

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

**Before
J.A. MAKSYM, F.D. MITCHELL, M. FLYNN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ANTHONY R. SARACOGLU
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201000447
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 6 May 2010.

Military Judge: LtCol Steven Logan, USMCR.

Convening Authority: Commanding General, Marine Corps
Recruit Depot/Western Recruiting Region, San Diego, CA.

Staff Judge Advocate's Recommendation: Col M.B. Richardson,
USMC.

For Appellant: LT James Head, JAGC, USN; LT Toren Mushovic,
JAGC, USN.

For Appellee: LCDR Sergio Sarkany, JAGC, USN.

9 August 2011

OPINION OF THE COURT

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

FLYNN, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of conspiracy, making a false official statement, selling military property valued at over \$500.00 without proper authority, and larceny of the same military property, in violation of Articles 81, 107, 108, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, 908, and 921. The appellant was sentenced to confinement for 12 months, forfeiture of \$500.00 pay per month for 12 months, a bad-conduct discharge, and a fine of \$8,000.00. The convening authority approved the sentence as adjudged.

This case was submitted to this court without assignment of error. After reviewing the record, we specified the issue of whether the military judge erred by denying the defense's motion to dismiss due to unlawful command influence.

Background

At an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, the defense moved to dismiss the charges on the basis that remarks made by the appellant's company commander during a company formation, amounted to unlawful command influence. During the proceedings on the motion, the military judge considered the written pleadings and oral argument offered by the parties, as well as testimony from the appellant, the company commander, and members of the command. The military judge made detailed findings of fact and conclusions of law.

In his findings of fact, the military judge determined that in January 2010, Captain (Capt) Hillary, Headquarters and Service (H&S) Company Commander for Weapons Field Training Battalion, held a Friday morning formation. The formation included two platoons of enlisted Marines, including the appellant, and a few officers. Formations of this sort were held every Friday morning as a means of disseminating information. At this particular formation, Capt Hillary read a newspaper article from the San Diego Union Tribune that discussed the recent court-martial of Private Bradley, a member of H&S company. The article stated that Private Bradley had pled guilty to "stealing truckloads of spent ammunition casings from the base firing range where he worked and selling them as scrap metal, raking in nearly \$31,000." AE IV at 6. After reporting the sentence awarded, the article went on to state that Bradley's "alleged accomplice, Pvt. Anthony Saracoglu, is awaiting trial." *Id.*

The military judge found that Capt Hillary read the newspaper article verbatim to the company and then "stated some warning to the masses to the effect of, 'if you steal brass, then this is what is going to happen to you.' He did not mention Private Saracoglu during this warning after reading the article verbatim." Record at 76-77. He further found that the article was a report of news without commentary, with no inflammatory treatment of the topic, and that the information was all over the command. *Id.* at 78. Regarding Capt Hillary's comments, the military judge concluded that two witnesses who testified that they remembered the company commander reading the article could not recall what it was about or what he said and in any case were not hesitant to testify or get involved in the trial. He further found that the appellant's testimony as to Marines being worried about "what was coming down" was focused on members of the command being concerned about who might get in trouble next, rather than a fear or reluctance to take part in the trial process. *Id.* at 77. The military judge concluded that, although initially raised so as to shift the burden to the Government to

rebut, there was no actual or apparent unlawful command influence.

Regarding actual unlawful command influence, the military judge stated:

I find that there is no evidence that was presented here that merely reading the article improperly influenced any service member. There is actually no evidence that came forward that that was the case. I also find that there was no evidence that any service member was discouraged either explicitly or as a result of the formation from testifying on the accused's behalf. In short, I find that there is no actual unlawful command influence.

Record at 79.

Regarding the appearance of unlawful command influence, the military judge found that while it would have been better if the appellant's name had not been mentioned, there was no evidence that Capt Hillary had any intention of "calling [the appellant] out or in shaming him or demeaning him in any way" and that "an objective member of the public would expect a commander to somehow address this issue. And I don't think that anybody would walk away, after this formation, if they were a fly on the wall, and be disappointed in the military justice system in some way because they addressed this issue." *Id.* He concluded by stating "I find no unlawful command influence in this case. Even if it were indicated in some way, I find beyond a reasonable doubt that these actions do not constitute unlawful command influence and in any event would not affect the proceedings." *Id.* at 80. As such, the military judge denied the defense's motion.

Unlawful Command Influence

Unlawful command influence has often been referred to as "the mortal enemy of military justice." *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)). Article 37(a), UCMJ, 10 U.S.C. § 837(a), provides, in relevant part: "No person subject to this chapter may attempt to coerce or . . . influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case" The mere appearance of unlawful command influence may be "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ayers*, 54 M.J. 85, 94-95 (C.A.A.F.2000) (quoting *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)). Moreover, the law is clear in condemning any unlawful command influence directed against prospective witnesses at a court-martial. *Gore*, 60 M.J. at 185; *United States v. Newbold*, 45 M.J. 109 (C.A.A.F. 1996); *United States v. Gleason*, 43 M.J. 69, 75 (C.A.A.F. 1995); *United States v. Stombaugh*, 40 M.J. 208, 212 (C.M.A. 1994); *United States v.*

Levite, 25 M.J. 334, 340 (C.M.A. 1987); *Thomas*, 22 M.J. at 393; *United States v. Rosser*, 6 M.J. 267, 271-72 (C.M.A. 1979). In *Thomas*, 22 M.J. at 393, the court noted that when unlawful command influence is directed against prospective defense witnesses, it "transgresses the accused's right to have access to favorable evidence," thus depriving the servicemember of a valuable constitutional right.

[O]nce the issue of unlawful command influence is raised, the Government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence.

United States v. Biagase, 50 M.J. 143, 15 (C.A.A.F. 1999).

When the issue of unlawful command influence is litigated on the record, the military judge's findings of fact are reviewed under the clearly-erroneous standard, but the questions of command influence flowing from those facts are questions of law that we review *de novo*. *United States v. Reed*, 65 M.J. 487, 488 (C.A.A.F. 2008) (quoting *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)).

In this case, there is no dispute about the predicate facts but, rather, whether those facts constitute actual or apparent unlawful command influence. We agree with the military judge's conclusion that there was no actual unlawful command influence. However, we find that he erred with respect to the existence of apparent unlawful command influence.

In addressing whether the appearance of unlawful command influence has been created in a particular situation, we consider, objectively, "the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). We will find the appearance of unlawful command influence where "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id.* Under these circumstances, we find that the reading of the article and comments made by the company commander in the aftermath of the *Bradley* trial, while the appellant's trial was pending, would be perceived by a disinterested member of the public as improper command influence or otherwise indicative of an unfair proceeding.

There is no evidence that Capt Hillary's remarks at the company formation were intended to humiliate or ridicule the appellant. *Cf. United States v. Cruz*, 25 M.J. 326, 330 (C.M.A. 1987) (apprehending suspected drug users in front of unit formation and stripping them of unit crests was punishment under

Article 13 and tainted future legal proceedings). Here, other than being identified in the article as an alleged co-conspirator, the appellant's name was never mentioned, and he was not brought before the formation.

Nevertheless, we find that the company commander's briefing to the unit had the potential for unlawfully influencing the outcome of the trial and that a member of the public would perceive that he was acting with the mantle of command authority. His briefing was heard by potential members, as well as potential witnesses, and would be perceived as having a chilling effect on those listeners. As observed many years ago, "the scales [of justice always] become loaded against justice when lectures attended by court members involve extended discussions of offenses identical or closely related to those for which an accused is shortly to be tried." *United States v. Olson*, 29 C.M.R. 102, 105 (C.M.A. 1960). See also *United States v. Brice*, 19 M.J. 170 (C.M.A. 1985) (court members' attendance at Commandant's lecture on drug abuse during court-martial proceedings involving possession, transfer and sale of drugs required military judge to grant mistrial on motion of the accused).

Having found apparent unlawful command influence, we must consider its impact on the proceedings. The appearance of unlawful command influence provides a presumption of prejudice, but the presumption is rebuttable. In the case at hand, we find that the presumption is rebutted.

An Article 32, UCMJ, 10 U.S.C. § 832, investigation was conducted in this case, and there is nothing in the record to indicate that the company commander made any recommendations as to the disposition of the charges or provided any input. The appellant has presented no evidence demonstrating prejudice in any respect regarding the decision to refer the charges to trial and, in fact, preferral and referral occurred well before the formation at issue. This is not a case where the company commander was the court-martial convening authority. Cf. *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). The appellant elected trial by military judge and there is no evidence that any unlawful command influence caused him to plead guilty or forgo trial by members. Indeed, the appellant voluntarily entered into a pretrial agreement attesting to the fact that his pleas of guilty were being made freely and that "[n]obody has made any attempt to force or coerce me into making this agreement or into pleading guilty." AE X at 1. See *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986). In view of the safeguards surrounding the entry of guilty pleas by accused service members, we perceive no unfairness in letting stand the guilty pleas entered by this appellant. Here, we are persuaded beyond a reasonable doubt that the findings, based on the appellant's provident guilty pleas, were not affected by command influence." *Thomas*, 22 M.J. at 395.

We are likewise convinced, beyond a reasonable doubt, that the sentence was not affected by the apparent unlawful command influence. Factors that informed our decision in this regard include the military judge's findings that the witnesses who testified that they did not feel intimidated or discouraged from participating in the trial were more persuasive than the appellant's testimony, as well as the fact that evidence presented in extenuation and mitigation included a statement from a warrant officer from the appellant's command who provided favorable evidence on the appellant's behalf. As such, we are satisfied that the appellant's sentence was not tainted by apparent unlawful command influence.

In sum, we find beyond a reasonable doubt that the findings and sentence were unaffected by any of the actions of which appellant complains. See *Biagase*, 50 M.J. at 150. We are satisfied that the appellant's trial was in fact fair, and that the record completely dispels any prospect of unfairness stemming from the pretrial activities the appellant complains of.

Conclusion

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

Senior Judge MITCHELL and Senior Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge MITCHELL participated in this case prior to detaching from the court.