

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

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

**UNITED STATES OF AMERICA**

**v.**

**DUSTIN D. KISH  
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 201100404  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 22 April 2011.

**Military Judge:** Maj Robert G. Palmer, USMC.

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

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

**For Appellant:** LT Daniel C. LaPenta, JAGC, USN.

**For Appellee:** Capt Samuel C. Moore, USMC.

**29 March 2012**

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**OPINION OF THE COURT**  
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**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 special court-martial comprised of members with enlisted representation, convicted the appellant, contrary to his pleas, of four specifications of failure to obey a general order in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. The members sentenced the appellant to nine months of confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the

sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.<sup>1</sup>

### **Facts**

The appellant was a canvassing recruiter assigned to Recruiting Substation (RSS) Oswego, New York, in 2009. Following an investigation by Captain T into an allegation that the appellant engaged in an inappropriate relationship with a prospective recruit applicant, the appellant was convicted of four specifications of violating Article 92 by: engaging in an inappropriate relationship with Ms. AS, a prospective recruit applicant; providing alcohol to Ms. AS, who was under the legal drinking age of twenty-one; using a Government vehicle for unauthorized purposes; and, engaging in an inappropriate relationship with Ms. GD, also a prospective recruit applicant.

The appellant assigns five errors on appeal: (1) that the military judge abandoned his impartial role and that he was denied a fair trial; (2) that the military judge erred in admitting evidence of uncharged misconduct, specifically, evidence that the appellant had sex with CB while AS was in the same bed with them; (3) that trial defense counsel was ineffective for failing to object to the military judge's inquiry of AS into the appellant's uncharged misconduct; (4) that the military judge erred in not defining "being actively processed for enlistment" for the members; and, (5) that the Government presented inadmissible evidence and made improper argument on sentencing, specifically the trial counsel advising the members that the law authorized a maximum punishment of eight years confinement.<sup>2</sup>

### **Factual Sufficiency**

Although not specifically raised as error, we find the evidence relative to Specification 1 of the Charge, violating Depot Order 1100.5A by having an inappropriate relationship with Ms. AS, a prospective recruit applicant, factually insufficient to convince us of the appellant's guilt. When we examine the factual sufficiency of the evidence, we must ourselves be

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<sup>1</sup> To the extent that this court reads the convening authority's action as ordering the punitive discharge executed, such action is a legal nullity. See *United States v. Tarniewicz*, 70 M.J. 543, 544 (N.M.Ct.Crim.App. 2011) (holding the phrase "will be executed" in the convening authority's action a legal nullity).

<sup>2</sup> The military judge overruled trial defense counsel's objection that trial counsel was arguing for a sentence outside the forum's jurisdiction.

convinced beyond a reasonable doubt of the appellant's guilt. We conduct our review with the understanding that we did not personally observe the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

To convict the appellant of the violating the Depot Order, the Government was required to prove that Ms. AS was a prospective recruit applicant. The Depot Order defines a prospective recruit applicant as one who is "being actively processed for enlistment." The evidence fails to demonstrate that Ms. AS was being actively processed for enlistment. Other than expressing some interest in the Marine Corps and attending physical training events, there is no evidence that she was in the process of enlistment or was a "Working Applicant" as defined by Volume III, Guidebook for Recruiters. Appellate Exhibit XVIII at 3. Instead, the evidence supports a contrary conclusion. Captain T, the Government investigator, testified that Ms. AS was never entered into MCRISS<sup>3</sup> and, from March 2009 until July 2010, she was not qualified to enlist as she was not within weight standards. We also note that there is no evidence that prior to July 2009 Ms. AS ever completed an application for enlistment, submitted to any mental or physical examinations, or was otherwise formally screened for enlistment. The appellant's conviction of Specification 1 of the Charge is set-aside and Specification 1 is dismissed. Given the facts of this case, our action dramatically changes the sentencing landscape, which gravitates away from our ability to reassess the sentence. Accordingly, we authorize a rehearing on sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (citing *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)).

### **Judicial Impartiality**

Turning to his first assigned error, the appellant avers that the military judge abandoned his impartiality. In support of this error, the appellant relies principally on the military judge's exceptionally lengthy examination of Ms. AS. As further evidence of the military judge's partiality, the appellant also points to injudicious comments made by the military judge, soliciting character evidence over the objection of trial defense counsel, allowing members to state questions aloud, and

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<sup>3</sup> The Marine Corps Recruiting Information Support System (MCRISS) is a web-based, multi-user system that supports the collection, maintenance, inquiry, and reporting of the voluminous data required to effectively manage the activities of the Marine Corps Recruiting Command.

engaging in a dialogue with members regarding evidentiary matters.

Initially, we note that there is a strong presumption that a military judge is impartial in the conduct of a judicial proceeding. *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). Nonetheless, when a military judge's impartiality is challenged on appeal, the test is "whether, 'taken as a whole in the context of this trial,' a court-martial's 'legality, fairness, and impartiality' were put into doubt by the military judge's questions." *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995) (citation omitted). The test is objective, judged from the standpoint of a reasonable person observing the proceedings. *Id.*

We have carefully reviewed the entirety of the record and, in particular, the specific examples of partiality or unfairness cited by the appellant; we find no evidence from which a reasonable person would doubt the court-martial's legality, fairness, or impartiality. Although the military judge needlessly interjected himself into the examination of witnesses and engaged in lengthy and largely irrelevant questioning, his actions were not so egregious that a reasonable member of the public would question the legality, fairness and impartiality of the court-martial.

In this instance, the military judge's most lengthy examination of a witness involved the inappropriate relationship with Ms. AS. Even assuming *arguendo* that the military judge abandoned his impartial role in his examination of Ms. AS, our action in setting aside the finding of guilty of the relevant specification concerning the inappropriate relationship and ordering a rehearing on sentencing mitigates the possibility of any prejudice.

We remind military judges that counsel are primarily responsible for preparing their own cases and that military judges, particularly in member cases, should refrain from needlessly interjecting themselves into the examination of witnesses or making any comment that might detract from the seriousness and solemnity of the proceeding.

Our action in setting aside the guilty finding to Specification 1 of the Charge and authorizing a rehearing on sentence renders moot the remaining assignments of error.

### **Conclusion**

The finding of guilty for Specification 1 under the Charge is set aside and Specification 1 is dismissed. The remaining findings are affirmed. The sentence is set aside and record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority with a rehearing on the sentence authorized. Should the convening authority determine that a rehearing on sentence is impracticable; a sentence of no punishment may be approved. Art. 66(d), UCMJ. Following post-trial processing, the record will be returned for completion of appellate review.

For the Court

R.H. TROIDL  
Clerk of Court