

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

**Before
J.K. CARBERRY, F.D. MITCHELL, L.T. BOOKER
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**WILLARD R.K. SMILEY II
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100163
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 8 December 2010.

Military Judge: LtCol Peter R. Rubin, USMC.

Convening Authority: Commanding Officer, Headquarters and
Headquarters Squadron, Marine Corps Air Station, Yuma, AZ.

Staff Judge Advocate's Recommendation: Maj H.J. Redman,
USMC.

For Appellant: LCDR Ronald Hocevar, JAGC, USN.

For Appellee: Mr. Brian K. Keller, Esq.

14 July 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:

After careful consideration of the record, submitted without assignment of error, we affirm the findings and sentence as approved by the convening authority. Art. 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c).

BOOKER, Senior Judge (dissenting in part):

I respectfully dissent from the majority's decision to affirm the finding of guilty to the general order violation. I agree that the remaining findings are correct in law and fact, but I would set aside the sentence and order a rehearing.

I cannot affirm the order violation conviction because I am not convinced that the order involved is a general order. The Air Station order, which appears in the record as Appellate Exhibit III, dates to 1998, and at that time the Commanding Officer, Marine Corps Air Station, Yuma, was not a general court-martial convening authority (GCMCA). My research of the Manual of the Judge Advocate General shows that he first appeared as a GCMCA in the 2007 edition. He therefore could not issue "general orders" under Article 92 in the year 1998. See MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 16c(1)(a). I further do not read the routine "adoption of orders" message that appears in Appellate Exhibit IV to elevate the 1998 order to the status of "general order" in 2008.

I note as well that "the order, in its entirety," demonstrates nothing more than "general guidelines for the conduct of military functions." *United States v. Nardell*, 45 C.M.R. 101, 103 (C.M.A. 1972). The order is titled "Standing Operating Procedures" for administering the barracks, and the "Background" section of the order states its purpose as establishing policy to govern the assignment, use, inspection, maintenance, and related responsibilities "for the routine operations" of the barracks. The governing Marine Corps order that it implements, Marine Corps Order P11000.22 of 14 February 1991 as amended, is not itself a punitive general regulation. The Air Station order directs "Commanding Officers and Department Heads" to familiarize themselves with its content and to be guided accordingly. The order simply advises all occupants in the BEQ to "read and familiarize themselves" with its contents; it does not direct them to do so. If in fact the order were conceived as a general order, then the language directed toward the occupants would be redundant, as "proper publication" is all that is needed to make it enforceable. See generally *United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982).

True, the order does warn of sanctions for disobeying, but they could run from expulsion from the barracks to charges of disorderly conduct to charges of destruction of Government property, depending on the particular breach. Indeed, one questions whether a member could be lawfully punished beyond the maximum for disorderly conduct, unlawful entry, or damaging or destroying military property, for example, simply because those offenses also violate the order. See generally *United States v. Quarles*, 1 M.J. 231, 232-33 (C.M.A. 1975). I finally note that individual service members could "opt out" of the order's coverage simply by electing to live off base (subject, perhaps, to local directives and policy and a member's willingness to bear the costs if not eligible for a basic allowance for housing), thus calling further into question whether the order's primary purpose is "to regulate conduct of individual members." *Nardell*, 45 C.M.R. at 103. Cf. *United States v. Tinker*, 27 C.M.R. 366, 367 (C.M.A. 1959) (whether an order is "general" includes determination that it applies generally "to all personnel stationed within or having duty with a command").

Because I would set aside the order violation conviction, I would have to set aside the sentence as well. Use of ecstasy by a noncommissioned officer is a serious offense that could warrant serious punishment, but I cannot say that but for the error in convicting the appellant of the order violation, the sentence would have been of at least the severity imposed here. *United States v. Buber*, 62 M.J. 476, 478 (C.A.A.F. 2006).

For the Court

R.H. TROIDL
Clerk of Court