UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant ANDREW L. BARKER
United States Air Force

ACM 37104

15 August 2008

Sentence adjudged 30 August 2007 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: William M. Burd (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Lance J. Wood.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Nicole P. Wishart.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant of one specification of assault consummated by a battery and four specifications of indecent assault, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934.[1] The military judge sentenced the appellant to a bad-conduct discharge, nine months confinement, forfeiture of all pay and allowances, a reduction to the grade of E-1, and a

[1] The appellant pled guilty to two of the five indecent assault specifications and guilty to the lesser-included offense of assault consummated by a battery on the remaining three indecent assault specifications. After hearing evidence and argument of counsel, the military judge found the appellant guilty of four indecent assault specifications, and one assault consummated by a battery specification.

reprimand. The convening authority reduced the confinement to five months but otherwise approved the adjudged sentence.[2] On appeal the appellant asserts that his sentence is inappropriately severe.[3] Finding no error, we affirm.

Background

The appellant was a 32-year-old, 13-year Air Force veteran assigned as an aircraft maintenance instructor at Sheppard Air Force Base, Texas. During the early morning hours in mid September 2006, the appellant was performing Non-Commissioned Officer of the Day (NCOD) duty in an airman-trainee dormitory. As the NCOD, the appellant was the only faculty member located in the dormitory and was responsible for maintaining security in the dormitory and supervising the airman-trainees.

While performing his NCOD duties, the appellant witnessed a "candy fight" among female airmen-trainees. The appellant decided to join the "candy fight" and during the course of the horseplay reached into the shirts of three female airmen-trainees, placed candy under their bras, and either touched their chest or breasts. During the evening hours of 09 December 2006, the appellant was again performing NCOD duty in the airman-trainee dormitory. A female, airman-trainee sought the appellant's assistance in gaining entrance to her room and as they entered the airman's room the appellant reached into the shirt of the airman and another female airman, placed candy under their bras, and touched their breasts.

Discussion

Inappropriately Severe Sentence

The appellant asserts that his sentence to a bad-conduct discharge is inappropriately severe. In support he highlights his: (1) admission of guilt and acceptance of responsibility; (2) thirteen years of excellent service; (3) extensive combat service; and (4) rehabilitative potential as highlighted by character statements and senior non-commissioned officer recommendations.

Article 66(c), UCMJ, 10 U.S.C. § 866 provides that this Court "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Our superior court has

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[2] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty to: (a) two of the five indecent assault specifications and (b) the lesser-included offenses of assault consummated by a battery on the remaining three indecent assault specifications in return for the convening authority's promise to withdraw four specifications of violating an unprofessional relationship instruction and a promise not to approve confinement in excess of 12 months. The convening authority, exercising his clemency powers, approved five months of confinement rather than the nine months of confinement he legally could have approved.

[3] This issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955), *quoted in United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

When considering sentence appropriateness, we should give "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). However we are not authorized to engage in an exercise of clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant, through his actions, abused his position of trust and authority and clearly departed from the standards expected of service members. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence inappropriately severe.

Conclusion

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court