UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ELIZABETH E. LEAHY
United States Air Force

ACM S31462

10 December 2008

Sentence adjudged 19 February 2008 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: William M. Burd (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $898.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Nurit Anderson, and Major Jeremy S. Weber.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

PER CURIAM:

The appellant was tried at Lackland Air Force Base (AFB), Texas. In accordance with her pleas, she was found guilty of willful dereliction of duty (underage drinking) and wrongfully using cocaine on divers occasions in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. The approved sentence consists of a bad-conduct discharge, confinement for two months, forfeiture of $898.00 pay per month for two months, and reduction to E-1.

The appellant raises two issues on appeal. The first issue is whether the military judge erred by admitting into evidence, over defense hearsay and authenticity objections, a letter of reprimand during the government's sentencing case without any foundation for a hearsay exception and without an attesting certificate meeting the definition set out by the Drafters' Analysis of Mil. R. Evid. 902. The second issue is whether a sentence including a bad-conduct discharge is inappropriately severe for first-time drug use and underage drinking by an airman diagnosed with severe adjustment disorder with mixed anxiety and depressed mood and borderline traits.

Background

During the evening hours of 3 July 2007, while the appellant and her boyfriend, Airman First Class (A1C) LC, were planning to leave Lackland AFB, and go to a local Red Roof Inn hotel in San Antonio, Texas, A1C LC discussed getting some cocaine. A1C LC then left to obtain the cocaine. Upon his return, A1C LC met the appellant at the mini-mall on Lackland AFB, where he gave her a small bluish-green plastic bag containing cocaine. The appellant proceeded into the min-mall restroom and snorted a small amount of cocaine off of her hand.

Later that evening, the appellant and A1C LC took a taxi from Lackland AFB to the Red Roof Inn. While at the hotel, the appellant snorted four to five lines of cocaine during the night of 3 July 2007 and into the early morning hours of 4 July 2007. During the morning of 4 July 2007, she also consumed a small amount of tequila.

Sentencing

During the government's sentencing case, the trial counsel offered a letter of reprimand, dated 9 August 2007, from the appellant's personnel information file (PIF) that she received for failure to obey an order prohibiting smoking during duty hours. The trial defense counsel objected citing hearsay, relevance, and authenticity. The trial counsel responded that the letter of reprimand was admissible under Rule for Courts-Martial (R.C.M.) 1001(b)(2). The letter of reprimand was certified as a true copy by an orderly room clerk, bore the appellant's signature acknowledging her receipt and that she was given an opportunity to respond within three duty days, indicated that the appellant did not submit any matters in response, and included a statement that the commander decided to uphold the letter of reprimand but was not establishing an Unfavorable Information File. The trial defense counsel was provided a copy of the letter of reprimand prior to trial. The military judge overruled the defense objection and admitted the letter of reprimand.

The appellant asserts that the military judge abused his discretion in admitting the letter of reprimand over defense objection because the government did not lay a

foundation to establish that the letter of reprimand qualified under a hearsay exception and did not provide a proper certification under Mil. R. Evid. 902(11).

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citing *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). An abuse of discretion standard of review is a strict one, requiring more than a difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). The challenged action must be found to be "arbitrary," "clearly unreasonable," or "clearly erroneous" to be invalidated on appeal. *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987).

Under R.C.M. 1001(b)(2), the prosecution may present personal data and character of the accused's prior service. This provision states:

> Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and 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.
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> "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 Military Rules of Evidence, the matter shall be determined by the military judge.

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

Air Force Instruction 51-201, *Administration of Military Justice,* Section 8E—Presentencing Matters (R.C.M. 1001) (21 Dec 2007) provides the following concerning the prerequisites for admitting documents from an airman's PIF:

> 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:
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> 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.

We find that the military judge did not abuse his discretion in admitting the letter of reprimand. The letter of reprimand was contained in the appellant's PIF, the trial defense counsel was provided a copy prior to trial, the document itself indicates that the appellant had an opportunity to respond and declined to do so, and the document bears the appellant's signature acknowledging receipt of the letter of reprimand. No evidence was presented at trial that the letter of reprimand was inaccurate, incomplete, or contained matter inadmissible under the Military Rules of Evidence. Accordingly, this assignment of error is without merit.[1]

Sentence is Inappropriately Severe

The second issue is whether the appellant's sentence is inappropriately severe. This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). 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. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but 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).

The maximum possible punishment in this case was a bad-conduct discharge, confinement for 12 months, two-thirds forfeiture of pay, and reduction to E-1. The appellant's approved and adjudged sentence was a bad-conduct discharge, confinement for two months, forfeiture of $898.00 pay per month for two months, and reduction to E-1.

[1] Even if the military judge erred in admitting the letter of reprimand for the minor offense of smoking during duty hours, we find that the error did not substantially influence the adjudged sentence under *United States v. Griggs*, 64 M.J. 445, 449 (C.A.A.F. 2005).

Having given individualized consideration to this particular appellant, including her age (18) at the time of the offenses, the nature of the offenses (wrongful use of cocaine on divers occasions and underage drinking), the appellant's diagnosed adjustment disorder,[2] her record of service, and all other matters in the record of trial,[3] we hold that the approved sentence is not inappropriately severe.

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; *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, YA-02, DAF
Clerk of the Court

[2] On 28 June 2007, the appellant was diagnosed with an Adjustment Disorder with Mixed Anxiety and Depressed Mood. As a result of this recommendation, discharge proceedings were initiated but subsequently terminated.
[3] In a post-trial submission, the appellant included a statistical summary of sentences in Air Force courts-martial for cocaine use tried during calendar year 2007. We considered this document in reaching our decision in this case.