UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ROBERT M. CRAWFORD II
United States Air Force

ACM 34837

23 December 2002

Sentence adjudged 3 October 2001 by GCM convened at Travis Air Force Base, California. Military Judge: Steven A. Gabrial (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Marc A. Jones, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Captain Matthew J. Mulbarger.

Before

BURD, PECINOVSKY, and EDWARDS
Appellate Military Judges

OPINION OF THE COURT

EDWARDS, Judge:

Pursuant to his pleas, the appellant was convicted by military judge sitting alone of three specifications of violating Air Education and Training Command Instruction (AETCI) 36-2909, *Professional Conduct and Relationships* (21 Jun 2000), in violation of Article 92, UCMJ, 10 U.S.C. § 892 and of one specification of false swearing in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged sentence consists of a bad-conduct discharge, confinement for 2 years, and reduction to E-1. Pursuant to a pretrial agreement, the convening authority approved only the bad-conduct discharge, confinement for 10 months and reduction to E-1. The appellant now contends that he

was not subject to AETCI 36-2909 and therefore his conviction for failing to obey that instruction must be set aside. He also contends pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that the sentence as adjudged and approved is inappropriately severe. We hold that appellant's guilty pleas to violating AETCI 36-2909 "were improvident but that a conviction may be affirmed for the closely related offense of dereliction of duty." *United States v. Shavrnoch*, 49 M.J. 334, 335 (1998). *See also United States v. Bivins*, 49 M.J. 328 (1998). Given our holding, we will also reassess the sentence.

Facts

At the time of the offenses, the appellant was assigned to the 364th Recruiting Squadron, Sacramento, California. Sometime in the summer of 2000, SW, a 23-year-old female, came to the recruiting office where the appellant worked and indicated an interest in enlisting in the Air Force. As part of the application process, the appellant asked SW to step on the scales so that she could be weighed. At that time, the appellant advised SW that her clothes weighed five pounds and that she could remove her clothes to reduce the weight shown on the scales. Subsequently, SW removed her jacket and shirt. They kissed and the appellant then placed his hand on SW's breast and pulled his pants down. SW performed fellatio on the appellant and the appellant performed oral sodomy on SW.

In October 2000, the appellant drove CP, a 20-year-old Air Force recruit from the Military Entrance Processing Station to her home. During this trip, the appellant kissed her and fondled her vaginal area. On the way to her home, the appellant took CP to the Air Force Recruiting Center in Novato, California. At that time, the appellant kissed CP and attempted to fondle CP's breast. Approximately two weeks later, CP returned to the recruiting office and was greeted by the appellant with a kiss. Subsequently, the appellant went to CP's place of work to deliver some enlistment paperwork to CP. At this time, the appellant kissed CP on the mouth and on her breast. He then unzipped his pants and exposed his penis to CP. Over the course of the next month, the appellant kissed CP approximately five more times and occasionally fondled her breasts.

In late December 2000, the appellant drove AO, a 20-year-old Air Force recruit from her home to the Air Force Recruiting office in Novato, California. During this trip, the appellant discussed sexual positions with AO. When they arrived at the recruiting office, the appellant told AO to take off an item of clothing for every piece of enlistment paperwork she completed. AO took off her socks, rings, glasses and shirt. The appellant then fondled AO's breasts and kissed them. He also kissed her on the mouth. The appellant then pulled down his pants, exposing his penis to AO and requested that she perform fellatio on him, but AO declined.

On 18 January 2001, agents from the Air Force Office of Special Investigations questioned the appellant. During the meeting with the agents, the appellant wrote a

statement under oath wherein he denied any sexual activity with recruits prior to his relationship with AO.

The AETC Instruction

This is not a case where we are called upon to determine if an instruction or regulation is punitive in nature. AETCI 36-2909 is a lawful general regulation issued by the general officer, commander of Air Education and Training Command (AETC). *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 16c(1)(a) (2002 ed.).[1] The provisions of the instruction in question, paragraphs 4.3.3 and 4.3.6, are punitive in nature. *See MCM*, Part IV, ¶ 16c(1)(e); *United States v. Hode*, 44 M.J. 816 (A.F. Ct. Crim. App. 1996). However, the question is whether paragraphs 4.3.3 and 4.3.6 of AETCI 36-2909 are punitive as they relate to the appellant. We hold that they are not.

According to the introductory paragraph, AETCI 36-2909:

> [A]pplies to the following individuals assigned or attached to, or operating on, an AETC unit as staff, faculty, students, trainees, or cadets: active duty military, Air National Guard, and Air Force Reserve Command members; DoD civilians; Reserve Officer Training Corps (ROTC) cadets; international military or civilian personnel; and contractor personnel. It also applies to recruiters performing in any of the capacities detailed in paragraph 3.3. . . . Military members who violate a prohibition in paragraph 4 (or any subparagraph thereunder) of this instruction and/or paragraph 3.5 (or any subparagraph thereunder) of AFI [Air Force Instruction] 36-2909 are subject to prosecution under Article 92 of the *Uniform Code of Military Justice* (UCMJ) as well as any other applicable article of the UCMJ.

Paragraph 3, entitled "Terms Explained" is critical for an analysis of whether the instruction applies to the appellant. Paragraph 3.3 provides

> **Recruiters.** This includes any commissioned or noncommissioned officer (NCO) whose primary duty is to recruit persons for the Air Force's nonprior service (NPS), prior service (PS), Officer Training School (OTS), or health professions (HP) programs or ROTC. Recruiters include, but are not limited to, ROTC admissions liaison (AL) officers, liaison officer directors (LOD), regional directors of admissions (RDA), assistant regional directors of admissions (ARDA) (commonly referred to as goldbars), and unit admissions officers (UAO).

[1] All *Manual for Courts-Martial* provisions cited herein are identical to those in the edition of the *Manual* in effect at the time of the appellant's trial.

Paragraph 4.3 provides specific prohibitions with regard to recruiters. Paragraphs 4.3.3 and 4.3.6 provide that **recruiters** will:

> 4.3.3 Not establish, develop (or attempt to develop), or conduct a personal, intimate, or sexual relationship with a recruit applicant. This includes, but is not limited to, dating, hand-holding, kissing, embracing, caressing, and engaging in sexual activities.
>
> 4.3.6. Not make sexual advances toward, or seek or accept sexual advances or favors from, a recruit applicant.

Analysis

Our close review of the provisions of this instruction convinces us that the punitive provisions of paragraph 4.3 do not apply to the appellant. "General orders, like penal statutes, are to be strictly construed, and when doubt exists respecting an order's meaning or applicability, the doubt should be resolved in favor of the accused." *Hode*, 44 M.J. at 817 (citations omitted).

The introductory paragraph coupled with paragraph 3.3 result in a particularly confusing state that we cannot resolve in favor of the government. The introductory paragraph states that it applies to "recruiters performing in any of the capacities detailed in paragraph 3.3." Yet, paragraph 3.3 is a definitional paragraph that defines the term "recruiter" to include "any commissioned officer or noncommissioned officer". The government's counsel would have us read this provision as one of inclusion rather than one of exclusion. The problem with the government's argument is that the drafters of this instruction clearly understood how to craft a provision to be one of inclusion. For example, in a later portion of paragraph 3.3, the drafters of the instruction provided that "[r]ecruiters include, but are not limited to" a certain designated group of individuals. In addition, in paragraph 4, the drafters provided that the specific prohibitions of the instruction "include, but are not limited to".

As the term "recruiters" is defined in the instruction, we must strictly construe that definition and not conclude, as the government would have us do that the "regulation was intended to apply to all recruiters." We hold that the punitive provisions of AETCI 36-2909 do not apply to members of the Air Force who are neither commissioned officers nor noncommissioned officers. The appellant, as a senior airman, was neither. *See generally* Air Force Instruction 36-2618, *The Enlisted Force Structure* (1 Apr 1999).

However, there are three reasons to affirm the appellant's convictions under Charge I for the closely related offenses of dereliction of duty. Art. 92, UCMJ. First, the appellant was on notice that he faced a charge of a violation of Article 92, UCMJ. He

was charged with the most serious offense under Article 92, UCMJ. *MCM*, Part IV, ¶ 16c(1). A violation under Article 92(1) carries a maximum punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years. *MCM*, Part IV, ¶ 16e(1). A violation under Article 92(3) for dereliction of duty carries a maximum punishment of bad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months. *MCM*, Part IV, ¶ 16e(3)(B).

Second, the appellant admitted all the elements of willful dereliction of duty in his providence inquiry. He admitted that he knew of the instruction and the prohibitions contained therein. He further admitted that those prohibitions applied to him. Hence, he admitted a duty to refrain from engaging in sexual activities with recruits and admitted knowledge of that duty. His admissions during the providence inquiry fully disclosed that he willfully engaged in sexual conduct with three recruits thereby admitting the derelictions.

Third, "dereliction of duty is an offense 'closely-related' to violating a lawful general order" under the facts of this case. *Bivins*, 49 M.J. at 333.

Therefore, we will modify the findings of guilty with respect to Specifications 1, 2, and 3 of Charge I. We modify the findings as follows:

> Of Specification 1 of Charge I: GUILTY, except the words: "did, in the State of California, on or about 29 December 2000, violate a lawful general regulation, to wit: paragraphs 4.3.3 and 4.3.6 of AETCI 36-2909, Professional Conduct and Relationships, dated 21 June 2000, by wrongfully", substituting therefore the words: "who knew of his duties, in the State of California, on or about 29 December 2000, was derelict in the performance of those duties in that he willfully failed to refrain from" and the words "as it was his duty to do". Of the excepted words, NOT GUILTY, of the substituted words, GUILTY.
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> Of Specification 2 of Charge I: GUILTY, except the words: "did, in the State of California, on divers occasions between on or about 1 July 2000 and on or about 31 August 2000, violate a lawful general regulation, to wit: paragraphs 4.3.3 and 4.3.6 of AETCI 36-2909, Professional Conduct and Relationships, dated 21 June 2000, by wrongfully", substituting therefore the words: "who knew of his duties, in the State of California, on divers occasions between on or about 1 July 2000 and on or about 31 August 2000, was derelict in the performance of those duties in that he willfully failed to refrain from" and the words "as it was his duty to do". Of the excepted words, NOT GUILTY, of the substituted words, GUILTY.

> Of Specification 3 of Charge I: GUILTY, except the words: "did, in the State of California, on divers occasions between on or about 1 October 2000 and on or about 31 December 2000, violate a lawful general regulation, to wit: paragraphs 4.3.3 and 4.3.6 of AETCI 36-2909, Professional Conduct and Relationships, dated 21 June 2000, by wrongfully", substituting therefore the words: "who knew of his duties, in the State of California, on divers occasions between on or about 1 October 2000 and on or about 31 December 2000, was derelict in the performance of those duties in that he willfully failed to refrain from" and the words "as it was his duty to do". Of the excepted words, NOT GUILTY, of the substituted words, GUILTY.

We must now reassess the sentence in light of our modifications of the findings and in light of the appellant's assertion that the imposition of a punitive discharge was inappropriately severe in this case. In order to reassess the sentence, we must "assure that the sentence is appropriate in relation to the affirmed findings of guilty [and] also . . . assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). We "may purge the prejudicial impact of an error at trial if [we] can determine that 'the accused's sentence would have been at least of a certain magnitude.'" *United States v. Harris*, 53 M.J. 86, 88 (2000) (quoting *United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994) and *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). In our reassessment, we are bound by the mandate that "[n]o sentence higher than that which would have been adjudged absent error will be allowed to stand." *Jones*, 39 M.J. at 317 (citations omitted).

We are aware that the modification of the findings changes the maximum imposable confinement from nine years to four and one half years. This difference would not have changed the sentence imposed nor the sentence approved. Both were well within the maximum. The evidence the military judge considered would not have changed. The appellant, who served as a representative of the United States Air Force as a recruiter, seriously abused his position for his own sexual gratification. Reassessing the sentence, we find the approved sentence nonetheless appropriate.

The approved findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.

Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator