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

Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DOMINIC P. ALTIER
GAS TURBINE SYSTEM MECHANICAL TECHNICIAN
FIRST CLASS (E-6), U.S. NAVY

NMCCA 201000361
SPECIAL COURT-MARTIAL

Sentence Adjudged: 22 July 2011.
Military Judge: CAPT J.R. Redford, JAGC, USN.
Convening Authority: Commanding Officer, Training Support Center, Great Lakes, IL.
Staff Judge Advocate's Recommendation: LCDR Myoung Lee, JAGC, USN.
For Appellant: LCDR Michael Torrisi, JAGC, USN.
For Appellee: Capt Samuel Moore, USMC.

30 April 2012

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.

PAYTON-O'BRIEN, Judge:

This case was returned for review after this court originally affirmed the findings of guilt as to the charges of fraternization and sexual harassment, but set aside the appellant's sentence to a bad-conduct discharge and authorized a rehearing on the sentence. *United States v. Altier*, No.

201000361, 2011 CCA LEXIS 201, unpublished op. (N.M.Ct.Crim.App. 26 May 2011).

On 22 July 2011, a rehearing on the sentence was held before a military judge.[1] The military judge sentenced the appellant to confinement for 30 days, reduction to pay grade E-5, restriction to base limits and hard labor without confinement for 45 days, and forfeiture of $1,500.00 pay per month for three months. On 31 October 2011, the convening authority (CA) took action and approved the sentence. The appellant sought an extraordinary writ from this court to preclude the Government from executing the adjudged confinement prior to our review as to the legality of the punishment. On 27 July 2011, this court issued a Writ of Prohibition to prevent the imposition of confinement pending review of the legality of the sentence adjudged.

The original adjudged sentence, which was ultimately approved by the convening authority, included only a bad-conduct discharge. The appellant now submits two assignments of error: (1) that his sentence upon rehearing is in excess of or more severe than his original approved sentence; and (2) that his sentence is inappropriately severe.[2]

Was the Rehearing Sentence In Excess of or More Severe?

The question in this case is whether the sentence approved by the CA after rehearing, which included confinement, reduction, restriction and hard labor without confinement, and forfeitures, was "in excess of or more severe" than the sentence originally approved by the CA.

Article 63, Uniform Code of Military Justice, 10 U.S.C. § 863, provides that upon a rehearing, no sentence in excess of or more severe than the original sentence may be approved. RULE FOR COURTS-MARTIAL 810(d)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES

[1] Prior to the rehearing, the parties agreed with the military judge that the maximum punishment available at the rehearing was a bad-conduct discharge, confinement for 12 months, reduction to pay grade E-1, forfeiture of two-thirds pay per months for 12 months, and a fine not to exceed the forfeiture equivalent. Rehearing Record at 10-11.

[2] Although not submitted as error, we note that in the record of trial, under the section labeled, “Prosecution Exhibits Admitted”, there is a document, “Prosecution Exhibit 27 - For Identification” which was not admitted into evidence by the military judge. Record at 86. We discern no prejudice to the appellant from this error. Also, the prosecution exhibits admitted into evidence during sentencing, PE 22-26, are all marked “For Identification,” but it is clear from the record that the military judge admitted them into evidence.

(2008 ed.), implements this statutory provision by requiring that offenses on which a rehearing has been ordered shall not be the basis for an approved sentence in excess of or more severe than the sentence ultimately approved by the convening or higher authority following the previous trial. The discussion following R.C.M. 810(d) explains: "At a rehearing, the trier of fact is not bound by the sentence previously adjudged or approved."

We have examined the record of trial and the pleadings of the parties. We hold that under the facts and circumstances of this case, the sentence approved by the CA following the rehearing was not in excess of, or more severe than, the appellant's original approved court-martial sentence. Art. 63, UCMJ; R.C.M. 810(d).

The appellant essentially argues that under *United States v. Mitchell*, 58 M.J. 446 (C.A.A.F. 2003) and *United States v. Zarbatany*, 70 M.J. 169 (C.A.A.F. 2011), there is "no readily measurable equivalence" between a punitive discharge and confinement, and thus, we can never substitute *any* length of confinement for a punitive discharge. Appellant's Brief of 15 Dec 2011 at 6 (quoting *Mitchell*, 58 M.J. at 448). We are not persuaded by this argument.

A punitive discharge "terminates military status with dreadful finality; it ends the appellant's right to receive all pay allowances and it wipes out his military rank and the perquisites thereof." *United States v. Monett*, 36 C.M.R. 335, 338 (C.M.A. 1966) (citation omitted). Thus, a punitive discharge is qualitatively different from other punishments in that it involves severance of military status. It is a "severe punishment"[3] involving a stigma commonly recognized by society. As noted by the late Judge Brosman in *United States v. Kelley,* "[V]iewed realistically and practically, I doubt that scarcely any punishment is more severe than a punitive discharge." 17 C.M.R. 259, 264 (C.M.A. 1954) (Brosman, J., concurring in the result).

Indeed, courts have held in commutation cases that changing a punitive discharge to a period of confinement may lessen the severity of the punishment. *See United States v. Hodges*, 22 M.J. 260, 262 (C.M.A. 1986) (holding a punitive discharge may lawfully be commuted to some period of confinement); *United States v. Prow*, 32 C.M.R. 63, 64 (C.M.A. 1962) (changing a bad

[3] Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at ¶ 2-6-10 (Ch.2, 1 Jan 2010).

conduct discharge to confinement for three months and forfeiture of $30.00 per month for three months lessens the severity of the punishment); *United States v. Brown*, 32 C.M.R. 333, 336 (C.M.A. 1962) (permissible to substitute six months confinement and partial forfeitures for six months for a bad-conduct discharge); *United States v. Owens,* 36 C.M.R. 909, 912 (A.F.B.R. 1966) (commuting a bad-conduct discharge to confinement at hard labor for eight months, forfeiture of $83.00 per month for eight months, and reduction to airman basic constituted a lesser punishment).

Commutation is a *reduction* in penalty rather than a *substitution*, and is highly case-specific. *United States v. Josey*, 58 M.J. 105, 108 (C.A.A.F. 2003). *See also Waller v. Swift*, 30 M.J. 139, 143 (C.M.A. 1990). However, as was noted in *Hodges*, in comparing two different species of punishment, it is not always apparent which punishment is the more or less "severe." *Hodges*, 22 M.J. at 262. Of significance, the discussion to R.C.M. 1107(d) mentions that when the CA takes action on the sentence, "a bad-conduct discharge adjudged by a special court-martial could be changed to confinement for up to one year (but not vice versa)."

In cases on rehearing, the variety of factors bearing upon the relative severity of a punitive discharge and other punishment has tended to discourage the establishment of a fixed table of substitutions. *United States v. Darusin*, 43 C.M.R. 194, 196 (C.M.A. 1971). Similar to the commutation cases, courts have determined that a period of confinement can be substituted for a punitive discharge and the result is not an increase in the punishment. *See Kelley*, 17 C.M.R. at 263 (holding the military judge erred at the rehearing in assuming that he had no alternative except a bad-conduct discharge or no punishment when the original sentence included only a bad-conduct discharge); *United States v. Jones*, 31 M.J. 908 (A.F.C.M.R. 1990) (holding military judge did not abuse his discretion in refusing to give an instruction that would have prohibited court members, in a rehearing on sentence, from adjudging confinement in lieu of the bad-conduct discharge adjudged at the original trial).

While the Court of Appeals for the Armed Forces (C.A.A.F) has held that there is no exact answer as to how many days of confinement "equal" a bad conduct discharge, there are some cases that offer guidance. *See United States v. Rosendahl*, 53 M.J. 344, 347-48 (C.A.A.F. 2000) (finding that 120 days' confinement is so different from a punitive discharge as to not

be equivalent, stressing that the period of confinement is relatively short); *United States v. Kinzer*, 56 M.J. 741, 743-44 (N.M.Ct.Crim.App. 2002), *aff'd*, 58 M.J. 287 (C.A.A.F. 2003) (the court declined to hold that 220 days of unlawful confinement are equal to, or more serious than a bad-conduct discharge adjudged by a general court-martial).

Under the circumstances of this case, we do not find confinement for 30 days, restriction with hard labor without confinement for 45 days, reduction to pay grade E-1, and forfeiture of $1500.00 pay per month for three months to be in excess of or more severe than a bad-conduct discharge.

Sentence Appropriateness

Turning to the issue of sentence appropriateness, in this particular case we do not find the appellant's approved punishment to be unjustifiably severe. 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. However, we balance that against the nature of the offenses committed by the appellant. Based on our review of the record we find the sentence appropriate in all respects for the offenses and this offender. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). 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. *United States v. Healy*, 26 M.J. at 395-96. We resolve this assignment adversely to the appellant, finding no error in his sentence based upon severity.

Conclusion

We are convinced that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. The sentence is affirmed.

Recognizing that this is a case of first impression and that the appellant is likely to petition the CAAF for review of our decision, the stay we issued on execution of the sentence approved by the CA will remain in effect until the CAAF acts on such a petition, or the time for filing a petition with that court expires, or the appellant informs the Government that he will not appeal this court's decision.

Senior Judge MAKSYM concurs.

PERLAK, Senior Judge (dissenting):

I respectfully dissent. Article 63, UCMJ, in pertinent part states, ". . . no sentence in excess of or more severe than the original sentence may be approved." In affirming the sentence approved by the convening authority (CA), the majority affirms a sentence contrary to law, which stands to result in, *inter alia*, the placing of the appellant into confinement for thirty days.

The essential question presented requires us to compare strikingly dissimilar aspects of two lawful sentences, and then make a determination as to their relative severity or excessiveness. What is conspicuously lacking in this process is any obvious, known, statutory or moral baseline for somehow converting a man's liberty interest into the ramifications found in an enduring negative characterization of his military service. The Court of Appeals for the Armed Forces wrestled with this very issue and determined that the process defies objective analysis. *See United States v. Mitchell*, 58 M.J. 446 (C.A.A.F. 2003).

RULE FOR COURTS-MARTIAL 305(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) does provide a limited punishment conversion calculus (in the Article 13, UCMJ, context), however it "does not authorize application of credit against two types of punishment: reduction and punitive separation." *United States v. Rosendahl*, 53 M.J. 344, 347 (C.A.A.F. 2000). "Conversion of confinement credit to forms of punishment other than those found in R.C.M. 305(k) is generally inapt. This is especially true in the case of punitive discharges, where the qualitative differences between punitive discharges and confinement are pronounced." *United States v. Zarbatany*, 70 M.J. 169, 170 (C.A.A.F. 2011). Such is the case here. Doing so requires the application of a standard not found in R.C.M. 305 or elsewhere in the Manual for Courts-Martial, and which necessarily must qualitatively compare the apple to the orange: physical liberty to punitive discharge status.

Adopting all of the majority's points on the severity of the punitive discharge, it remains impossible to articulate any legal standard by which to reliably compare the social sanction of a punitive discharge against the very basic physical and social consequences accompanying a loss of liberty.

What we can and therefore must do, however, is compare head-to-head, authorized punishment for authorized punishment, the approved sentence from the initial court-martial and that from the rehearing. Doing so, the punitive discharge is obviously no longer a consideration. A sentence to no confinement is now a sentence to 30 days confinement, which, per Article 63, is necessarily more severe and cannot be approved. The same is true of the restriction and forfeiture aspects of the sentence. Each is more severe and each exceed that adjudged and approved at the initial sentencing hearing. As for the reduction, the punitive discharge initially adjudged and approved, if affirmed and ordered executed, would, in the fullness of time, necessarily carry with it reduction to E-1. Art. 58a, UCMJ. The sentence of reduction to E-5 adjudged at the rehearing, therefore, would not run afoul of Article 63 in any statutory sense.

There is no rational equivalency assignable to the fundamentally dissimilar punishments of a punitive discharge and confinement and they defy any severity comparison. Such an assessment must therefore be undertaken on a like-for-like basis. The CA erred in this case in approving and ordering executed the entirety of the sentence adjudged at the rehearing. Consistent with the analysis above, Article 63 limited his approval to so much of that sentence as provided for reduction to E-5. Exercising this court's jurisdiction under Article 66(c), I join the majority in affirming that reduction and in their resolution of the second assignment of error.

For the Court

R.H. TROIDL
Clerk of Court