UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JACOB M. HAWKES
United States Air Force

ACM S31754

31 January 2011

Sentence adjudged 20 October 2009 by SPCM convened at Presidio of Monterey, California. Military Judge: Vance H. Spath (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 75 days, forfeiture of $650.00 pay per month for 5 months, a reprimand, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Michael S. Kerr, and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Major Roberto Ramirez, Captain Joseph Kubler and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

PER CURIAM:

A special court-martial composed of a military judge alone convicted the appellant in accordance with his pleas of five specifications of failing to go to his appointed place of duty, one specification of disobeying a lawful general regulation, one specification of wrongful use of ecstasy, one specification of divers wrongful use of marijuana, and one specification of divers wrongful use of cough medicine to become intoxicated in violation of Articles 86, 92, 112a, and 134, UCMJ, 10 U.S.C. §§ 886, 892, 912a, 934. The court sentenced him to a bad-conduct discharge, confinement for 75 days, forfeiture of $650 pay per month for five months, reduction to the grade of E-1, and a reprimand. The convening authority approved the sentence adjudged. The appellant assigns two errors:

(1) whether the military judge committed error by the admission in sentencing of certain derogatory documents from the appellant's personnel records and (2) whether his sentence is inappropriately severe.[1]

Admission of Personnel Documents in Sentencing

The appellant argues that the military judge committed plain error by admitting the appellant's 14 January 2009 Article 15, UCMJ, 10 U.S.C. § 815, action because he also admitted a Vacation of Nonjudicial Punishment action that "involved the same misconduct contained in the Article 15[, UCMJ]." The 14 January 2009 Article 15, UCMJ, action states the offense as violating a lawful order by leaving the installation on *10 January 2009*; the Vacation of Nonjudicial Punishment action states the offense as violating a lawful order by leaving the installation on *2 January 2009*. While each involves the same type of misconduct, each involves a separate act of misconduct and each may be the subject of separate disciplinary actions. The military judge committed no error in admitting these documents. Rule for Courts-Martial (R.C.M.) 1001(b)(2).

The appellant next asserts error in the admission of certain letters of reprimand because the documents did not contain a third endorsement. The military judge addressed this issue on the record, finding that the second and third endorsements were combined in the letters and reflected that, where the appellant did respond, his response had been considered. The appellant submitted responses to all but one letter, and all were annotated accordingly.

Under R.C.M. 1001(b)(2), the prosecution may introduce personal data and information pertaining to the character of the accused's prior service. This Rule provides as follows:

> Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's . . . character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15[, UCMJ].
>
> "Personnel records of the accused" includes 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 in a specified respect, or as containing matter that is not admissible under the

[1] Both issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

> Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.

R.C.M. 1001(b)(2).

Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 8.13 (21 Dec 2007), sets the following guidelines for admission of documents from an accused's personnel information file:

> 8.13.1. Personnel Information File. Relevant material contained in an accused's unit personnel information file (PIF) may be admitted pursuant to [R.C.M.] 1001(b) if:
>
> 8.13.1.1. Counsel provided a copy of the document or made the document available to opposing counsel prior to trial; and
>
> 8.13.1.2. There is some evidence on the document or attached to it that:
>
> 8.13.1.2.1. The accused received a copy of the correspondence (a document bearing the signature of the accused, or a witnessed statement regarding the accused's refusal to sign, would meet this criterion) and had the opportunity to respond to the allegation; and,
>
> 8.13.1.2.2. The document is not over 5 years old on the date the charges were referred to trial.

Applying these requirements to the letters of reprimand at issue here, we find that they were properly admitted. Each shows that the appellant received the document and had an opportunity to respond; in fact, each contains the appellant's signed acknowledgement to include notice of his right to respond and several contain lengthy responses from the appellant. As such, the personnel documents are in substantial compliance with both R.C.M. 1001(b)(2) and AFI 51-201.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, 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); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004), *aff'd in part and rev'd in part on other grounds*, 60 M.J. 368 (C.A.A.F. 2004).

The appellant argues that his sentence is inappropriately severe because he has sleep apnea and has sought substance abuse treatment. The military judge thoroughly discussed sleep apnea with the appellant during the plea inquiry to ensure that it was not a defense to the charge under Article 86, UCMJ. Further, the appellant presented in sentencing evidence concerning both his sleep apnea and substance abuse treatment. While the matters cited by appellant are appropriate considerations in clemency, they do not show that his sentence is inappropriately severe. These matters were properly before the court-martial that sentenced him as well as the convening authority that approved the sentence. Having considered the sentence de novo in light of the character of this offender, the nature and seriousness of his offenses, and the entire record of trial, we find the appellant's sentence appropriate.

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 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
Clerk of the Court