UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman KRISTY K. BARRETT
United States Air Force

ACM S31464

30 January 2009

Sentence adjudged 01 February 2008 by SPCM convened at Vandenberg Air Force Base, California. Military Judge: Steven J. Ehlenbeck.

Approved sentence: Bad-conduct discharge, forfeiture of $450.00 pay per month for 2 months, and reduction to E-2.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Captain Coretta E. Gray, and Captain Naomi N. Porterfield.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

Consistent with the appellant's pleas, she was convicted of one charge and specification of larceny in violation of Article 121 UCMJ, 10 U.S.C. § 921. A panel of officers sentenced her to a bad-conduct discharge, forfeitures of $450 pay per month for two months, and reduction to E-2. The convening authority approved the sentence as adjudged. The appellant asserts the military judge erred when he admitted a referral performance report, which refers to a nonjudicial punishment action that was more than five years old on the date charges were referred, in violation of Air Force Instruction

(AFI) 51-201, *Administration of Military Justice*, ¶ 8.13.3 (21 Dec 2007).[1] Finding no error, we affirm.

Background

The appellant was the assistant noncommissioned officer in charge of the commander's support staff at the Intelligence Squadron at Vandenberg Air Force Base (AFB), California. In August 2007, the appellant filed a travel voucher for her change of assignment from McChord AFB, Washington to Vandenberg. She claimed her three stepchildren traveled with her in the move, which was completely false. In making the claim, she told the finance representative that her three stepchildren flew to Los Angeles, California and then traveled by car to Vandenberg. She asserted she did not have a receipt for the airline tickets and was unable to get proof from her credit card company. Therefore, in accordance with accepted procedures, she prepared a signed receipt indicating that she spent $1,000 for the three tickets. The voucher was processed and the appellant was paid $872.31 for the travel of her three stepchildren to Vandenberg.

During sentencing, the military judge admitted the appellant's performance reports, including three referral performance reports; disciplinary records, including a record of nonjudicial punishment pursuant to Article 15, UCMJ, 10 U.S.C. § 815[2] and a letter of counseling; and the fraudulent voucher and receipt submitted by the appellant in connection with the issue at hand. The referral performance reports were from 2007, 2001, and 2000. The 2007 report indicated the appellant received "an Article 15 for financial fraud against the government and falsifying a housing document." The 2001 report indicated she was initially on the weight management program but later met standards and that she received "an Article 15 when she with intent to deceive submitted an official document to her unit which was false as a result of her altering the recorded information." The 2000 report indicated she failed to meet the minimum standards of dress and appearance, demonstrated lack of respect by questioning her supervisor's authority and direction in the presence of customers, exercised poor judgment in handing financial obligations, and engaged in breaches of integrity. The letter of counseling, received in December 2006, was for leaving her duty section without authority.

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[1] Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 8.13.3 (21 Dec 2007), prohibits the admission of records of nonjudicial punishment that are more than five years old on the date charges are referred.

[2] Just a few months before she filed the travel voucher that led to the charges in this case, the appellant filed another fraudulent travel voucher, claiming her three stepchildren traveled with her by car the entire trip from McChord Air Force Base (AFB), Washington to Vandenberg AFB, California. Her larceny on that occasion was discovered and the appellant received nonjudicial punishment and was reduced in rank. When the squadron commander learned the appellant recently filed another travel voucher for the same travel, an investigation ensued and the latest criminal activity of the appellant was discovered, which resulted in the charge in this case.

Sentencing Evidence Admitted by Military Judge

During sentencing, the trial defense counsel objected to the admission of the 2001 performance report and argued it should be redacted to eliminate all references to the nonjudicial punishment received during that period because it was more than five years old. The trial defense counsel cited AFI 51-201, ¶ 8.13, which prohibits introduction of a record of nonjudicial punishment which is more than five years old on the date of referral of charges, and argued that pursuant to Mil. R. Evid. 403, the prejudicial effect far outweighed the probative value in such admission. The trial counsel asserted it was proper sentencing evidence and should not be redacted. In his ruling, the military judge stated he had considered Mil. R. Evid. 403 and found the rule not to be a basis for excluding the evidence. He further noted the referral performance report may have some bearing on rehabilitation potential. The military judge admitted the 2001 referral performance report with no redactions.

During deliberations on sentence, the officer members questioned whether they could review the nonjudicial punishment referenced in the 2001 referral performance report "to better understand [the appellant's] character." With the concurrence of counsel, the military judge provided the following instruction:

> Members, in response to that question, let me just tell you the Air Force instruction on military justice provides that Article 15 actions more than 5 years old are not admissible in sentencing, because the relatively minor misconduct that was involved is so old that it has little present relevance, if any. To the extent that there is reference to an old Article 15 in a performance report, you may consider such reference along with all other evidence in the case. However, keep in mind that the accused is to be sentenced only for the offense of which she has been found guilty at this court-martial. So, that's basically why you weren't given a copy of that.

The president of the court responded that he understood the instruction.

Discussion of Sentencing Evidence Admission

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)) (additional citations omitted). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). Rule for Courts-Martial (R.C.M.) 1001(b)(2) provides that matters to be presented by the prosecution include personal data and character of prior service of the accused. Such evidence includes copies of "reports reflecting the past military efficiency, conduct, performance, and history of the accused."

R.C.M. 1001(b)(2). The rule further defines personnel records of the accused as including

> any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete or in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.

Id.

The instruction governing the preparation of referral performance reports in effect at the time was AFI 36-2406, *Personnel, Officer and Enlisted Evaluations Systems* (1 Jul 2000). The relevant provisions are as follows:

> Refer a performance report when:
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> . . . .
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> . . . Comments in the report . . . are derogatory in nature, imply/refer to behavior incompatible with or not meeting minimum acceptable standards of personal or professional conduct, character, judgment or integrity, and/or refer to disciplinary actions. This includes, but is not limited to, comments regarding omissions or misrepresentation of facts in official statements or documents, financial irresponsibility, mismanagement of personal or government affairs, unsatisfactory progress in the [Weight Management Program] or [Fitness Program] . . . [and] Article 15 actions.
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> . . . *When referencing Article 15 actions . . . comments must be included identifying the underlying conduct or behavior that led to the action. For example, a report should not simply contain the comment that "MSgt Xxxx received an Article 15 during this period." Instead, the underlying conduct should be specifically cited with the resulting action included, such as "During this reporting period, Lieutenant Xxxx sexually harassed a female subordinate for which he received an Article 15." In any case, the focus of the comment should be on the conduct or behavior.*

AFI 36-2906 ¶¶ 3.9.1. – 3.9.1.2.2. (emphasis added).

The current instruction governing military justice is AFI 51-201. The relevant provisions dealing with sentencing evidence are as follows:

> **Personal Data and Character of Prior Service.** "Personnel records of the accused," as referenced in RCM 1001, includes all those records made or maintained in accordance with Air Force directives that reflect the past military efficiency, conduct, performance, and history of the accused, as well as any evidence of disciplinary actions, including punishment under Article 15, UCMJ, and previous court-martial convictions.
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> . . . .
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> . . . **Nonjudicial Punishment.** Records of punishment under Article 15, UCMJ, from any file in which the record is properly maintained by regulation, may be admitted if not over 5 years old on the date the charges were referred. . . .
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> . . . ***Performance Reports.*** *Trial counsel offers all Enlisted or Officer Performance Reports maintained according to departmental directives, as evidence of the character of the accused's prior service.*

AFI 51-201, ¶¶ 8.13 – 8.13.3(emphasis added).

We have reviewed the record of trial, the assignment of errors, and the government's reply thereto. The contested 2001 referral performance report was prepared in accordance with Air Force directives and contained no matters prohibited by such directives. Pursuant to AFI 51-201, ¶ 8.13.3, the trial counsel was required to offer all of the appellant's performance reports maintained in accordance with Air Force directives as evidence of the appellant's prior service. Further, the military judge conducted a proper balancing test under Mil. R. Evid. 403 and found the probative value to outweigh any prejudicial impact.[3] *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001).

After reviewing the entire record, we find the military judge did not abuse his discretion in admitting the 2001 referral performance report with no redactions. The probative value of such a document far outweighed any prejudicial impact. Furthermore,

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[3] We note the military judge did not thoroughly articulate his balancing analysis on the record. The matter was raised by the trial defense counsel during the initial presentation of evidence by trial counsel. The military judge requested the trial defense counsel provide copies of the relevant instruction. The issue was later raised and argued by both counsel. Six pages of the record of trial are devoted to the issue, much of which contains discussion and argument regarding Mil. R. Evid. 403. It is quite clear that the military judge conducted a proper balancing test.

when questioned by the members whether they could review the nonjudicial punishment action referenced in the 2001 referral performance report, the military judge provided an appropriate instruction and ensured the members understood the instruction. *Cf. United States v. Evans*, 27 M.J. 34, 39 (C.M.A. 1988) (issuing a curative instruction and eliciting statement of understanding from members can cure prejudice of erroneously admitted information). Whether the members were properly instructed is reviewed de novo. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (quoting *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996) (additional citations omitted)). We find the military judge properly instructed the members in this case, and the instructions were sufficient to avoid any prejudice to the appellant.

Even if it was error for the military judge to admit the 2001 referral performance report without redacting the references to the nonjudicial punishment, we find such error to be harmless. The appellant pled guilty to a serious offense. She faced the maximum allowable sentence for a special court martial, including confinement for up to one year. However, the court members only imposed a bad conduct discharge, $450 forfeiture of pay per month for two months, and reduction to E-2. The appellant's personnel record was replete with admissible evidence of misconduct and derelictions, including other offenses implicating her integrity and documenting a previously filed false travel voucher. The appellant had three referral performance reports, a recent letter of counseling, and a very recent nonjudicial punishment action. When we consider all the evidence the members had available in sentencing the appellant, including the instruction provided by the military judge, we are convinced the reference to a nonjudicial punishment action in the 2001 referral performance report did not materially prejudice the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Erroneous Court-Martial Order

We note that the court-martial order (CMO), dated 14 March 2008, is erroneous in several aspects. First, it fails to list the plea and finding for the specification of the Charge. Additionally, the specification should read "Did, at or near Vandenberg AFB, California on or about 07 August 2007, steal money in the form of travel voucher payments, military property, of a value of more than $500.00, the property of the United States." This was the language used on the charge sheet and during the appellant's *Care*[4] inquiry. Therefore, we order the promulgation of a corrected CMO.

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, 10

[4] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

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

STEVEN LUCAS, YA-02, DAF
Clerk of the Court