UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant GARY L. MCMAHEL, JR.
United States Air Force

ACM S32100

28 October 2013

Sentence adjudged 19 July 2012 by SPCM convened at Peterson Air Force Base, Colorado. Military Judge: W. Shane Cohen.

Approved Sentence: Bad-conduct discharge and reduction to E-4.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

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

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PER CURIAM:

A special court-martial composed of officer and enlisted members convicted the appellant, in accordance with his pleas, of one specification of failure to obey a lawful general regulation; one specification of willful dereliction of duty; and one specification of adultery, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. The adjudged and approved sentence consisted of a bad-conduct discharge and reduction to the grade of E-4.[1] On appeal, the appellant argues his sentence is inappropriately severe. We disagree and affirm.

[1] The military judge merged, for purposes of sentencing, the adultery specification, in violation of Article 134, UCMJ, 10 U.S.C. § 934, with the dereliction of duty specification, in violation of Article 92, UCMJ, 10 U.S.C. § 892.

Background

In July 2009, 18-year-old Cadet HL arrived at the United States Air Force Academy Preparatory School to complete a year of study with the goal of entering the United States Air Force Academy (USAFA). A native of Texas, she had been heavily involved in basketball and academics in high school, and after three service academies invited her to their respective basketball camps she chose the Air Force. Her parents were initially concerned about their daughter attending a school so far away from home, but after visiting the Academy, listening to the parents' orientation, and meeting the officers and trainers, they felt reassured that it was a safe place for her.

Cadet HL's preparatory school class was divided into three squadrons and included a staff of Academy Military Trainers (AMTs), one of whom was the appellant. The appellant, then a Technical Sergeant, was 17 years older than Cadet HL, married, and had two daughters. Although the appellant was not the AMT for Cadet HL's squadron, she felt that he supported her and confided in him about personal issues. While their conversations initially took place at the school, they began to communicate outside of school by phone and text message after Cadet HL obtained the appellant's phone number from a friend.

After graduating from the preparatory school, Cadet HL entered the USAFA in the summer of 2010 and began her basic training. Through the Cadet Sponsor Program, Cadet HL requested the appellant and his family become her "sponsor family." The purpose of the Cadet Sponsor Program is to provide new cadets at the USAFA with exposure to the military lifestyle while providing positive adult role models and a "home away from home." As a result of her request, the appellant became Cadet HL's sponsor, and following basic training Cadet HL communicated with him about every other day. Cadet HL's father, a police officer, first met the appellant at Cadet HL's graduation from the preparatory school, and at that time he felt good about the appellant sponsoring his daughter because the appellant appeared to be well-spoken, qualified, and professional.

In August 2010, the appellant's relationship with Cadet HL became physical when one night after meeting at the gym, the appellant kissed her. The following month, the appellant and Cadet HL had sexual intercourse in a car on the side of a road. By this time, the appellant was no longer an AMT, and had become the executive assistant to the command chief at the USAFA. Afterwards, the appellant and Cadet HL talked about not disclosing their relationship to anyone because they could get in trouble. They were both aware that unprofessional relationships and sexual intercourse between a cadet and an enlisted member were forbidden by Air Force custom and regulation. Nevertheless, after a brief hiatus, during which time the appellant attended First Sergeant school and was promoted to the grade of Master Sergeant, the appellant and Cadet HL continued to meet and have sexual relations on numerous occasions. Although the appellant was now serving as a First Sergeant at Peterson Air Force Base, they rendezvoused after Cadet

HL's classes, on the weekends, at the appellant's home, in a Las Vegas hotel room, and at the home of Cadet HL's family. Throughout this time, the appellant was married to his wife, although his wife had separated from him in the spring of 2011. Cadet HL at one point wanted to marry the appellant, and the appellant felt as if he had "fallen" for her. Their relationship continued until early 2012 when Air Force investigators learned of the relationship and called in Cadet HL for questioning.

When Cadet HL's father learned of the appellant's actions, he was shocked and angry. He believed the sponsorship program was there to provide cadets with the security of home during the stress of the USAFA, and he had thought the appellant was caring for his daughter. He did not want to view the entire Air Force negatively because of the appellant's actions, but he was angry with the Air Force, and in particular with the sponsorship program, to the extent that he felt compelled to dissuade other parents from considering the program.

During the *Care*[2] inquiry, the appellant acknowledged his actions discredited the armed forces, violated Air Force regulations meant to establish good order and discipline, let down the members of his unit, damaged his credibility as a senior noncommissioned officer, and impacted those who trusted him. Having enlisted in the United States Air Force on 29 July 1992, the appellant was 10 days away from being retirement eligible with 20 years of active duty service when his court-martial concluded.

Sentence Severity

The appellant asks that we disapprove the punitive discharge because his offenses "barely rise to the level of a special court-martial," and "[n]othing in this case merits exceptional punishment." He also argues that a punitive discharge is too severe a punishment in light of his court-martial concluding only a few days prior to becoming eligible to retire.

This Court "may affirm only . . . 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 review sentence appropriateness de novo, employing "a sweeping congressional mandate to ensure 'a fair and just punishment for every accused.'" *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (quoting *United States v. Bauerbach*, 55 M.J. 501, 504 (Army Ct. Crim. App. 2001)). We make such determinations by considering "the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *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). Although we have great discretion in determining whether a particular sentence is

[2] *United States v. Care*, 45 C.M.R. 247, 253 (C.M.A. 1969).

appropriate, we are not authorized to engage in exercises of clemency, which is a responsibility placed by Congress in the hands of the convening authority. *United States v. Healy*, 26 M.J. 394, 395–96 (C.M.A. 1988); *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

After carefully examining the appellant's record and lengthy military service, the nature and seriousness of his offenses, and all matters contained in the record of trial, we do not find the appellant's sentence inappropriately severe. In our view, the appellant's actions were a clear departure from the standards of expected military conduct, particularly for a senior noncommissioned officer entrusted with the responsibility of serving as a positive role model and influence in the life of a young cadet. Rather than serving as such a role model, the appellant demonstrated to Cadet HL, her parents, and all who learned of his conduct, an abandonment of the requirements of the military profession for the pursuit of personal desires. As the appellant himself acknowledged, his actions discredited the armed forces, impacted those who trusted him, and violated military requirements in place to preserve good order and discipline. The fact that the appellant honorably served his country for many years before he began his adulterous and unprofessional relationship does not excuse his behavior, but rather highlights the abuse of the trust he acquired from those years of service. We find that the approved sentence was within the discretion of the convening authority and appropriate in this case.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court