

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant HERMAN N. ELIZEE
United States Air Force

ACM S31316

20 August 2008

Sentence adjudged 15 March 2007 by SPCM convened at Kunsan Air Base, Republic of Korea. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Roberto Ramirez.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification of willful dereliction of duty and two specifications of negligent dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for four months, and reduction to E-1. The appellant asserts that his sentence is inappropriately severe. We find to the contrary. However, we note that the

approved sentence exceeds the period of confinement permitted by the appellant's pre-trial agreement (PTA).¹ We modify the sentence accordingly and affirm.

Background

The appellant was an F-16 engine mechanic assigned to 8th Fighter Wing, Kunsan Air Base, Korea. On 26 June 2006, he was serving as the "Ground Man" as part of a three-man team responsible for Hush House² testing of an F-16 engine. As Ground Man, he was responsible for the entire outside of the aircraft as the engine was being tested. As a jet engine mechanic, the appellant had the responsibility and duty to follow all maintenance regulations and rules, to include following all technical orders and manuals regarding the performance of aircraft maintenance and required inspections to ensure compliance with Air Force and base Foreign Object Damage (FOD) prevention programs. The appellant also had the responsibility, and had received training, to become familiar with the wide array of technical orders associated with his position as a jet engine mechanic, which included his required duties following ingestion of a foreign object into the jet engine. A small frog entered the Hush House and was being pulled towards the engine. The team members joked about whether or not the frog would be sucked into the engine intake. The appellant used a camera that was brought into the Hush House by another team member to film the senior airman team member as he threw the small frog in front of the F-16 engine, in an attempt to have it sucked into the intake. When the first attempt failed, the appellant picked up the frog and threw it forward into the wheel area where it was sucked into the intake during the engine run. The appellant's conduct was in violation of FOD prevention regulations, technical orders and local instructions and procedures, and prohibitions against filming in controlled and restricted areas. In addition, the appellant thereafter failed to conduct the required detailed inspection following a Foreign Object (FO) intake incident into the engine to ensure the engine was not damaged. The violations came to light after another Air Force member saw a copy of the video taken by the appellant posted on the Internet and reported it the Air Force Office of Special Investigations.

Faced with evidence that maintenance personnel under his command had intentionally put FO into the engine of a fighter aircraft, the wing commander grounded the entire fleet of 41 aircraft until all could be inspected for potential damage. To minimize operational downtime, all wing maintenance personnel and all wing pilots were called in, working extended hours to complete the required inspections in two days.

¹ The appellant notes in his brief that despite the approved sentence, pursuant to a Pretrial Agreement (PTA), the convening authority agreed not to approve any sentence of confinement in excess of 60 days. In a footnote, the appellant writes: "Appellant only served a 60 day sentence as agreed in the PTA. . . . Appellant was not required to serve the adjudged confinement of four months as stated in the convening authority's action. *See Confinement Order*, ROT, Vol 1."

² An interior testing facility designed to contain engine noise during tests which require engine runs at high thrust.

Pre-Trial Agreement Violation

The appellant pled guilty pursuant to a PTA that limited confinement to 60 days if a bad-conduct discharge was also adjudged. Contrary to the terms of that PTA, the convening authority approved the sentence adjudged, which included four months confinement. We correct the error in our decretal paragraph.

Sentence Appropriateness

The appellant asserts that a sentence consisting of a bad-conduct discharge is inappropriately severe in light of one charge and three specifications of dereliction of duty, with only one specification being willful and the other two specifications being negligent, and his exemplary military record.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007).

The appellant correctly points out that the frog ingested into the engine was small, soft, and ultimately caused no damage. Nonetheless, the offenses of which he stands convicted are serious. The record indicates that proper FOD prevention and control is critical to the safety of Air Force fighter aircraft and the pilots who fly them, in particular for the F-16, which has only one engine. The appellant, a mechanic charged with the responsibility of properly maintaining those aircraft, intentionally caused a FO to be sucked into an engine. It was clear he had the training and experience, and he intentionally disregarded regulations, tech orders and local instructions. Ultimately, his actions caused an entire fleet of 41 aircraft to be grounded for two days, and forced hundreds of personnel to work extra hours to ensure the aircraft were safe. In addition, he negligently failed to ensure the proper inspections were conducted following the ingestion of the FO and he was negligent in his duties by filming the F-16 engine run in a restricted and controlled area without authorization. Considering these offenses, and weighing the appellant's service record and other matters properly contained within the record, the approved sentence, as modified below, is fair, just, and appropriate.

Defective Court-Martial Order

The court-martial promulgating order does not accurately reflect the fact there was a charge and an additional charge; instead it references Charge I and Charge II. The government is directed to issue a corrected copy.

Conclusion

The approved findings are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). However, we affirm only so much of the sentence as includes a bad-conduct discharge, confinement for 60 days, and reduction to E-1. The approved findings and sentence, as modified, are

AFFIRMED.

Judge HEIMANN did not participate.

OFFICIAL



STEVEN LUCAS, YA-02, DAF
Clerk of the Court