

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Senior Airman ALEXANDER C. FLANNER
United States Air Force**

ACM S31938

11 September 2013

Sentence adjudged 1 April 2011 by SPCM convened at Holloman Air Force Base, New Mexico. Military Judge: Scott E. Harding (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of \$970.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Tom E. Posch; Captain Nicholas D. Carter; and Captain Shane McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and SANTORO
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his conditional guilty pleas, of divers violations of a general order by wrongfully using “spice,” and divers uses of cocaine, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892 and 912a. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 2 months, forfeiture of \$970.00 pay per month for two months, and reduction to E-1.

The appellant's conditional guilty plea preserved for appellate review the military judge's denial of a motion to dismiss with prejudice.¹ Before us, the appellant raises two additional issues: (1) Whether the staff judge advocate (SJA) was disqualified from providing Rule for Courts-Martial (R.C.M.) 1106 post-trial advice to the convening authority; and (2) Whether the SJA failed, as required by R.C.M. 1106, to address defense allegations of legal error. Because the record of trial (ROT) must be remanded to the convening authority for a new staff judge advocate's recommendation (SJAR) and convening authority action, we will not decide the remaining issues presented at this time.

Background

During the pretrial investigation of Airman First Class (A1C) JF for illicit drug use, the wing SJA, Lieutenant Colonel (Lt Col) DH, requested the general court-martial convening authority (GCMCA) grant the appellant testimonial immunity. The request was sent to the GCMCA's SJA, who forwarded the following recommendation to the GCMCA: "[W]e formally request that the Commander, 12th Air Force, grant testimonial immunity to be effective upon receipt of an immunity letter, to [the appellant]" The GCMCA granted the appellant testimonial immunity but the grant and order made no reference to when it became effective. Instead, the order stated, "I hereby grant you testimonial immunity and order you to answer any questions posed to you by investigators and counsel . . . and to testify at any proceeding held pursuant to the Uniform Code of Military Justice"

On 3 February 2011, the grant of immunity was signed, dated, and transmitted to the chief of military justice, Captain (Capt) DK. On 4 February 2011, Capt DK interviewed the appellant. The interview had been arranged through the appellant's first sergeant and the appellant initially believed he was being interviewed concerning A1C JF. When the interview began, however, Capt DK informed the appellant that he was suspected of having used cocaine and advised him of his Article 31, UCMJ, 10 U.S.C. § 831, rights. The appellant eventually waived his rights to counsel and to remain silent and confessed to using cocaine and spice. The appellant was not informed about the existence of the immunity letter until after charges were preferred.

Trial defense counsel made a timely motion to dismiss the charges and specifications, arguing that the appellant had received testimonial immunity at the time the GCMCA signed the memorandum. Lt Col DH testified during the motion hearing. She told the military judge she sought testimonial immunity for the appellant because she suspected he had used cocaine and would invoke his right to remain silent if he were called to testify in A1C JF's court-martial.

¹ The specific preserved issue is: "[W]hether dismissal of charges would be appropriate due to the accused having received de facto testimonial or transactional immunity and use of that immunized testimony in the decision to prefer and refer charges"

On cross-examination, Lt Col DH stated she told the special court-martial convening authority she intended to set up a “Chinese wall” within her office to segregate the information received during the interview from other staff attorneys in the event the appellant was prosecuted. Lt Col DH testified that the “wall” was not ultimately erected because—

[The appellant] was read his rights, confessed pursuant to that rights advisement—after a rights advisement and we never actually provided him with the immunity; therefore, none of his statements were pursuant to a grant of immunity, therefore, I did not see any need to set up a Chinese wall.

The military judge denied the defense counsel’s motion to dismiss, finding that testimonial immunity had not attached at the time the GCMCA signed the order.

During submission of R.C.M. 1105 clemency matters, trial defense counsel asked the convening authority not to approve the bad-conduct discharge, arguing in part that the appellant had been granted immunity by the GCMCA. The appellant also asked the convening authority not to approve the punitive discharge, stating:

My attorney, Captain [WB], Cannon AFB Defense Counsel, has advised me on a potential legal issue regarding my case which will be reviewed at the appellate level. Having been informed of this potential issue, I now respectfully request that you please consider disapproving my bad conduct discharge and offer me an administrative discharge with a general (under honorable conditions) characterization. If you so choose to approve my request, in turn I will willingly waive my right to appellate review of my case. This will ensure that no further action is taken, regardless of legal error, essentially ending this issue and putting my case to rest.

Following the clemency submission, the SJA provided the convening authority with an Addendum to her original SJAR. Paragraph two of the Addendum states, “The defense does not allege any legal errors.” Paragraph three states, “I reviewed the attached clemency matters submitted by the defense. My earlier recommendation remains unchanged. I recommend you approve the findings and sentence as adjudged.”

Disqualification of the SJA

The appellant argues that the SJA was disqualified from providing post-trial advice to the convening authority because she testified at trial on the contested issue of whether the appellant received testimonial immunity. We agree.

We determine whether an SJA is disqualified from participating in post-trial review de novo. *United States v. Taylor*, 60 M.J. 190, 194 (C.A.A.F. 2004). The defense has the initial burden of making a prima facie case for disqualification. *Id.* If the defense meets its initial burden, the government must prove that the SJA was not disqualified.

If an SJA testifies as a witness at a court-martial concerning a contested matter, he or she may be disqualified from thereafter serving as the SJA for the convening authority in that case. *United States v. Gutierrez*, 57 M.J. 148, 149 (C.A.A.F. 2002). “[W]here a legitimate factual controversy exists between the staff judge advocate and the defense counsel, the staff judge advocate must disqualify himself from participating in the post-trial recommendation.” *United States v. Lynch*, 39 M.J. 223, 228 (C.M.A. 1994). While testifying as a witness does not per se disqualify the SJA from preparing an SJAR, we must determine whether an impartial recommendation can be rendered. Applying an objective test, the test for disqualification turns on whether the SJA “is put in the position of weighing his testimony against or in light of other evidence which conflicts with or modifies his own.” *United States v. Choice*, 49 C.M.R. 663, 665 (C.M.A. 1975).

We find that, in the case before us, Lt Col DH was disqualified from providing a post-trial recommendation to the convening authority. The issue of whether immunity took effect upon the GCMCA’s signature was the focus of the pretrial motion and is raised as an assignment of error before this court.² At trial, Lt Col DH defended her subordinate’s decision not to inform the appellant of the signed immunity letter, agreeing with Capt DK that the appellant’s waiver of his rights made immunity unnecessary. As such, she expressed a definitive opinion on a question in controversy that has continued into the post-trial phase. As a result, we find that she could not provide an impartial recommendation to the convening authority.

Conclusion

Accordingly, the convening authority’s Action is set aside. The ROT is returned to The Judge Advocate General for remand to the convening authority for new post-trial processing consistent with this opinion. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.



FOR THE COURT

STEVEN LUCAS
Clerk of the Court

² The appellant’s conditional guilty plea permits his appeal concerning whether the grant of immunity required dismissal of the charges. See Rule for Courts-Martial 910(a)(2).