IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20230128
Sergeant First Class (E-7) **RUEBEN K. YOUNG** United States Army, Appellant	Tried at Fort Meade, Maryland, on 13 February and 8-10 March 2023, before a special court-martial appointed by the Commander, U.S. Army Garrison, Fort Meade, Colonel Adam Kazin, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error

WHETHER APPELLANT'S CONVICTION FOR THE SPECIFICATION OF CHARGE I IS FACTUALLY SUFFICIENT.[1]

Statement of the Case

A panel of enlisted and officer members sitting as a special court-martial convicted appellant, contrary to his pleas, of one specification of failure to report to his appointed place of duty and one specification of being disrespectful in language toward a noncommissioned officer, in violation of Articles 86 and 91, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 891 (2019) [UCMJ]. (Statement of

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

Trial Results; R. at 434). The military judge sentenced appellant to reduction to the grade of sergeant (E-5). (Statement of Trial Results; R. at 490). The convening authority took no action on the findings or sentence in appellant's case. (Convening Authority Action). The military judge entered judgment on 25 March 2023. (Judgment).

Statement of Facts

[redacted] was appellant's company commander at the time of the alleged misconduct. (R. at 170). In that role, he coordinated yearly Sexual Harassment and Assault Response and Prevention [SHARP] training. (R. at 171-73). [redacted] scheduled SHARP training for his unit to be held on 27 and 28 September 2022 at building 316. (R. at 173; Pros. Ex. 1).

[redacted] did not directly contact those who needed to attend training. Instead, he delegated responsibility to [redacted] to ensure attendance. (R. at 173, 177). [redacted] "assumed [redacted] was pushing out the 27th, and then if there were people who couldn't go to the 27th, who had a valid reason, we would then give the second option." (R. at 177). [redacted] wanted to "funnel everyone to the 27th . . . . [T]he hope is we can knock everyone out on 27 September. That didn't happen. So we went with the additional date. But my guidance to him was I'm available to conduct both." (R. at 208-09).

[redacted] was appellant's first sergeant and sent an email to various personnel regarding the upcoming training. (R. at 117, 119; Pros. Ex. 1). In the email, sent at 1459 on 26 September, [redacted] requested "support to ensure the individuals on the attached tracker attend the annual SHARP training" on 27 September. (Pros. Ex. 1).

Appellant was on the "to" line of the email, and his name was listed on the tracker of personnel expected to be in attendance. (Pros. Ex. 1, 2). Appellant was teleworking on 26 September and was not physically present in the unit footprint that day. (R. at 245). [redacted] was unable to recall if anyone had explained to appellant the guidelines for attending trainings while on telework status. He was similarly unable to recall any knowledge regarding appellant having attended trainings while still on telework status. (R. at 160).

[redacted] did not speak to appellant directly about the SHARP training. (R. at 147-48). In the weeks prior to the training, appellant had kept [redacted] abreast of the multitude of issues he was experiencing regarding childcare and the relationship with his child's mother. (R. at 144-48, 203-05).

[redacted] was in the unit S-3 section along with appellant. (R. at 225). On 26 September 2022, [redacted] was not appellant's supervisor, rater, acting first sergeant, nor noncommissioned officer in charge. (R. at 166-67, 206-07). Neither [redacted] nor [redacted] had knowledge of appellant

reporting to [redacted] prior to 27 September. (R. at 162-63, 206-07). [redacted] claimed that appellant would report to him for "trainee accountability" when appellant's chain of command was on leave. (R. at 242-43). This accountability did not include accountability for work call. (R. at 243). [redacted] could not recall another training requirement for which appellant was required to report to him. (R. at 243-44).

[redacted] testified that [redacted] called him to ensure he had seen the email regarding the SHARP training. (R. at 228). He also testified that [redacted] "asked specifically if – he requested that I specifically call the accused in order to bring [the training] to his attention . . . ." (R. at 228). However, [redacted] testified he did not call [redacted] to follow up on the email. (R. at 339-40). First [redacted] also stated he did not direct [redacted] to call appellant. (R. at 340).

When [redacted] called appellant, he did not answer; appellant later called back [redacted] (R. at 229-30). [redacted] claimed he told appellant about the SHARP training and that [redacted] had specifically reached out to him to ensure there were no conflicts. (R. at 230). Appellant acknowledged he received a phone call from [redacted] R. at 284-85). Appellant believed the discussion of training to be an "FYI" because he did not regularly communicate with [redacted] R. at 285). Appellant communicated with [redacted] or a master sergeant in his unit regarding required events. (R. at 285).

During this time, appellant had ongoing childcare issues with his son due to a contentious relationship with the child's mother. (R. at 269-72). These issues included appellant reporting that the child's mother had abducted the child prior to the alleged misconduct. (R. at 270-71). Appellant provided updates regarding these issues, including the abduction, to [redacted] (R. at 271-72).

Appellant was at a civilian courthouse in Maryland and did not attend the 27 September training. (R. at 273). Appellant was there to attend a court protection order hearing with his son. (R. at 273, 279). Appellant learned around noon that the mother of his child was not going to attend the hearing. (R. at 278). Because of the mother's absence, appellant left the courthouse. (R. at 279-80). First [redacted] called appellant around 1700 on 27 September regarding the SHARP training. (R. at 326).

Appellant attended SHARP training on 28 September and was present by 0845. (R. at 233, 286). The training conducted on 27 September was the same as that conducted on 28 September. (R. at 204). Multiple persons were unable to attend on the 27th and instead attended on the 28th. (R. at 204). [redacted] testified that not having proper childcare was a valid reason not to attend on the 27th and instead attend on the 28th. (R. at 205).

Standard of Review

Upon appellant making a specific showing of a deficiency in proof, this court may consider whether the findings are correct in fact. Article 66(d)(1)(B); Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12. In conducting its review, this court gives "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and appropriate deference to findings of fact entered into the record by the military judge." *Id*. A finding of guilty may then be set aside if this court is clearly convinced such finding was against the weight of the evidence. *Id*.

When conducting its factual sufficiency review, appellant respectfully requests this court consider the procedure outlined in *People v. Danielson*, 9 N.Y.3d 342 (N.Y.C.A. 2007), cited by the Military Justice Review Group in recommending changes to the previous version of Article 66, UCMJ. This is a two-step process. First, the court must "determine whether an acquittal would not have been unreasonable." MIL. JUST. REV. GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS (2015), 610, fn 25 (citing *Danielson*, 9 N.Y.3d at 348). Then, if an acquittal would not have been unreasonable, "the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the

credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt." *Id*.

Regardless of the framework used to assess the current Article 66 standard of factual sufficiency, this court still impartially reviews all evidence. Nothing in the current statutory language erodes the fundamental principle that, when this court conducts its factual sufficiency review, "neither a presumption of innocence nor a presumption of guilt" is applied. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Argument

The elements of failure to report are: (a) That a certain authority appointed a certain time and place of duty for the accused; (b) That the accused knew of that time and place; and (c) That the accused, without authority, failed to go to the appointed place of duty at the time prescribed. Article 86, UCMJ.

Appellant's conviction is against the weight of the evidence, as there is insufficient evidence to show that the SHARP training on 27 September was appellant's appointed place of duty, that appellant knew it was his appointed place of duty, or that appellant's absence on 27 September was without authority.

Although [redacted] and [redacted] attempted to portray 27 September as the only date for training, [redacted] stated 28 September was also a training day for which people could attend with no negative consequences. (R. at 204). The email

sent by [redacted] only mentions 27 September; however, there is no indication appellant read that email. (Pros Ex. 1).

Although [redacted] knew about appellant's ongoing legal and childcare issues because he had spoken to appellant about them multiple times, [redacted] did not directly contact appellant prior to 27 September 2022 to ensure he was aware of any training requirement. (R. at 144-48, 203-05). This training also occurred during a time in which appellant was teleworking, and no evidence was presented regarding guidelines for appellant's attendance at trainings while on telework status. (R. at 160). Indeed, [redacted] could not recall any guidance disseminated regarding attendance. (R. at 160).

[redacted] testimony about his conversation with appellant is undermined for two primary reasons. First, multiple witnesses testified that [redacted] was not appellant's supervisor, rater, acting first sergeant, or noncommissioned officer in charge. (R. at 166-67, 206-07). [redacted] attempted to declare himself as responsible for accountability for training requirements, and nothing more, during the infrequent times in which appellant's actual supervisory chain was on leave. (R. at 243). However, despite multiple training requirements, [redacted] could not name one other training requirement for which he maintained accountability over appellant. (R. at 243-44).

Second, [redacted] statements that [redacted] prompted the phone call to appellant are contradicted by [redacted] attempted to portray his actions as at the behest of [redacted] However, [redacted] testified he did not call [redacted] about contacting appellant, nor did he direct [redacted] to call appellant. (R. at 339-40). This undercuts [redacted] description of his conversation with appellant. Rather than conveying the authoritative tone of a supervisor, [redacted] used a more informative tenor, as described by appellant.

Appellant's description of this informative tone buttressed by [redacted] calling appellant on 27 September after training had ended for the day. Appellant received [redacted] phone call around 1700 directing him to training on the 28th, and there is no evidence that [redacted] admonished appellant during that phone call for any failure to attend training. Had [redacted] phone call conveyed an order, it is likely [redacted] or [redacted] would have inquired as to appellant's whereabouts on 27 September when training began, or while it was ongoing. No one did.

Throughout this time, appellant's supervisory chain was aware of ongoing issues appellant had with childcare and the mother of his child. Moreover, appellant was in a telework status with ambiguous requirements for attending trainings in-person. There is no evidence of appellant's attendance at other unit training events during this time. Instead, [redacted] and [redacted] had clearly given

appellant wide latitude to address personal matters, even during traditional work hours.

Given both 27 and 28 September were options for training, and that those who attended on 28 September did so with no consequence, there is insufficient credible evidence that the training on 27 September was appellant's place of duty. If this court nevertheless finds otherwise, given the tone of appellant's conversation with [redacted] there is insufficient credible evidence that appellant knew it was his duty to attend the training. Moreover, with the flexible circumstances of appellant's teleworking and the lack of specific requirements for attendance at in-person events, there is insufficient credible evidence that appellant's 27 September absence was without authority. When [redacted] told appellant his place of duty was SHARP training on 28 September, he attended – that was his place of duty, and he knew it to be so. The same does not hold for 27 September.

Conclusion

For the foregoing reasons, appellant respectfully requests this court set aside the conviction of Charge I and its specification.

[redacted]

JUSTIN L. WATKINS
CPT, JA
Appellate Defense Counsel
Defense Appellate Division

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on October 3, 2023.

[redacted]

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