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

Before
E.E. GEISER, L.T. BOOKER, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JERROD M. GLASS
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200800743
GENERAL COURT-MARTIAL

Sentence Adjudged: 15 November 2007.
Military Judge: LtCol Jeffrey Meeks, USMC.
Convening Authority: Commanding General, Marine Corps Recruit Depot/Western Recruiting Region, San Diego, CA.
Staff Judge Advocate's Recommendation: LtCol S.C. Smith, USMC.
For Appellant: LT Brian Korn, JAGC, USN.
For Appellee: Maj Elizabeth Harvey, USMC.

15 September 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

The appellant was convicted, contrary to his pleas, at a general court-martial composed of officer and enlisted members, of two specifications of violating a lawful general order, two specifications of cruelty and maltreatment, three specifications of destruction of personal property, and one specification of assault in violation of Articles 92, 93, 109, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, 909, and 928. The appellant's approved sentence extended to a bad-conduct

discharge, confinement for 4 months, total forfeiture of pay and allowances, and reduction to pay grade E-1.

After carefully considering the record of trial, the appellant's brief, his assignment of error asserting unlawful command influence (UCI), the Government's answer, and the affidavit of Captain (Capt) B, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Factual Background

The appellant was one of four drill instructors (DI) assigned to Platoon 2167 Recruit Training Regiment (RTR), Second Battalion, Marine Corps Recruit Depot (MCRD), San Diego. The appellant was the junior DI on the four-man team which was responsible for training the platoon of recruits. The charges against the appellant arise from instances where he was alleged to have maltreated, assaulted, and damaged the personal property of, various recruits on numerous occasions. The abusive behavior consisted of kicking, pushing, and shoving as well as striking various individuals with objects such as flashlights, tent poles, helmets, and canteens. The appellant was also accused of stomping on the personal hygiene gear of multiple recruits, and forcing recruits to hydrate until they vomited.

When the allegations of recruit abuse within Platoon 2167 arose, the Battalion Commander, Lieutenant Colonel (LtCol) S, appointed Capt B, the Series Commander for Platoon 2167, to conduct a command investigation.[1] As the Battalion Commander, LtCol S was also the special court-martial convening authority (SPCMCA). Capt B's investigation was to run concurrent with the investigation being conducted by the Criminal Investigative Division (CID). The focus of Capt B's investigation was supervisory issues within Platoon 2167, while CID focused on the criminal aspect of the abuse allegations. Sworn Statement of Capt B of 5 Oct 2007 at 1, Appellant's Motion to Attach of 21 Jan 2009.

After initiating the investigation, Capt B determined that he had a potential conflict of interests because he was the Company Duty Officer (CDO) for at least one of the alleged assaults committed by the appellant. *Id*. at 2. He advised LtCol S of the potential conflict, but was ordered to proceed

[1] The chain of command for the platoon of recruits included the DI's, then the Series Commanders, the Company Commander, and finally the Battalion Commander.

with the investigation. *Id.* He interviewed numerous recruits and prepared a draft report containing his findings of fact and recommendations, and forwarded the report to LtCol S. The report included Capt B's recommendation that charges against the appellant be adjudicated at a general court-martial (GCM). LtCol S stated that Capt B should recommend that a special court-martial (SPCM) was the proper forum to prevent the perception that the appellant was a "scapegoat." *Id.* at 3.

Capt B's draft report was also reviewed by the Deputy Staff Judge Advocate (SJA), MCRD, Major (Maj) P. He told Capt B that his investigation was insufficient, primarily because it minimized the culpability of the appellant. *Id.* at 4. He advised Capt B to reopen the investigation, commenting that CID's investigation was poorly done, and not thorough enough to prosecute the appellant. *Id.* at 5. Shortly thereafter, for reasons not entirely clear from his sworn statement, Capt B was removed as the investigating officer and replaced by Maj R. Maj R was then the Executive Officer (XO) of Third Battalion, and did not have any connection to or conflict with the individuals being investigating within Second Battalion. Following Maj R's preliminary investigation, charges were preferred and an Article 32, UCMJ, investigation was conducted, the results of which were forwarded to the general court-martial convening authority (GCMCA) with a recommendation to refer the charges for trial by general court-martial.

Unlawful Command Influence (UCI)

Law

We note that the appellant raises the issue of unlawful command influence (UCI) for the first time on appeal. *See, e.g., United States v.* Blaylock*,* 15 M.J. 190, 193 (C.M.A. 1983). Ordinarily, we would order a fact-finding hearing to assist us in resolving the issue. *See, e.g. United States v. Cruz,* 25 M.J. 326, 328 n.1 (C.M.A. 1987)(citing *United States v. DuBay,* 37 C.M.R. 411 (C.M.A. 1967), as the "preferred method" for addressing such matters). However, since the appellant has not met his burden of proof to show facts raising UCI, such a hearing is unnecessary.

The appellant concedes that his general court-martial was free from actual UCI, and he does not allege that the convening authority (CA) engaged in UCI. He complains that actual and apparent UCI occurred during the investigative phase, prior to preferral and referral. He claims LtCol S should not have

assigned Capt B to investigate, since he was not disinterested and impartial, and further claims LtCol S improperly influenced Capt B's investigation by instructing Capt B to change his punitive recommendations, and by replacing Capt B as the investigating officer. He asserts prejudice because his case might have been resolved at a lesser forum or not referred to a court-martial without LtCol S's improper influence. Finally, he argues that LtCol S's unlawful actions were not cured despite his concession that his GCM was fair and not tainted by UCI. *See United States v. Lewis,* 63 M.J. 405, 415 (C.A.A.F. 2006).

"We review allegations of unlawful command influence *de novo*." *United States v. Villareal,* 52 M.J. 27, 30 (C.A.A.F. 1999)(citing *United States v. Wallace,* 39 M.J. 284, 286 (C.M.A. 1994)). To prevail on an allegation of UCI on appeal, the appellant must: (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that UCI was the cause of the unfairness." *United States v. Biagase,* 50 M.J. 143, 150 (C.A.A.F. 1999); *United States v. Harris,* 66 M.J. 781, 785 (N.M.Ct.Crim.App. 2008). Once the appellant has met the burden of production and proof, the burden then shifts to the Government to prove beyond a reasonable doubt that the findings and sentence have not been affected by the UCI. *United States v. Stombaugh,* 40 M.J. 208, 213-14 (C.M.A. 1994).

Analysis

The appellant has not met his burden of showing facts which, if true, would constitute either actual or apparent UCI. The only evidence the appellant presents to support his claim of UCI is the sworn statement of Capt B. However, Capt B's sworn statement pertains to his (Capt B's) knowledge of allegations of recruit abuse against Sergeant (Sgt) W, another of the DI's responsible for Platoon 2167, and refers only tangentially to the appellant. Further, his statement acknowledges that his investigation focused on supervisory issues because CID was tasked with investigating whether crimes were committed by the appellant. Sworn Statement of Capt B at 1, 4. Notably, Capt B's sworn statement indicates that he thought the charges against the appellant were worthy of a GCM, while LtCol S recommended an SPCM, in part, to avoid the appellant being perceived as a "scapegoat". *Id.* at 3.

Further, it was the deputy SJA, Maj P, not LtCol S, who told Capt B that his investigation of the appellant was insufficient because it minimized the appellant's responsibility.

Id. at 4. Maj P also told Capt B that he would need to reopen his investigation, particularly in regard to the appellant, because the CID investigation was "shoddy", and he needed more detailed information to prosecute the appellant. *Id.* at 5. Soon thereafter, Capt B was removed as investigating officer, and his investigative file was turned over to Maj P. *Id.* at 5. We recognize that an SJA as a representative of the CA, generally acts with the mantle of command authority. *United States v. Kitts,* 23 M.J. 105, 108 (C.M.A. 1986). However, we do not find that Maj P's actions were improper or indicative of UCI, in requesting Capt B to reopen his investigation, particularly in regard to the culpability of the appellant. Maj P was clearly acting within the scope of his authority as the deputy SJA to ensure that the investigation was conducted in a thorough manner. *See United States v. Argo,* 46 M.J. 454, 458 (C.M.A. 1997)(SJA acting within the scope of his authority as wing commander's representative by requesting investigative officer to reopen the investigation).

We also note that the parties have not produced, and we have not been able to discover, any authority to extend the provisions of Article 37, UCMJ, to the investigative stage of a criminal proceeding. There are myriad types and purposes of investigations, including investigations of alleged wrongdoing, and we note the broad discretion that a commander enjoys for ensuring the well-being of those under his command. Further, in this case, the appellant was not even the central character in the initial investigation conducted by Capt B.

Ultimately, in this case, LtCol S removed Capt B as the investigating officer and appointed Maj R to complete the investigation. Thereafter, an Article 32, UCMJ, hearing was held, and the appellant's case was referred to a GCM. The appellant does not claim that the referral process or the GCM was tainted by actual or apparent UCI. In fact, the appellant concedes his court-martial was fair.

Thus, we conclude that the appellant has failed to meet his burden of proof to show facts which amount to actual or apparent UCI. Likewise, there is no indication that an objective, disinterested observer fully informed of these facts would harbor significant doubt about the fairness of the proceeding against the appellant.

Finally, although not raised as an assignment of error, we note the appellant implies that he may have received a disparate

sentence in comparison to his fellow DI's.[2] The appellant bears the burden of demonstrating that any cited cases are "closely related" to his case, and the sentences are "highly disparate." *United States v. Lacy,* 50 M.J. 286, 288 (C.A.A.F. 1999). Here, the appellant offers nothing more than speculation that the cases involving the other DI's, to the extent they existed, were "closely related" to his case or the sentences "highly disparate".

Conclusion

Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

[2] "Neither the Staff Judge Advocate's Report nor the Convening Authority's Action in Appellant's case contain any information on any of the disciplinary proceedings against any other DI's . . . Appellant's Brief of 21 Jan 2009 at 10.