

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

**Before
J.R. PERLAK, J.K. CARBERRY, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ESTEVAN L. PACHECO
HOSPITALMAN SECOND CLASS (E-5), U.S. NAVY (Retired)**

**NMCCA 201100543
GENERAL COURT-MARTIAL**

Sentence Adjudged: 13 June 2011.

Military Judge: LtCol David M. Jones, USMC.

Convening Authority: Commanding General, III Marine Expeditionary Force, Okinawa, Japan.

Staff Judge Advocate's Recommendation: Col J.R. Woodworth, USMC.

For Appellant: Capt Bow Bottomly, USMC.

For Appellee: Capt David N. Roberts, USMC.

29 May 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 general court-martial convicted the appellant, pursuant to his pleas, of one specification of making a false official statement, three specifications of aggravated sexual abuse of a child, one specification of aggravated sexual contact with a child, two specifications of indecent liberties with a child, one specification of indecent acts, one specification of forcible

sodomy, one specification of child endangerment, one specification of soliciting another to commit an offense, and one specification of possessing child pornography in violation of Articles 107, 120, 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 920, 925, and 934. The military judge also convicted the appellant, pursuant to his pleas, of two specifications of indecent acts with a child, in violation of Article 134, UCMJ 10 U.S.C. § 934. The military judge sentenced the appellant to be confined for thirty-three years and to be discharged from the Navy with a dishonorable discharge.

The convening authority (CA) approved the sentence as adjudged. Pursuant to a pretrial agreement, the CA suspended all confinement in excess of six years until 29 April 2023, and deferred and waived automatic forfeitures in accordance with Article 58b(a), UCMJ. The CA ordered the sentence executed.

The appellant assigns two errors: (1) that Article 120(k), UCMJ, is unconstitutionally vague and overbroad; and (2) that Specifications 1, 2, 5, 6, and 8 under Charge IV (each alleging violations of Article 134, UCMJ) fail to state offenses because they do not allege the "terminal element". Having considered the parties' pleadings and the record of trial, we are satisfied 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. We therefore affirm the findings and the approved sentence.

Constitutionality of Article 120(k)

In his first assigned error the appellant acknowledges this Court's opinion in *United States v. Rheel*, No. 201100108, 2011 CCA LEXIS 370, unpublished op. (N.M.Ct.Crim.App. 20 Dec 2011), *rev. denied*, __ M.J. __, 2012 CAAF LEXIS 349 (C.A.A.F. Mar. 23, 2012) and raises this summary assignment of error in order to preserve the issue for appeal. For the same reasons we cited in *Rheel*, and even more recently in *United States v Hancock*, No. 201100466, 2012 CCA LEXIS 110, unpublished op. (N.M.Ct.Crim.App. 29 Mar 2012) we reject the appellant's claims that Article 120(k) is unconstitutionally vague or overbroad.¹

Article 134

¹ In *Rheel*, we dealt with both a facial and an "as applied" vagueness and overbreadth challenge to Article 120(k). We note that the appellant does not distinguish whether he raises a "facial" or "as applied" challenge; therefore, we will treat his claim as a facial challenge only.

In the context of a guilty plea we apply a plain error analysis to allegations of defective specifications first raised on appeal. *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012). In this case the appellant pled guilty to the offenses at issue, the military judge ensured he understood the terminal element, and the appellant provided a factual basis to establish that his conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces (Record at 89, 90, 109, 120, 133, 136, 139, and 143). Accordingly, even though the specifications failed to expressly allege the terminal element, and assuming without deciding that the specifications do not allege the terminal element by necessary implication, we find that the error in omitting the terminal element, although plain, did not prejudice a substantial right of the appellant. *Ballan*, 71 M.J. at 33. We have no doubt that the appellant enjoyed what has been described as the "clearly established" right of due process to "'notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge.'" *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (quoting *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)). Consequently, we decline to grant relief.

Conclusion

We affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court