

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

**Before
C.L. REISMEIER, J.A. MAKSYM, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MANUEL F. PEREZ
GUNNER'S MATE THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201100650
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 23 September 2011.

Military Judge: CDR Lewis Booker, JAGC, USN.

Convening Authority: Commanding Officer, USS RODNEY M. DAVIS (FFG 60).

Staff Judge Advocate's Recommendation: LT G. Touchton, JAGC, USN.

For Appellant: LtCol Richard Belliss, USMCR; Capt Bow Bottomly, USMC.

For Appellee: Capt David Roberts, USMC.

30 April 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 one specification of larceny, two specifications of wrongful appropriation, and one specification of assault consummated by a battery, in violation of Articles 121 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 928. The military judge

sentenced the appellant to be confined for seven months, to pay a fine of \$6,500.00, to be confined for an additional two months if the fine is not paid, to be reduced to the pay grade of E-1, and to receive a bad-conduct discharge. The convening authority (CA) approved only so much of the sentence as included confinement for seven months, a fine of \$6,500.00, reduction to pay grade E-1, and a bad-conduct discharge, but suspended confinement in excess of six months.

The appellant stole \$3,273.01 from the bank account of his former girlfriend between March and July 2009, after wrongfully appropriating her bank card. He later wrongfully appropriated \$300.00 in the form of a loan using false pretenses. He also grabbed another woman's wrists and squeezed with sufficient force to cause bruising. He raises one assignment of error regarding the sentence imposed as a result of his misconduct: that a fine of \$6,500.00 warrants relief under Article 66(c), UCMJ, because the fine exceeds the amount of unjust enrichment, some restitution has been made, and administrative errors with regard to his pay resulted in non-payment of funds. While we regard the appellant's argument as potentially compelling for purposes of clemency, we cannot agree that it merits relief under Article 66(c).

"[A] court-martial is free to impose any legal sentence that it determines to be appropriate." *United States v. Dedert*, 54 M.J. 904, 909 (N.M.Ct.Crim.App. 2001) (citations omitted). "When a sentence is before us for review, we 'may affirm . . . the sentence or such part or amount of the sentence, as [we] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved.'" *Id.* (quoting Article 66(c), UCMJ). "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

We have carefully considered the appellant's length of service, age, background and performance. We have also considered the entire record, to include the matters the appellant submitted in extenuation and mitigation, clemency, and for attachment to the record. While the trauma the appellant suffered as a child moving in and out of abusive foster homes

would be difficult to overstate, we cannot ignore the misconduct he committed and the breach of trust it reflected. Likewise, the post-trial administrative errors that impacted his pay status had nothing to do with the appellant's misconduct, or with his failure to make restitution.¹ We do not find a fine of \$6,500.00 inappropriate for misconduct that included over \$3,000.00 in theft and \$300.00 in wrongful appropriation, particularly given the means by which the moneys were obtained. *United States v. Stebbins*, 61 M.J. 366, 370-72 (C.A.A.F. 2005).

We find that the approved sentence is appropriate for this offender and his offense. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. Granting sentence relief in this regard would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96.

The findings and sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

¹ The larcenous actions occurred in 2009. The appellant's court-martial and attendant pay problems were in 2011. The appellant made no restitution in the two intervening years other than two \$500.00 payments in August and September 2011.