

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

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

UNITED STATES OF AMERICA

v.

**MATTHEW M. MAJORS
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 201200153
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 15 December 2011.

Military Judge: Maj Clay Plummer, USMC.

Convening Authority: Commanding Officer, Marine Unmanned
Aerial Vehicle Squadron 2, MACG 28, Cherry Point, NC.

Staff Judge Advocate's Recommendation: Col S.C. Newman,
USMC.

For Appellant: LT Ryan Mattina, JAGC, USN.

For Appellee: CDR Deborah S. Mayer, JAGC, USN; Maj David N.
Roberts, USMC.

10 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, contrary to his pleas, of one specification of violating a lawful general order, two specifications of assault, and one specification of using indecent language, in violation of Articles 92, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 928, and

934. The appellant was sentenced to reduction to pay grade E-1 and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant submitted a single assignment of error: that his conviction of violating a lawful general order is not legally and factually sufficient because the military judge failed to admit the order into evidence.

We have carefully examined the entire record of trial, including its allied papers and the parties' pleadings. We are satisfied that the findings and sentence are correct in law and in fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

The sole specification under Charge I alleged a violation of a lawful general order precluding sexual harassment: Marine Corps Order 1000.9A. During a pretrial conference, the Government asked the military judge to take judicial notice of the order. During the appellant's trial, the military judge made the following summation, on the record, of that RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) conference:

In addition, the government discussed the judicial notice concerning the order in that the government asked the Court to take judicial notice that Marine Corps Order 1000.9A, dated 30 May 2006, be deemed a lawful order that was in effect on or about 16 July 2011. I indicated that I would take judicial notice of that order; that it was a lawful order, and it was in effect on that date. . . .

Record at 36. The trial counsel then corrected the military judge:

Sir, to the government's recollection, we requested that the Court take judicial notice that it was a lawful general order; however, if . . . the government is now remembering that correctly, we would make that request now, sir.

Id. at 37. The military judge then corrected the record: "Lawful general order that was in effect at the time of the

alleged offense." *Id.* At no time did the defense counsel object to the military judge's stated intent to take judicial notice of the order, or otherwise ask to be heard concerning the judicial notice issue.

The military judge made no further mention of Marine Corps Order 1000.9A during the trial; however, during closing arguments the appellant's trial defense counsel made express reference to Marine Corps General Order 1000.9A by quoting the order's definition of sexual harassment.¹

Analysis

The appellant argues that his Article 92, UCMJ, conviction is legally insufficient or, in the alternative, factually insufficient because Marine Corps Order 1000.9A was never put in evidence. We find that the military judge did, in fact, take judicial notice of Marine Corps Order 1000.9A, thus rendering appellant's arguments moot.

Under the Military Rules of Evidence, the parties are entitled to "be informed in open court when, without being requested, the military judge takes judicial notice of an adjudicative fact essential to establish an element of the case."² MILITARY RULE OF EVIDENCE 201(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). They are also "entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." MIL. R. EVID. 201(e) (emphasis added). No specific wording is prescribed for the military judge to take judicial notice.

Although not a model of clarity, the military judge's statements during his summary of the R.C.M. 802 conference made it clear to both parties that he was, pursuant to the Government's request, taking judicial notice of the existence of Marine Corps Order 1000.9A., that it was a lawful general order,

¹ "[I]t's a form of discrimination that involves unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature when such conduct has a purpose or effect of unreasonably interfering with an individuals' work performance, or creates an intimidating, hostile, or offensive working environment." Record at 204.

² Although there is an argument that the dictates of MIL. R. EVID. 201(c) are inapplicable in this case, since the military judge took judicial notice of Marine Corps Order 1000.9A pursuant to a Government request, this court will assume, without deciding, that such requests must be made on the record, and not during an R.C.M. 802 conference, to relieve the trial court of its duty to inform the parties of its decision in open court.

and that it was in effect on the dates alleged in the specification. The fact that he said that he "would" take judicial notice, when summarizing an earlier conference he had with counsel, does not negate the military judge's clear intent to put it on the record that he was taking judicial notice of the order. Had his intent not been clear, the trial counsel, who caught the military judge's failure to use the word "general" when he first spoke only of a "lawful order," would no doubt have asked for clarification, and - more importantly - the appellant's trial defense counsel would not have quoted from the order during closing arguments. Because we find that the military judge took judicial notice of the order, we conclude that the evidence is legally and factually sufficient to sustain a conviction under Article 92.

Conclusion

The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court