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

Before
J.R. PERLAK, M.D. MODZELEWSKI, D.O. HARRIS
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOSEPH B. SALYER
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201200145
GENERAL COURT-MARTIAL

Sentence Adjudged: 21 November 2011.
Military Judge: Col Michael B. Richardson, USMC.
Convening Authority: Commanding General, 3d Marine Division (-)(Rein), Kaneohe Bay, HI.
Staff Judge Advocate's Recommendation: LtCol K.J. Estes, USMC.
For Appellant: Maj Jeffrey Liebenguth, USMC; LT David Dziengowski, JAGC, USN.
For Appellee: Capt Samuel Moore, USMC.

23 October 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.

HARRIS, Judge:

A general court-martial comprised of officer and enlisted members convicted the appellant, contrary to his pleas, of wrongfully possessing child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for 2 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a

bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

In his sole assignment of error, the appellant asserts that the findings and sentence must be set aside due to unlawful command influence, which led to the recusal of the military judge who initially presided over the case. *See* Appellant's Brief of 29 May 2012 at 1. After carefully considering the record of trial and the briefs of counsel, we hold that the findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

I. Background

The appellant was originally charged with a possession of child pornography in violation of clauses 1, 2, and 3 of Article 134. At a pretrial Article 39(a), UCMJ, session, the Government amended the specification, striking through the clause 1 and clause 3 language and leaving only the language alleging a violation under clause 2. Following that amendment, the military judge Lieutenant Colonel (LtCol) MDM raised the following question: for a child pornography specification alleged under clause 2, did the term "minor" mean a child under the age of 16 or a child under the age of 18? The Government argued that, for purposes of a child pornography charge, the correct definition of "minor" was a child under the age of 18, in accordance with the federal statute. The military judge agreed that the other definitions from the federal child pornography statute would be given, but expressed an opinion that the term "minor" should be defined as under 16 and reserved his decision. Record at 248-51. At a subsequent pretrial session, the trial counsel requested the military judge's decision on the definition of "minor," but the judge again deferred. *Id*. at 267-69.

Trial commenced on 14 November 2011 in front of officer and enlisted members, with LtCol MDM presiding as military judge. The trial proceeded through *voir dire* of the members, after which the military judge excused the members for the day. LtCol MDM then addressed several issues that remained from pretrial Article 39(a) sessions. At that juncture, LtCol MDM informed the parties that, in his instructions to the members, he would define "minor" as a child under the age of 16 because the "age of consent" in the military is 16 years of age. *Id*. at 300-02. Over the Government's objection, LtCol MDM subsequently instructed the members on this definition prior to opening

statements, and the trial proceeded to the Government's case-in-chief.

During the first day of trial testimony, the Government asked to *voir dire* LtCol MDM about the age of his second wife at the time of their marriage. LtCol MDM disclosed that his wife was 17 years old at the time they married, and was now 27. The Government offered as an appellate exhibit an excerpt from LtCol MDM's service record confirming that fact, and then moved to disqualify the military judge for actual and implied bias. The Government's position was that the military judge's ruling on the definition of a minor was influenced by the fact that his wife was under the age of 18 at the time of their marriage. LtCol MDM took the issue under advisement. After another recess, LtCol MDM excused the members for the rest of the day and recessed until the following morning.

The next morning, LtCol MDM disclosed a telephone conversation he had with the Circuit Military Judge, Captain (CAPT) DB, during the lunch break on the preceding day. LtCol MDM had called CAPT DB about another matter, but CAPT DB then relayed that he had received a call earlier from LtCol JAM, who was "dual hatted" as the Staff Judge Advocate (SJA) for Marine Corps Base Hawaii, and the Officer-in-Charge (OIC) of the Law Center. In the latter role, LtCol JAM served as the trial counsel's supervisor. As Marine Corps Base was not the CA in the appellant's trial, LtCol JAM was not serving in an SJA role for these proceedings, or acting on behalf of the CA. In that telephone call, LtCol JAM had discussed LtCol MDM's ruling on the definition of a minor, and indicated that the Government would be moving to disqualify LtCol MDM. LtCol MDM stated that he felt that CAPT DB was "rais[ing] concern with [LtCol MDM's] performance"[1] and that LtCol JAM was unhappy with the earlier ruling. LtCol MDM again excused the members for the day, so both sides could research the issue further.

At this session of court, LtCol MDM first raised the possibility that the Government's actions could constitute unlawful command influence. The court recessed for several hours, after which LtCol MDM recused himself from further participation in the proceedings. *Id*. at 386-88; Appellate Exhibit LX. A substitute military judge, Colonel (Col) Richardson, was flown in from the West Coast, and trial resumed the next morning.

[1] Record at 378.

Before continuing with the Government's case-in-chief, the appellant moved to dismiss the charges for actual and apparent unlawful command influence. The appellant claimed that the telephone call by LtCol JAM to CAPT DB, as well as "orchestrated actions" to disqualify LtCol MDM as the military judge, constituted unlawful command influence. Col Richardson heard testimony from LtCol JAM and Captain JPS, the Military Justice Officer, and argument from both trial and defense counsel. Col Richardson ruled that there was no actual unlawful command influence, but that LtCol JAM's telephone call to CAPT DB created the appearance of unlawful command influence. As a remedy, Col Richardson barred LtCol JAM from all participation in the proceedings, and refused to reconsider any of LtCol MDM's rulings that were favorable to the defense. The trial then resumed, proceeding to verdict and sentencing with Col Richardson as the military judge.

II. Analysis

A. Standard of Review

This court reviews claims of unlawful command influence *de novo*. *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999). We review the military judge's findings of fact in conjunction with the appellant's claim under a clearly erroneous standard. *Id*. We review a military judge's remedy for unlawful command influence for an abuse of discretion. *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010).

"[O]nce unlawful command influence is raised at the trial level, as it was here, a presumption of prejudice is created." *Douglas*, 68 M.J. at 354 (citing *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). To affirm in such a situation, we must be convinced beyond a reasonable doubt that the unlawful command influence had no prejudicial impact on the court-martial. *Id*.

B. Unlawful Command Influence

Article 37(a), UCMJ, 10 USC § 837(a) provides:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the

> court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. . . .

See also United States v. Stombaugh, 40 M.J. 208, 210 (C.M.A. 1994). Unlawful command influence is "the mortal enemy of military justice." *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)). "Even the mere appearance of unlawful command influence may be as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 2009) (quoting *United States v. Ayers*, 54 M.J. 85, 94-95 (C.A.A.F. 2000) (internal citation and quotation marks omitted)).

In addressing the appearance of unlawful command influence, appellate courts consider, objectively, "'the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public.'" *Ashby*, 68 M.J. at 129 (quoting *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)). An appearance of unlawful command influence exists where "'an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.'" *Id*. (quoting *Lewis*, 63 M.J. at 415).

Not every violation of Article 37 automatically amounts to unlawful command influence. *Stombaugh*, 40 M.J. at 211. Moreover, "there is a distinction between influence that is private in nature and influence that carries with it the mantle of official command authority." *Id*. Resolution of the issue necessarily turns on the specific facts of each case.

C. Unlawful Command Influence Directed at the Military Judge

Improper attempts to intimidate a military judge may constitute unlawful command influence. For example, the United States Court of Appeals for the Armed Forces (CAAF) has held that the fitness-report system cannot be used "as a conduit for command complaints" against military judges. *See United States v. Mabe*, 33 M.J. 200, 206 (C.M.A. 1991). Likewise, creating a

situation where a military judge feels compelled to recuse can constitute unlawful command influence. *See Lewis*, 63 M.J. at 412 (quoting *United States v. Lewis*, 61 M.J. 512, 518 (N.M.Ct.Crim.App. 2005)). However, appellate courts will not presume that a military judge has been influenced simply "by the proximity of events which give the appearance of command influence[.]" *Stombaugh*, 40 M.J. at 213.

In *Lewis*, 63 M.J. at 405, the CAAF addressed unlawful command influence that resulted in recusal of the military judge. In *Lewis*, the trial counsel, apparently aided by the SJA, engaged in a lengthy *voir dire* regarding the female military judge's relationship with the female civilian defense counsel in the case. 63 M.J. at 407-09. The SJA later testified in connection with pretrial motions, and referred to the military judge as having been "on a date" with the civilian defense counsel. *Id.* at 410. Eventually, the military judge recused herself, stating that the "slanderous" accusations by the trial counsel and SJA had her "second guessing every decision in [the] case." *Id*. at 411. A second military judge recused himself as well, stating he was so "shocked and appalled" by the conduct of the Government representatives that he did not believe he could remain objective. *Lewis*, 61 M.J. at 515.

On appeal this court held that:

> The unprofessional actions of the trial counsel and the SJA improperly succeeded in getting the military judge to recuse herself from the appellant's court-martial. . . . To the extent that the SJA, *a representative of the convening authority*, advised the trial counsel in the *voir dire* assault on the military judge and to the extent that his unprofessional behavior as a witness and inflammatory testimony created a bias in the military judge, the facts establish clearly that there was unlawful command influence on this court-martial.

Lewis, 61 M.J. at 518 (emphasis added). We further noted that "the manner in which the *voir dire* was conducted and the crass, contemptuous behavior of [the SJA] while testifying displayed nothing but disrespect for the military judge." *Id*. at 517.

The last assigned military judge in *Lewis*, who came from outside the circuit, took several remedial actions, including barring the SJA from the courtroom and disqualifying the SJA

from any further participation in the case, transferring the case to a new convening authority for post-trial proceedings, and additional precautions to ensure any court members were untainted by the earlier proceedings. *Lewis*, 63 M.J. at 411-12. Based largely upon those remedial measures, this court found no prejudice resulting from the unlawful command influence. *Lewis*, 61 M.J. at 518.

The CAAF subsequently granted review of our decision and reversed. Although limited by its terms to the "unique facts" of the case, the CAAF held that "the actions taken by [the substituted military judge] fell short of removing doubts about the impact of the actual unlawful command influence in this case." 63 M.J. at 415 (footnote omitted). The CAAF also found that the appearance of unlawful command influence would cause a member of the public to harbor "significant doubt about the fairness of this court-martial in light of the Government's conduct with respect to [the original military judge]." *Id*. The CAAF set aside the conviction and sentence and dismissed the charges with prejudice, noting that the drastic remedy was the only way to cure the "unlawful" conduct at issue and ensure the public perception of fairness in the military justice system. *Id*. at 416-17.

We now apply this body of law to the facts of this case.

D. Discussion

Military courts have set forth a specific procedure at trial to address allegations of actual unlawful command influence. *See United States v. Simpson*, 58 M.J. 368, 373 (C.A.A.F. 2003). First, the defense must make an initial showing of facts which, if true, constitute unlawful command influence. *Id.* (quoting *v. Biagase*, 50 M.J. at 150). Second, the defense must show that the alleged unlawful command influence has a logical connection to the appellant's court-martial. *Id*. "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." *Id*. (citations and internal quotation marks omitted).

If the defense makes this requisite showing, the burden then shifts to the Government either to: (1) disprove the predicate facts on which the allegation of unlawful command influence is based; or (2) persuade the military judge that the facts do not constitute unlawful command influence; or (3) prove at trial that the unlawful command influence will not affect the proceedings. *Id*. (internal citations and quotation marks

omitted). Here, the trial court found, and the Government conceded, that the defense met its initial burden. AE LXXXIV at 8-9.

There are two separate bases for the unlawful command influence motion: 1) the phone call placed by LtCol JAM to the Circuit Military Judge; and 2) the *voir dire* of LtCol MDM about his wife's age at the time of their marriage. We have reviewed the military judge's findings of fact on the motion, find them not clearly erroneous and adopt them here. We hold that there was no actual unlawful command influence, and any appearance of unlawful command influence was adequately remedied by the military judge.

1. Phone Call to the Circuit Military Judge

Col Richardson made a specific finding of fact that LtCol JAM's purpose for calling the Circuit Military Judge was merely to provide a "heads up" that the Government planned to make a recusal motion, and that there could be a short fuse need to find a replacement judge in a remote location. AE LXXXIV at 9. Col Richardson further found that the Circuit Military Judge did nothing improper, and did not attempt to influence LtCol MDM in their subsequent telephone conversation. Although we share Col Richardson's view that a phone call to a sitting military judge's reporting senior in the middle of trial is ill advised, and we have no reason to doubt LtCol MDM's statement that he *felt* LtCol JAM's phone call was an attempt to "tattle" on him,[2] these facts alone do not establish actual unlawful command influence.

Col Richardson found as fact that LtCol JAM did not complain about any of LtCol MDM's rulings and did not seek any relief or assistance from the Circuit Military Judge. AE LXXXIV at 9. He further found that neither LtCol JAM nor the Circuit Military Judge intended to influence LtCol MDM's rulings. LtCol MDM made no assertion that the Circuit Military Judge pressured him in any way, only that LtCol MDM "interpreted his questioning of me to raise concern with my performance." Record at 378. However, "[t]he fact that military judges may issue rulings adverse to the interests of superior officers . . . does not in itself preclude those judges from exercising independence in their judicial rulings." *United States v. Norfleet*, 53 M.J. 262, 268 (C.A.A.F. 2000). On these facts we find no actual unlawful command influence.

[2] Record at 386.

We agree with Col Richardson that this situation does amount to apparent unlawful command influence. Notwithstanding the innocent purpose behind the call, the Government's actions created the appearance that the phone call was the sort of "conduit for complaints" against a military judge prohibited by the UCMJ. *See Mabe*, 33 M.J. at 206. We address the remedy for the apparent unlawful command influence in Part E, below.

2. *Voir Dire* of LtCol MDM

Regarding the inquiry into LtCol MDM's marriage and potential bias, we find no actual or apparent unlawful command influence. Although the facts bear some similarity to those in *Lewis*, we find the two situations to be readily distinguishable.

First and foremost, as noted by Col Richardson in the findings of fact, LtCol JAM was *not* acting as the SJA for the convening authority in the appellant's case. Therefore, unlike in *Lewis*, there was no influence by or on behalf of the command. There are no facts anywhere in the record suggesting that the convening authority or anyone acting on his behalf knew of, let alone participated in, any of these events. Second, in *Lewis* there was no good faith basis to inquire into the military judge's personal life. Here the facts are undisputed that LtCol MDM did marry a 17-year-old woman. The Government had verified this fact before commencing its *voir dire* into how that fact might have influenced LtCol MDM's pretrial ruling on the definition of a minor. Col Richardson found this to be a good faith basis for questioning and we agree. Third, the appellant in *Lewis* ultimately waived his right to a members trial and was found guilty and sentenced by the replacement military judge. In this case, trial by members continued, and the members--wholly unaffected by and unaware of these events--convicted the appellant and sentenced him. Finally, the allegations in *Lewis* involved what was potentially illegal and, at that time, career-ending conduct. Notwithstanding the appellant's attempt to characterize this case as identical, we find no similar explicit or implicit assertion that LtCol MDM did anything wrong; rather, the Government's inquiry suggested that LtCol MDM might be biased against the Federal definition of a minor in light of his life experience.

At one point during the discussion regarding the appropriate definition of a minor for purposes of the child pornography charge, LtCol MDM remarked "(Y)ou couldn't have a naked picture of someone who you could lawfully have sexual intercourse with; a 17 year old?" Record at 250. LtCol MDM is

not the first person to point out this somewhat counterintuitive wrinkle in the law. *See United States v. Nerad*, 69 M.J. 138, 141 (C.A.A.F. 2010) (reversing the Air Force Court of Criminal Appeals for dismissing a conviction for possessing child pornography on similar facts). Because LtCol MDM had married a 17-year-old woman, it is a reasonable inference that his view on the legal definition of a "minor" might be colored by his personal history.

"A military judge 'shall perform the duties of judicial office impartially and fairly.'" *Lewis*, 63 M.J. at 414 (quoting *United States v. Quintanilla*, 56 M.J. 37, 42 (C.A.A.F. 2001)). To ensure compliance with this requirement, the Government has every right to "question the military judge and to present evidence regarding a possible ground for disqualification . . . ." RULE FOR COURTS MARTIAL 902(d)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). *Lewis* was limited by its own terms to the "unique circumstances" of that case. 63 M.J. at 407. Were we to eliminate or severely restrict the questioning of a military judge about a personal matter as creating an appearance of unlawful command influence, it would essentially nullify R.C.M. 902. We find nothing in *Lewis* requiring such a result. Nor do we find any evidence in this case of the extraordinarily disrespectful and unprofessional tone of the questioning present in *Lewis*. *Cf. Lewis*, 61 M.J. at 517. Accordingly, we find no actual or apparent unlawful command influence resulting from the *voir dire* of LtCol MDM.

E. Remedy

The military judge is the "last sentinel" in the trial process to protect a court-martial from unlawful command influence. *United States v. Harvey*, 64 M.J. 13, 14 (C.A.A.F. 2006). Appellate decisions encourage military judges to take "proactive, curative steps to remove the taint of unlawful command influence and ensure a fair trial." *Douglas*, 68 M.J. at 354. As a last resort, a military judge may consider dismissal of the charges when no other remedy will avoid prejudice against the appellant. *Id*. (quoting *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)). When an error can be rendered harmless, dismissal is not an appropriate remedy. *Gore*, 60 M.J. at 187 (citing *United States v. Mechanik*, 475 U.S. 66 (1986)).

A military judge has a range of options in addressing unlawful command influence. *Id*. As the CAAF stated, "our prior cases have addressed only what a military judge can do, not what the military judge must do, to cure (dissipate the taint of the

unlawful command influence) or to remedy the unlawful command influence if the military judge determines it cannot be cured." *Id.* at 186. We review a military judge's remedial actions for an abuse of discretion. *Id*. at 187.

In this case, the military judge took steps to cure any appearance of unlawful command influence. First, he barred LtCol JAM from the courtroom and from any further participation in the proceedings. Second and significantly, he refused to reconsider any of LtCol MDM's rulings favorable to the defense, eliminating any possible tactical advantage to the Government resulting from LtCol MDM's recusal. Unlike the situation in *Lewis*, there is no suggestion that the CA or someone acting on his behalf was involved. For that reason, we conclude that dismissal would be too harsh of a remedy. We are convinced beyond a reasonable doubt that a reasonable member of the public would not harbor significant doubts as to the fairness of these proceedings.

III. Conclusion

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

Chief Judge PERLAK and Senior Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL
Clerk of Court