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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

GEORGE W. PRICE, JR.

v.

UNITED STATES OF AMERICA

NMCCA 201000193
Review of Petition for Extraordinary Relief in the Nature of a Writ of *Mandamus*

Sentence Adjudged: 12 August 2009.
Military Judge: CDR B.L. Payton-O'Brien, JAGC, USN.
Convening Authority: Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Maj M.J. Kent, USMC.
For Petitioner: LT Kevin S. Quencer, JAGC, USN.
For Respondent: LT Ian D. Maclean, JAGC, USN.

18 April 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.

PER CURIAM:

A military judge sitting as a general court-martial convicted the petitioner, pursuant to his pleas, of one specification of violating a lawful general order, and three specifications of abusive sexual contact, in violation of Articles 92 and 120, 10 U.S.C. §§ 892 and 920. In August 2009, the military judge sentenced the petitioner to forfeiture of all pay and allowances, confinement for six years, and a dishonorable discharge. In March 2010, the convening authority (CA) approved the sentence and, except for the punitive discharge, ordered it executed. Pursuant to a pretrial

agreement (PTA), the CA suspended confinement in excess of 48 months for the period of confinement served plus six months. In August 2010, this court affirmed the findings and sentence as approved by the CA. The petitioner was dishonorably discharged from the U.S. Marine Corps in October 2011.

As discussed below, Commander, Navy Personnel Command (CNPC), the officer exercising general court-martial jurisdiction (GCMCA) over the petitioner, subsequently vacated the suspension of 12 months of the previously suspended confinement. The petitioner now challenges the hearing that preceded the vacation and seeks issuance of a writ of *mandamus* ordering a new vacation hearing by a neutral and detached hearing officer.

Background

While confined at the Naval Consolidated Brig Charleston, the petitioner was sent to four Discipline and Adjustment Boards (DABs) for alleged infractions of brig rules. At the first DAB, in November 2011, he was found guilty of possessing tobacco and pornography, which were defined as contraband under brig regulations. The petitioner apparently obtained the contraband from a brig guard; their prohibited relationship and associated acts was the subject of the guard's subsequent trial by special court-martial. Commander (CDR) CB was assigned as the brig's executive officer and served as reviewing officer for the first DAB. The brig's then commanding officer, CDR RD, approved the DAB findings and imposed punishment.

The petitioner was sent to three more DABs between April and July 2012. By that time, CDR CB had assumed command of the brig, and he approved each DAB's findings and imposed punishment on the petitioner. As the brig commanding officer, CDR CB was also the officer with special court-martial jurisdiction (SPCMCA) over the petitioner.

The PTA included as a condition of suspension that the CA "may" vacate any periods of suspension agreed to in the PTA, "after complying with the procedures set forth in R.C.M. 1109" for "any misconduct after the date of the Convening Authority's action." PTA at ¶ 12. Prior to the vacation hearing, the petitioner's counsel[1] requested that the GCMCA appoint a

[1] "The petitioner's counsel," "counsel for the probationer," and related terms are used interchangeably throughout this opinion. The petitioner is referred to as such for the purposes of this writ, but he was "the probationer" at the vacation hearing.

different hearing officer, citing petitioner's constitutional "Due Process rights" and asserting that CDR CB could not serve "impartially" as he had previously determined both guilt and appropriate punishment for the "same matters pending a vacation hearing." Letter of Counsel for the Probationer of 18 Jul 2012. The GCMCA denied the request, citing the requirement under RULE FOR COURTS-MARTIAL 1109, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) that the SPCMCA "personally hold vacation hearings in this type of case." CNPC letter of 22 Aug 2012. On 13 September 2012, CDR CB, the SPCMCA, personally conducted a hearing on the alleged violations of the conditions of suspension; specifically the misconduct subject of the four DABs.

Approximately one hour into the hearing, counsel for the probationer moved to introduce five documentary exhibits, some of which contained materials related to the petitioner's DABs. She suggested that she would challenge whether some of the misconduct underlying the DABs had actually occurred. CDR CB admitted the evidence, but stated that he "would not allow" the counsel for the probationer to "retry" those DABs. He suggested that he had "concluded already that . . . the D and A Board results are valid and thereby a decision's already been made." Audio Recording of Hearing of 13 Sep 2013, at 1.07.13-1.07.54.

Counsel for the probationer then requested a recess to renew her request for a more neutral and detached hearing officer. The hearing was recessed, although it is not clear from the record whether a second request was made. When the hearing reconvened, CDR CB continued as the hearing officer. He then stated that he would "allow discussion of each D and A Board exhibit . . . [and] allow . . . counsel for probationer to present information that pertains to Prisoner Price and the disciplinary reports. . . ." He added that he would "give each argument due consideration and ensure that I maintain a fair and impartial attitude throughout the remainder of the hearing as is my job to do as hearing officer." *Id.* at 1.13.55-1.14.52.

Although counsel for the probationer suggested that she would challenge whether the petitioner had committed the misconduct underlying some of the DABs, she did so through argument only, focusing exclusively on the three DABs in 2012. CDR CB listened to this argument at the close of the hearing without interruption and without further reference to whether the disposition of the DABs was binding. Counsel for the probationer's argument relied on references to portions of the DAB documents that were favorable to the defense, and to documents highlighting the character and other misconduct of a

fellow prisoner whose complaints formed the basis for the rules infractions considered at one of the DABs. The defense presented no testimony relevant to reconsideration of the DABs; neither of the defense witnesses challenged the underlying misconduct, and instead focused on the petitioner's character and attempts to rehabilitate him.

In October 2012, the SPCMCA recommended that the GCMCA vacate 12 months of the suspended portion of petitioner's sentence to confinement. The Report of Proceedings included CDR CB's remark that the "most serious infraction" and "primary basis for the vacation hearing" was the petitioner's manipulation of a staff member to provide him contraband, the subject of the November 2011 DAB. Report of Proceedings at ¶ 18. In response, counsel for the probationer submitted a letter of deficiency to the GCMCA asserting deficiencies including that CDR CB was "partial and biased" due to his role in the prior DABs and statements that he had already concluded that the DAB "results were valid" and that he "would not allow" the counsel for the probationer to "retry" those DABs.

In his endorsement of that letter of deficiency, CDR CB acknowledged advising counsel for the probationer that "it was already determined that [the petitioner] had committed these offenses and that the [DABs] were valid and as such . . . would not be retried or reconvened." CO, NavConBrig Charleston ltr of 15 Oct 2012. He also acknowledged stating that he "could remain impartial and objective throughout the vacation hearing proceedings and consider evidence from Counsel for the Probationer in providing [his] recommendation regarding suspension." *Id*.

The GCMCA followed CDR CB's recommendation and vacated 12 months of the suspended confinement in December 2012. *See* Appendix 6 to Petitioner's Brief of 13 Feb 2013. The GCMCA also noted, as a reason for vacating the suspension, that the petitioner's "misconduct . . . is undermining the good order and discipline [in the brig]" and "directly resulted in the court-martial of a staff member." Report of Proceeding at ¶ 19e.

Jurisdiction

The parties acknowledge our authority to "issue all writs necessary or appropriate in aid of [our] jurisdiction [] and agreeable to the usages and principles of law." All Writs Act, 28 U.S.C. § 1651(a); *see also Cheney v. United States Dist. Court for Dist. Of Columbia*, 542 U.S. 367, 380 (2004). The

parties also agree that the issuance of a writ is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney*, 542 U.S. at 380 (citation and internal quotation marks omitted). The primary issue in controversy is whether, under the circumstances present here, it is "necessary or appropriate" to issue the requested writ.

Error

We agree with the petitioner that the hearing officer's stated unwillingness to reconsider the misconduct subject of the DAB findings constituted error, although we evaluate that error differently than the petitioner. The petitioner sees it as a matter of personal bias and a lack of neutrality and detachment, which he contends is a Due Process requirement for SPCMCAs conducting vacation hearings.

We note that neither the Court of Appeals for the Armed Forces (CAAF) nor this court have held that the requirement for "a neutral and detached" hearing body applies to the vacation hearing officer. *See United States v. Connell*, 42 M.J. 462, 465 (C.A.A.F. 1995); *United States. v. Englert*, 42 M.J. 827, 830-31 (N.M.Ct.Crim.App. 1995). In *Connell*, the court acknowledged that "it is constitutionally permissible for the . . . hearing function to be separate from the final decision-making function." 42 M.J. at 465 (quoting *United States v. Bingham*, 3 M.J. 119, 123 (C.M.A. 1977)). Moreover, the court declined to answer the questions of "[w]here those functions are split under Article 72, [UCMJ,] does *Morrissey*'s due process requirement of 'a "neutral and detached" hearing body' (P 10) apply only to the decision-maker (the general court-martial convening authority) or, as well, to the hearing officer (the special court-martial convening authority)?" *Id*. (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)).[2]

Similar to the CAAF in *Connell*, we need not decide the petitioner's "broad constitutional challenge," because we hold that the petitioner's SPCMA, "who conducted his revocation hearing, met that standard." *Id*.

[2] *But see United States v. Conover*, 61 M.J. 681, 687 (C.G.Ct.Crim.App. 2005) ("Since the [GCMCA] must be neutral and detached when carrying out the decision-making function [under R.C.M. 1109], it is our conclusion that the hearing officer must also meet that requirement in compiling and reporting the facts upon which the decision must be based.").

The SPCMCA's prior involvement with the petitioner's DABs was simply part of his official duty and not disqualifying. CAs often have knowledge of an individual's broader disciplinary history, but they only lose their neutrality and detachment when that knowledge establishes a "fixed bias" against the individual's interest. *United States v. Rozycki,* 3 M.J. 127, 130 (C.M.A. 1977); *see also Connell*, 42 M.J. at 467 (distinguishing between a CA permissibly "acting in furtherance of his official interest" and acting impermissibly with "personal bias"). There is no indication that this SPCMCA bore any bias against the petitioner as a result of his review and approval of the findings of the DABs. On the contrary, "neither the evidentiary content of the hearing record nor the recommendation that followed is noteworthy as demonstrating the hearing officer's personal bias, as opposed to his acting in furtherance of his official interest." *Connell*, 42 M.J. at 467 (citing *United States v. Jeter*, 35 M.J. 442, 446 (C.M.A. 1992)).

We nonetheless find error in the hearing officer's stated unwillingness to reconsider the DAB findings, which violates the petitioner's right to a full and fair hearing under R.C.M. 1109. At the close of a vacation hearing, the presiding officer must provide an evaluation of any contested facts. *United States v. Miley*, 59 M.J. 300, 304 (C.A.A.F. 2004). The *Miley* Court reasoned that the hearing "would have little meaning if the SPCMCA was not required to resolve any contested evidentiary questions and provide the basis for that resolution to the GCMCA." *Id*. *A fortiori*, the hearing would have little meaning if the SPCMCA was not required to hear the facts contested in the first place. *See Englert*, 42 M.J. at 831; *cf. Morrisey*, 408 U.S. at 488 ("The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions . . . ."). The SPCMCA's statements during the proceeding and in his endorsement of the letter of deficiencies reveal that he misunderstood that obligation.

Issuance of a Writ of *Mandamus*

Although we find error, this petition does not meet the necessary conditions for issuance of a writ of *mandamus*. A petition must satisfy "three conditions . . . before a court may provide extraordinary relief in the form of a writ of mandamus: (1) the party seeking the writ must have 'no other adequate means to attain the relief';[3] (2) the party seeking the relief

[3] We reject the Government's argument that because an Article 138, UCMJ, complaint was still a viable option the petitioner did not exhaust other remedies. Such a complaint would have been forwarded to the same GCMCA who

must show that the 'right to issuance of the relief is clear and indisputable'; and (3) . . . the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.'" *Lawanson v. United States*, No. 201200187, 2012 CCA LEXIS 345 at *14, unpublished op. (N.M.Ct.Crim.App. 2012) (quoting *Cheney*, 542 U.S. at 380-81). This petition falls short of satisfying the second and third conditions.

There is no clear and indisputable right to relief because the law requires the SPCMCA, and no one else, to hold the vacation hearing. 10 U.S.C. § 872. The CAAF has recognized that the SPCMCA may still be "constitutionally disqualified," *Bingham,* 3 M.J. at 124, but the same court has declined to disqualify a CA under very similar circumstances. In *Connell*, the SPCMCA similarly appeared to treat the appellant's misconduct as a "done deal" because the same SPCMCA had imposed nonjudicial punishment just weeks before the vacation hearing based upon the same misconduct. 42 M.J. at 467. At the hearing, the SPCMCA appeared partial in that he called and examined his own witnesses. Still, the court declined to grant relief because it could identify no prejudice, since the appellant freely admitted having violated the conditions of his suspended sentence. It was "virtually unthinkable that, with the underlying misconduct established, any hearing officer would have failed to recommend vacation of the suspension." *Id*.

The underlying misconduct was established by admission in *Connell*, and in this case by extensive evidence of misconduct and the absence of conflicting evidence, particularly with respect to the most serious misconduct, the petitioner's manipulation of a staff member to provide him contraband that was the subject of the November 2011 DAB and that staff member's subsequent court-martial. The effect from our standpoint is the same: we cannot perceive any prejudice to the petitioner resulting from the SPCMCA's initial misunderstanding as to his role on this hearing. Potential prejudice attributable to his stated unwillingness to reconsider the findings of the DABs would be of much greater concern if the petitioner offered substantive evidence to reconsider, but the petitioner presented no such evidence at the hearing, in his letter of deficiencies to the GCMCA, or in this petition for extraordinary relief. He has not challenged the DAB finding that both the SPCMCA and

---

denied the petitioner's requests for a different hearing officer, and who previously considered the letter of deficiency submitted after the hearing. Thus we do not find it to be an "adequate means to attain the relief" sought by this petition.

GCMCA considered the most serious misconduct, and his challenge to the other three DABs during the hearing was purely argumentative. These minimal differences do not meaningfully distinguish the petitioner's case from *Connell* and do not establish a clear and indisputable right to relief.

Moreover, the record indicates that the petitioner was availed of all other rights due under Article 72, UCMJ, R.C.M. 1109, and applicable case law, including the opportunity to be heard and to present witnesses and other evidence. Perhaps most significantly, the petitioner neither asserts nor does the record suggest that the GCMCA was not "a neutral and detached hearing body." Quite the opposite, the record reflects that the GCMCA reviewed the record of proceedings and recommendation of the SPCMCA, decided that the petitioner violated a condition of probation and then decided to vacate a portion of the suspended sentence. *See* R.C.M. 1109(d)(2).

Apart from the foregoing, we find it inappropriate as a matter of discretion to grant a writ of *mandamus* in this case. The remedy of *mandamus* is a drastic one, to be invoked only in extraordinary situations. *Kerr v. United States Dist. Court for Northern Dist.*, 426 U.S. 394, 402 (1976). One commonly-cited situation is a "judicial usurpation of power." *Will v. United States*, 389 U.S. 90, 95 (1967). Were we concerned that this SPCMCA had abused his "discretionary powers of a quasi-judicial nature," *Bingham*, 3 M.J. at 124, we might decide differently. But this SPCMCA, a non-lawyer, simply made an injudicious and legally inaccurate comment in the midst of more than two hours of proceedings. Both before and after that comment, he expressed a willingness to receive all of the petitioner's evidence, to listen to all of his arguments, and to keep an open mind before making his recommendation to the GCMCA. Ultimately, he only recommended that 12 months of the suspended 24 months confinement be vacated. This recommendation for only a partial vacation is significant in light of the severity of the petitioner's misconduct subject of the first DAB and his pattern of continued misconduct thereafter. Taken as a whole, these circumstances do not warrant such an extraordinary form of relief.

Conclusion

The Petition for Extraordinary Relief in the Nature of a Writ of *Mandamus* is denied.

For the Court

R.H. TROIDL
Clerk of Court