

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

**Before
C.L. REISMEIER, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JESSE A. SPICER
GUNNERY SERGEANT (E-7), U.S. MARINE CORPS**

**NMCCA 201000241
GENERAL COURT-MARTIAL**

Sentence Adjudged: 18 October 2011.

Military Judge: LtCol G.L. Simmons, USMC.

Convening Authority: Commanding General, Third Marine Aircraft Wing, Marine Corps Air Station Miramar, San Diego, CA.

Staff Judge Advocate's Recommendation: Col Philip J. Betz, Jr., USMC.

For Appellant: LCDR Michael Torrisi, JAGC, USN.

For Appellee: LCDR Craig A. Poulson, JAGC, USN; Maj William Kirby, USMC.

26 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 general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of one specification of false official statement and rape, in violation of Articles 107 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 920. The appellant was sentenced to 90 days

confinement and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

On 21 December 2010, we affirmed the finding of guilty for false official statement, but set aside the finding of guilty for rape. *United States v. Spicer*, No. 201000241, 2010 CCA LEXIS 397, unpublished op. (21 Dec 2010). We authorized a rehearing on sentence. A military judge sitting as a general court-martial sentenced the appellant to five months confinement, reduction to pay grade E-1, and a bad-conduct discharge. The CA approved only so much of the sentence as included thirty days confinement and a bad-conduct discharge.

The appellant alleges that the sentence as approved is inappropriately severe. We disagree.

"[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 Art. 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 false statement he made, its content, and the context in which it was made. The appellant lied to a federal investigator regarding the age of his stepdaughter, VL, at the time he touched and took inappropriate photographs of VL's breasts. The appellant's statements cast the young girl as over the age of 16, placing her actions in the context of consensual, mutual attraction. The appellant, a staff noncommissioned officer, exculpated himself at the expense of his minor stepdaughter, and involved a federal agent in his actions. 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.

We affirm the sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court