UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2013-21**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Staff Sergeant (E-5)	)	
RONNIE S. MOBLEY, JR.,	)	
USAF,	)	
Appellee	)	**En Banc**

WEBER, Judge:

On 11 April 2013, the Commander of the United States Air Force Expeditionary Operations School preferred court-martial charges against the appellee. The charges are one specification of rape of SSgt BM on divers occasions by using strength sufficient that she could not avoid or escape the sexual contact, one specification of assault consummated by a battery by kicking SSgt BM on the hip with his feet, and one specification of assault on divers occasions by raising his hand at SSgt BM, in violation of Articles 120 and 128, 10 U.S.C. §§ 920, 928. On 31 May 2013, Major General (Maj Gen) William Bender, the general court-martial convening authority (GCMCA), referred the charges to a general court-martial.

Prior to entering pleas, trial defense counsel moved to dismiss the charges for unlawful command influence (UCI), asserting that several statements and actions of the President of the United States and senior Air Force and Department of Defense officials regarding sexual assault in the military created both actual and apparent UCI. Trial counsel opposed the motion. The military judge granted the motion and subsequently denied the Government's request for reconsideration. The Government timely appealed both of the military judge's rulings, pursuant to Article 62, UCMJ, 10 U.S.C. § 862. On 1 November 2013, we heard oral argument in this matter.

Procedural Background

Trial defense counsel's motion to dismiss asserted that UCI affected the preferral and referral process in this case. The alleged instances of UCI included: "years of intentionally legally incorrect sexual assault briefings"; statements made by the Honorable (Hon.) Leon Panetta, former Secretary of Defense; statements made by the Chief of Staff of the Air Force; actions by The Judge Advocate General of the Air Force; statistical claims and message by Department of Defense and Air Force officials; the Air

Force sexual assault training video; the "uproar" resulting from the *United States v. Wilkerson* case and the resulting actions by Hon. Chuck Hagel, the current Secretary of Defense; remarks made by President Barack Obama; and a speech given by Congresswoman Loretta Sanchez at a military judge training course.

Trial counsel argued that these statements and actions did not rise to the level of UCI. Trial counsel provided statements from the preferring commander and the convening authority which stated each was aware of comments made by the President and other high ranking military and civilian officials regarding sexual assault in the military, but that they each came to their own decision and independently decided to prefer or refer charges against the appellee.

After hearing argument, the military judge found that certain statements of the Air Force Chief of Staff and the President – in the context of the current political climate surrounding sexual assault in the military – presented some evidence of UCI. He then found the preferring commander's affidavit sufficiently demonstrated beyond a reasonable doubt that the preferral of charges was not tainted by UCI.

With regard to referral, however, he found Maj Gen Bender's memorandum did not demonstrate beyond a reasonable doubt that either actual or apparent UCI was absent. He noted that since the defense raised some evidence of UCI, the burden of proof was on the Government to prove beyond a reasonable doubt that UCI was not present or that it did not affect the proceedings. The military judge found several deficiencies in the convening authority's memorandum, noting it did not meet the criteria for an affidavit and it did not specifically reference the particular comments and actions that the defense's motion claimed constituted UCI. The military judge concluded: "While this court could conclude that the [convening authority's] memorandum is both earnest and honest, it does not address principal issues, with the indicia of reliability expected from a memorandum purporting to be an affidavit for this court to conclude that unlawful command influence did not, beyond a reasonable doubt, effect the referral. Such a reason may exist, but it is for the government alone to produce it, and not the court."[1]

Immediately after the military judge issued his ruling, he informed trial counsel he "would entertain a motion for reconsideration on the basis of [his] ruling," and he would give defense counsel the opportunity to object to any motion for reconsideration. Trial counsel moved for reconsideration, stating that the Government would be prepared to have Maj Gen Bender testify telephonically from his deployed location the next day in support of the motion. Trial counsel and the military judge then discussed what time the convening authority would be available to testify telephonically. Defense counsel opposed the motion for reconsideration, and the military judge requested an update by the following morning as to when the convening authority would be available to testify.

[1] The military judge stated, however, that he would have reached the same conclusion even if he found the statement from the convening authority to meet the criteria for an affidavit.

The next morning, the military judge asked trial counsel if he desired to formally move for reconsideration. Trial counsel responded that he thought he had already done so, but if not then he desired to so move. Defense counsel again opposed the motion for reconsideration. Trial counsel responded that it would serve the interest of judicial economy for the military judge to grant the motion for reconsideration and hear the convening authority's testimony, since the military judge's ruling indicated he might find this testimony helpful.

The military judge denied the Government's motion for reconsideration. He noted the Government had been in receipt of the defense's motion to dismiss for an extended period. He also stated that this case presented "greater principles of the critical right to a trial untainted by unlawful command influence." He stated the "needs of fair justice and appearance are not served by granting reconsideration," as granting reconsideration after the Government already had an opportunity to meet its burden would "erode the appearance of efficacy in this court-martial in light of the important issue decided upon." He also observed that the Government was not left without recourse, as it could re-prefer the charges and specifications. The Government's Article 62, UCMJ, appeal followed the military judge's denial of its reconsideration motion.

Standard of Review and Legal Framework

On an interlocutory appeal, we "may act only with respect to matters of law." Article 62, UCMJ. Thus, we are bound by the military judge's findings of fact unless they are clearly erroneous, and we have no authority to find additional facts. *United States v. Baker*, 70 M.J. 283 (C.A.A.F. 2011). Thus, we "'give due deference'" to the judge's findings of fact and accept them "'unless [they are] unsupported by the evidence of record or . . . clearly erroneous.'" *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985) (quoting *United States v. Middleton*, 10 M.J. 123, 133 (C.M.A. 1981)).

This Court reviews a military judge's ruling on a motion to dismiss for an abuse of discretion. *United States v. Gore*, 60 M.J. 178, 186-87 (C.A.A.F. 2004). We review a military judge's findings of fact as to UCI "'under a clearly-erroneous standard, but the question of command influence flowing from those facts is a question of law [we] review de novo.'" *United States v. Reed*, 65 M.J. 487, 488 (C.A.A.F. 2008) (quoting *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)); *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999) (citations omitted).

Although the accused has the initial burden of raising UCI, he only has to present "'some evidence'" that UCI exists. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)); *United States v. Simpson*, 58 M.J. 368, 373 (C.A.A.F. 2003) (citations omitted); *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994). At the appellate level, we evaluate UCI in the context of a completed trial using the following factors: "[T]he defense must (1) show facts which, if true, constitute [UCI]; (2) show that the

proceedings were unfair; and (3) show that the [UCI] was the cause of the unfairness." *Biagase*, 50 M.J. at 150 (citing *Stombaugh*, 40 M.J. at 213). *See also Simpson*, 58 M.J. at 374; *United States v. Reynolds*, 40 M.J. 198, 202 (C.M.A. 1994). Once the issue of command influence is properly placed at issue, "no reviewing court may properly affirm findings and sentence unless [the court] is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence." *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986).

A military judge may reconsider any ruling not amounting to a finding of not guilty. Rule for Court-Martial 905(f); *United States v. Lincoln*, 42 M.J. 315, 322 (C.A.A.F. 1995). When reconsidering a ruling, the military judge may permit the opportunity for the parties to present additional evidence and argument. *United States v. Kosek*, 41 M.J. 60, 65 (C.M.A. 1994). "[A] trial judge has inherent authority, not only to reconsider a previous ruling on matters properly before him, but also to take additional evidence in connection therewith." *Harrison v. United States*, 20 M.J. 55, 57 (C.M.A. 1985).

We review a military judge's decision on whether or not to admit evidence for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010) (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citations and internal quotation marks omitted). As with practically all rulings during a trial, the military judge must be sensitive to whether reconsidering an earlier ruling favorable to the accused may unduly prejudice the defense, *see* Mil. R. Evid. 403, or possibly raise the issue of a mistrial upon defense motion if a ruling particularly beneficial to an accused is reversed. *See United States v. Cofield*, 11 M.J. 422, 431 n. 14 (C.M.A. 1981).

Analysis

The Government asserts the military judge abused his discretion in two respects: 1) He improperly granted the defense's motion to dismiss the charges based on a finding of actual and apparent UCI; and 2) He improperly denied the Government's motion to reconsider his ruling to dismiss the charges without prejudice based on his UCI finding.

We find the military judge abused his discretion in denying the Government's motion for reconsideration. Therefore, we need not address the first issue.

The military judge found UCI only with regard to the referral of charges. The military judge based his ruling in large part on the sparcity of information in the GCMCA's affidavit and the fact the convening authority did not testify at the hearing. Although the trial counsel offered to have the convening authority available to testify telephonically the next day (and the military judge initially indicated he would be willing

to hear such testimony), the military judge subsequently stated he would not hear from the convening authority and denied the government's request for reconsideration.

In denying reconsideration, the military judge noted trial counsel had "ample opportunity" to present relevant evidence in the first place. While the military judge was satisfied that the preferring commander's affidavit overcame the defense counsel's assertion of UCI, we recognize the Government made a poor choice to rely upon a summary written statement from the convening authority as its sole evidence to meet its burden of proof beyond a reasonable doubt in this matter.[2] Our superior court has specifically warned that "perfunctory statements from subordinates" or a "blanket assertion of a subordinate in rank that he was not influenced" may not meet the Government's burden of disproving UCI. *United States v. Wallace*, 39 M.J. 284, 287 n.* (C.M.A. 1994) (quoting *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979)); *see also United States v. Plumb*, 47 M.J. 771, 779 (A.F. Ct. Crim. App. 1997). As Chief Judge Everett has noted, "the judge would have been entitled to exclude the additional evidence [offered at reconsideration] if he concluded that the prosecution failed negligently to arrange for its presentation at the initial proceeding." *Harrison*, 20 M.J. at 60 (Everett, C.J., concurring).

Under the unique facts of this case, however, we find the military judge erred in not reconsidering his ruling and hearing the convening authority's testimony. Once the military judge ruled against the Government, trial counsel promptly arranged to have the convening authority available to testify telephonically. In fact, it appears he was working to arrange for the convening authority's testimony even before the military judge issued his ruling. Although the convening authority was a two-star general deployed to Afghanistan, he was nonetheless available to provide testimony immediately after the military judge's ruling. The military judge could have easily heard the convening authority's testimony, testimony he had already indicated may have affected his ruling. No significant delay would have resulted in hearing the testimony and reconsidering the ruling.

The military judge was bound to consider not only the interests of the accused in a fair trial, but the interests of the accused, the purported victim, and the Government in a timely and just resolution of this matter. Hearing the testimony of the convening authority may or may not have altered the military judge's ruling, but it would have developed a full record and provided the military judge with evidence he had already stated he would have found helpful. Instead of promptly resolving this issue, he dismissed the charges without prejudice, requiring the Government to return to the pre-

[2] Trial counsel's reply to the defense motion to dismiss included this statement explaining why it did not provide a signed affidavit from the convening authority: "Due to the Independence Day holiday break and commanders PCSing, the government does not currently have a signed affidavit from the GCMCA confirming that he did not convene this courts-martial [sic] as a result of UCI and that his decision was not impacted from heightened awareness of military sexual assault cases."

preferral stage even though no error was found with respect to preferral or the Article 32, UCMJ, 10 U.S.C. § 832, investigation. The military judge explicitly recognized the defense's UCI motion presented "an issue both complex and significant." Where such an important issue was at stake, where the Government was prepared to present evidence the military judge required, and where the interests of timely justice would have been served by simply hearing the testimony, we find the military judge's actions in denying the motion for reconsideration to be clearly unreasonable, and therefore an abuse of discretion.

Conclusion

On consideration of the appeal by the United States under Article 62, UCMJ, it is by the Court on this 20th day of December 2013,

ORDERED:

That the appeal of the United States under Article 62, UCMJ, is hereby **GRANTED** insofar as the military judge erred in denying the Government's motion for reconsideration. The ruling of the military judge denying the Government's motion for reconsideration is vacated and the record is remanded for further proceedings consistent with this opinion.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

ROAN, Chief Judge, ORR, Senior Judge, HELGET, Senior Judge, HARNEY, Senior Judge, MARKSTEINER, Judge, WIEDIE, Judge, and PELOQUIN, Judge, concurring.

MITCHELL, Judge dissenting.

> Once an issue of unlawful command influence is raised by some evidence, the burden shifts to the government to rebut an allegation of unlawful command influence by persuading the Court beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence did not affect the findings or sentence.

United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013) (citing *United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999)).

The Government chose to meet its burden of proof beyond a reasonable doubt by submitting statements from the preferring and referring commanders. "On an issue as sensitive as unlawful command influence, evaluation of demeanor of the . . . witnesses, viewed through the prism of *Biagase* and the presumption of prejudice, is critical to evaluate whether there is an objective appearance of unfairness." *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002). Because the Government chose to rely on written statements, the military judge was deprived of any evidence regarding the demeanor of these witnesses. Furthermore, the statements provide little more information than that already contained in the court documents themselves – that each individual is who he says he is and that he takes his responsibilities seriously. We should hope that is true of every preferring and referring authority. They each acknowledge they know of certain statements by senior leaders, but summarily state that they were not influenced by such. We have previously cautioned counsel, "[i]t is well settled that 'such perfunctory statements from subordinates on the effects of command influence [are] inherently suspect, not because of the credibility of the witness, but because of the difficulty of the subordinate in ascertaining for himself the effect of an attempted command influence.'" *United States v. Plumb*, 47 M.J. 771, 779 (A.F. Ct. Crim. App. 1997) (quoting *United States v. Rosser*, 6 M.J. 267, 272 (C.M.A. 1979)) (second alteration in original).[3]

In his rationale for not allowing additional evidence to be presented by the Government, the military judge noted that trial counsel had "ample opportunity" to present relevant evidence in the first place. As noted by the majority's opinion, the trial counsel's reply to the defense motion to dismiss did not even contain the summary statements that were later produced at trial and instead included an explanatory note. As Chief Judge Everett explained in his concurrence to *Harrison v. United States*, 20 M.J. 55, 60 (C.M.A. 1985), "the judge would have been entitled to exclude the additional evidence [offered at reconsideration] if he concluded that the prosecution failed negligently to arrange for its presentation at the initial proceeding."

I would uphold the trial judge's authority to prohibit the Government from having another opportunity to introduce this additional evidence. The Government was on notice by the defense motion that the issue of unlawful command influence was to be litigated at the motion proceedings. The Government's initial response was that they did not have the affidavits (evidence), but made a proffer as to what the evidence would be. At trial, the Government then chose to meet the burden of proof beyond a reasonable

[3] *United States v. Zagar*, 18 C.M.R. 34, 38 (C.M.A. 1955); *United States v. Carlson*, 21 M.J. 847, 851 (A.C.M.R. 1986). *See also United States v. Treakle*, 18 M.J. 646, 658 (A.C.M.R. 1984), *aff'd*, 23 M.J. 151 (C.M.A. 1986) (member's denial he was influenced insufficient to rebut the presumption of influence).

doubt by submitting perfunctory statements from the preferring and referring commanders. The Government counsel surely reviewed the statements before deciding to rest solely on this evidence to meet its burden of proof beyond a reasonable doubt. At every trial, the burden of proof is on Government counsel to prove each element beyond a reasonable doubt. I am hard-pressed to imagine that trial counsel would have been surprised by an acquittal if their only evidence at trial were perfunctory written statements. It likewise should not have surprised the Government that the military judge found that its summary statement from the convening authority failed to meet this high burden.

The test is not whether those of us on the appellate court may have allowed the Government to call the witness at reconsideration. While I may have a difference of opinion with the trial judge given the availability of the witness at the time of the motion for reconsideration, I do not conclude that his action was "arbitrary, fanciful, clearly unreasonable or clearly erroneous." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citations omitted). The Government was twice provided an opportunity to meet its burden. I would not require the military judge to provide them a third attempt. I would, therefore, deny this aspect of the Government's motion and address the other issues in its appeal.