-martial is free to impose any legal sentence that it determines is appropriate." *United States v. Dedert*, 54 M.J. 904, 909 (N.M.Ct.Crim.App. 2001). "When a sentence is before us for review, we 'may affirm . . . the sentence or such part or amount of the sentence, as [we] find [] correct in law and fact and determine[], on the basis of the entire record, should be approved.'" *Id.* (quoting Article 66(c), UCMJ). "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *Healy*, 26 M.J. at 395. This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *Snelling*, 14 M.J. at 268 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

The appellant points out that he is remorseful for his crimes, and has been all along. He has acknowledged that he failed to live up to the Core Values of the Navy, and that one night of bad judgment and alcohol led him to throw away his dream of retiring as a chief, going to college, going overseas, and using his corpsman skills to save the lives of people at home and abroad.

Nonetheless, we view his misconduct as quite serious, with seven years as the maximum confinement authorized for the offense to which he pled guilty. He admitted that he knew the victim from Corps School at Great Lakes, and that the two were to attend Aerospace Medicine Technician "C" school together. He admitted that the two were at the same party where the victim became intoxicated, and that he was fully aware of her incapacity, as he had thrice entered her barracks room to check on her. He rolled her over onto her stomach to ensure she did not aspirate vomit, placed a trash can next to the bed for her to use, and during one visit, shook her foot to ensure she was still alive. Despite her obvious state of intoxication and appellant's apparent concern as to whether she was even still breathing, he made a conscious determination to pull her pants down and touch her anus and vagina. We also note that while appellant may desire to be a corpsman to save lives, his conduct, in taking advantage of an incapacitated victim, was wholly inconsistent with a profession which requires the placing of extraordinary trust in its practitioners, and which often places its practitioners in direct contact with incapacitated persons.

We have carefully considered the appellant's length of service, youth, background, and performance. Nonetheless, we do not view his misconduct as being the simple result of alcohol and bad judgment, as he portrays it. Rather, his crime was a predatory act of sexual misconduct against a helpless shipmate. Rather than recognize his obligations to protect his shipmate, he betrayed her faith and trust in her shipmates by victimizing her

as she lay in bed, semi-conscious, covered in vomit. His conduct in victimizing a helpless shipmate - regardless of her responsibility for becoming helplessly intoxicated - strikes at the heart of good order, discipline, and morale.

The appellant was sentenced to 13 months confinement, reduction to paygrade E-1, and a dishonorable discharge. He received slightly more than half of the 24 months confinement sought by the Government, one month less confinement than provided for in the sentence limitation portion of the pretrial agreement he negotiated, and a discharge specifically permitted by both law and the pretrial agreement. After reviewing the entire record, we find that the sentence is appropriate for this offender and his offense. *Baier*, 60 M.J. at 382; *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96.

### **Conclusion**

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court