

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

**Before
L.T. BOOKER, J.K. CARBERRY, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**GARY W. LUMPKINS, JR.
CHIEF CULINARY SPECIALIST (E-7), U.S. NAVY**

**NMCCA 201000554
GENERAL COURT-MARTIAL**

Sentence Adjudged: 27 May 2010.

Military Judge: CDR Bethany Payton-O'Brien, JAGC, USN.

Convening Authority: Commander, Navy Region Southwest, San Diego, CA.

Staff Judge Advocate's Recommendation: CDR L.B. Sullivan, JAGC, USN.

For Appellant: Maj Jeffrey Liebenguth, USMC.

For Appellee: Capt Samuel Moore, USMC.

15 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.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of conspiracy to commit larceny, violating the Joint Ethics Regulation, two specifications of dereliction of duty, violating the Financial Management Regulation, six specifications of signing false official statements, two specifications of larceny, making a false official claim, and graft in violation of Articles 81, 92, 107, 121, 132, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 907, 921, 932, and 934. The appellant was sentenced to confinement for seventy-eight months, reduction in pay grade to E-1, a fine of \$20,000.00, with an additional two

years of confinement to be served if the fine is not paid, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 22 months for the period of confinement served plus 12 months thereafter pursuant to a pretrial agreement.

In his sole assignment of error, the appellant contends that the specification alleging graft (Specification 1 of Charge VI) fails to state an offense because it does not expressly allege the terminal element of Article 134, UCMJ.¹ We find that the Government is not required to expressly allege the terminal element for an Article 134, UCMJ, offense, and affirm the findings and sentence. *United States v Fosler*, 69 M.J. 669 (N.M.Ct.Crim.App. 2010), rev. granted, __ M.J. __ (C.A.A.F. Feb. 9, 2011).

Standard of Review

Whether a specification states an offense is a question of law reviewed *de novo*. *United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010). A specification challenged at trial is viewed more critically than one challenged for the first time on appeal, as here. *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990).

RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) provides: "[a] specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. See *Sutton*, 68 M.J. at 455. The key is to provide: (1) fair notice that conduct is subject to criminal sanction, and (2) notice of the elements to be defended against. *United States v. Saunders*, 59 M.J. 1, 6, 9 (C.A.A.F. 2003).

Analysis

The appellant asserts that the specification charging graft fails because it does not expressly allege the terminal element of Article 134, that his conduct was prejudicial to good order and discipline or service discrediting. He contends that, except

¹ In that Chief Culinary Specialist Gary W. Lumpkins, JR [sic], U.S. Navy, Navy Region Southwest Reserve Component Command San Diego, on active duty, being at the time the command training officer with administrative responsibilities for orders, travel claims, and training records for Navy Operational Support Center, Las Vegas, NV, did, at or near Las Vegas, NV, between on or about May 2005 and on or about September 2007, wrongfully receive from Sailors assigned to or affiliated with Navy Operational Support Center, Las Vegas, NV, the sum of more than \$500.00, as compensation for services rendered by him, the said Lumpkins, in relation to an official matter in which the United States was and is interested, to wit: accurate accounting and payment of official orders, travel claims and inactive duty training records.

for attempt crimes, a charge must expressly allege every element of the charged offense. *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007). Alternatively, the appellant asserts that even if the terminal element can be implied, here the terminal element is not implied because the specification does not contain an allegation of prohibited conduct.

Our decision in *Fosler* is dispositive of both contentions. First, *Resendiz-Ponce* does not stand for the proposition that an element can only be implied in attempt cases as we clearly articulated in *Fosler*. *Fosler*, 69 M.J. at 675; see *Resendiz-Ponce*, 549 U.S. at 103-11. Second, even if a specification does not contain the terminal element specifying the conduct was prejudicial to good order and discipline or service discrediting, alleging the criminality of the specified conduct by use of the words "wrongful" or "unlawful" is sufficient. *Fosler*, 69 M.J. at 676.

In this case, the specification clearly alleges criminality and the acts that might be determined as prejudicial to good order and discipline or service discrediting are fairly implied. The specification provided notice to the appellant that he wrongfully received compensation from Sailors for services rendered by him. It was clearly implied that those services, initiating and approving orders directing Reserve members to report for annual training, falsifying inactive duty training records to credit Reserve members for performing drills that were never performed, and signing page 2's without the Reserve member's consent, were criminal if the conduct was prejudicial to good order and discipline or service discrediting. Further, the crime of graft is included as a specifically listed offense under Article 134 and has been since at least 1984. *MANUAL FOR COURTS-MARITAL, UNITED STATES* (1984 ed.), Part IV, ¶ 66.

In short, the appellant was on notice that misusing his position as training officer to monetarily benefit himself while engaging in a *quid pro quo* with Reserve members who received credit for drills or annual training not performed would be prejudicial to good order and discipline or service discrediting.

We find pursuant to our decision in *Fosler* that the Government is not required to allege the terminal element of an Article 134, UCMJ, offense.

Conclusion

Accordingly, we affirm the findings and sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court