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

Before
F.D. MITCHELL, J.A. FISCHER, M.K. JAMISON
Appellate Military Judges

UNITED STATES OF AMERICA

v.

WILLIE L. JAMES III
CHIEF YEOMAN (E-7), U.S. NAVY

NMCCA 201300182
SPECIAL COURT-MARTIAL

Sentence Adjudged: 15 January 2013.
Military Judge: CDR John A. Maksym, JAGC, USN.
Convening Authority: Commander, Patrol and Reconnaissance Force Seventh Fleet, Atsugi, Japan.
Staff Judge Advocate's Recommendation: LCDR T.M. Flintoft, JAGC, USN.
For Appellant: CAPT Diane L. Karr, JAGC, USN.
For Appellee: CDR Mary Grace McAlevy, JAGC, USN; LT Philip S. Reutlinger, JAGC, USN.

24 October 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITES 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 two specifications of attempted larceny, willful dereliction of duty, five specifications of making a false official statement, four specifications of making a false claim, and impersonating a senior chief petty officer, in violation of Articles 80, 92, 107, 132, and 134, Uniform Code of Military Justice, 10 U.S.C.

§§ 880, 892, 907, 932, and 934. The military judge sentenced the appellant to confinement for ten months, reduction to pay grade E-1, and a bad-conduct discharge.[1] The convening authority (CA) approved the sentence as adjudged.

In the appellant's sole assignment of error, he contends that the bad-conduct discharge is inappropriately severe.[2] After carefully considering the record of trial and the submissions of the parties, we are convinced 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.

Factual Background

In March of 2009, the appellant was assigned to Strike Fighter Squadron 27 (VFA-27) in Atsugi, Japan. As the squadron's Educational Service Officer, the appellant failed to order a sufficient number of E-4 to E-5 enlisted advancement examinations for the squadron's eligible personnel in the rate of Aviation Electronics Technician (ATO).[3] To hide his failure to order the correct number of advancement examinations, the appellant created duplicate examinations, administered them in an unauthorized fashion, and created false examination serial numbers. Because each examination had a unique serial number, the appellant's actions resulted in these advancement examinations being declared invalid. The appellant received nonjudicial punishment (NJP) for dereliction of duty associated with the administration of these examinations. He received a punitive letter of reprimand. Following the NJP, the appellant was detached for cause, and the command recommendation for his advancement to Senior Chief was withdrawn. Although the appellant received NJP for dereliction of duty associated with his administration of these examinations, a command investigation revealed that the appellant made false official

[1] Following the announcement of sentence, the military judge recommended that the convening authority suspend the bad-conduct discharge. Record at 186-87.

[2] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] Although not central to the resolution in this case, there is a factual discrepancy between the stipulation of fact and the providence inquiry. The stipulation of fact refers to five Sailors who did not receive examination results due to the appellant's dereliction, while the providence inquiry mentions four Sailors. This is not material to the offenses to which the appellant pled guilty because this discrepancy relates to the underlying dereliction of duty for which the appellant received nonjudicial punishment.

statements with regard to his level of involvement in falsifying the advancement examination profile sheets and serial numbers.[4]

Following his tour with VFA-27, the appellant executed permanent change of station (PCS) orders in January 2011 to Commander, Maritime Prepositioning Ship Squadron (COMPSRON) THREE in Diego Garcia. Despite having been aware that his command recommendation for advancement to the grade of senior chief had been withdrawn, the appellant reported to COMPSRON THREE wearing the grade insignia of a senior chief. He continued to wear senior chief insignia until May of 2011.[5]

In November of 2011, the appellant communicated with his detailer regarding follow-on PCS orders. The appellant was given the choice of executing PCS orders to a stateside command or to Fleet Support Unit 7 (FSU-7) in Misawa, Japan. The appellant requested orders to FSU-7 because he wanted to attempt to reconcile with his former spouse and to be near his son. As part of its security clearance procedures, FSU-7 required that the appellant submit his prior evaluation & counseling records (NAVPERS 1616/27) going back five years. The appellant knew that because of his 2010 NJP from VFA-27, he would be ineligible to receive PCS orders to FSU-7. To conceal his ineligibility to receive PCS orders to FSU-7, the appellant submitted his records as part of the FSU-7 security clearance process, but altered two of his NAVPERS 1616/27 evaluation reports by deleting any reference to his NJP and by changing the promotion recommendation from "promotable" to "early promote."

Having executed PCS orders to FSU-7 in January 2012, the appellant twice attempted to steal U.S. funds by filing

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[4] The appellant pled guilty in Specifications 4 and 5 of Charge III to making false official statements to Lieutenant MR, U.S. Navy. Lieutenant MR was appointed to investigate the circumstances surrounding the administration of these ATO advancement examinations. The military judge inquired why the Government was pursuing charges related to the appellant's misconduct that had already been the subject of NJP. Record at 72-73. Following a colloquy between trial counsel and defense counsel, the military judge concluded that the false official statements to which the appellant pled guilty were sufficiently unrelated to the dereliction of duty for which the appellant received NJP. Record at 77. We agree.

[5] When COMPSRON THREE received official notification of his non-selection to senior chief, the appellant was originally the subject of NJP for wearing unauthorized insignia. The appellant, however, falsely claimed that he had a frocking letter from his previous command and had been unaware that the command's recommendation for his advancement to senior chief had been withdrawn. Based on the appellant's claim, the NJP charges were dismissed. Record at 115-16; Prosecution Exhibit 1 at 1.

counterfeit paperwork with the Personnel Support Detachment (PSD) claiming that he rated overseas housing allowance (OHA). On 15 March 2012, the appellant submitted a false Individual OHA Report (DD Form 2367)[6] with a counterfeit lease agreement and bachelor housing termination letter. His paperwork was rejected by PSD personnel. On 5 April 2012, the appellant submitted false documentation to receive OHA at the "with dependents" rate by submitting a counterfeit lease agreement and command endorsement.

In July of 2012, Special Agent F, Naval Criminal Investigative Service, questioned the appellant as part of an investigation into his impersonation of a senior chief petty officer while assigned to COMPSRON THREE. The appellant made two false official statements to Special Agent Fichthorn. First, the appellant falsely stated that he had received a frocking letter from VFA-27, authorizing him to wear senior chief grade insignia. Second, the appellant falsely stated that he was unaware until after May of 2011 that VFA-27 had recommended revocation of his advancement to senior chief, when, in fact, he knew that his advancement was revoked in September of 2010, prior to his executing orders to COMPSRON THREE.[7]

Sentence Appropriateness

[6] The military judge inquired whether the false official statement regarding the submission of a false DD Form 2367 (Specification 1 of Charge III) represented an unreasonable multiplication of charges with the attempted larceny (Specification 1 of Charge I). Record at 55-56. The defense counsel's position was that it did not. *Id*. at 55. The military judge stated that he was not pleased with the Government bringing that particular charge and would sentence the appellant accordingly. *Id*. at 56. We need not determine whether the appellant's submission of a false DD Form 2367, which served as the basis for his provident plea to false official statement, was unreasonably multiplied with his plea to attempted larceny, because we find that the appellant affirmatively waived this issue. *See United States v. Olano*, 507 U.S. 725, 733-34 (1993) (holding that waiver, the "intentional relinquishment or abandonment of a known right," extinguishes error) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

[7] Because the appellant's two false official statements to Special Agent F (Specifications 2 and 3 of Charge III) were made in the same statement, the Government requested that the military judge treat the specifications as "multiplicious for purposes of sentencing." The military judge agreed. Record at 97. In fact, the military judge indicated that he would consider all five specifications of Article 107, UCMJ, as one offense for purposes of imposing sentence. *Id*. at 98-99.

In accordance with Article 66(c), UCMJ, 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." This court reviews the appropriateness of the sentence *de novo*. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). "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) (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 offender 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. In addition to considering the nature and the seriousness of the specific offenses committed by the appellant, we have carefully considered the individual characteristics of the appellant, which includes his performance and awards during the course of his twenty-four year military career. Considering the entire record, we conclude that justice is done and that the appellant receives the punishment he deserves by affirming the sentence as approved by the CA. Granting sentence relief at this point would be to engage in dispensing clemency -- a prerogative uniquely 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