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

Before
B.L. PAYTON-O'BRIEN, R.G. KELLY, R.Q. WARD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

EUGENIO ACABEO
FIRE CONTROLMAN SECOND CLASS (E-5), U.S. NAVY

NMCCA 201200270
SPECIAL COURT-MARTIAL

Sentence Adjudged: 16 March 2012.
Military Judge: CAPT John Waits, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.
Staff Judge Advocate's Recommendation: CDR M.C. Holifield, JAGC, USN.
For Appellant: CDR R.D. Evans, Jr., JAGC, USN.
For Appellee: Mr. Brian Keller, Esq.

31 August 2012

OPINION OF THE COURT

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of conspiracy, two specifications of violating a lawful general regulation, and one specification of larceny, in violation of Articles 81, 92, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, and 921. The military judge sentenced the appellant to be confined for 100 days, to be

reduced to pay grade E-1 and to be discharged from the Navy with a bad-conduct discharge. A pretrial agreement had no effect on the sentence adjudged.[1] The convening authority (CA) approved the sentence and, except for the bad-conduct discharge, ordered it executed. The case was submitted without an assignment of error.

We find that the two specifications of violating a lawful general regulation are an unreasonable multiplication of charges. Accordingly, we will take appropriate action in our decretal paragraph. Following that action and reassessment of sentence, we find that the remaining guilty findings and sentence are correct in law and fact and that no materially prejudicial error remains. *See* Arts. 59(a) and 66(c), UCMJ.

The appellant, a fire controlman second class (FC2) and a three-time failure of the Navy advancement exam for FC1, conspired with his command's education service officer, Personnel Specialist First Class (PS1) Eugene Cody, to steal the next Navy advancement exam for FC1. PS1 Cody removed the classified examination from the command safe, made a copy, and gave the copy to the appellant two weeks before he sat for the exam. Not surprisingly, the appellant passed the exam on this, his fourth attempt. His command frocked him to FC1 before discovering his illicit activities with PS1 Cody.

At trial, the appellant pleaded guilty both to conspiring with PS1 Cody to steal the advancement exam, and to theft of the advancement exam as an accomplice. He also pleaded guilty to violating Secretary of the Navy Instruction 5510.36A, the Department of the Navy Information Security Program Instruction for wrongfully failing to safeguard and store the copy of the classified advancement exam, and U.S. Navy Regulation 1145 for wrongfully receiving the same Navy advancement exam. Having applied the five-part test laid out in *United States v. Quiroz*,[2]

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[1] The CA agreed to defer and waive automatic forfeitures for the benefit of the appellant's family members.

[2] In examining whether an unreasonable multiplication of charges exists, we consider five factors: 1) did the appellant object at trial; (2) are the charges aimed at distinctly separate criminal acts; (3) do the charges misrepresent or exaggerate the appellant's criminality; (4) do the charges unreasonably increase the appellant's punitive exposure; and (5) is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). We also consider RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL (2008 ed.), which provides the following guidance: "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." We will grant

we conclude that finding the appellant guilty of violating two different regulations where the same conduct--unauthorized possession or receipt of a classified advancement exam-—forms the basis of the violation constitutes an unreasonable multiplication of charges. Although several factors weigh in favor of the Government (the appellant did not object at trial, the appellant's remaining guilty findings alone exposed him to the special court-martial jurisdictional maximum punishment, and we find no evidence of prosecutorial overreaching), we find that these two offenses are not aimed at distinctly separate criminal acts and that multiple convictions under two different regulations for same conduct exaggerates the appellant's criminality. This is especially true when we consider the related guilty findings for conspiracy to steal the advancement exam and the ultimate theft of the exam.

Accordingly, the guilty finding to Specification 2 of Charge II is set aside and that specification is dismissed. Art. 66(c), UCMJ. The remaining findings are affirmed. Notwithstanding this action, we find that the sentencing landscape has not dramatically changed and we can reassess the sentence. *United States v. Buber,* 62 M.J. 476, 479 (C.A.A.F. 2006); *United States v. Peoples,* 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales,* 22 M.J. 305, 307-08 (C.M.A. 1986). We conclude that absent the error the sentencing authority would have adjudged and the convening authority would have approved the same sentence.

For the Court

R.H. TROIDL
Clerk of Court

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appropriate relief if we find that the aggregate of charges is so unreasonable as to warrant invocation of our Article 66(c), UCMJ, authority. *See United States v. Tovar*, 63 M.J. 637, 643 (N.M.Ct.Crim.App. 2006).