

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

**Before
B.L. PAYTON-O'BRIEN, R.G. KELLY, J. MCFARLANE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DANIEL S. EVERETT
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201200239
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 15 February 2012.

Military Judge: LtCol Robert Palmer, USMC.

Convening Authority: Commanding Officer, 4th Marine Corps
District, New Cumberland, PA.

Staff Judge Advocate's Recommendation: Col E.R. Kleis,
USMC.

For Appellant: LT David Dziengowski, JAGC, USN.

For Appellee: Mr. Brian Keller, Esq.

17 October 2012

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.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of four specifications of a violation of a lawful order, two specifications of making a false official statement, one specification of sodomy, and one specification of adultery, in violation of Articles 92, 107, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, 925, and 934,

respectively. The appellant was sentenced by a panel of members, to include enlisted representation, to confinement for 60 days, reduction to pay grade E-2, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant's case was submitted to this court without a specific assignment of error. Upon review, we find that corrective action is necessary which we will take in our decretal paragraph. Following our corrective action, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66 (c), UCMJ.

Background

In early 2011, the appellant, a married recruiter for the United States Marine Corps, began an unprofessional relationship with a prospective recruit. Over time, the relationship became sexual; their behavior was discovered when other recruiters opened mail from the recruit while she was attending boot camp. While being questioned concerning this relationship, the appellant lied to the officers questioning him and these matters eventually ended up at trial.

Unreasonable Multiplication of Charges

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

As a result of the appellant's false official statements during his questioning by the investigating officers, he was charged with and pled guilty to two separate specifications under Article 107. This misconduct took place at the same time, in the same room, and while speaking to the officers together. After applying the *Quiroz* factors to these specifications, we find that the misconduct should be merged into one specification, in that it reflects the same misconduct, and the specification should read as follows:

Specification: Did, at or near Danville, Virginia, on divers occasions, on 11 March 2011, with the intent to deceive, make to Captains John Tucker and Shanelle Porter, U.S. Marine Corps, official statements, to wit:

- a. "I have never had sexual intercourse with Recruit [S]," or words to that effect;
- b. "I have never inappropriately touched, kissed, or hugged Recruit [S]," or words to that effect;
- c. "I have never cheated on my wife," or words to that effect;
- d. "I am not Boo Boo," or words to that effect;
- e. "I never had an inappropriate relationship with Recruit [S]," or words to that effect
- f. "Recruit [S] is not addressing the letter to me ma'am because I am not Boo Boo and I did not have a personal relationship with a recruit" or words to that effect;
- g. "I don't know ma'am. It's not me ma'am. I am not Boo Boo that is not my name," or words to that effect; and
- h. "Recruit [S] never told me she loved me," or words to that effect;

Which statements were totally false, and then known by the said Sergeant Everett to be so false.¹

Sentence Reassessment

Having consolidated the two specifications, we conclude that there has not been a drastic change in the penalty landscape. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*,

¹ We note that the convening authority neglected to reflect in the court-martial order as pertaining to Specification 1 under Charge II that the words "[s]taff Sergeant Gilman proposed to shred any additional letters from Recruit [S]" had been withdrawn prior to the military judge's findings. Our merger of the two specifications resolves this error.

63 M.J. 40 (C.A.A.F. 2006), and carefully considering the entire record, we are satisfied beyond a reasonable doubt that had the error not occurred the members would not have adjudged a sentence less than that approved by the convening authority in this case.

Conclusion

The supplemental court-martial order shall reflect the merger of Specification 1 and 2 under Charge II as reflected herein. The findings, as modified, and sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court