

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

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

UNITED STATES OF AMERICA

v.

**JONATHAN L. NETH
HOSPITAL CORPSMAN FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 201000276
GENERAL COURT-MARTIAL**

Sentence Adjudged: 5 January 2010.

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

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

Staff Judge Advocate's Recommendation: CDR D.C. King, JAGC, USN.

For Appellant: LT Ryan Santicola, JAGC, USN; LT Michael Hanzel, JAGC, USN.

For Appellee: CDR Kevin L. Flynn, JAGC, USN; Capt Samuel C. Moore, USMC; Capt Mark V. Balfantz, USMC.

23 June 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:

This case is before us for the second time. We initially returned this record to the convening authority (CA) to allow the appellant to submit post-trial clemency matters, but we did not conduct a statutory review of the case at that time. Navy-Marine Corps Court of Criminal Appeals order of 20 Aug 2010. The case is now ready for review.

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of conspiracy to make a false official statement, making a false official

statement, bribery, and graft, respectively violations of Articles 81, 107, and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, and 934. The military judge also accepted the appellant's guilty plea to willful dereliction in the performance of his duties in violation of Article 92, but then dismissed that charge and specification as an unreasonable multiplication of charges with the false official statement. The CA approved the adjudged sentence of confinement for 9 months, a fine of \$6,700.00, reduction to pay grade E-4, and a bad-conduct discharge.

In his single assignment of error, which he asserts personally under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant claims that he was subjected to illegal pretrial punishment in violation of Article 13, UCMJ, because his command withheld an authorized advancement after he became a suspect in a wide-ranging scheme to defraud the Government. As a remedy, the appellant requests that we order some amount of back pay to recognize that he should have been paid at a higher grade for several months preceding his trial.

The appellant was selected for advancement to the rate of Chief Hospital Corpsman by the Fiscal Year 2009 Full-Time Support Chief Petty Officer Advancement Selection Board. In an administrative remarks entry dated 30 September 2008, the appellant acknowledged that his commanding officer was withholding his advancement in rate due to an ongoing investigation. The appellant acknowledged his rights under Article 1150, United States Navy Regulations (1990 ed.), to petition for redress of a wrong by a superior, and under Article 138, Uniform Code of Military Justice, to complain of a wrong by his commanding officer. NAVPERS 1070/613 of 30 Sep 2008, contained in the appellant's Motion to Attach of 12 Jan 2011. As the hold was not lifted before the end of the advancement cycle, the appellant lost his selection for advancement. Bureau of Naval Personnel Instruction 1460.1F at ¶ 721a (2 Nov 2007).

When asked whether he believed that the appellant had been subjected to illegal pretrial punishment, the appellant's civilian counsel told the military judge that he did not. Record at 128. The matter of illegal pretrial punishment is thus waived. *United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F. 2003); RULE FOR COURTS-MARTIAL 905(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). See generally *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (known right waived at trial is extinguished and may not be raised on appeal; distinct from forfeiture, which may be reviewed for plain error). We observe, furthermore, that the appellant had ample notice and opportunity to avail himself of the administrative due process in Navy Regulations and Article 138 yet apparently declined to do so. We finally note the availability of the United States Court of Federal Claims and the United States District Courts to determine and resolve issues of back pay. See 28 U.S.C. §§ 1346, 1491.

Finding no error materially prejudicial to the substantial rights of the appellant, we affirm the findings and the approved sentence. Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court