

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

**Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BRYAN B. HARRIS
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201200274
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 20 April 2012.

Military Judge: LtCol Robert G. Palmer, USMC.

Convening Authority: Commanding Officer, First Marine Corps District, Eastern Recruiting Region, Garden City, NY.

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

For Appellant: CAPT Stephen White, JAGC, USN.

For Appellee: LT Philip S. Reutlinger, JAGC, USN.

30 November 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 violating a general order by wrongfully engaging in a nonprofessional relationship with a prospective recruit applicant, making false official statements to an investigating officer, and obstruction of justice in violation of Articles 92, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 934. The military judge sentenced the appellant to confinement for six months, reduction to pay grade E-1, and a bad-conduct discharge.

The convening authority (CA) approved the adjudged sentence as modified by the terms of the pretrial agreement and, except for the punitive discharge, ordered the sentence executed. In accordance with the pretrial agreement the CA suspended confinement in excess of 120 days.

The appellant raises one assignment of error. He avers that certain comments attributed to the military judge during a training evolution unrelated to the appellant's trial, reflect an arbitrary and inflexible attitude about what constitutes an appropriate sentence, and put into doubt the fairness and impartiality of the appellant's court-martial.

After carefully considering the record of trial and the submissions of the parties, we are convinced that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

The assignment of error focuses on post-trial events. On 20 April 2012, the military judge sentenced the appellant. On 22 May 2012, after reviewing the record of trial, the military judge submitted a letter to the CA asking him to consider clemency in the appellant's case as his "conduct in court was exemplary" and "[h]e was very honest when answering the incriminating questions during the providency inquiry." On 7 June 2012, the CA approved the sentence as adjudged. On 21 June 2012, the military judge spoke for two hours to five junior Marine Corps officers providing professional military education (PME) regarding the practice of military justice. These officers were law students assigned to various Marine Corps legal offices to work with judge advocates and participate in legal training during their summer recess from law school; some were working for defense, and some for the Government. Two of these officers provided written statements¹ summarizing their recollection of the military judge's comments, and these statements form the entire factual basis for the appellant's assigned error. Appellant's Motion to Attach of 10 Aug 2012 at Appendices I and II.

During the PME, the military judge spoke on a wide range of topics and made various statements not in keeping with standards of judicial decorum. In discussing trial strategy, he

¹ One was an affidavit and the other a declaration under penalty of perjury.

encouraged the junior officers to aggressively charge and prosecute cases, stating that Congress and the Commandant of the Marine Corps wanted more convictions, and opined that trial counsel should assume the defendant is guilty. At one point he referred to defendants as "scumbags." *Id.* A fair read of one statement is that the law student had mixed thoughts as to whether the remarks were odd or intended to be humorous. *Id.* at Appendix II.

Disqualification of a Military Judge

We review whether a military judge has acted appropriately *de novo*.² "An accused has a constitutional right to an impartial judge." *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (quoting *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001)). A military judge's impartiality is crucial to the conduct of a legal and fair court-martial. *United States v. Quintanilla*, 56 M.J. 37, 43 (C.A.A.F. 2001).

RULE FOR COURTS-MARTIAL 902, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) divides the grounds for disqualification into two categories, actual and apparent bias, and applies a two-step analysis. *Quintanilla*, 56 M.J. at 45. The first step asks whether disqualification is required under the specific circumstances listed in R.C.M. 902(b), which constitute actual bias. If no actual bias is demonstrated, we then ask whether the circumstances nonetheless warrant disqualification based upon a reasonable appearance of bias.³

"There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *Id.* at 44. "The moving party has the burden of establishing a reasonable

² In applying a *de novo* standard, we follow the guidance of the Court of Appeals for the Armed Forces, which has applied the same standard when facing questions that the appellant could not reasonably have raised at trial. See, e.g., *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (reviewing *de novo* the deficient performance and prejudice aspects of an ineffective assistance of counsel claim); *United States v. Stefan*, 69 M.J. 256, 258 (C.A.A.F. 2010) (considering *de novo* the qualification of a staff judge advocate to make the post-trial recommendation).

³ R.C.M. 902(a) provides that disqualification is required "in any proceeding in which [the] military judge's impartiality might reasonably be questioned." Disqualification may be required even if the evidence does not establish actual bias. *Quintanilla*, 56 M.J. 37, 45.

factual basis for disqualification. More than mere surmise or conjecture is required." *Wilson v. Ouellette*, 34 M.J. 798, 799 (N.M.C.M.R. 1991) (citing *United States v. Allen*, 31 M.J. 572, 601 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991)). With respect to the appearance of bias, the appellant must prove that, from the standpoint of a reasonable person observing the proceedings, "'a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions.'" *Martinez*, 70 M.J. at 158 (quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)).

In applying this analysis to the question of actual bias, we conclude that the appellant fails to demonstrate any actual bias under R.C.M. 902(b). He has made no showing that the military judge had a personal bias or prejudice concerning him or his case.

We turn next to whether there is any appearance of bias that would require disqualification under R.C.M. 902(a). A reasonable person made aware of the post-trial comments by the military judge in this case may well conclude that they are indicative of an apparent bias since the comments depart markedly from the neutral and detached posture that trial judges must always maintain. Assuming evidence of apparent bias, we next determine "whether the error was structural in nature, and therefore inherently prejudicial, or in the alternative, determine whether the error was harmless under *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 . . . (1988)." *United States v. Roach*, 69 M.J. 17, 20 (C.A.A.F. 2010).

This error was not structural. The record shows that the appellant's court-martial was a fair and impartial proceeding, occurring two months before the military judge made the comments in question. Therefore, we focus on whether the military judge's appearance of bias materially prejudiced any substantial rights of the appellant, and whether reversal is otherwise warranted in this case. The Court of Appeals for the Armed Forces in *Martinez* treated these two questions as distinct lines of analysis: the first governed by Article 59(a), UCMJ, and the second by *Liljeberg*. 70 M.J. at 159. Under *Liljeberg*, we consider "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." 486 U.S. at 864.

We do not find prejudice under either Article 59(a) or *Liljeberg*, and we find no risk of injustice to the appellant in

this case. The military judge spoke in a training environment that was unrelated to the appellant's trial. To the extent that he addressed particular types of cases, the military judge focused on trial strategy in cases of sexual assault, child abuse, and child pornography. He made no mention of recruiter misconduct cases, or anything that remotely approached this type of case. Moreover, his comments were largely focused on the performance of Government counsel. Bias and antipathy toward an attorney are generally insufficient to disqualify a judge "unless petitioners can show that such a controversy would demonstrate a bias against the party itself." *United States v. Ettinger*, 36 M.J. 1171, 1174 (N.M.C.M.R. 1993) (quoting *Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 385 (11th Cir. 1991)). Here, the appellant has established no nexus between his own case of recruiter misconduct and the military judge's remarks.

Even more notable is the fact that, after reviewing the entire record of trial (to include the maximum sentence appendix to the pretrial agreement), this same military judge requested, in writing, that the CA consider clemency on the appellant's behalf. We do not view this action as indicative of a biased or inflexible judge. While the military judge asks that the CA consider clemency, he accurately states, "[the appellant's] actions deserved punishment and it was given." Military Judge's ltr of 22 May 2012. After a sound providence inquiry, and correctly entered findings pursuant to the appellant's pleas, the military judge sentenced the appellant in accordance with his actions. There is nothing severe about the punishment the appellant received after admitting that he had an affair with a young prospective recruit, to include sex at least four times in his recruiting office, then lied about it to an investigating officer, and even asked the recruit to lie about it as well. The appellant had the benefit of a pretrial agreement at a special court-martial, in which the CA suspended all confinement in excess of 120 days.

Likewise, our finding of no prejudice in this case presents no risk of injustice in other cases. That nexus simply does not exist here. Other appellants remain free to show a prejudicial nexus to their own case.

Finally, our decision will not undermine the public's confidence in the judicial process. This appellant made a provident plea of guilty, after freely negotiating a pretrial agreement with the Government and receiving protections for confinement, adjudged forfeitures, automatic forfeitures, and

fines. Appellate Exhibit III. He was sentenced to six months confinement and had a pretrial agreement suspending confinement in excess of 120 days, well below the jurisdictional maximum. Furthermore, the very military judge that the appellant is trying to disqualify wrote a letter on his behalf asking the CA to consider clemency in his case. Even though the CA did not grant clemency to the appellant, which was his prerogative, all these actions taken together do not support a conclusion that the military judge's appearance of bias materially prejudiced the substantial rights of the appellant.

One could only find prejudice in this case through the exercise of surmise and conjecture, as warned of in *Wilson*. 34 M.J. at 799. We decline to speculate, in the absence of any demonstrated prejudice, how comments made two months after a provident guilty plea could have affected this court-martial.

Conclusion

We affirm the findings and the sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court