UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ERIC P. LUNDEEN
United States Air Force

ACM 35095

5 March 2004

Sentence adjudged 10 January 2002 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Thomas W. Pittman.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Major Terry L. McElyea, Major Andrew S. Williams, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

PRATT, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto. The contested referral enlisted performance report (EPR) was prepared in accordance with Air Force Instruction (AFI) 36-2406, *Officer and Enlisted Evaluation System,* ¶ 3.9 (1 Jul 2000). The report contained no matters prohibited by paragraph 3.7 of that instruction. A trial counsel is required to offer all performance reports maintained in accordance with departmental directives as evidence of the accused's prior service. AFI 51-201, *Administration of Military Justice,* ¶ 8.5.2 (26 Nov 2003); *United States v. Wingart*, 27 M.J. 128 (C.M.A. 1988). Although the military judge did not perform on the record the balancing test pursuant to Mil. R. of Evid. 403, we hold that the report was properly admitted. Rule of Courts-Martial (R.C.M.) 1001(b)(2). *See United States v. Zakaria*, 38 M.J. 280 (C.M.A. 1993); *United States v. Hursey*, 55 M.J. 34 (C.A.A.F. 2001); *United States v. Craze*, 56 M.J. 777 (A.F.

Ct. Crim. App. 2002). Even if erroneous, admission of the EPR did not materially prejudice the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a). *See United States v. Hampton*, 40 M.J. 457 (C.M.A. 1994).

Concerning his rulings on challenges for cause, the military judge applied the correct test for implied bias. *See United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002). Therefore, despite the liberal grant mandate, we find no error in his denial of the challenge for cause against Major H. Her answers on voir dire would not raise in an objective observer a "substantial doubt as to the legality, fairness, and impartiality" of the court-martial. R.C.M. 912(f)(1)(N); *United States v. Napoleon*, 46 M.J. 279 (C.A.A.F. 1997).

Finally, there was an adequate factual basis for the appellant's plea of guilty to the offense of disorderly conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Therefore, the military judge did not abuse his authority in accepting that plea. *See United States v. Eberle*, 44 M.J. 374 (C.A.A.F. 1996); *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 73(b) (2002 ed.); *United States v. Manos*, 24 C.M.R. 626 (A.F.B.R. 1957).

Accordingly, we conclude the findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant was committed. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (2000). On the basis of the entire record, the findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court