

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

**Before
M.D. MODZELEWSKI, C.K. JOYCE, J.P. LISIECKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**GRADY W. NATIONS
AVIATION ORDNANCEMAN FIRST CLASS (E-6), U.S. NAVAL RESERVE**

**NMCCA 201200524
GENERAL COURT-MARTIAL**

Sentence Adjudged: 29 August 2012.

Military Judge: Maj Brandon Bolling, USMCR.

Convening Authority: Commander, Navy Recruiting Command,
Millington, TN.

Staff Judge Advocate's Recommendation: LCDR A.M. Cooper,
JAGC, USN.

For Appellant: LT Jared Hernandez, JAGC, USN.

For Appellee: CDR James E. Carsten, JAGC, USN; CDR Mary
Grace McAlevy, JAGC, USN; LT Philip Reutlinger, JAGC, USN.

26 September 2013

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.**

LISIECKI, Judge:

Before a general court-martial composed of officer members, the appellant was convicted, contrary to his pleas, of making a false official statement and wearing an unauthorized decoration in violation of Articles 107 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 934. The members sentenced the appellant to a dishonorable discharge. The convening authority (CA) approved the sentence.

The appellant raises two assignments of error: (1) that the dishonorable discharge is inappropriately severe; and (2) that the military judge abused his discretion by allowing improper MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), evidence to be admitted over defense objection and without proper notice.¹

Upon initial review of the record, this court specified the following additional issue: Did the appellant "make" or "sign" a false official statement by "submitting for inclusion" in his official military record a document purporting to certify an award, which document was false and was then known by the appellant to be false?

After careful consideration of the record and all the submissions of the parties, we conclude that the findings and the sentence are correct in law and in fact. Additionally, no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was a first class petty officer with over sixteen years of active service in the U.S. Navy. At the time of these offenses, he was serving as the coordinator of the Honor Guard with the Navy Operational Support Center, Nashville, Tennessee. In this position, he participated in over 1,500 military funerals and over 1,500 casualty calls to families of fallen service members.

On 30 September 2010, the appellant submitted for insertion into his official military record an altered copy of his father's Distinguished Flying Cross (DFC) certificate. The DFC is a highly recognized award for heroism or extraordinary achievement while participating in an aerial flight. Record at 383-84. The appellant's father, an Air Force technical sergeant, was awarded the DFC by the Department of the Air Force "for extraordinary achievement while participating in aerial flight as an HC-130H Rescue Crew Flight Engineer over Central Laos, north of the Demilitarized Zone, on 11 November 1967." Prosecution Exhibit 5 at 1.

When the appellant submitted the DFC certificate for inclusion in his own record, the actual certificate had been altered to reflect his own name and rank, and a more recent date

¹ This second assignment of error was submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

of action. The altered certificate was accepted by Naval Personnel Command and the appellant's electronic service record (ESR) thereafter reflected that he had been awarded the DFC. The appellant wore the DFC medal on his uniform as he participated in military funerals and casualty calls from 1 January 2010 until 23 September 2011. For this course of action, the appellant was charged with, and convicted of, two offenses: the unauthorized wearing of the decoration in violation of Article 134 and a charge of making a false official statement for the act of submitting the altered award citation for inclusion in his official military record.

False Official Statement

Article 107, UCMJ, provides that "[a]ny person subject to this chapter who, with intent to deceive, *signs* any false record, return, regulation, order, or other official document, knowing it to be false, or *makes* any other false official statement knowing it to be false, shall be punished as a court-martial may direct." (Emphasis added). The charge against the appellant reads, in part, as follows: "[the appellant] . . . did . . . with intent to deceive, submit for inclusion in his Electronic Service Record [ESR] a paper purporting to be an award of the Distinguished Flying Cross, which award was totally false, and was then known by the said [appellant] to be so false."

The specified issue now before us is whether the appellant's act of submitting a false DFC certificate to be inserted into his ESR, without any accompanying verbal statement, is a "statement" in violation of Article 107. We conclude that it is.

It is well-settled that the purpose of Article 107 is to protect the authorized functions of the military from the perversion that might result from deceptive practices. See *United States v. Spicer*, 71 M.J. 470, 473-74 (C.A.A.F. 2013). In a case with similar circumstances to this one, the Army Court of Criminal Appeals concluded that an act of handing over a false document constitutes making a false statement within the meaning of Article 107. *United States v. Newson*, 54 M.J. 823 (Army Ct.Crim.App. 2001). In *Newson*, the appellant handed to her supervisor a fraudulent written pregnancy profile, without speaking any words. The issue before the court was whether handing over a known false document without speaking any words may lawfully constitute the offense of making "any other" false official statement under Article 107, UCMJ. *Id.* at 824. The

Army court reasoned that “[a]lthough the word ‘statement,’ in the context of making a false official statement, is not defined in either the *Manual for Courts-Martial* or the Military Judges’ Benchbook, other areas of military law have interpreted the term ‘statement’ to include nonverbal conduct.” *Id.* (footnote omitted). Specifically the hearsay rule defines a “statement” to include “‘nonverbal conduct of a person, if it is intended by the person as an assertion.’” *Id.* at 825 (quoting MILITARY RULE OF EVIDENCE 801(a)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.)).

The court in *Newson* held that the physical act or nonverbal conduct intended by a soldier as an assertion is a “statement” that may form the basis for a charge of making “any other” false official statement under Article 107, UCMJ, provided that remaining elements of that offense are satisfied. *Id.* We concur with this analysis, and adopt it here.

We find that the appellant’s conviction under Article 107 is factually and legally sufficient as the act of submitting a known fraudulent document to be included in a service member’s official ESR is a false official statement within the meaning of Article 107.

Abuse of Discretion Under MIL. R. EVID. 404(b)

The appellant asserts that the military judge abused his discretion by admitting improper MIL. R. EVID. 404(b) evidence over defense objection. The Government called two witnesses to testify that they observed the appellant wearing the DFC well before the appellant submitted the certificate for inclusion in his ESR and before the Navy Personnel Command accepted the award. Upon defense objection, the military judge determined that the evidence fell within the scope of MIL. R. EVID. 404(b), articulated an exhaustive analysis of whether the testimony was properly admissible to prove intent, and concluded that it was. Record at 366-78.

We review a military judge’s decision to admit or exclude evidence for an abuse of discretion. *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010). Assuming *arguendo* that this testimony was evidence of “other crimes, wrongs, or acts” within the meaning of MIL. R. EVID. 404(b), we conclude that the military judge did not abuse his discretion in admitting the evidence for the limited purpose of proving the appellant’s intent.

Sentence Appropriateness

In his sentencing hearing, the appellant highlighted his exceptional prior record of service, submitting performance evaluation reports, letters written on his behalf, and certificates, awards, and citations.

We review the appropriateness of sentences *de novo*. *United States v. Roach*, 66 M.J. 410, 413 (C.A.A.F. 2008). We may only affirm a sentence that we find correct in law and fact based on our review of the entire record. Art. 66(c), UCMJ. We are mindful of our mandated judicial function under *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988), and analysis required by *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

In arguing that the dishonorable discharge was inappropriately severe, the appellant contends that the military judge erred in that he erroneously omitted the language found in R.C.M. 1003(b)(8)(B): "A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies[.]" More specifically, the appellant contends that if the military judge had discussed a dishonorable discharge in relation to a "felony," the members would have awarded a bad-conduct discharge. We find no error.

The military judge properly instructed the members on the severity of both a dishonorable discharge and a bad-conduct discharge, and distinguished between the two. Record at 720-21. Although a dishonorable discharge is a harsh punishment with serious ramifications, in this particular case it is not an unjustifiably severe punishment. We reach that conclusion after careful consideration of the entire record of trial, including the evidence presented in extenuation and mitigation, and the matters submitted in clemency. We balance that consideration against the nature of the offenses committed by the appellant. The appellant's misconduct was serious. He intentionally submitted a false DFC to alter his official military record. Having fraudulently altered his ESR, the appellant thereafter wrongfully wore the DFC. The maximum authorized punishment for the appellant's offenses was confinement for 66 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The members chose to adjudge solely a dishonorable discharge.

After giving the appellant "individualized consideration . . . on the basis of the nature and seriousness of the offense and character of the offender," we are convinced that his

sentence is not inappropriately severe. *Snelling*, 14 M.J. at 268. Granting relief absent a substantive legal error would be an act of clemency, a congressionally allocated function entrusted to other authorities, but not to this court. *Healy*, 26 M.J. 395-96. In light of the foregoing, we resolve this assignment adversely to the appellant, finding no error in his adjudged or approved sentence based upon severity.

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the CA, are affirmed.

Chief Judge MODZELEWSKI and Judge JOYCE concur.

For the Court

R.H. TROIDL
Clerk of Court