

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

**Before
M.D. MODZELEWSKI, R.G. KELLY, C.K. JOYCE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOSHUA W. TIGER
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201200284
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 19 April 2012.

Military Judge: LtCol Robert G. Palmer, USMC.

Convening Authority: Commanding Officer, First Marine Recruiting District, Eastern Recruiting Region, Garden City, NY.

Staff Judge Advocate's Recommendation: Col E.L. Kleis, USMC.

For Appellant: CAPT Ross L. Leuning, JAGC, USN.

For Appellee: LCDR Keith B. Lofland, JAGC, USN.

30 November 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.**

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of violating a general order, making a false official statement, sodomy, and adultery, in violation of Articles 92, 107, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. § 892, 907, 925, and 934. The military judge sentenced the appellant to confinement for 4 months, forfeiture of \$994.00 pay per month for four months, reduction to pay grade E-1, and a bad-conduct discharge.

The convening authority (CA) approved the sentence as adjudged, suspending all confinement pursuant to a pretrial agreement.

The appellant raises two assignments of error: that the bad-conduct discharge is unjustifiably severe, and that the military judge was disqualified by his inflexible attitudes about sentencing and by allowing his perceptions of what Congress and the Commandant of the Marine Corps expect from Marine Corps courts-martial to enter into his deliberations. Additionally, the second assignment raises unlawful command influence.

After carefully considering the record of trial and the submissions of the parties, we are convinced that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Sentence Appropriateness

The appellant asserts that the portion of the sentence extending to a bad-conduct discharge is inappropriately severe. Upon *de novo* review, we disagree and decline to grant relief.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). We independently determine the appropriateness of the sentence in each case we review. See *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005).

While assigned to recruiting duty, Sergeant (Sgt) Tiger approached MW, an eighteen-year-old senior, as a potential recruit and scheduled an appointment for the next day at his office. During that first visit to his recruiting office, the appellant initiated a sexual relationship with MW. Within the next week, MW enlisted in the United States Marine Corps through the Delayed Entry Program. Over the next two months, Sgt Tiger engaged in intercourse and sodomy with MW in his office, his residence, and a public parking lot. Their relationship ended only when it was reported to his command. During the course of

the ensuing investigation, Sgt Tiger lied about the relationship to the investigating officer.

We find the approved sentence is appropriate for this offender and his offenses. Granting sentence relief at this point would be engaging in an act of clemency, a prerogative reserved to the CA, and we decline to do so. *Healy*, 26 M.J. at 395-96.

Disqualification of a Military Judge

The second assignment of error focuses on post-trial events. On 19 April 2012, the military judge sentenced the appellant. On 14 June 2012, the CA took his action. On 21 June 2012, the military judge gave two hours of Professional Military Education to five junior Marine Corps officers, law students on temporary orders to Marine Corps legal offices during their summer recess. Two of those officers provided statements summarizing their recollection of the military judge's comments, and these statements form the basis for the appellant's assigned error. Appellant's Response to Court Order of 14 Nov 2012 at Appendices I and II.

According to the statements, the military judge spoke on a wide range of military justice topics. In discussing trial strategy, he encouraged the junior officers to aggressively charge and prosecute cases, stated that Congress and the Commandant of the Marine Corps wanted more convictions, and opined that trial counsel should assume the defendant is guilty. At one point, he referred to defendants as "scumbags." *Id.* A fair read of one statement is that the law student found the military judge's comments "odd" and "somewhat bothersome," but also believed some of the comments were made in jest. *Id.* at Appendix II.

We review whether a military judge has acted appropriately *de novo*.¹ "'An accused has a constitutional right to an impartial judge.'" *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (quoting *United States v. Butcher*, 56 M.J. 87,

¹ In applying a *de novo* standard, we follow the guidance of the Court of Appeals for the Armed Forces, which has applied the same standard when facing questions that the appellant could not reasonably have raised at trial. See, e.g., *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (reviewing *de novo* the deficient performance and prejudice aspects of an ineffective assistance of counsel claim); *United States v. Stefan*, 69 M.J. 256, 258 (C.A.A.F. 2010) (considering *de novo* the qualification of a staff judge advocate to make the post-trial recommendation).

90 (C.A.A.F. 2001)). A military judge's impartiality is crucial to the conduct of a legal and fair court-martial. *United States v. Quintanilla*, 56 M.J. 37, 43 (C.A.A.F. 2001).

RULE FOR COURTS-MARTIAL 902, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) divides the grounds for disqualification into two categories, actual and apparent bias, and applies a two-step analysis. *Quintanilla*, 56 M.J. at 45. The first step asks whether disqualification is required under the specific circumstances listed in R.C.M. 902(b), which constitute actual bias. If no actual bias is demonstrated, we then ask whether the circumstances nonetheless warrant disqualification based upon a reasonable appearance of bias.²

"There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *Id.* at 44. "The moving party has the burden of establishing a reasonable factual basis for disqualification. More than mere surmise or conjecture is required." *Wilson v. Ouellette*, 34 M.J. 798, 799 (N.M.C.M.R. 1991) (citing *United States v. Allen*, 31 M.J. 572, 601 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991)). With respect to the appearance of bias, the appellant must prove that, from the standpoint of a reasonable person observing the proceedings, "'a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions.'" *Martinez*, 70 M.J. at 158 (quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)).

In applying this analysis to the question of actual bias, we conclude that the appellant fails to demonstrate any actual bias under R.C.M. 902(b). He has made no showing that the military judge had a personal bias or prejudice concerning him or his case.

We turn next to whether there is any appearance of bias that would require disqualification under R.C.M. 902(a). A reasonable person made aware of the post-trial comments by the military judge in this case may well conclude that they are indicative of an apparent bias since the comments depart markedly from the neutral and detached posture that trial judges

² R.C.M. 902(a) provides that disqualification is required "in any proceeding in which [the] military judge's impartiality might reasonably be questioned." Disqualification may be required even if the evidence does not establish actual bias. *Quintanilla*, 56 M.J. 37, 45.

must always maintain. Assuming evidence of apparent bias, we next determine "whether the error was structural in nature, and therefore inherently prejudicial, or in the alternative, determine whether the error was harmless under *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 . . . (1988)." *United States v. Roach*, 69 M.J. 17, 20 (C.A.A.F. 2010).

Our review convinces us that the error was not structural. Sgt Tiger's court-martial was held two months prior to the military judge's training session, and the record before us indicates that the appellant's trial was a fair and impartial proceeding. Therefore, we focus on whether the military judge's appearance of bias materially prejudiced any substantial rights of the appellant, and whether reversal is otherwise warranted in this case. The Court of Appeals for the Armed Forces in *Martinez* treated these two questions as distinct lines of analysis: the first governed by Article 59(a), UCMJ, and the second by *Liljeberg*. 70 M.J. at 159. Under *Liljeberg*, we consider "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." 486 U.S. at 864.

We do not find prejudice under either Article 59(a) or *Liljeberg*, and we find no risk of injustice to the appellant in this case. The military judge spoke in a training environment that was unrelated to the appellant's trial. To the extent that he addressed particular types of cases, the military judge focused on trial strategy in cases of sexual assault, child abuse, and child pornography. He made no mention of recruiter misconduct cases, or anything that remotely approached this type of case. Moreover, his comments were largely focused on the performance of Government counsel. Bias and antipathy toward an attorney are generally insufficient to disqualify a judge "unless petitioners can show that such a controversy would demonstrate a bias against the party itself." *United States v. Ettinger*, 36 M.J. 1171, 1174 (N.M.C.M.R. 1993) (quoting *Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 385 (11th Cir. 1991)). Here, the appellant has established no nexus between his own case of recruiter misconduct and the military judge's remarks.

Likewise, our finding of no prejudice in this case presents no risk of injustice in other cases. Although Sgt Tiger failed to establish a nexus between his case and the military judge's remarks, other appellants remain free to show a prejudicial nexus to their own case.

Finally, our decision will not undermine the public's confidence in the judicial process. This appellant made a provident plea of guilty, after freely negotiating a pretrial agreement with the Government and receiving protection from all adjudged confinement. He was sentenced to 120 days confinement, well below the jurisdictional maximum of twelve months requested by the trial counsel.

In the absence of any evidence, we decline to speculate how comments made two months after a provident guilty plea could have affected this court-martial.

Unlawful Command Influence

Finally, the appellant raises the issue of unlawful command influence. When raising this issue 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 the unlawful command influence was the cause of the unfairness." *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003) (quoting *United States v. Biagese*, 50 M.J. 143, 150 (C.A.A.F. 1999)). Here, the appellant attempts to raise unlawful command influence based on a report that the military judge made comments that Congress and the Commandant of the Marine Corps want to see more convictions. Even if this were enough to satisfy the first prong, the appellant fails to show that his proceeding was unfair and that the unlawful command influence was the cause of the unfairness. The events are simply too remote in time and too attenuated from the facts of the appellant's court-martial to support a retroactive finding of unfairness in the proceedings.

While "[t]here is no doubt that the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial. . . . [t]here must be something more than an appearance of evil to justify action by an appellate court in a particular case. Proof of [command influence] in the air, so to speak, will not do. We will not presume that a military judge has been influenced simply by the proximity of events which give the appearance of command influence in the absence of a connection to the result of a particular trial." *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991) (citations, internal quotation marks, and footnote omitted).

Conclusion

We affirm the findings and the sentence as approved by the
CA.

For the Court

R.H. TROIDL
Clerk of Court