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

UNITED STATES OF AMERICA

v.

KYMANI R. TATE
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201200399
SPECIAL COURT-MARTIAL

Sentence Adjudged: 18 July 2012.
Military Judge: Col Paul Starita, USMCR.
Convening Authority: Commanding Officer, Combat Logistics Regiment 17, 1st Marine Logistics Group, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: LtCol E.J. Peterson, USMC.
For Appellant: CAPT Diane L. Karr, JAGC, USN.
For Appellee: LT Philip S. Reutlinger, JAGC, USN.

12 March 2013

OPINION OF THE COURT

JOYCE, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, consistent with his pleas, of one specification of violating a lawful general order, one specification of graft, one specification of violating 18 U.S.C. § 1028a(7) by transferring, possessing, and using a means of identification of another person with intent to commit, or aid or abet, or in connection with, an unlawful activity, in

violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The military judge sentenced the appellant to confinement for 10 months, reduction to pay grade E-1, a fine of $2,260.00, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged, suspended all confinement in excess of 150 days, and, except for the punitive discharge, ordered the sentence executed.

The appellant now avers that the military judge erred in accepting his guilty plea to violating paragraph C4.1.3 of Department of Defense 5400.11-R (DoD 5400.11-R) because it is a non-punitive regulation and, as a result, his guilty plea to the alleged violation of Article 92(1) is improvident. We agree that the regulation is not punitive and set aside the guilty finding for Specification 2 of Charge II and Charge II. After carefully considering the record of trial and the submission of the parties, we are convinced that the remaining findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was assigned as the Systems Noncommissioned Officer and Terminal Area Security Officer for the Disbursing Office at Marine Corps Base, Camp Pendleton, California. As part of his duties, he was granted access to reset pin numbers belonging to service members in their Defense Financial Accounting Service (DFAS) MyPay accounts. Record at 26. The appellant had an overdue account at a local jewelry store, and came to an arrangement with the store manager wherein the store manager would provide the appellant with the social security numbers of other service members, who presumably had accounts with the store, so that the appellant could reset their pin numbers permitting the manager of the jewelry store to set up allotments. The appellant admitted that he reset approximately 100 pin numbers to accounts belonging to both Marines and Sailors without their knowledge or consent. *Id.* at 35. In exchange for his services, the appellant received $1,460.00 and a necklace worth approximately $800.00. Prosecution Exhibit 1 at 3.

Department of Defense Privacy Program Regulation

Specification 2 of Charge II alleges that the appellant failed to obey a lawful general order, referencing paragraph C4.1.3 of DoD 5400.11-R, “by disclosing information from a

system of records to an individual not entitled to receive the information."

DoD 5400.11-R, dated May 14, 2007, was issued by "Michael B. Donley, DoD Senior Privacy Official," is titled "Department of Defense Privacy Program," and is set forth, in part, below from the Foreword:

> This Regulation is reissued under the authority of DoD Directive 5400.11, "DoD Privacy Program," May 8, 2007 (Reference (a)). It *provides guidance* on section 552a of title 5 United States Code (U.S.C.), the Privacy Act of 1974, as amended, (Reference (b)), and *prescribes uniform procedures for implementation of the DoD Privacy Program*.
>
> . . .
>
> This Regulation applies to the Office of the Secretary of Defense, *the Military Departments*, the Chairman of the Joint Chiefs of Staff, the Combatant Commanders, the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, *and all other organizational entities* within the Department of Defense (hereinafter referred to as the "DoD Components").
>
> . . .
>
> This Regulation is effective immediately and *its use is mandatory for all DoD components*. *The Heads of the DoD Components may issue supplementary instructions* only when necessary to provide for unique requirements within their Components. Such instructions may not conflict with the provisions of this Regulation.

Appellate Exhibit III at 2-3 (emphasis added).

Chapter 10 of the regulation, entitled "PRIVACY ACT VIOLATIONS," has the following subparagraph:

> C10.4. CRIMINAL PENALTIES
>
> > C.10.4.1. The [Privacy] Act *also provides for criminal penalties* . .. . Any official or employee may be found guilty of a misdemeanor and fined not more than $5,000 if he or she willfully: C.10.4.1.1. Discloses information

> from a system of records, knowing that dissemination is prohibited, to anyone not entitled to receive the information.

Id. at 4 (emphasis added).

The appellant pled guilty and was convicted of violating the following paragraph of the regulation:

> C4.1.3. Disclosures outside the Department of Defense. Do not disclose personal information from a system of records outside the Department of Defense unless:
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> C4.1.3.1. The record has been requested by the individual to whom it pertains;
>
> C4.1.3.2. The written consent of the individual to whom the record pertains has been obtained for release of the record to the requesting Agency, activity, or individual; or
>
> C4.1.3.3. The release is authorized pursuant to one of the specific non-consensual conditions of disclosure as set forth in section C4.2.[1] of this Chapter.

Id. at 5.

The appellant stipulated, as fact, that he "believed that the Secretary of Defense is authorized to issue that [regulation], believed it to be properly published, and believed it to be a lawful order." PE 1 at 2. During the providence inquiry, the military judge asked the appellant if he "believe[d] and admit[ted] that it's a lawful regulation," to which the appellant responded affirmatively.[2] Record at 21-22. The appellant now claims that this regulation is not punitive

[1] Paragraph C4.2 is titled "NON-CONSENSUAL CONDITIONS OF DISCLOSURES." AE III at 6.

[2] The military judge had previously explained to the appellant that in order for a general order or regulation "to be lawful it must relate to a specific military duty and be one which is authorized under the circumstances." Record at 19. He also advised that "[a] general order or regulation is lawful if it is reasonably necessary to safeguard or protect the morale, discipline, usefulness of the members of the command and is directly connected with the maintenance of good order and discipline in the Armed Services . . . ." *Id.* at 19. Although accurate statements of law, we find this colloquy insufficient to conclude that the regulation was punitive.

because "its stated purpose is to merely establish policy guidance for the DoD Privacy Program and its self-described sanctions are less severe than those authorized under Article 92(1), UCMJ." Appellant's Brief of 14 Nov 2012 at 7.

Discussion

We review a military judge's decision to accept a plea of guilty for abuse of discretion. *United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F. 1996). We may find an abuse of discretion only if there is a substantial basis in law or fact for doing so. *United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F. 2008).

We begin our analysis with the recognition that the punitive character of a regulation is determined by examining it in its entirety. Ordinarily, no single factor is controlling. *United States v. Nardell,* 45 C.M.R. 101, 103 (C.M.A. 1972). In every case, the question is whether the regulation, by its terms, "regulates conduct of individual members and that its direct application of sanctions for its violation is self-evident." *United States v. Blanchard*, 19 M.J. 196, 197 (C.M.A. 1985) (citations omitted); *see also* the Drafters' Analysis of Article 92, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), at Appendix 23, ¶ 16 (citing *Nardell*). Further, "if the order requires implementation by subordinate commanders to give it effect as a code of conduct, it will not qualify as a general order for the purpose of an Article 92 prosecution." *Blanchard*, 19 M.J. at 197 (citations omitted).

The President makes it clear that "[n]ot all provisions in general orders or regulations can be enforced under Article 92(1). Regulations which only supply *general guidelines* or *advice for conducting military functions may not be enforceable under Article 92(1)*." MCM, Part IV, ¶ 16c(1)(e) (emphasis added).

Applying these standards to the instant case, we conclude the challenged regulation is not punitive in nature. First, the stated purpose of the regulation is to "provide[] guidance" on the "Privacy Act" and "prescribe[] uniform procedures" to Heads of DoD Components and all other "organizational entities" within DoD to manage and implement the privacy program. It neither affirmatively declares nor otherwise clearly regulates the conduct of individual members. The Government asserts that the directive language, "do not disclose" and other language renders the punitive nature of the regulation "self-evident."

Government's Answer of 14 Jan 2012 at 7. We disagree and find that the words "do not" in paragraph C4.1.3 of the regulation do not regulate conduct of individual members. We note that the words "do not," repeated more than 30 times in the 110 page regulation, appear consistent with the stated purpose of the regulation of advising "Heads of DoD Components" of the rules pertaining to disclosure of personal information from a system of records.[3] C*f. United States v. Simmons*, 70 M.J. 649, 651 (N.M.C.C.A. 2012) (holding a DoD directive regarding uniform regulations "was published with a view toward governing conduct of service members, rather than simply stating guidelines for performing military functions" and was punitive in nature); *United States v. Horton,* 17 M.J. 1131, 1133-34 (N.M.C.M.R. 1984) (holding that the use of mandatory language such as "shall be reported" and "must be reported," when dealing with classified material, was specifically directed at individuals, both military and civilian, throughout the entire instruction, therefore the instruction was punitive).

Second, the regulation does not reflect the direct application of sanctions for its violation. *United States v. Shavrnoch*, 49 M.J. 334, 336 (C.A.A.F. 1998). Paragraph C10.4.1 of the regulation states that the Privacy Act "also provides for criminal penalties," but provides no notice to individual service members that any portion of the regulation might be enforceable under Article 92(1). On the contrary, the potential criminal and civil penalties addressed in Paragraph C10.4.1 are those provided for by the Privacy Act itself and not for violation of the Department of Defense regulation.[4] We also find reference to potential statutory sanctions consistent with the stated purpose of the regulation to "provide[] guidance" on the "Privacy Act" and "prescribe[] uniform procedures." Therefore

[3] This is supported by the Privacy Act itself, which refers directly to "each agency," "no agency," "any agency," "an agency," *et cetera*. It is not directed toward individuals, and particularly not service members. Section 552(b) of Title 5, United States Code.

[4] We are also troubled by the disparity in punishments. The Privacy Act provides for conviction of a misdemeanor, a term not used in the military justice system, and a maximum fine of $5,000.00. The maximum punishment for a violation of Article 92(1) (Failure to Obey Lawful General Order or Regulation) is 2 years confinement and a dishonorable discharge, while the maximum punishment for a violation of Article 92(3) (Willful Dereliction of Duty) carries a maximum punishment of 6 months and a bad-conduct discharge. Paragraphs 16.e.(2) and (3)(B) of the 2008 Manual; *see also United States v. Shepherd*, No. 34766, 2002 CCA LEXIS, *unpublished op.* 189 (A.F.Ct.Crim.App. 2002) (affirming a finding of guilty to willful dereliction of duty by failing to safeguard personal Privacy Act information of squadron members).

we conclude that sanction for violations of this regulation is not "self-evident." *Shavrnoch*, 49 M.J. at 335.

Third, on the basis of the record before us, we are left with doubt that the individual who signed the regulation, "Michael B. Donley, DoD Senior Privacy Official," had the authority to sign or issue a punitive general regulation.[5] *Cf. Simmons*, 70 M.J. at 651.

Fourth, the fact that the regulation explicitly authorizes "Heads of DoD Components" to issue supplementary instructions tailored to the unique requirements within their components further supports the conclusion that the regulation merely establishes policy guidance. As written, the regulation fails to provide fair notice of its penal nature to individual service members potentially subject to its terms when the only reference to potential punishment is directed toward criminal and civil remedies provided for in a separate statute. *Cf. United States v. Jackson*, 61 M.J. 731, 734 (N.M.Ct.Crim.App. 2005).

While it is possible for parts of a document to be punitive while others are not, *United States v. Brooks,* 42 C.M.R. 220, 222 (C.M.A. 1970), the President specifically prohibits the prosecution of a violation of Article 92(1) when, as here, the regulation was intended to provided general guidance to Heads of DoD Components and prescribe uniform procedures for implementation of the DoD Privacy Program. "General orders, like penal statutes, are to be strictly construed, *United States v. Scott*, 46 C.M.R. 25 (1972), and when doubt exists respecting an order's meaning or applicability, the doubt should be resolved in favor of the accused." *United States v. Hode*, 44 M.J. 816, 817 (A.F.Ct.Crim.App. 1996) (citations omitted).

As this regulation is not punitive in nature, we find that the military judge abused his discretion in accepting the appellant's pleas of guilty to violation of a lawful general regulation. We therefore set aside the findings of guilty to Specification 2 of Charge II and Charge II.

[5] This is especially the case where the Government is silent in addressing the language from Part IV, ¶ 16c (1)(a) of the 2008 Manual, in which a lawful general regulation may only be issued by, "the President or the Secretary of Defense, of Homeland Security, or of a military department, [or by various uniformed officials]."

Reassessment of the Sentence

Having set aside Specification 2 of Charge II and Charge II, we must next determine if we can reassess the sentence. A "'dramatic change in the penalty landscape' gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)). We find that there has not been a dramatic change in the sentencing landscape and that we are able to reassess the sentence in accordance with the principles set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 438, (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986). The record as a whole and the facts adduced on the affirmed charge and its two specifications give ample justification for the sentence awarded, with or without a violation of Article 92(1). The appellant's conduct is still reflected in the gravamen offenses of graft and the violation of 18 U.S.C. § 1028a(7). Setting aside the violation of Article 92(1) did not change the acts committed by the appellant that were before the military judge when determining an appropriate sentence and did not change the maximum punishment at this special court-martial. We are confident that the military judge would have imposed, and the CA would have approved, a sentence that included a bad-conduct discharge, a fine, reduction to pay grade E-1, and at least 5 months confinement.

Conclusion

For the reasons set forth above, the findings of guilty to Specification 2 of Charge II and Charge II are set aside. The findings as to Specifications 1 and 2 of Charge IV and Charge IV, and the sentence as reassessed and as approved by the CA are affirmed.

Senior Judge MODZELEWSKI and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court