UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant ERICA N. PERRY
United States Air Force

ACM 37676

03 February 2011

Sentence adjudged 12 March 2010 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, total forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Captain Nicholas W. McCue, and Frank J. Spinner, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen, Major Naomi N. Porterfield, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ROAN, Judge:

A general court-martial composed of a military judge convicted the appellant, contrary to her pleas, of making and signing a false leave statement, making a false official statement and larceny, in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907, 921. The approved sentence consisted of a bad-conduct discharge, confinement for 18 months, total forfeiture of all pay and allowances and reduction to the grade of E-1.

Background

Appellant, a member of the Georgia Air National Guard (ANG), was ordered to active duty service effective 4 April 2007 to support ongoing contingency operations. She was instructed to report to Charleston Air Force Base (AFB), South Carolina (SC), to perform her duties. The order calling her to active duty correctly listed her home address in Beaufort, South Carolina, where she maintained an apartment. On 22 May 2007, the appellant leased an apartment in North Charleston. She canceled her Beaufort lease and moved out of her apartment there in July 2007. She entered into subsequent apartment leases in June 2008 and again in July 2009, both within the local Charleston area.

The appellant's initial active duty orders were set to expire on 30 September 2007. Subsequent orders issued on 28 September 2007, 16 October 2008, 29 September 2009, 13 November 2009, and 22 January 2010 extended the appellant on active duty through 24 March 2010. At no point during this period was appellant released from active duty nor did a break in service of more than one day occur.

Beginning in April 2007, the appellant lived in the Charleston area and commuted to her duty station at Charleston AFB. She filed several accrual and final vouchers (DD Form 1351-2) from 7 August 2007 through 15 October 2009 claiming her "address" in block 6 of the DD Form 1351-2 voucher was in Beaufort, SC. The appellant was subsequently paid nearly $123,000 for per diem and lodging reimbursement expenses over the two-year period.

On 17 June 2009, the appellant was interviewed by agents of the Air Force Office of Special Investigations (OSI) concerning the validity of her travel vouchers. She told the agents she maintained an apartment in Beaufort for the entire period she was on active duty and it was her intent to return to Beaufort when her orders expired.

Issue

We specified the following issue: Whether the appellant's convictions for making a false official statement and larceny, in violation of Articles 107 and 121, UCMJ, were factually and legally sufficient.[1]

[1] On 13 September 2010, appellant petitioned this court by writ of habeas corpus to consider a 12 July 2010 Defense Finance and Accounting Service (DFAS) memorandum along with the affidavits of two attorneys representing other Air Force members charged with offenses similar to the appellant's. That same day, appellant petitioned this court to classify the DFAS memorandum as new evidence and order a new trial pursuant to Article 73, UCMJ, 10 U.S.C. § 873. We denied both the habeas petition and request for new trial by written order on 22 November 2010.

Legal and Factual Sufficiency

We may affirm only those findings of guilt that we find are 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).

The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). In conducting this unique appellate role, we are required to conduct a de novo review of the entire record of trial, taking "a fresh, impartial look at the evidence" and applying "neither a presumption of innocence nor a presumption of guilt" and then "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

After a thorough review of the record of trial and applying the appropriate tests for determining factual and legal sufficiency, we find the appellant's conviction for larceny to be factually insufficient.[2] We set aside this finding and the sentence and return the record of trial to the Judge Advocate General with a rehearing on the sentence authorized pursuant to Articles 59(a) and 66(c)-(d), UCMJ, 10 U.S.C. §§ 859(a), 866(c)-(d).

Applicable Law and Regulation

Travel and transportation allowances for members of the reserve component (RC), to include the ANG, are governed by 37 U.S.C. § 404 and the Joint Federal Travel Regulation (JFTR). The two relevant provisions of the JFTR applicable to the appellant's court-martial are paragraph U7150(A)(4)(b)(3):

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[2] We did not consider the information contained within the DFAS memorandum in making our decision. Our authority to review findings of guilt pursuant to Article 66(c), UCMJ, is limited to the facts, testimony, and evidence presented at the trial, and we are precluded from considering "extra-record" matters when making determinations of guilt, innocence, and sentence appropriateness. *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) (citing *United States v. Bethea*, 46 C.M.R. 223, 246 (C.M.A. 1973)); *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007).

> Per Diem in Excess of 180 Days. Except when paid station allowances and/or OHA under par. U7150-H, a member called to active duty away from home for other than training purposes for:
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> (a) More than 180 days at one location, or
>
> (b) 180 or fewer days but extended to be more than 180 days (from the extension date) at one location,
>
> may be authorized per diem for the entire period if the call to active duty/extension is required by:
>
> . . . .
>
> (e) Contingency Operations . . . .

and paragraph U7150(A)(1)(b):

> Travel and Transportation Allowances when Member Commutes. Travel and/or transportation allowances are not authorized for travel between the home/PLEAD and the place of active duty when:
>
> (1) Both are in the corporate limits of the same city or town,
>
> (2) The member commutes daily between home/PLEAD and the place of active duty, or
>
> (3) The order-issuing official/installation commander determines that both are within reasonable commuting distance of each other and that the nature of the duty involved permits commuting.

Joint Federal Travel Regulation (JFTR), Vol. 1, *Uniformed Service Members*, ¶¶ U7150(A)(4)(b)(3) and U7150(A)(1)(b) (1 Jul 2007).[3]

Discussion

While the term "PLEAD" is defined in the JFTR,[4] "home" is not. Much of the testimony and evidence presented at trial centered on whether the use of the terms

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[3] The Court notes that during the charged timeframe of 31 July 2007 to 15 October 2009, the Joint Federal Travel Regulation (JFTR) underwent many revisions. The applicable provisions, however, remained substantially the same throughout that period.

[4] Place From Which Called (or Ordered) to Active Duty (PLEAD): The place of acceptance in current enlistment, commission, or appointment of members of the Regular services, or of members of the Reserve components [(RC)]

"home" and "PLEAD" in paragraph U7150(A)(1)(b) of the JFTR referred to the appellant's primary residence in the Charleston area or her apartment in Beaufort where she was ordered to active duty.

The government's theory was the appellant stole the money by false pretenses; essentially, she knew that after 1 July 2007, she had forfeited all ties with Beaufort yet still claimed that address when submitting her travel vouchers. Two pay and finance technicians, Technical Sergeant (TSgt) JP and Staff Sergeant (SSgt) JB, testified for the government. TSgt JP stated "home" referred to "the physical address, where that member lays their head at night." He also said that if a member's physical address changed between active duty orders, it was incumbent upon the member to "notif[y] their proper chain of command which then should have notified finance to change that address in order to reflect the true address for the new set of orders that were cut at that time." He further stated that the new orders should contain the member's "current address." When asked by defense counsel whether the address listed on the orders could be amended, TSgt JP replied that it could not be changed "unless that member no longer physically lives at that address." SSgt JB testified similarly, stating per diem payments are based on the "actual home of where the member resides" and the determination is made by where "they are living at and laying their head down at night."

Following this theme, trial counsel argued that an individual's home is defined by where the member resided during the active duty period and once the appellant abandoned her ties to Beaufort her home for per diem purposes became Charleston. He told the military judge:

> The rules . . . show you that if you live within the corporate limits of where you are serving on active duty you are not entitled to per diem and lodging. . . . Let's look at just some common sense about how this procedure should be working. . . . If you have one household you shouldn't be getting paid benefits for two. . . . It makes absolutely no sense that if your home becomes where you're serving duty that we're going to pay for two homes when you have one. That's what the rule is. If your home is within corporate [limits you get] nothing and it makes sense. It makes some common sense."

Conversely, Mr. WT, an employee of the Air Force Audit Agency, testified for the defense and opined that JFTR paragraph U7150(A)(1)(b)'s use of "home" referred to the location where the RC member was ordered to active duty as shown on her active duty orders, also known as the PLEAD. Mr. WT based his opinion, in part, on guidance received from finance specialists at ANG headquarters relating to this issue. He stated

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when enlisted, commissioned, or appointed for immediate active duty. Joint Federal Travel Regulation (JFTR), Appendix A, *Definitions*, Part I (1 Jul 2007).

that unless the member's tour of active duty service expired for more than one day, per diem must be paid based on the address listed on the member's orders, regardless of whether the original residence was vacated.

We start our analysis by noting the government witnesses did not provide specific JFTR references to support their conclusion that "home" specifically referred to the appellant's current address in Charleston or why she had an explicit duty to inform her chain of command that she no longer lived in Beaufort. Throughout their testimony, the witnesses continually based their answers on personal opinion rather than the JFTR itself.[5] Likewise, the prosecutor's appeal to "common sense" does not dictate entitlement to per diem; rather, such payments are made solely through application of the JFTR. Paragraph U7150(A)(1)(b) of the JFTR prohibits per diem if the member is commuting between his or her "home/PLEAD" and their duty station. JFTR, Vol. I, ¶ U7150(A)(1)(b). Unfortunately, neither the JFTR nor its implementing statutes, 37 U.S.C. §§ 404, 1001, define the term "home" or provide instruction as to how "home/PLEAD" should be applied. It is not clear whether the terms "home" and "PLEAD" are intended to be synonymous with one another or whether each is to be given a unique meaning. Even reading "home" in the broadest sense advocated by the government to mean the appellant's residence in Charleston, we cannot determine whether "home" is read in combination with "PLEAD" or separately. Different results occur if the rule is read as "home and PLEAD" versus "home or PLEAD." Accordingly, we find the term "home/PLEAD" to be ambiguous on its face. However, a 15 March 2007 memorandum entitled *Revised Mobilization/Demobilization Personnel and Pay Policy for Reserve Component Members Ordered to Active Duty in Response to the World Trade Center and Pentagon Attacks – Section 1*, signed by the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), does shed some light on the issue. The USD(P&R) stated in paragraph 6(h) of his memorandum:

> Upon being called to active duty, Reserve component members who report to a location that is within the commuting distance of the member's *home of record* are entitled to active duty pay and allowances only. (1) In the

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[5] For instance, Staff Sergeant (SSgt) JB provided the following answers in response to defense counsel's questions:
Q. What is your source or how is it that you come to understand that's the definition of somebody's legal residence to be on these orders?
A. It doesn't specifically say in the JFTR, but it's your integrity. Wherever you are actually living is where your actual residence and home is at. . . . To me residing means where they live and lay their head down at night.
. . . .
Q. So it's more than just where they are residing. It's where they intend to be, as well.
A. Yes.
. . . .
Q. Is it the JFTR that actually says that if you move your household to a place, and you sleep there, and you intend to stay there permanently that's what means that you reside there?
A. I'd have to look it up.
Q. In general, is that your understanding?
A. Yes.

> case where the reporting location is not within commuting distance of the member's *home of record*, the Secretary of the Military Department may, IAW Section U7150, paragraph A4 of the JFTR, call the member to active duty in a temporary duty status . . . .[6]

(Emphasis added.)

Additionally, an e-mail message submitted as a defense exhibit assists our inquiry. The message originating from the Noncommissioned Officer-in-Charge, Travel Policy and Procedures, ANG/FMFS, states:

> Mobilization orders shall not be amended for the purpose of changing the members [sic] *Home of Record* (HOR)/Place of entry for Active Duty (PLEAD) except for errors at the time orders are issued. *HOR*/PLEAD cannot be amended for the purpose of increasing entitlements. Entitlements are based on the *HOR*/PLEAD established on the date orders are effective . . . .

(Emphasis added.)

Given the USD(P&R)'s specific reference to "home of record" when discussing authorized travel allowances for RC members ordered to active duty, the ANG/FMFS e-mail message stating entitlements are based on the home of record/PLEAD established on the date the orders became effective, as well as the lack of precise statutory or regulatory direction as to how "home/PLEAD" should be interpreted, we find that the term "home" in paragraph U7150(A)(1)(b) of the JFTR refers to the appellant's home of record in Beaufort when she was ordered onto active duty and not her subsequent residence in Charleston.[7]

Having made this determination, the analysis is straightforward. There is no dispute that the appellant resided in Beaufort, South Carolina, at the time her active duty orders were issued in April 2007, that her orders correctly identified her Beaufort address or that Beaufort was outside the reasonable commuting distance of Charleston AFB.[8]

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[6] By operation of 37 U.S.C. §§ 404, 1001, and Department of Defense Directives (DODD) 5154.29, *DoD Pay and Allowances Policy and Procedures* (9 March 1993), and 5124.02, *Under Secretary of Defense for Personnel and Readiness* (USD(P&R)) (17 October 2006), the USD(P&R) is authorized to prescribe regulations pertaining to per diem, travel, and transportation allowances for members of the armed forces. Therefore, the 15 March 2007 policy memorandum impacting travel allowances for reserve component members is incorporated into the JFTR and we will take this into consideration.

[7] The JFTR defines "home of record" as the place recorded as the individual's home when ordered into a tour of active duty. *See* JFTR, Appendix A, *Definitions*, Part I.

[8] The appellant's active duty orders specifically state the "[m]ember's residence is outside [the] local commuting distance and [she] will not commute." Additionally, Beaufort, SC, was not listed within the area established by the installation commander to be within a reasonable commuting distance of Charleston AFB.

There is likewise no controversy that the appellant did not commute between Beaufort and Charleston AFB when performing her duties. Consequently, whether "home of record" or "PLEAD" is applied in paragraph U7150(A)(1)(b) of the JFTR, the appellant was entitled to per diem while her duty station remained Charleston AFB. Furthermore, despite the government's claims to the contrary, the JFTR itself prohibited changing the appellant's orders when she vacated her Beaufort residence. In Appendix A, the JFTR states "the PLEAD changes only if there is a break in service exceeding one full day, in which case it is the place of entry into the new period of service." JFTR, Appendix A, *Definitions*, Part I, definition of PLEAD (1 Jul 2007). Likewise, a member may only change their home of record if a break in service exceeds one full day. JFTR, Appendix A, *Definitions*, Part I, definition of Home of Record. Because the record indicates the appellant's active duty orders were continually extended without a break in service of more than one day, the Beaufort address that established both the appellant's PLEAD and home of record could not be amended.

For these reasons, we find the appellant was authorized to receive per diem and lodging payments for the entire period she was on active duty orders. Accordingly, the evidence is factually insufficient to support the appellant's conviction of larceny.

We have reviewed the appellant's conviction for making and signing a false leave statement and making a false official statement in violation of Article 107, UCMJ, and find both to be correct in law and fact. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41.

Conclusion

The findings of guilty for Charge II and its specification are set aside and dismissed. The findings of guilty as to Charge I and its specifications are affirmed. The sentence is set aside. The record of trial is returned to the Judge Advocate General for remand to an appropriate convening authority who may order a rehearing to determine an appropriate sentence for the affirmed findings of guilty.

If the convening authority determines that a rehearing on the sentence is impracticable, the convening authority may approve a sentence of "no punishment" or dismiss the charge.

OFFICIAL

STEVEN LUCAS
Clerk of the Court