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

**Before**
**J.K. CARBERRY, L.T. BOOKER, B.L. PAYTON-O'BRIEN**
**Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**MATTHEW W. SIMMONS**
**SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201100044**
**GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 21 October 2010.
**Military Judge:** CAPT Bruce w. MacKenzie, JAGC, USN.
**Convening Authority:** Commanding General, Marine Corps Combat Development Command, Quantico, VA.
**Staff Judge Advocate's Recommendation:** Col C.W. Miner, USMC.
**For Appellant:** CAPT Diane L. Karr, JAGC, USN.
**For Appellee:** Capt Paul Ervasti, USMC; Capt Robert E. Eckert, Jr., USMC.

**27 September 2011**

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**OPINION OF THE COURT**

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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

BOOKER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of two offenses involving general orders (specifically, a Department of Defense instruction on uniforms and the Department of Defense Joint Ethics Regulation [“JER”]) and one offense involving the General Article, respectively violations of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The convening authority approved only so much of the sentence as

extended to confinement for 90 days, a fine of $10,000.00, and a bad-conduct discharge from the United States Marine Corps.

In his initial pleading, the appellant averred that the General Article specification failed to state an offense because it did not allege that his disorder/neglect was prejudicial to good order and discipline or that his conduct was of a nature to bring discredit upon the armed forces. We then specified four additional issues: whether one of the regulations that the appellant violated was issued by competent authority; whether the regulation was punitive; whether the appellant was operating in an official capacity when violating the other general regulation; and whether the military judge correctly calculated the maximum punishment. With the benefit of the parties' briefs on the initial and specified issues, we may now resolve the appellant's case.

**Background**

The appellant was an active-duty bandsman. He took leave to appear in several commercial pornographic videos that involved sodomy with numerous other men, by his own account being paid $10,000.00 for his performances. Some of the videos included shots of him wearing his Marine dress blue coat with the Marine Corps device, decorations, and rank insignia affixed; others showed him wearing a Marine physical training jacket; and at one point he mentioned that he was a Marine. Out-takes from the videos were used to advertise the videos on a website, and one of those out-takes showed the appellant wearing the blue coat. The appellant's activities came to the attention of his command after a former Marine, an acquaintance, learned of the videos and reported the information to the command.

**Discussion**

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *E.g., United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). We may find an abuse of discretion only if there is a substantial basis in law or fact for doing so. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). The issues specified reflect our concerns regarding both the legal and the factual basis for several of the pleas.

**Order Violations**

Our concerns about the legality of the instruction on uniforms led to the first two specified issues. Department of Defense Instruction 1334.01 of 26 October 2005, appended to the record as Appellate Exhibit VII, was issued by the Under Secretary of Defense for Personnel and Readiness, but it does not describe any delegation of authority to that Under Secretary to do so. Because a lawful general regulation may be issued only by "the President or the Secretary of Defense, of Homeland Security, or of a military department, [or by various uniformed officials]," MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 16c(1)(a), and because those orders "which only supply general guidelines or advice for conducting military functions may not be enforceable," *id*. at ¶ 16c(1)(e), we required additional briefing. We are now satisfied that the Instruction clears the necessary hurdles to be considered a "lawful general regulation".

We recognize that any large organization must function through delegations of authority, as it is impossible to have the head of the organization take every single action necessary to the organization's operation. Acting pursuant to statutory authority, specifically section 113 of title 10, United States Code, the Secretary of Defense has delegated areas of his authority to Deputy, Under, and Assistant Secretaries of the Department to ensure that the Department runs smoothly and can discharge its responsibilities. Pertinent to this case, the Secretary of Defense has delegated to the Under Secretary for Personnel and Readiness the authority to regulate in the area of readiness and training. *Compare* Department of Defense Directive 5124 of 23 June 2008 *with* 10 U.S.C. § 136. While the current Departmental directive was not in effect when the Under Secretary issued the Instruction on wearing the uniform, its provisions are consistent with those that governed at the time. We are satisfied that the Under Secretary was vested with sufficient statutory and regulatory authority to issue, in his own right, this regulation. *Cf. United States v. Bartell*, 32 M.J. 295 (C.M.A. 1991) (distinguishing between decisional authority, that is the exercise of discretion, and signature authority, a ministerial aspect, when determining lawfulness of orders and regulations).

We are also satisfied that the regulation is punitive; that is, it was published with a view toward governing conduct of service members rather than simply stating guidelines for performing military functions. *See United States v. Nardell*, 45 C.M.R. 101, 103 (C.M.A. 1972). We reach this conclusion in part

because of the similarity to other regulations – the prohibition against wearing the uniform to endorse commercial entities, for example, is similar to the prohibitions found in the JER – and to punitive provisions of United States law. *Compare* 10 U.S.C. Chapter 45 *wit*h 18 U.S.C. § 702 (providing for imprisonment for unauthorized uniform wear) *and* MCM, Part IV, ¶ 113 (wearing unauthorized uniform devices).

The two order violations alleged both involve the appellant's participation in a commercial video. Due to overlapping language in both the specifications and the respective orders that they invoke, we will discuss these offenses together.

Before beginning our discussion, we note as unresolved a significant factual question, which is what constitutes a "uniform" for purposes of this prosecution. We can tell from the appellant's admissions during the providence colloquy and in the statement of fact, Prosecution Exhibit 1, that the appellant wore *components* of his uniform; the sentencing exhibits also bear this out. When we review a directive, Marine Corps Order P1020.34G of 31 March 2003, provided by the Government in its pleading in response to the specified issues, however, we cannot say with certainty that the terms "uniform" and "uniform items" are interchangeable.

The JER, the regulation around which Specification 1 of Charge I pivots, prohibits the use of one's official capacity for private gain. That regulation does not define "official capacity," although it and regulations and opinions cited by both parties do give examples of what may or may not constitute an "official capacity." The chapter in which the provision cited in the specification appears, fairly read, is aimed at prohibiting the Department of Defense and its employees from becoming too entwined with the operation of commercial enterprises or from giving some commercial enterprises an unfair competitive advantage. *Cf*. 32 C.F.R. § 2635.702(b) and (c) and examples cited. Likewise, the uniform directive prohibits wearing a uniform when to do so would create "an inference of official sponsorship" for a commercial interest. AE VII at ¶ 3.1.2.

Looking first at the colloquy on the JER violation, significantly the appellant never mentions any "official capacity" regarding his appearance in the videos. He does say that he "probably" mentioned that he was a Marine, Record at 73, and that he was wearing part of a uniform when he responded to a

question whether he was a Marine. We note, though, that the appellant used a "screen name" for the videos and had stripped his dress blue coat of an aiguillette that identified his unit. He never identified any particular office – Sergeant of the Guard, Drum Major – during the interview. *Cf*. 32 C.F.R. § 2635.702(c)(4) (example of Assistant Attorney General, a public official appointed by the President with the advice and consent of the Senate; *see* 28 U.S.C. § 506). At most, the appellant revealed a status as an active-duty Marine. Just as the appellant's being involved in an accident on liberty with a privately owned vehicle would not create liability on the Marine Corps under the Federal Tort Claims Act, neither does his saying that he was a Marine permit any conclusion that he was acting in an "official capacity" when he appeared in the videos.

We are also not satisfied, on the basis of this record, that the appellant's statements or wear of uniform items may create an inference of service endorsement of the activities depicted. The appellant never wore a complete "uniform," so the general public could never receive "visual evidence of the authority and responsibility vested in the individual by the United States Government." MCO P1020.34G ¶ 1000.3. He did not voice any Marine support for what he was doing or any service views on the propriety or impropriety of his conduct.

We accordingly set aside the guilty findings on Specifications 1 and 3 of Charge I.

**General Article Violation**

Moving to the Additional Charge and its underlying specification, we agree with the appellant that the specification as alleged failed to state an offense in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). Our inquiry does not end there, however.

We resolve this assignment adversely to the appellant notwithstanding *Fosler* for two reasons. First, the appellant pleaded guilty to the offenses laid under Article 134, and we note that *Fosler* was a contested case. "Where . . . the specification is not so defective that it 'cannot within reason be construed to charge a crime,' the accused does not challenge the specification at trial, pleads guilty, has a pretrial agreement, satisfactorily completes the providence inquiry, and has suffered no prejudice, the conviction will not be reversed on the basis of defects in the specification." *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986). Here, the appellant

entered into a pretrial agreement that contemplated guilty pleas to the General Article offenses; he received the correct statutory elements and definitions from the military judge; and he satisfactorily completed the providence inquiry.

Even if *Watkins* should for some reason be overruled or severely limited, we note that the military judge, in informing the appellant here of the elements, included the "prejudice" and "discredit" aspects of the two statutory elements of Article 134. The appellant did not object to what is arguably a major change, *see* RULE FOR COURTS-MARTIAL 603(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), and thus waived the objection. He did not request repreferral, reinvestigation, rereferral, or the statutory delay afforded between referral and trial. *See also* Art. 35, UCMJ. We are satisfied, then, that the appellant enjoyed what has been described as the "clearly established" right of due process to "`notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge.'" *Fosler*, 2011 CAAF LEXIS 661, at *12-13 (quoting *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)). We emphasize as well that this was a guilty-plea case, and we note that the appellant has only now challenged the legal effect of the specification. "A flawed specification first challenged after trial . . . is viewed with greater tolerance than one which was attacked before findings and sentence." *Watkins*, 21 M.J. at 209.

We therefore affirm the finding of guilty for the Additional Charge and its underlying specification.

**Maximum Punishment**

We turn our attention now to the matter of sentencing. Certainly the "sentencing landscape" has changed significantly since the maximum possible punishment has been reduced by 4 years. The question is to what level it has been reduced. The punishment for an offense is a question of law to be reviewed *de novo*. *See United States v. Ronghi*, 60 M.J. 83, 84-85 (C.A.A.F. 2004). As this novel specification is not a listed offense in the Manual, the question becomes whether it is related to a listed offense. R.C.M. 1003(c)(1)(B).

The plea inquiry regarding this offense emphasized that the appellant was guilty not because he was engaged in sodomy, but because he was wearing uniform items during the production of the video. As we have noted, his pleas to wearing the uniform to endorse or advance private interests were improvident; the Department of Defense Instruction at issue, however, does

provide that it is likewise a violation to wear the uniform in situations that might reflect discredit upon the armed forces. AE VII at ¶ 3.1.4. Under these circumstances, then, we look to precedent and find that this offense should be punished as a general neglect or disorder with a maximum punishment of confinement for 4 months and forfeiture of 2/3 pay per month for 4 months. *See United States v. Beaty*, 70 M.J. 39, 46 (C.A.A.F. 2011) and cases cited.

**Conclusion**

The findings of guilty of specifications 1 and 3 of Charge I and Charge I itself are set aside, and those specifications and that charge are dismissed. The findings of guilty of the Additional Charge and its specification are affirmed. The sentence is set aside, and a rehearing on sentence is authorized; however, no punitive discharge is authorized, nor is any monetary penalty in excess of the equivalent of forfeiture of 2/3 pay per month for 4 months authorized.

Senior Judge CARBERRY and Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge BOOKER participated in the decision of this case prior to detaching from the court.