UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant KEVIN K. VARGA
United States Air Force

ACM 36093

12 October 2006

Sentence adjudged 15 April 2004 by GCM convened at Aviano Air Base, Italy. Military Judge: Thomas W. Pittman.

Approved sentence: Dismissal and confinement for 6 months.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, Major N. Anniece Barber, and Major David P. Bennett.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Nurit Anderson.

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

OPINION OF THE COURT

BROWN, Chief Judge:

The appellant was convicted, in accordance with his pleas, of willfully disobeying a lawful order of his superior commissioned officer, Major William T. Carter, on divers occasions, and violating a lawful general regulation on divers occasions, in violation of Articles 90 and 92, UCMJ, 10 U.S.C. §§ 890, 892. Contrary to his pleas, he was also convicted by officer members sitting as a general court-martial, of making a false official statement, assault consummated by battery, conduct unbecoming an officer, and committing an indecent assault, in violation of Articles 107, 128, 133, and 134, UCMJ, 10 U.S.C. §§ 807, 928, 933,

934. The members sentenced him to a dismissal and six months confinement. The convening authority approved the findings and sentence as adjudged.[1]

The appellant raised eleven assignments of error. Because of our resolution of the assignment of error regarding the defense challenges for cause, we need not address the remaining assignments of error.

Background

During voir dire of the court members, the president of the court-martial, Colonel Strines, indicated she was in the supervisory chain of command of four other court members: Captain Gilliland, Captain Ingersoll, Captain Miller, and Captain Vattioni. Colonel Strines explained she was the Maintenance Group Commander for the wing at Aviano Air Base, Italy, and the four captains, all maintenance or munitions officers, fell under her group and were in her direct chain of command. Colonel Strines was the endorsing official on the Officer Performance Reports of both Captain Ingersoll and Captain Gilliland. The military judge asked the four captains whether they would feel inhibited or restrained by having Colonel Strines serve with them as court members. Each indicated they would not. The military judge also asked Colonel Strines whether she would be restrained in any way in performing her duties as a court member if a member over whom she held a position of authority should disagree with her. She said she would not be restrained. Also during voir dire, court member Major Nolan stated that he knew Major Carter, the officer whose order the appellant violated on divers occasions and for which appellant pled guilty. Major Carter was also the government's sole witness as to Additional Charge I, to which the appellant pled not guilty. Upon further voir dire by the military judge Major Nolan provided the following information:

> MJ: I'm going to ask some general questions. Does anybody know Major Carter in any capacity other than duty-related professional capacity?
> MBR (Major Nolan): [Affirmative response.]
> MJ: Major Nolan, I take it you know him socially?
> MBR (Major Nolan): Yes, Sir.
> MJ: Can you go into that a little bit?
> MBR (Major Nolan): We would meet at the Officer's [sic] Club, outside of work, and talk about what's going on as squadron commanders.
> MJ: Do you know how frequent that is?

[1] At the time of trial, the appellant was a First Lieutenant. After trial, it was determined that a promotion propriety action that recommended the delay or removal of his promotion to captain was null and void. Consequently, his original date of rank, 13 June 2003, was reinstated after trial.

MBR (Major Nolan): Once ever [sic] two or three weeks.
MJ: Is there anything about the interaction that you have with him, in that capacity, that's going to cause you to be anything less than fair and impartial in this case?
MBR (Major Nolan): No, Sir.
MJ: If Major Carter came in and testified, could you evaluate his credibility the same as you would any other witness?
MBR (Major Nolan): Yes, Sir.
MJ: Would you feel uncomfortable, at all doing that?
MBR (Major Nolan): No, Sir.

During individual voir dire by the trial defense counsel, Major Nolan provided additional information:

DC: Sir I just wanted to ask you a few more questions about your relationship with Major Carter. If you'll look at the charges and specifications, you'll see that he was the victim of a violation of a general order which Lt Vega has pled guilty to. He's also named in one of the other specification. [sic] Sir, do you consider yourself friends with Major Carter?
MBR (Major Nolan): Yes, I do.
DC: How long have you been engaged with him socially?
MBR (Major Nolan): Probably the last three or four months.
DC: Do you have an off-base social encounter; you've been over to his house; you go to the same church?
MBR (Major Nolan): No. I haven't been over to his house or gone over to his church. We did play in a recent crud tournament together on the same team at the Consolidated Club. His wife and my wife are friends and had conversations about buying gifts.

The court-martial panel originally contained 14 officers. The military judge granted defense challenges for cause against Lieutenant Colonel Hall and Captain Piccin. The defense also challenged Colonel Strines and Major Nolan for cause, arguing that Colonel Strines should be removed for implied bias because she held a supervisory position over four junior court members. The defense also argued that Major Nolan should be removed for implied bias because he was a friend of Major Carter. The military judge denied each of these challenges for cause. The trial defense counsel preserved for appeal the denial of the challenges against Colonel Strines and Major Nolan pursuant to Rule for Courts-Martial (R.C.M.) 912 (f)(4)[2]:

[2] R.C.M. 912 (f)(4) and R.C.M. 912 (f)(1)(N) in the 2005 edition of the Manual for Courts-Martial (MCM) are identical to the 2002 edition of the MCM that was in effect at the time of the appellant's trial.

MJ: Defense, any peremptory?
DC: Your Honor, we exercise our peremptory challenge against Colonel Strines. I will note for the record that had the court granted our challenge for cause against Colonel Strines, we would have exercised that challenge against Major Nolan. And had the court granted both of those challenges for cause, Colonel Strines and Major Nolan, we would have exercised our peremptory challenge against Captain Ingersoll.

Challenges for Cause

The appellant contends the military judge abused his discretion when he denied the defense challenges for cause against Colonel Strines and Major Nolan and that under the liberal-grant mandate, the military judge should have granted the challenges for cause. R.C.M. 912 includes challenges based upon the concepts of both actual and implied bias. *United States v. Moreno*, 63 M.J. 129, 133 (C.A.A.F. 2006) (citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997); *United States v. Minyard*, 46 M.J. 229, 231 (C.A.A.F. 1997)). The issue *sub judice* concerns implied bias. R.C.M. 912 (f)(1)(N) provides that a member shall be excused for cause whenever it appears that the member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."

The test for implied bias is objective, viewed through the eyes of the public, and focusing on the appearance of fairness in the military justice system. *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006); *Moreno*, 63 M.J. at 134; *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998); *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). If there is too high a risk the public will perceive that an accused received less than a court composed of fair, impartial, and equal members, our superior court has not hesitated to set aside the affected findings and/or sentence. *See Leonard*, 63 M.J. at 403; *Moreno*, 63 M.J. at 135; *United States v. Wiesen*, 56 M.J. 172, 176-77 (C.A.A.F. 2001). However, implied bias should be relied upon sparingly. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004).

We review rulings on challenges for implied bias under a standard that is less deferential than abuse of discretion, but more deferential than de novo review. *Moreno*, 63 M.J. at 134; *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000); *Napoleon*, 46 M.J. at 283. Military judges are required to follow the liberal grant mandate in ruling on challenges for cause made by an accused. *Moreno*, 63 M.J. at 134 (citing *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005); *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v.*

White, 36 M.J. 284, 287 (C.M.A. 1993)). If a military judge clearly abuses his discretion in applying the liberal grant mandate we will not hesitate to reverse his ruling on a challenge for cause.

Applying the principles of law noted above to the facts of this case, we do not find the military judge abused his discretion in applying the liberal grant mandate as to Colonel Strines. The appellant correctly points out that our superior court, in *Wiesen*, 56 M.J. at 176-77, held that the military judge abused his discretion when he failed to grant Wiesen's challenge for cause against the president of the court-martial based on implied bias. However, as government appellate counsel points out, *Wiesen* was a unique case, in that the president of the court-martial was in a supervisory position over six of the other members. Those six members plus the president of the court-martial constituted the two-thirds majority necessary to convict Wiesen. In the instant case, Colonel Strines held a supervisory position over four other court members who were part of a panel of court members that began with 14, and after two challenges for cause were granted, still consisted of 12 members. Thus, even if Colonel Strines and all four junior members over whom she held supervisory authority all sat as court members, they would not have constituted even a simple majority of the court members, much less the two-thirds majority of *Wiesen*. Moreover, it is well settled that a "senior-subordinate/rating relationship" does not *per se* disqualify a panel member. *Wiesen*, 56 M.J. at 175 (citing *Rome*, 47 M.J. at 469; *White*, 36 M.J. at 287; *United States v. Murphy*, 26 M.J. 454, 455 (C.M.A. 1988)). Under the facts of this case, we do not find Colonel Strines' service as a court member raises a "substantial doubt as to [the] legality, fairness, and impartiality" of the proceedings. *See* R.C.M. 912(f)(1)(N).

However, we are unable to reach the same conclusion as to Major Nolan. Major Nolan was a friend of Major Carter, whose order the appellant had violated on divers occasions, an offense to which the appellant had earlier pled guilty. Moreover, Major Carter was the government's only witness as to Additional Charge I, and was recalled in rebuttal by the government at trial to contradict the appellant's testimony. Major Nolan met with Major Carter at the Officers' Club outside of work to talk about what was going on as squadron commanders and they did this every two to three weeks for the last three to four months. Finally, near the time of the trial they had been teammates in a crud tournament and their wives were friends. These circumstances undermine the appearance of fairness in the military justice system. An observer could reasonably question whether Major Nolan could set aside his friendship with Major Carter and give the appellant a fair trial as to the contested findings and sentence. We therefore hold the military judge erred in failing to follow the liberal grant mandate by denying the challenge for cause against Major Nolan. *See* R.C.M. 912(f)(1)(N); *Leonard*, 63 M.J. at 402-03; *Moreno*, 63 M.J. at 135.

Conclusion

The findings of guilty of Charges I and II and their Specifications are correct in law and fact and are affirmed. *See* Article 66(c), UCMJ, 10 U.S.C. 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The remaining findings of guilty and the sentence are set aside. The record of trial is returned to The Judge Advocate General. A rehearing is authorized.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator