UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JOHN E. BEACHAM
United States Air Force

ACM 33999

28 January 2002

Sentence adjudged 3 December 1999 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: William E. Orr Jr.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for Appellant: Colonel James R. Wise, Major Stephen P. Kelly, and Major Jeffrey A. Vires.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Ronald A. Rodgers, and Major Martin J. Hindel.

Before

BRESLIN, HEAD, and BILLETT
Appellate Military Judges

OPINION OF THE COURT

BILLETT, Judge:

Contrary to his plea, the appellant was convicted by a general court-martial of one specification of violating a lawful general regulation under Article 92, UCMJ, 10 U.S.C. § 892. He was sentenced to a bad-conduct discharge and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts the military judge erred by denying his challenge for cause directed against one of the court members. We affirm.

The appellant was convicted of wrongfully sharing information about Weighted Airman Promotion System (WAPS) test materials with other Air Force members who were actual or potential examinees. His specific actions involved sending to and receiving from other examinees actual test material or testable material that had been

marked or highlighted. This conduct violated Air Force Instruction (AFI) 36-2605, *Air Force Military Personnel Testing System,* ¶ 5.13 (1 May 2000), a regulation which set forth certain restrictions on group study and the sharing of test information among those preparing for Promotion Fitness Examinations (PFE). At trial, the defense tried unsuccessfully to convince the court members that the appellant's case fit under an exception to exchanging test materials set forth in paragraph 5.13, a provision that allowed for the exchange or sharing of certain test materials that were not marked or highlighted.

During voir dire of the prospective court members, Major [Maj] H revealed that he had been "a special testing officer for PFE." Defense counsel later followed up with some specific questions:

> DC: Has anyone ever read the WAPS compromise regulation? Negative response from everyone except [Maj H]. Maybe you've seen it?
>
> [Maj H]: It was a while back. I suppose that at that time I was serving as that, I most likely reviewed some of the paragraphs, but I can't specifically remember the entire AFI.
>
> DC: Did you have an opportunity to interpret the paragraphs for somebody as an issue?
>
> [Maj H]: No. I never dealt with any issue. I just needed to be aware of my responsibilities for protecting the materials themselves, and I think I have just the same general knowledge as most members do of the injunction against sharing of information, particularly specific test questions.

Later, during individual voir dire, the following conversation took place, which covered Maj H's knowledge of the AFI and his use of it while performing his testing officer duties:

> TC: Okay. And then you said that you had referred possibly to the AFI on WAPS testing for your duties?
>
> [Maj H]: I suspect that I reviewed those paragraphs concerning safeguarding the materials. I do not recall getting in-depth about test compromise by test takers, as that issue never came up in my two years. There was never an allegation or any suspicion on my part or anyone else's part raised to me that we had any of that going on in my squadron in my area or responsibility.

> TC: So basically, your involvement was just administering the test itself?
>
> [Maj H]: Yes.
>
> TC: Based on that background, are you going to have any sort of preconceived notion about anything regarding this case, any sort of compromise, test compromise?
>
> [Maj H]: I don't believe so, no. I just wanted to make it known that I have maybe a little more involvement with the test than maybe anyone else. But, no. I don't believe that it will affect my ability to adjudicate in this matter.

Maj H then answered questions posed by the defense counsel, the most pertinent of which is as follows:

> DC: In your capacity as test monitor, did you give advice to examinees about prohibitions on group study?
>
> [Maj H]: In group study? Not as concerns group study. I did have to read them statements concerning the subsequent—not to discuss test—on the day of the test, as I gave the test. I would be reading them information there about divulging any specific test questions, et cetera. I did that on several- the eight occasions that I tested people.

At the conclusion of voir dire, the appellant challenged Maj H for cause, claiming that his prior experience as a test monitor established him as "inextricably involved" in the WAPS testing process and cast substantial doubt on his ability to be impartial. The appellant argued that Maj H's role as a test monitor cast substantial doubt on the fairness of the proceedings under Rule for Courts-Martial (R.C.M.) 912(f)(1)(N). That rule provides that a member shall be excused for cause whenever it appears that the member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness and impartiality." The government opposed the challenge and argued that Maj H's test monitor position was only an additional duty, and that Maj H had no "particular knowledge about the AFI [AFI 36-2605] that was inelastic" and he had "no inelastic views on the system at all." After hearing arguments of counsel, the military judge ruled on the challenge for cause:

> MJ: After considering the testimony from [Maj H], I find that he was merely—that it was an additional duty, and he said that he could

> be fair and impartial. I'm not going to grant the challenge for cause against [Maj H].

On appeal, a military judge's ruling on a challenge for cause is reviewed for an abuse of discretion. *United States v. Napoleon*, 46 M.J. 279 (1997). While military judges must grant challenges for cause liberally, the judge's determination not to grant a challenge for cause should not be overturned absent a clear abuse of discretion in applying the liberal-grant mandate. *United States v. White*, 36 M.J. 284 (1993). The question of actual bias is essentially one of credibility and therefore largely one of demeanor. *United States v. Reynolds*, 23 M.J. 292 (C.M.A. 1987). The military judge enjoys "great deference because we recognize that he has observed the demeanor of the participants in the voir dire and challenge process." *White*, 36 M.J. at 287; *United States* v. *Daulton*, 45 M.J. 212, 217 (1996).

By contrast, implied bias issues are reviewed under a somewhat less deferential standard. Actual bias is reviewed through the eyes of the military judge or the court members. Implied bias is reviewed under an objective standard, viewed through the eyes of the public. *Daulton*, 45 M.J. at 217. The focus "is on the perception or appearance of fairness of the military justice system." *United States* v. *Dale*, 42 M.J. 384, 386 (1995), *aff'd,* 48 M.J. 329 (1997).

The appellant's objections at trial to Maj H's participation appeared to be grounded in notions of both actual and implied bias. On appeal, his challenge is confined to the concept of implied bias. As Maj H stated forcefully during the proceedings that he believed he could be fair and impartial, and he did not think his test monitor background would hinder his efforts to be unbiased, we are satisfied that no actual bias exists in this case. We now analyze the issue on the basis of implied bias.

A court member's past experience or training by itself does not establish implied bias, and technical expertise is not automatically disqualifying. *Daulton*, 45 M.J. at 217; *White*, 36 M.J. at 288. Thus, Maj H's mere involvement with the testing program does not establish implied bias. The facts and circumstances of that involvement are, of course, important to the bias determination. Here, Maj H was unique among the court members in having, at least in the past, some knowledge as to the detailed workings of the WAPS testing program. Nevertheless, several other court members indicated some familiarity with the testing program, as indeed most Air Force members would. Also, Maj H's participation in the testing program was a part-time, additional duty that he had not performed in four years at the time of the appellant's court-martial. Thus, at the time of appellant's court-martial, Maj H's knowledge of the testing process was not significantly different from the individual or the collective knowledge of the other court members. Maj H was not in a position to wield an inappropriate level of influence with the other court members and a lay member of the public observing the trial would recognize this.

It is also significant that Maj H, while having a degree of familiarity with AFI 36-2605 that was somewhat greater than the other court members, was never called upon to apply the regulation to specific individuals or to interpret its meaning in the context of a compromise of test material. He testified on voir dire only that he had a general familiarity with the regulation and that he was sometimes tasked with informing examinees about its contents and the general provision against sharing test materials.

Our superior court has said '[n]either law nor logic demands that a court-martial be detailed with members devoid of the common experiences of mankind." *United States* v. *Towers*, 24 M.J. 143 (C.M.A. 1987). That court was unwilling to adopt a rule requiring "the automatic disqualification of any person from serving as a court-martial member simply because that individual possesses some degree of expertise in a field related to that which is the substance of the charges against an accused." *Id*. at 146. In order for a member's vocational or professional experience to be disqualifying, the member must demonstrate a bias or prejudice resulting from or inseparable from this experience. *Id*. Nothing in this case indicates or even suggests that Maj H possessed such bias or that a disinterested observer of the court-martial proceedings would suspect such a bias. The military judge did not abuse his discretion in denying the appellant's challenge for cause.

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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, SSgt, USAF
Chief Court Administrator