

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Senior Airman STEPHEN L. CLEVINGER
United States Air Force**

ACM S30107

29 January 2003

Sentence adjudged 13 March 2002 by SPCM at Whiteman Air Force Base, Missouri. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 days, \$4000.00 fine, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Maria A Fried.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Lori M. Jemison (legal intern).

Before

**BURD, ORR W.E., and CONNELLY
Appellate Military Judges**

OPINION OF THE COURT

CONNELLY, Judge:

The appellant was convicted, by a military judge sitting alone, in accordance with his pleas, of two specifications of larceny of military property, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The sentence, adjudged and approved, was a bad-conduct discharge, confinement for 30 days, a fine of \$4,000.00, and reduction to airman basic. The appellant contends that his sentence is inappropriately severe.

Following his divorce in August 1998, the appellant continued to receive his housing allowance at the higher “with-dependent” rate for a period of 40 months (\$4,241.02), although he no longer had a lawful dependent. In addition to failing to inform the government that he was no longer entitled to the “with-dependent” rate,

shortly after his divorce and permanent change of station, he certified in writing that he was still entitled to the “with-dependent” rate. Two days prior to his court-martial, the appellant reimbursed the government \$4,200.00.

During the sentencing portion of the trial, the appellant presented strong evidence in mitigation. He offered information regarding his nine and a half years of impeccable service, frequent overseas tours, significant awards and decorations, and a large number of positive character statements from officers, enlisted personnel, and civilians who knew the appellant.

In his appeal, the appellant contends that the Discussion in Rule for Courts-Martial (R.C.M.) 1003(b)(3) enumerates a policy that a fine is normally not adjudged unless a service member is unjustly enriched. The appellant claims that because he paid back the money he wrongfully took, it cannot be said that he was unjustly enriched, citing *United States v. Olson*, 25 M.J. 293 (C.M.A. 1987). Under the appellant’s logic, therefore, the imposition of the fine is inappropriate. In addition, the appellant further claims that the imposition of the punitive discharge, fine, confinement, and reduction in rank was too severe in light of his record and favorable character letters.

The appellant was unjustly enriched by receiving enhanced housing allowances for a period of 40 months. While the appellant paid back the principal prior to trial, the government suffered a loss of the money for more than 40 months. The appellant’s reliance on the wording in *Olson* is misplaced. In *Olson*, the accused paid restitution as part of his pretrial agreement, and was fined as part of his sentence. Due to an ambiguity in the pretrial agreement, the fine was set aside. Therefore, *Olson* does not stand for the proposition that a fine is not appropriate where restitution has been made.

Considering the nature of the offenses and having given individualized consideration to the appellant, we find the sentence to be appropriate. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). The offense lasted for more than three years and involved a significant amount of money. Not only did the appellant fail to notify the government of his change in marital status and change in entitlements, he affirmatively misled the government by falsely certifying that he qualified for a housing allowance at a “with-dependent” rate.

The 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 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator