

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

**Before  
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**KEVIN C. DUFF  
BOATSWAIN'S MATE THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201300173  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 2 January 2013.

**Military Judge:** CDR Douglas Barber, JAGC, USN.

**Convening Authority:** Commander, Naval Medical Center,  
Portsmouth, VA.

**Staff Judge Advocate's Recommendation:** LT Medardo Martin,  
JAGC, USN.

**For Appellant:** LCDR Brandon Boutelle, JAGC, USN.

**For Appellee:** CAPT Janis Monk, JAGC, USN; LT Philip S.  
Reutlinger, JAGC, USN.

**24 October 2013**

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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 military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of three specifications of attempting to communicate indecent language to a minor under the age of 16, and one specification of violating a lawful general order, in violation of Articles 80 and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 892. The military judge sentenced the appellant to six months confinement

and a bad-conduct discharge. A pretrial agreement had no effect on the adjudged sentence. The convening authority (CA) approved the adjudged sentence and, except for the punitive discharge, ordered it executed.

The appellant's sole assignment of error is that the bad-conduct discharge is unjustifiably severe since: 1) he "never communicated with an actual minor and appears to have never 'acted' on his prurient thoughts"; and 2) his combat deployment and past military service in the Army and Navy.<sup>1</sup> Appellant's Brief of 7 Aug 2013 at 7. After carefully considering the record of trial and the submissions of the parties, we are convinced that the findings and the 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.

### **Background**

On multiple occasions, the appellant used his Yahoo! email account to indecently communicate with a person he believed to be a 12-year-old female. However, the person with whom the appellant was communicating was in actuality a civilian police officer who was posing as a 12-year-old female.

### **Sentence Appropriateness**

The appellant contends that a bad-conduct discharge is unjustifiably severe under the circumstances of his case. We disagree.

This court reviews the appropriateness of the sentence *de novo*. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). A military appellate court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." 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 the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)

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<sup>1</sup> This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

After review of the entire record, we find that the sentence is appropriate for this appellant and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. The appellant was a 26-year-old married father with two young children who repeatedly communicated sexually graphic language to a person he believed was a 12-year-old child. Considering the nature and seriousness of a this conduct, against the appellant's record of military service, overall performance and recognition he received in the Army National Guard and Navy, we conclude that justice is done and the appellant received the punishment he deserves by affirming the sentence as approved by the CA. Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the CA, and we decline to do so. *Healy*, 26 M.J. at 395-96.

#### **Conclusion**

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

For the Court

R.H. TROIDL  
Clerk of Court