**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Master Sergeant ANTHONY Q. DUPREE**
**United States Air Force**

**ACM S31828**

**04 January 2013**

Sentence adjudged 16 October 2009 by SPCM convened at Ramstein Air Base, Germany. Military Judge: William E. Orr, Jr.

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

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Major Reggie D. Yager; and Captain Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. DiDomenico; Major Naomi N. Porterfield; Major John M. Simms; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges



PER CURIAM:

At a special court-martial composed of officer members, the appellant pled guilty by exceptions to one specification of adultery on one occasion, in violation of Article 134, UCMJ, 10 U.S.C. § 934, and entered pleas of not guilty to the remaining charges and specifications. After trial on the merits, the court-martial convicted him of two specifications of dereliction of duty by failing to maintain professional relationships with subordinate Airmen, in violation of Article 92, UCMJ, 10 U.S.C. § 892, and acquitted him of the remaining offenses of soliciting prostitution and most of the excepted

language in the adultery specification, which alleged divers occasions both on and off base.[1] The court sentenced him to a bad-conduct discharge, reduction to E-1, and a reprimand. The convening authority approved the adjudged sentence. The appellant assigns five errors: sufficiency of the Article 134, UCMJ, specification to allege an offense; sufficiency of the evidence regarding dereliction of duty; merger for sentencing of the adultery and unprofessional relationship charges regarding the same Airman; sentence appropriateness; and denial of speedy post-trial review from trial to action.

*Background*

The appellant, a master sergeant with almost 24 years of service at the time of trial, developed a personal relationship with Airman First Class (A1C) CC who was assigned to the appellant's unit where he was the noncommissioned officer in charge of her shop. The appellant repeatedly made sexually suggestive comments and gestures toward her, visited her multiple times each duty day, and often intervened when intermediate supervisors attempted to discipline her. A1C CC testified that she was flattered by the personal attention of this senior noncommissioned officer, and ultimately agreed to let the appellant visit her at her off-base residence, where they had sexual intercourse. At the time, both were married, but both were separated from their spouses.

The appellant also developed a personal relationship with Senior Airman (SrA) IR, a junior Airman who was assigned to the base honor guard on which the appellant served. She would often visit the appellant in his office after duty hours, where they kissed on several occasions. The appellant asked SrA IR if he could perform oral sex on her and slid his hands up her leg to her panty line. She refused and left his office crying. The appellant offered her $800 for a trip she wanted to take if she would visit him at his residence. She agreed and slept with the appellant but refused to have sexual intercourse with him. The appellant later provided her additional money to travel home on leave and proposed "opening up his wallet" to her if she would spend time with him. When she had difficulty repaying him, the appellant told her, "If you spend time with me, you know, you don't have to worry about paying me back for the ticket . . . Boyfriends and girlfriends don't pay each other back." When she refused his offer, he threatened to go to her first sergeant and commander about her nonpayment of the debt.

*Sufficiency of the Adultery Charge to State an Offense*

The appellant argues that the specification alleging adultery fails to state an offense because the specification does not expressly allege the terminal element required for an Article 134, UCMJ, offense. While failure to allege the terminal element of an Article 134, UCMJ, offense is error, in the context of a guilty plea the error is not

[1] When the appellant pled guilty to the adultery specification, he excepted the language that the other party was married. The members found that she was married as well.

prejudicial where the military judge correctly advises the appellant of all the elements and the plea inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, 71 M.J. 28, 34-36 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). Here, the military judge fully advised the appellant of the required elements during the plea inquiry, the appellant acknowledged understanding the elements, and the appellant explained how his misconduct satisfied the terminal elements. Therefore, the appellant suffered no prejudice from the omission of the terminal element.

*Sufficiency of the Evidence*

The appellant argues that the evidence regarding the alleged unprofessional relationship with SrA IR is legally and factually insufficient to support the finding of guilty. Though apparently conceding the inappropriateness of the relationship, the appellant argues that it did not violate the prohibition on unprofessional relationships because he was not in SrA IR's chain of command. We disagree.

The duty to avoid unprofessional relationships is not limited to personnel within a military member's chain of command. Failure to maintain professional relationships "can adversely affect morale and discipline, *even when the members are not in the same chain of command or unit*." Air Force Instruction (AFI) 36-2909, *Professional and Unprofessional Relationships*, ¶ 3.3 (1 May 1999) (emphasis added). A military relationship becomes unprofessional when, among other things, it detracts from the authority of superiors or reasonably creates the appearance of misuse of office or position. *Id*. at ¶ 2.2.

Here, a senior noncommissioned officer invited a junior Airman to his office on multiple occasions after duty hours, kissed her, offered to have oral sex with her, loaned her money in an attempted exchange for physical companionship, and threatened to contact her superiors when she refused his sexual advances and could not repay the loan. This evidence is more than sufficient to legally and factually support the finding of guilty of dereliction of the duty imposed by AFI 36-2909 by having an unprofessional relationship with SrA IR. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

*Merger of Adultery and Dereliction Specifications*

The appellant argues that the specifications alleging dereliction of duty by having an unprofessional relationship with A1C CC (Charge I, Specification 1) and adultery with A1C CC (Charge II, Specification 1) should have been merged for sentencing purposes. Because the appellant did not move to merge the two specifications at trial, we will review the issue for plain error. *See United States v. Powell*, 49 M.J. 460 (C.A.A.F.

1998); *United States v. Lloyd*, 43 M.J. 886 (A.F. Ct. Crim. App. 1995), *aff'd on other grounds*, 46 M.J. 19 (C.A.A.F. 1997). Under the facts of this case, the offenses are clearly separate for both findings and sentence. The appellant's act of adultery with A1C CC was just one of many distinct acts encompassed within the unprofessional relationship, and the two charges do not share the same elements. We find no plain error. *See United States v. Paxton*, 64 M.J. 484, 490-91 (C.A.A.F. 2007).

*Sentence Appropriateness*

The appellant asserts that a bad-conduct discharge is inappropriately severe. In reviewing sentence appropriateness, we "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Applying these standards to the present case we do not find the sentence inappropriately severe.

The appellant cultivated an unprofessional relationship with two junior Airmen then misused his authority as a senior noncommissioned officer to intervene in disciplinary matters involving one of the Airmen and used money loans to leverage companionship from the other. Far from an isolated mistake by an uninformed noncommissioned officer, the appellant had received a letter of reprimand from his squadron commander the previous year for failing to maintain professional relationships. In his response to the letter of reprimand, the appellant stated that he realized the "error of [his] ways" and assured his commander that he would "never make a similar mistake again." Within a few months of that response, he was having sex with A1C CC. Having considered the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial, we do not find the sentence inappropriately severe for the appellant's repeated disregard of the duty required of a senior noncommissioned officer to maintain professional relationships with junior Airmen.

*Post-Trial Processing Delay*

The appellant argues that he was prejudiced by the post-trial delay from sentence to action of 238 days. We review de novo whether an appellant's due process right to a speedy post-trial review has been violated. *United States v. Moreno*, 63 M.J. 129, 135

(C.A.A.F. 2006). A presumption of unreasonable delay applies if the convening authority does not act on a case within 120 days of trial. *Id*. at 142.

The convening authority here took almost double the amount of time that makes the delay facially unreasonable. Under these circumstances, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *Moreno*, 63 M.J. at 135-36. The Government apparently concedes that the length of the delay weighs in favor of the appellant but asserts that the reasons for delay favors the Government. Those reasons, as detailed in an affidavit submitted by the law office superintendent, are primarily administrative: court reporter workload, computer access issues, illnesses, leaves, base exercises, etc. Further, as appellate defense counsel points out, 54 days in the court reporter's chronology include "general office administrative work." Under the circumstances of this case, we do not find the reasons for the delay sufficient because such administrative matters do not excuse the failure to meet processing standards. *Id*. at 143. As to the third *Barker* factor, the appellant asserted his right to speedy post-trial review.

Turning to the final *Barker* factor of prejudice, the Court in *Moreno* recognized that particularized anxiety and concern could form the basis for relief. Here, this former senior noncommissioned officer was essentially held to work weeds and seeds for eight months while the base legal office sorted its manpower issues. In his clemency request, the appellant describes how he has worked for six months on base details picking up trash, emptying garbage, and shoveling snow – six months that he says will live with him forever. Five months before the convening authority took action, the appellant's counsel contacted the base legal office to ask when the transcript would be ready, stating that his client was "anxious to see final action." In another email three months later, defense counsel again reminded the legal office that they had been waiting for six months for the record and asked, "When are we going to be able to submit our clemency request so that he can get some reasonable relief and move on with the rest of his life?" Many senior noncommissioned officers who knew of the appellant's circumstances submitted clemency letters in which they stated that the excessive post-trial delay had negatively impacted their impression of the military justice system.[2] Under the totality of the circumstances in this case, we find sufficient prejudice to merit sentence relief.

*Conclusion*

The findings of guilty are affirmed. Reassessing the sentence on the basis of the error noted and the entire record, this Court affirms only so much of the sentence as

[2] Despite the length of time taken to assemble the record, many of these clemency statements were omitted from the record and had to be submitted by motion.

provides for a bad-conduct discharge, reduction to the grade of E-4, and a reprimand.

OFFICIAL


STEVEN LUCAS
Clerk of the Court