

**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.

**CHRISTOPHER M. HARRIS
CHIEF WARRANT OFFICER 2 (W-2), U.S. MARINE CORPS**

**NMCCA 201000341
GENERAL COURT-MARTIAL**

Sentence Adjudged: 28 January 2010.

Military Judge: CAPT D. Jacques Smith, JAGC, USN.

Convening Authority: Commanding General, Training and Education Command, Quantico, VA.

Staff Judge Advocate's Recommendation: LtCol C.M. Greer, USMC.

For Appellant: LT James Head, JAGC, USN; LT Jentso Hwang, JAGC, USN.

For Appellee: Capt Mark Balfantz, USMC.

31 March 2011

OPINION OF THE COURT

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

BEAL, Judge:

A general court-martial composed of members convicted the appellant, contrary to his pleas, of false official statement, conduct unbecoming of an officer, and obstruction of justice in violation of Articles 107, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 933, and 934. The court-martial acquitted the appellant of committing adultery, as alleged under Article 134, UCMJ. The appellant was sentenced to a dismissal from the naval service. The convening authority approved the sentence as adjudged.

The appellant assigns six errors: (1) the specification alleging conduct unbecoming of an officer fails to state an offense; (2) the military judge abused his discretion by denying a defense challenge for cause against a member; (3) the evidence was legally and factually insufficient as to the specification alleging a false official statement; (4) the military judge was disqualified under a theory of actual and apparent bias; (5) the appellant is entitled to a new presentencing hearing due to improper evidence that was admitted at his first presentencing hearing, and (6) the appellant's sentence is inappropriately severe. We have carefully considered the record of trial, the parties' pleadings, and oral argument. We conclude that the findings and the sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

I. Background

At the time of the alleged misconduct, the appellant, a married man with two children, was a newly commissioned Chief Warrant Officer-2, attending the Warrant Officer's Basic Course at The Basic School (TBS), Quantico, Virginia.¹ One night on liberty in late March 2009, the appellant and some of his friends went to eat at a local diner where they were served by 18-year-old TD. When paying the check, the appellant obtained TD's telephone number. Later that night, the appellant took TD out to dinner after she got off her shift and the two hit it off. Throughout this burgeoning relationship, the appellant assured TD and TD's mother that he was not married. Over the next six weeks, the appellant took TD away for several weekend trips in which they shared a room, the appellant gave her gifts of jewelry, wrote her poetry, and they had formal portraits taken together depicting them in romantic embraces. Towards the end of the relationship, the appellant and TD agreed she would move in with him at his next duty station.

During this whirlwind romance, the appellant's TBS roommate grew exasperated with the appellant's incessant bragging about his "hot eighteen-year-old girlfriend," and reported what he suspected as adultery to the school staff. Ultimately, a formal command investigation was conducted. After advising him of his rights under Article 31(b), UCMJ, the command investigator questioned the appellant. Amongst other questions, he specifically asked the appellant, "Did you have sex with [TD]?" and "Do you have any inappropriate relationship going on with [TD] whatsoever?" The appellant answered "No" to both questions.

Following the appellant's interview, the investigating officer went to the diner where TD worked to question her about

¹ The appellant was commissioned directly to Chief Warrant Officer-2 due to his status as a career recruiter.

the nature of their relationship. The appellant warned TD beforehand that someone might come to ask questions about their relationship. The appellant asked her to tell any inquisitors that she and appellant were just friends. The appellant explained that he could get into trouble if anyone found out they were dating because as a career recruiter, he was prohibited by regulation from dating women under age twenty-four because they were deemed potential recruits. During the interview at the diner, TD acknowledged that she knew the appellant but said they were just friends. In the course of the interview, the command investigator informed TD the appellant was 38 years old, which surprised her because she believed him to be 29. The investigator ended the interview with two last questions: "Do you know he is married?" and "Do you know he has a sixteen-year-old daughter?"

During this interview, the appellant entered the diner and sat at another section. Upon the investigator's departure, TD went back to the kitchen and asked the owner to ask the appellant to leave. A few minutes later, the appellant and TD exchanged a few text messages in which TD made it emphatically clear they were no longer involved and that he would regret his lies. The next day she called the investigator and told him the true nature of the relationship and turned over the jewelry and photos.

II. Deficient Specification

The specification at issue alleges the appellant's misrepresentation of his marital status to TD was conduct unbecoming of an officer.² What this specification does not allege is that the appellant actually engaged in an unduly familiar relationship with TD.

There are two elements to this offense: 1) the accused did or omitted to do certain acts; and 2) under the circumstances, these acts or omissions constituted conduct unbecoming of an officer and a gentleman. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 59b. The appellant's assigned error focuses on the first element of the offense; he argues that the specification fails to state an offense because the specification failed to adequately place the appellant on notice of the criminality of his actions. Appellant's Brief of 16 Aug 2010 at 20, 23. Specifically, the appellant advances three theories as to the specification's deficiency: a) the appellant's conduct was not proscribed by service custom or regulation; b) the wording of the specification contained no language of criminality; and c) the use of the words "unduly familiar relationship" was ambiguous

² The specification reads: "In that Chief Warrant Officer-2 Christopher M. Harris, U.S. Marine Corps, on active duty, did, at or near Marine Corps Base, Quantico, Virginia, between on or about 23 March 2009 and 6 May 2009, represent to [TD], a woman not his wife, that he was not married in order to mislead her into an unduly familiar relationship with him, which was conduct unbecoming an officer and a gentleman."

and misleading. Appellant's Brief at 23-28. We find the specification states an offense.

"A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The act alleged in the specification is that the appellant misrepresented his marital status to TD, a woman not his wife, with the specific intent to mislead her into an unduly familiar relationship. Additionally, the language of the specification, "did . . . represent . . . he was *not* married in order to mislead [TD] into an unduly familiar relationship," (emphasis added) necessarily implies the fact that appellant was actually married at the time of the offense, a fact which places the misrepresentation of fact into context.

We are not persuaded by the appellant's argument that the specification needed to cite some service custom or regulation to adequately place the appellant on notice. Some acts might be so broadly construed to fit the literal meaning of Article 133, UCMJ, that when charging them in a specification, citation of a service custom or regulation prohibiting such conduct is required to satisfy notice requirements; but not all conduct requires this additional content. *United States v. Rogers*, 54 M.J. 244, 256 (C.A.A.F. 2000). In this case, we note that the language "did . . . represent . . . he was not married in order to mislead," is a somewhat awkward, yet nonetheless sufficiently clear, allegation that the appellant lied about his marital status. Moreover, he deceived TD with the specific intent to trick her into relationship; a relationship he had no business seeking due to his married status.

This type of a fraudulent act does not require citation of a service custom or regulation to place the appellant on notice of the wrongfulness of his conduct. Integrity is a fundamental character trait required of personnel serving in all branches of the uniformed services, and lying is specifically penalized under the UCMJ under certain circumstances. In the Marine Corps particularly, if not service-wide, integrity is stressed as one of the most important leadership traits. This is true for all ranks, and officers in particular are traditionally expected to hold to a higher standard. Accordingly, we find the lie alleged in the specification did not require citation to service custom or regulation prohibiting such conduct, nor did it fail to put the appellant on notice as to the wrongfulness of the act.

As to the appellant's third theory, we are likewise unconvinced. The appellant argues the term "unduly familiar" is unique to the naval regulation prohibiting fraternization. The appellant further argues that because of the unique meaning of the term, the accused was misled as to the nature of the charge. We reject this argument because we find the expression is not exclusive to the military; in plain English *unduly* means excessively or inappropriately; *familiar* means close, or

intimate. *Webster's Third New International Dictionary*, 1971. "A specification that is susceptible to multiple meanings is different from a specification that is facially deficient. Although a facially deficient specification cannot be saved by reference to proof at trial or to a rule referenced in the specification . . . it is appropriate to consider such matters in the case of a specification susceptible to multiple meanings." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citing *United States v. Mayo*, 12 M.J. 286, 288 (C.M.A. 1982)).

During oral argument, the appellant also argued that not all lies amount to behavior unbecoming of an officer and a gentleman. "[T]he criminal conduct sought to be punished by an Article 133, UCMJ, offense is the act of committing dishonorable or compromising conduct, regardless of whether the underlying conduct constitutes an offense under the UCMJ." *United States v. Ashby*, 68 M.J. 108, 115 (C.A.A.F. 2009) (citation omitted). "The test for a violation of Article 133, UCMJ, is whether the conduct has fallen below the standards established for officers." *United States v. Diaz*, 69 M.J. 127, 135 (C.A.A.F. 2010) (citation and internal quotation marks omitted). As we noted above, the appellant's lie was made with the specific intent to fraudulently induce TD into entering into a relationship with him. The evidence of this case abundantly supports that allegation and establishes that the appellant, a married officer, did in fact have a romantic relationship with TD, which had reached a level where TD was making plans to relocate to Florida with the appellant upon his completion of training. The evidence also established that TD would not have entered into this relationship had she known the appellant was a married officer. Under the facts of this case, we find the appellant's deception was the type of ungentlemanly conduct properly within the scope of Article 133, UCMJ.

III. Denial of the Defense's Challenge for Cause Against a Member Whose Ex-Wife Committed Adultery

The appellant argues the military judge abused his discretion by denying a defense challenge for cause against Captain (Capt) [V] on the basis of actual and implied bias due to his status as a victim of a marriage-ending adultery. The Government argues: 1) the appellant's challenge went only to implied bias, thus waiving review of the challenge for actual bias, and 2) that the judge properly denied the challenge for implied bias. During the defense's *voir dire*, Capt [V] disclosed that his ex-wife committed adultery while they were married which resulted in divorce. The trial defense counsel noted that the appellant was charged with adultery then followed up with the following exchange:

DC: Do you think that what has happened to you will effect (sic) your ability to sit on this court-martial?
MBR: No, sir.

DC: You don't think that would, in any way, come into play?
MBR: No, sir.

DC: . . . What about if the evidence proved . . . [the appellant] actually did commit adultery, how would that effect [sic] you in coming into (sic) an appropriate sentence, do you think?

MBR: I don't think that would effect (sic) my decision on how the sentence would go.

DC: Okay. In other words, you wouldn't hold your past against Chief Warrant Officer 2 Harris?

MBR: No, sir.

DC: Are you confident about that?

MBR: Yes, sir.

Record at 109. The trial defense counsel then sought and received an assurance from Capt [V] that he would alert the military judge should some old feelings about the affair start to invade his deliberative process. After additional questions on separate matters, the trial defense counsel revisited the adultery issue with the member. He ascertained that the affair occurred seven or eight years earlier, Capt [V] had no unresolved feelings about the incident, and had since remarried. *Id.* at 111. When asked, "Is it fair to say that you moved on from that?" the member replied, "Yes, sir." *Id.* Neither the trial counsel nor the military judge asked the member any additional questions pertaining to this matter.

1. Waiver

In his challenge for cause, the trial defense counsel stated the basis for his challenge concerning the adultery issue as follows, "[C]ommon sense in life experience teaches us that someone who has had something like that happen to them, they would have a very difficult time putting aside those emotional feelings impartially while trying the case. That would of course go towards the implied bias portion." *Id.* at 133. He stated further, "[Capt V's] response is that he would be able to put that aside. That *may* put aside any concerns as to actual bias, but the fact that he was a victim of the exact same offense which [the appellant] stands accused, give us grounds to make an implied bias challenge." *Id.* at 133-34 (emphasis added). Because we find both that the basis of the challenge was not clearly stated and that the military judge did not seek clarification from the defense counsel, we decline to accept the Government's invitation to apply waiver to the challenge for actual bias. *United States v. Nerad*, 69 M.J. 138, 144 (C.A.A.F. 2010) (noting Courts of Criminal Appeal, in their broad powers of review under Article 66(c), UCMJ, may disregard the waiver doctrine in the interest of justice.)

2. Actual and Implied Bias

"A military judge's determinations on the issue of member bias, actual or implied, are based on the 'totality of the circumstances particular to [a] case.'" *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (citation and internal quotation marks omitted). "Actual and implied bias are separate legal tests, not separate grounds for challenge". *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (citation and internal quotation marks omitted). "The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions." *Terry*, 64 M.J. at 302 (citation and internal quotation marks omitted). Because the determination of actual bias is a question of fact, and given the military judge's physical presence at trial, the military judge's determinations as to actual bias are afforded significant latitude by reviewing authorities. *Id.* "[T]he test for implied bias is objective, and asks whether, in the eyes of the public, the challenged member's circumstances do injury to the perception of appearance of fairness in the military justice system.'" *United States v. Albaaj*, 65 M.J. 167, 171 (C.A.A.F. 2007) (citation and internal quotation marks omitted). In making this determination appellate courts ask "whether most members in the same position . . . would be prejudiced or biased." *Id.* (citation omitted). Appellate courts review rulings on challenges for implied bias "under a standard that is less deferential than an abuse of discretion but more deferential than *de novo*." *Id.* (citation and internal quotation marks omitted). The military judge in this case correctly stated the test for implied bias and he also expressed his understanding that "military courts apply a liberal mandate in granting challenges for cause only as it relates to the defense." Record at 135. However, in denying the challenge for cause, the military judge did not place his analysis of the facts and the law on the record when considering the challenge of the member regarding his ex-wife's adultery. Accordingly, we give his ruling less deference. *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010).

We find the military judge did not err by denying the challenge for cause, because the record as a whole does not support the challenge for cause under the tests for actual or implied bias. As to actual bias, the record was clear that the member's past experience did not affect his ability to sit as an impartial member. The incident involving the member's ex-wife happened many years earlier, he had moved on since then, and had re-married. We also note that the member was forthright and candid in discussing the matter with the trial defense counsel, and that he was convinced that the matter would have no impact on his ability to impartially try the case. As to implied bias, considering the record as a whole, we find that most people in Capt [V]'s position would not be prejudiced and that any reasonable member of the public would not have any doubt as to the fairness of the military justice system.

IV. Legal and Factual Sufficiency of False Official Statement

The appellant's third assigned error claims the evidence of a false official statement was legally and factually insufficient because the Government failed to present any evidence that the appellant ever said the alleged statements. Appellant's Brief at 21, 33. In its response, the Government notes that inherent in the appellant's argument as to legal and factual insufficiency lays the theory of a fatal variance between the charge and the evidence. The appellant argues that his denial of having an "unduly familiar relationship" as alleged in the specification is substantially different than his denial of having an "inappropriate relationship" as recounted by the command investigator during his testimony. Likewise, the appellant argues that his denial that he engaged "in any sex act" as alleged in the specification is substantially different than his denial of "having sex with" TD as recounted by the command investigator during his testimony.

For a variance to be fatal, the appellant must show both that the variance was material and that the appellant was substantially prejudiced by it. *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009). The appellant's arguments against both phrases rely on narrow interpretations of the language used. The terms "unduly familiar" and "sex act" can have specific meanings in the context of Navy Regulations or Article 120, UCMJ, but they are also common expressions used day-to-day in the English language. As noted earlier, specifications may employ broad language susceptible to multiple meanings. *Crafter*, 64 M.J. at 211. Accordingly, we find that the variances between the statements alleged and those testified to at trial are not material.

The test for legal sufficiency requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). That standard is met in this case.

The test for factual sufficiency requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. See *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Applying these tests, we conclude that the Government presented credible evidence that established beyond a reasonable doubt that the appellant made the false official statement

alleged when he responded "No," to the command investigator's question, "Did you have sex with [TD]?" TD testified that the last night that they spent together, after the appellant and she made plans for a future together, the appellant and she had sexual intercourse.³ Also, throughout the courtship the appellant and TD spent numerous nights together in which, although they did not have intercourse, they did engage in kissing and other touching. Likewise, we find the evidence of the gifted jewelry, the appellant's poetry addressed to TD, the portraits in which the appellant and TD posed in romantic embraces, the weekend getaways, the appellant's public references to TD as his "hot, 18-year-old-girlfriend" is legally and factually sufficient to support his conviction for false official statement by his responding, "No" to the command investigator's question, "Do you have any inappropriate relationship going on with [TD] whatsoever?"

V. Conclusion

We have considered the remaining assigned errors and find no prejudicial error. Accordingly, the findings and the approved sentence are affirmed.

Chief Judge REISMEIER and Senior Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court

³ Notwithstanding the "Not Guilty" finding as to the alleged adultery, we still consider TD's testimony as to having sexual intercourse with the appellant credible and not inconsistent with the member's finding as to adultery as they might well have found that under the circumstances the intercourse was not service discrediting or prejudicial to good order and discipline.