UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Lieutenant Colonel JOSEPH E. WILSON JR.
United States Air Force

ACM 35602

13 June 2006

Sentence adjudged 29 November 2002 by GCM convened at Osan Air Base, Republic of Korea. Military Judge: Anne L. Burman (sitting alone).

Approved sentence: Dismissal.

Appellate Counsel for Appellant: Frank J. Spinner, Esq. (argued), Colonel Carlos L. McDade, Major James M. Winner, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Major Kevin P. Stiens (argued), Colonel Gary F. Spencer, and Lieutenant Colonel Robert V. Combs.

Before

BROWN, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

MOODY, Senior Judge:

The appellant was convicted, contrary to his pleas, of one specification of false official statement, one specification of taking with intent to remove an officer performance report (OPR), one specification of wrongfully impeding an investigation, one specification of wrongfully influencing an investigation by requesting a witness to provide false information, two specifications of creating false OPRs, and one specification of wrongfully preventing a genuine OPR from entering the Air Force system of records, in violation of Articles 107 and 134, UCMJ, 10 U.S.C. §§ 907, 934. The general court-martial, consisting of a military judge sitting alone, sentenced the

appellant to be dismissed from the Air Force. The convening authority approved the findings and sentence as adjudged.

The appellant has submitted six assignments of error: (1) Whether the convening authority was disqualified because he had administered a referral OPR and non-recommendation for promotion that prejudged the appellant's guilt; (2) Whether the appellant was denied an impartial pretrial investigation; (3) Whether the case was tainted by unlawful command influence; (4) Whether the evidence is legally and factually insufficient to support the convictions, (5) Whether military judge erred by admitting documents purporting to be copies of the appellant's OPRs;[1] and (6) Whether the record of trial is incomplete. Finding no error, we affirm.

Convening Authority as Accuser

This Court reviews questions of law de novo. *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003). "An accuser may not refer charges to a general or special court-martial." Rule for Courts-Martial (R.C.M.) 601(c). The term "accuser" is defined as any person "who has an interest other than an official interest in the prosecution of the accused." Article 1(9), UCMJ, 10 U.S.C. § 801(9).

In the instant case, the General Court-Martial Convening Authority was the commander of Seventh Air Force (7 AF/CC), Lieutenant General (Lt Gen) Lance Smith, who was the successor to Lt Gen Charles Heflebower, a witness in the case. Prior to trial, Lt Gen Smith relieved the appellant of command, processed a referral OPR on him, and assigned him a "Do Not Promote" recommendation for his upcoming promotion board. The appellant contends that, in so doing, Lt Gen Smith prejudged the case, which had the ultimate effect of driving an unjust conviction. According to the appellant, in taking this alleged personal interest in the case, Lt Gen Smith deprived himself of his authority to convene a court-martial, which, in turn, deprived the court-martial of jurisdiction.

We have examined the entire record of trial and find therein nothing to support this position. While it is true that Lt Gen Smith took certain administrative actions against the appellant prior to trial, this fact is hardly unusual. The belief that Lt Gen Smith took the actions he did, to include referring the case to trial, in order to stroke his own "ego" is unsupported by the record. Of course it is possible for a commander to develop a personal interest in a case, thereby impairing his capacity to serve as a convening authority. However, to draw that conclusion in a given case requires some evidence beyond the fact that the convening authority took adverse actions consistent with the proper exercise of his official responsibilities. As the military judge observed in

[1] On 9 March 2006, we heard oral argument on Issues (1), (2), (3), and (4), at Lackland Air Force Base, Texas, as part of this Court's Project Outreach.

her findings of fact, "[t]he [d]efense has not provided any evidence to even allude to any personal motives for the otherwise lawful, official actions." We hold that the 7 AF/CC did not become an "accuser" in this case and, therefore, he was not deprived of his authority to convene the court-martial.

Bias of the Article 32, UCMJ, 10 U.S.C. § 832, Investigating Officer

This Court reviews a military judge's denial of a motion challenging the sufficiency of the Article 32, UCMJ, Investigation for an abuse of discretion. *United States v. Burfitt*, 43 M.J. 815, 817-18 (A.F.C.C.A. 1996). We review the military judge's findings of fact under a "clearly erroneous" standard. *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)).

In this case, the appellant has alleged certain defects with the Article 32, UCMJ, investigation that was conducted in his case. Specifically, he challenges the impartiality of the investigating officer (IO), Lieutenant Colonel (Lt Col) Bruce Lennard, based both on decisions he made during the course of the investigation as well as on his status as an official within Seventh Air Force (7 AF). We have examined the entire record and have compared the evidence adduced at trial with the military judge's findings of fact pertaining to this issue. We conclude that these findings are not clearly erroneous and we adopt them as part of our opinion. We will address the appellant's challenges individually.

a. *Whether Lt Col Lennard pursued his investigation outside the presence of the appellant, in violation of R.C.M. 405(f)(3)("At any pretrial investigation under this rule the accused shall have the right to . . . be present throughout the taking of evidence").* This case involved allegations that the appellant had, among other things, made a false official statement by creating a fictitious OPR. The IO testified during motion practice that he had gone to the Military Personnel Flight (MPF) to check on his own records and became curious as to whether there was any information which might assist in his investigation of the charges against the appellant. This occurred after the hearing had been closed pending the availability of forensic evidence from the United States Army Criminal Investigation Laboratory.

Lt Col Lennard testified that an Airman showed him a computer screen that displayed the date upon which an OPR on the appellant had been delivered to the MPF. The Airman printed a copy of the screen for Lt Col Lennard, who then consulted the successor in command of the appellant's prior unit. Lt Col Lennard asked the commander whether he could produce a log showing when the appellant's OPR was delivered to the MPF. The commander complied and Lt Col Lennard took a copy of the unit log with him.

After this, Lt Col Lennard inquired as to whether the trial defense counsel wanted to reopen the hearing to address whether he should consider these documents. Lt Col Lennard testified that the trial defense counsel failed to respond one way or another, despite repeated attempts to get him to do so. Therefore, Lt Col Lennard stated that he simply decided not to consider the documents. After the final conclusion of the hearing, Lt Col Lennard recommended that the appellant's case be referred to trial, with additional charges alleging that the appellant had created fictitious OPRs and caused them to be entered into the Air Force system of records.

We agree with the appellant that Lt Col Lennard erred in conducting the ex parte inquiry described above. In obtaining documentary evidence and questioning both the MPF representative and the unit commander, Lt Col Lennard effectively denied the appellant his right to be present during the taking of evidence. *See* R.C.M. 405(f)(3).

However, we must now examine the impact of Lt Col Lennard's conduct on the fairness of the appellant's trial. Both sides have referred us to *United States v. Payne*, 3 M.J. 354, 357 (C.M.A. 1977), which stands for the proposition that when an IO acts "in violation of the applicable standards of conduct for the judicial office he served" we will presume prejudice to the appellant "[a]bsent clear and convincing evidence to the contrary."

We are satisfied that the appellant suffered no prejudice by the error in question. In the first place, we agree with the military judge that the trial defense counsel's failure to take advantage of Lt Col Lennard's offer to reopen the hearing mitigates any claim of prejudice. Second, we further agree with the military judge that Lt Col Lennard's decision not to consider the evidence "cures any technical defect raised by the Defense." In any event, we conclude that the evidence adduced at the hearing was sufficient to support the charges, including the additional ones which Lt Col Lennard proposed.

Indeed, Lt Col Lennard's ex parte activities were less extensive than those described in *United States v. Rushatz*, 30 M.J. 525 (A.C.M.R. 1990), *aff'd*, 31 M.J. 450 (C.M.A. 1990), in which an IO visited several locations pertinent to the case and spoke with numerous potential witnesses in an effort, among other things, to obtain "background" information. Our sister court concluded that the IO's testimony at trial sufficiently rebutted any presumption of prejudice that might have arisen from his activities. "The information itself was not so significant as to suggest that it would have affected the IO's impartiality merely through discovering it." *Id.* at 532-33. By the same token, we conclude that the testimony of Lt Col Lennard, read in light of the record as a whole, rebuts any similar presumption of prejudice asserted by the appellant.

b. *That Lt Col Lennard's status as the Deputy Staff Judge Advocate (DSJA) for the General Court-Martial Convening Authority precludes his impartiality as IO.* The appellant contends that a judge advocate outside of 7 AF, perhaps a military judge, would

have been a more preferable IO than Lt Col Lennard. They note that the charges involve the appellant's alleged efforts to alter the substance of an OPR signed by Lt Gen Heflebower, the prior 7 AF/CC. Because the convening authority in this case was Lt Gen Heflebower's successor in command, because numerous witnesses in the case were assigned to 7 AF, either previously or at the time of trial, and because Lt Col Lennard was rated by officials of 7 AF, the appellant contends that "[e]ven the most casual observer would identify the fact that an IO from 7 AF could in no way sit impartially on a case that so intensely involves his own command."

Although the facts cited by the appellant in support of this claim are true enough, the record also reveals that Lt Col Lennard had only recently been assigned to 7 AF at the time of his appointment. He testified that he did not even examine the Report of Investigation prepared by the Air Force Office of Special Investigations until the Special Court-Martial Convening Authority had signed his appointment letter, and that his immediate supervisor, the staff judge advocate for 7 AF, insulated him from office discussions on the case in order to preserve his impartiality. We find nothing in the record to suggest that Lt Col Lennard's position as DSJA placed him in a conflict with any of the participants in the Article 32 investigation, as was the case in *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985). All in all we conclude that Lt Col Lennard's status as DSJA of 7 AF did not compromise his impartiality.

The appellant has also asserted other challenges to Lt Col Lennard's impartiality, to include his having denied the production of certain e-mail traffic and his denial of a defense request to have various persons testify in person before the hearing, notably Lt Gen Heflebower. We have examined the appellate filings along with the entire record, having paid special attention to the report of the Article 32 investigation, in which Lt Col Lennard explains why he ruled as he did upon these requests by the defense. We conclude that none of these matters evidence an abuse of discretion by Lt Col Lennard or that he was lacking the required impartiality. We are satisfied that the evidence is both clear and convincing that Lt Col Lennard's service in this case did not deny the appellant his right to an impartial hearing on the charges against him. We hold that the military judge did not abuse her discretion in denying the defense motion challenging the Article 32 investigation.

Unlawful Command Influence

This Court reviews allegations of unlawful command influence (UCI) de novo. *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). To establish this defect, an "accused must show facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). Once this issue is raised, the burden shifts to the government to show either that there was no UCI or that the UCI "will not affect the

proceedings." *Id.* The government's burden is proof beyond a reasonable doubt. *Id.* at 151. UCI may be apparent as well as actual. "'Even if there [is] no actual unlawful command influence, there may be a question whether the influence of command placed an intolerable strain on public perception of the military justice system.'" *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003) (quoting *United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002)).

The appellant alleges that the various actions taken by 7 AF/CC evidence UCI. Specifically, the appellant's brief states that "7 AF/CC personally endorsed the allegations made against the appellant by executing the pre-trial Referral OPR and promotion non-recommendation. These actions, and the premature findings of guilt stated therein, unfairly exerted [UCI] on 7 AF/CC's subordinate officers and on the pre-trial and subsequent stages of the appellant's case." Additionally, the appellant contends that the selection of Lt Col Lennard further evidences UCI as did the reassignment of the appellant following his removal from command.

Although in ruling on the motion at trial the military judge made extensive findings of fact in formulating her conclusions of law, she did not explicitly apply the *Biagase* criteria described above. Nevertheless, she held that UCI did not occur in the appellant's case and denied the motion for dismissal.

In applying *Biagase*, we conclude that the facts cited by the appellant do not constitute UCI, actual or implied. As stated above, we find nothing out of the ordinary in the administrative actions undertaken by 7 AF/CC, and find no reason to view them as an attempt to improperly influence the outcome of the appellant's case. Nor do we find Lt Col Lennard's conduct in the Article 32 investigation, even in those aspects which we have identified as error, to evidence such an impropriety.[2] Furthermore, we conclude that these facts, taken as a whole, would not cause a reasonable member of the public to doubt the fairness of the military justice system. Even assuming, arguendo, that the facts of this case might raise the spectre of apparent UCI, we have examined the record as a whole and are satisfied beyond a reasonable doubt that no UCI occurred. We hold that the military judge did not err in denying the appellant's challenge to his conviction based upon UCI.

[2] Although we reviewed this issue above for an abuse of the military judge's discretion, in examining it as part of the alleged UCI we find the IO's conduct to have been harmless even under the more stringent de novo standard.

Conclusion

We have examined the remaining assignments of error and resolve them adversely to the appellant. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). The approved findings and sentence 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). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator