UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain UN S. PAK
United States Air Force

ACM 35614

1 September 2005

Sentence adjudged 8 January 2003 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Timothy D. Wilson (sitting alone).

Approved sentence: Dismissal and confinement for 4 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Sandra K. Whittington, and Joseph W. Kastl.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Major James K. Floyd, and Major John C. Johnson.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

PER CURIAM:

The appellant was convicted, in accordance with her pleas, of dereliction of duty (consisting of misuse of a government charge card) and uttering bad checks (totaling nearly $45,000) in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. The appellant contends that her plea was improvident. We conclude that it was not.

The appellant urges us to find error in the military judge's decision to accept her guilty plea to dereliction of duty because she used the term "mistake" when discussing her improper use of the government charge card. A military judge's decision to accept a plea of guilty is reviewed for abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A guilty plea will not be set aside on appeal unless there is "a 'substantial basis' in law and fact for questioning" it. *United States v. Prater*, 32 M.J.

433, 436 (C.M.A. 1991). No such basis exists here. The appellant informed the military judge during her *Care* inquiry[1] that she knew she had a duty to not use her government charge card for personal purposes, but that she did so anyway, withdrawing $1,566.99 for personal use at the Caesar's Palace Casino in Las Vegas, Nevada.

The crux of the appellant's assignment of error appears to be that she did not intentionally use the government charge card. She was not, however, charged with *willful* dereliction of duty; rather, she was charged with, and pled guilty to, a *negligent* dereliction. Negligence means "a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances." *Manual for Courts-Martial, United States (MCM),* Part IV, ¶ 16c(3)(c).[2] The appellant admitted that she "should have double-checked" before using the government charge card, and that a reasonably prudent person would have taken the time to verify what credit card he or she was using before making such a large withdrawal. The military judge did not err in accepting the appellant's plea.

The appellant also challenges the appropriateness of her sentence, arguing that a dismissal is too harsh.[3] In determining sentence appropriateness, we exercise our judicial powers to assure that justice is done and that the appellant receives the punishment he or she deserves; performing this function does not authorize this Court to exercise clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). On the basis of the entire record, including all the matters introduced in aggravation, extenuation, and mitigation, we do not find the appellant's sentence to be inappropriately severe. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We have also considered the appellant's remaining assignments of error and find them without merit. *United States v. Martin*, 36 M.J. 739, 741 (A.F.C.M.R. 1993), *aff'd*, 39 M.J. 481 (C.M.A. 1994); *United States v. Bennett*, 28 M.J. 985, 986 (A.F.C.M.R. 1989), *aff'd*, 29 M.J. 354 (C.M.A. 1989); *United States v. Redding*, 11 M.J. 100, 109 (C.M.A. 1981); Rule for Courts-Martial 506(b); Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶¶ 5.3.2-4 (2 Nov 1999).

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).
[2] A mistake of fact defense, like the one the appellant is attempting to create on appeal, cannot be based on her own negligence. *United States v. True*, 41 M.J. 424, 426 (C.A.A.F. 1995).
[3] The appellant has presented this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

The findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. 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

ANGELA M. BRICE
Clerk of Court