

# Rank Relationships: Charging Offenses Arising from Improper Superior-Subordinate Relationships and Fraternization

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## Introduction

You stare at the phone on your desk as its strident rings rouse you from contemplating the final Criminal Investigation Division (CID) report. Something about the sound of that ring fills you with dread. As you raise the receiver to your ear you wince in response to the impassioned words flowing from the earpiece. "Yes sir. Right away sir. I'm on my way now sir. I'll be there in five minutes." Grabbing the CID report in one hand and your Army beret in the other, you head for the door and a meeting with one of your brigade commanders. As you hurry over to the commander's office you quickly review the facts surrounding the scenario laid out in the final CID report.

The brigade commander's unit has had more than its fair share of improper superior-subordinate relationships and fraternization problems over the last six months. One company commander in the support battalion has fallen in love with one of his subordinate noncommissioned officers and he has requested permission to marry her. The married first sergeant in another company is having a sexual relationship with one of his platoon sergeants. The platoon sergeant claims that the sex was consensual, but that she expected to avoid additional duties as a result of her relationship with the first sergeant. All of the other platoon sergeants in the company are aware of her affair with the first sergeant. Another soldier in the same first sergeant's company has accused him of threatening to send her to Korea if she did not have sex with him. Finally, the executive officer for the support battalion is sharing living accommodations with the battalion sergeant major and they have formed a business partnership selling refurbished computers in their spare time.

The brigade commander is facing some crucial decisions. He asks you to review the CID report one final time before recommending the various ways he can hold the relevant parties

accountable for their misconduct. He recently attended the Senior Officer Legal Orientation Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, and he is particularly interested in how the Army Command Policy<sup>1</sup> applies. Fortunately, you have reviewed the relevant regulations and relevant portions of the Uniform Code of Military Justice (UCMJ). You believe that you clearly understand the possible charging alternatives when dealing with this type conduct. As you hurry across the parade field toward the brigade commander's office, you quickly review the history of the Army's improper superior-subordinate relationship policy.

The above scenario sounds familiar to any judge advocate that has been fortunate enough to serve as a trial counsel. This article is designed to prepare judge advocates for the day that they walk across that parade field for a meeting with a commander about these types of issues. It discusses how the Army policy on improper superior-subordinate relationships has changed, outlines the current Army policy, suggest ways to address violations of the regulation, and discusses the most recent case law in the area.<sup>2</sup>

## How the Current Army Policy Developed

The current Army policy on improper superior-subordinate relationships and fraternization has been in effect since 2 March 1999.<sup>3</sup> Over the last two years, the Army has developed and implemented training programs designed to educate commanders and soldiers about their responsibilities under the new policy.<sup>4</sup> *Army Regulation (AR) 600-20* now contains punitive provisions,<sup>5</sup> and sufficient time has passed for the vast majority of soldiers on active and reserve duty to have been exposed and educated on the new standards imposed by those punitive sections of the regulation.<sup>6</sup> Judge advocates in the field have

1. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (15 July 1999) [hereinafter AR 600-20].

2. This article addresses these issues from an Army perspective, specifically discussing the requirements of *Army Regulation 600-20* and the guidance provided to commanders through *Department of the Army Pamphlet 600-35*. For a comprehensive look at the current application of the law regarding improper superior-subordinate relationships in the other branches of the service, see Major Paul Turney, *Relations Among the Ranks: Observations of and Comparisons Among the Service Policies and Fraternization Case Law, 1999, ARMY LAW.*, Apr. 2000, at 97. See generally U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2909 (1 May 1999); CHIEF OF NAVAL OPERATIONS INSTR. 5370.2B, para. 3 (27 May 1999); MARINE CORPS MANUAL, para. 1100.4 (C3, 13 May 1996); U.S. COAST GUARD PERSONNEL MANUAL, ch 8.H.2.c (C26, 3 Feb. 1997).

3. Message, 020804Z Mar 99, Headquarters, Dep't of Army, DAPE-HR-L, subject: Revised Policy on Relationships Between Soldiers of Different Ranks (2 Mar. 1999) [hereinafter DA Message]. For an excellent background discussion and analysis of the changed policy, see Major Michael J. Hargis, *The Password Is "Common Sense": The Army's New Policy on Senior-Subordinate Relationships*, ARMY LAW., Feb. 1999, at 12.

4. Turney, *supra* note 2, at 99.

developed and applied a cohesive pattern of analysis to these types of offenses, using common sense, an in-depth understanding of the law, and knowledge of the different ways in which similar types of misconduct can be charged and proven at court-martial. This extensive training program is a direct result of the substantive change in policy implemented in July of 1998.

Prior to July 1998, the Army applied an effects-based test when determining whether or not a relationship between superior and subordinate personnel was improper.<sup>7</sup> That test was based on years of experience, and reflected an understanding of the way in which relationships develop within the service.<sup>8</sup> *Army Regulation 600-20* addressed this type of conduct and was not punitive. When confronted with a possible improper superior-subordinate relationship, the commander first determined whether or not the relationship created one of the adverse effects listed in the regulation. If it fell into one of the defined adverse-effects categories, the commander could affirmatively order an individual to cease the conduct that formed the basis of the improper relationship. Failure to follow that direct order could then result in an offense under the UCMJ.<sup>9</sup> The Secretary of Defense changed that process in July 1998.

Secretary of Defense William Cohen issued a mandate on 29 July 1998,<sup>10</sup> requiring all of the services within the Department of Defense (DOD) to establish policies that prohibit certain relationships among the ranks and, specifically, between officer and enlisted members.<sup>11</sup> The Secretary of Defense identified several substantive differences between the policies of the var-

ious branches of the DOD and established a requirement “to eliminate as many differences in disciplinary standards as possible and to adopt uniform, clear and readily understandable policies.”<sup>12</sup> He issued his mandate after reviewing the findings of a task force that spent the prior year examining instances of improper superior-subordinate relationships in the different branches of DOD. He noted the lack of an across-the-board standard for what constituted misconduct in such situations. The Secretary of Defense determined the different branches of the DOD should adopt and enforce uniform policies in this area, irrespective of service-specific issues. He concluded that the men and women serving in America’s armed forces deserved clear, concise guidelines on superior-subordinate relationships.<sup>13</sup>

This mandate required the Army to substantively change the way it defined and addressed improper superior-subordinate relationships. The Army chose to modify portions of *AR 600-20* and draft a new version of *Department of the Army (DA) Pamphlet 600-35*<sup>14</sup> to satisfy the directive of the Secretary of Defense. The Department of the Army issued a message directing the implementation of the revised Army policy in response to the mandate issued by the Secretary of Defense, and the new policy became effective on 2 March 1999.<sup>15</sup> The revised *AR 600-20*<sup>16</sup> governing command policy contains the changes called for in the DA message.<sup>17</sup>

#### *Details of the Current Army Policy*

5. AR 600-20, *supra* note 1, paras. 4-14 through 4-16.

6. For example, the new regulation had a one-year grace period for business relationships and personal relationships between enlisted personnel and officer personnel. *Id.* para. 4-14.c(1). Relationships that were appropriate under the old regulation were in some instances now found to be inappropriate. *See id.* para. 4-14. The new policy acknowledged the difficulty in changing Army society overnight, and provided for a one-year grace period for the effected personnel to terminate the relationships that violated the new policy. That period expired on 1 March 2000. *Id.* para. 4-14.c(2). All Army personnel, without exception, have been operating under the current regulation for one calendar year as of the date of this article. *Id.*; *see also* DA Message, *supra* note 3.

7. U.S. DEP’T OF ARMY, PAM. 600-35, RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANKS, para. 1-5 (7 Dec. 1993) [hereinafter DA PAM 600-35 (1993)] (“The authority or influence one soldier has over another is central to any discussion of the propriety of a particular relationship between soldiers of different rank.”). DA PAM 600-35 (1993) reflected the previous effects-based orientation of any command analysis of a relationship between individuals of different rank in the Army.

8. *Id.* para. 1-5(e) (stating that “Army policy does not hold dating or most other relationships between soldiers [of different ranks] as improper, barring the adverse effects listed in AR 600-20.”).

9. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶16b (2000) [hereinafter MCM].

10. Memorandum, Secretary of Defense, to Service Secretaries, Chairman of the Joint Chiefs of Staff, and Under Secretaries of Defense, subject: Good Order and Discipline (29 July 98) [hereinafter SECDEF Memo].

11. *Id.*

12. *Id.*

13. *Id.*

14. DA PAM 600-35 (1993), *supra* note 7.

15. DA Message, *supra* note 3.

16. AR 600-20, *supra* note 1.

17. DA Message, *supra* note 3.

The current policy is punitive<sup>18</sup> and is premised on a three-part analysis. First, commanders must determine if the relationship is prohibited between and among the ranks.<sup>19</sup> This reflects the Secretary of Defense's guidance that specific types of relationships are per se prohibited based on the status of the individuals involved in the relationship. This is markedly different from the previous version of *AR 600-20*,<sup>20</sup> which focused on the effect of the relationship when determining whether or not a particular relationship between a superior and subordinate was improper.<sup>21</sup> The previous regulation looked to the impact of the relationship on the unit and its ability to accomplish its mission.<sup>22</sup> Absent one of the three adverse impacts outlined in the regulation, the relationship was not improper, and could continue.

The new regulation employs a status-based test. Various types of relationships are prohibited based solely on the status of the parties.<sup>23</sup> The status-based prohibitions include ongoing business relationships,<sup>24</sup> personal relationships,<sup>25</sup> gambling,<sup>26</sup> recruit-recruiter relationships, and trainer-trainee relationships.<sup>27</sup> These bright-line tests establish clear prohibitions based upon status, but the regulation goes on to adopt and expand upon the former effects-based test for those relationships that do not fall into specific status-based categories. If the relationship is not per se prohibited, then the commander must apply the additional effects-based tests found in *AR 600-20*.<sup>28</sup> The current *AR 600-20* adopted the three previous effects-based tests from the old regulation and added two additional effects-based tests dealing with trainer-trainee relationships and recruit-recruiter relationships.<sup>29</sup>

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18. AR 600-20, *supra* note 1, para. 4-16 (“[V]iolations of paragraph 4-14b, 4-14c, and 4-15 may be punished under Article 92, UCMJ, as a violation of a lawful general regulation.”).

19. *Id.* para. 4-14c.

20. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 4-14 (30 Mar. 1988).

21. *Id.* The previous regulation established the following effects-based test: “Relationships between soldiers of different rank that involve, or give the appearance of, partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline, and high unit morale. It is Army policy that such relationships will be avoided.” *Id.*

22. *Id.*

23. AR 600-20, *supra* note 1, para. 4-14c.

24. *Id.* para. 4-14c(1). See Turney, *supra* note 2, at 99. Turney states:

Prohibited business relationships are off-limits if they can be described as “on-going” yet several exceptions allow for limited relationships and for one-time transactions. The borrowing or lending of money is prohibited and the regulation lists no exigent circumstances or excuses for a debtor-creditor relationship, of any degree, to exist between officers and enlisted. Commercial solicitation and any other financial relationship is similarly disallowed.

*Id.*

25. AR 600-20, *supra* note 1, para. 4-14c(2). See Turney, *supra* note 2, at 99 (“In the realm of personal relationships, “dating, shared living accommodations other than those directed by operational requirements, and intimate or sexual relationships between officers and enlisted personnel” are prohibited. Again, several exceptions exist that serve to keep a relationship within policy compliance.”).

26. AR 600-20, *supra* note 1, para. 4-14c(3). See Turney, *supra* note 2, at 99. (“Officers and enlisted members are further prohibited from gambling with each other and there are no exceptions to this prohibition under the new policy.”).

27. AR 600-20, *supra* note 1, para. 4-15. See Turney, *supra* note 2, at 100. Turney states:

Two additional types of relationships are strictly prohibited by the new Army policy. Now, “any relationship between permanent party personnel and IET trainees not required by the training mission” is off-limits. Additionally, any relationship “not required by the recruiting mission” is prohibited as between members of the U.S. Army Recruiting Command and “potential prospects, applicants, members of the delayed entry program (DEP), or members of the delayed training program (DTP).”

*Id.*

28. AR 600-20, *supra* note 1, para. 4-14b. Paragraph 4-14b prohibits senior-subordinate relationships if they: (1) compromise, or appear to compromise, the integrity of supervisory authority or the chain of command; (2) cause actual or perceived partiality or unfairness; (3) involve, or appear to involve, the improper use of rank or position for personal gain; (4) are, or are perceived to be, exploitative or coercive in nature; or (5) create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission. *Id.*

29. *Id.*

How does the trial counsel walking across the parade field in our opening scenario assist the commander in addressing violations of the policy? Certain key issues should be addressed in each instance. Trial counsel should ensure that their commanders understand that the change in the command policy does not create a definitive requirement to take judicial action against a soldier who violates the policy.<sup>30</sup> The entire range of options is still available to the commander and should be considered on a case-by-case basis for each possible violation.<sup>31</sup>

Options include counseling and education, administrative actions, nonjudicial punishment, and court-martial. The goal is to use the response that is warranted, appropriate, and fair given the surrounding circumstances. *Department of the Army Pamphlet 600-35* advises commanders that they should pay particular attention to the potential for problems in supervisory relations and potentially influential relationships.<sup>32</sup> Commanders should also consider the fact that “[t]he appearance of impropriety can be as damaging to morale and discipline as actual misconduct.”<sup>33</sup> Finally, counsel should consider the other possible charges that may arise from the types of conduct normally associated with violations of the improper superior-subordinate relationship policy.<sup>34</sup>

Well, you have finished your meeting with the brigade commander and you fully understand his intent regarding the substantive misconduct. You have your marching orders and, as you hurry back to your office to draft some charge sheets, you realize that you must consider how charging violations of Articles 92 and 133 will play out at trial. You need guidance on the interplay between these two articles of the UCMJ. How will you prove that the conduct of the officers violated Article 133? Will there be some interplay between *AR 600-20* and Article 133? Can you charge violations of both Article 92 and Article 133 when the substantive misconduct arises from the same incident? You ponder these questions as you slide into the chair at your desk and fire up your computer for some much-needed research. Fortunately, the appellate courts have begun to

address these issues, and some guidance is already out there to assist you in making your charging decisions.

### *Case Law Update*

*“When Is Asking for a Date Conduct Unbecoming an Officer?”*

In *United States v. Brown*,<sup>35</sup> Captain (CPT) Brown contested his conviction for violations of Articles 89 and 133 of the UCMJ. In an unpublished opinion, the Air Force Court of Criminal Appeals affirmed his conviction. Captain Brown worked in a staff office with several other officers. He solicited dates from several of the other company grade officers working in his office. At some point, his chain of command became convinced that these requests for dates were not appropriate conduct for a captain in the Air Force. They preferred charges for violations of Articles 89 and 133. The panel found CPT Brown guilty of one of three specifications of disrespect towards a superior officer, in violation of Article 89, and six of ten specifications of conduct unbecoming an officer and a gentleman, in violation of Article 133.<sup>36</sup> He received a dismissal and fourteen days confinement. The appellate decision does not indicate any evidence of threats or abuse regarding the request for dates and it is also silent concerning any particular acts that the government may have relied upon in charging CPT Brown with a violation of Article 133. The opinion also does not indicate whether CPT Brown’s defense counsel requested and received a bill of particulars prior to trial.

On appeal, the Air Force court addressed the judge’s admission at trial, over defense objection, of *Air Force Pamphlet (AFPAM) 36-2705, Discrimination and Sexual Harassment*.<sup>37</sup> Captain Brown argued that the admission of this pamphlet invited the members to improperly consider official Air Force policy in adjudging findings and sentence. The court relied on the limiting instruction provided by the military judge in holding that the admission of the pamphlet was not error. They took note of the fact that the cover letter of the pamphlet, written and signed by the Air Force Chief of Staff and addressed to the entire Air Force, was removed before it was admitted into evi-

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30. U.S. DEP’T OF ARMY, PAM. 600-35, RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANKS, preface (21 Feb. 2000) [hereinafter DA PAM 600-35] (“The leader must be counted on to use good judgment, experience, and discretion to draw the line between relationships that are ‘destructive’ and those that are ‘constructive.’”).

31. *Id.* para. 1-4c. (“Absent the strictly prohibited categories, Army policy “judge[s] the results of relationships and not the relationships themselves.”).

32. *Id.* para. 1-5c.

33. *Id.* para. 1-5a.

34. Counsel should consider the full range of charging options based upon the substantive conduct. While the available charges are situationally dependent, at a minimum violations of Articles 92 and 133 should be considered. Additionally, Article 134, Fraternalization, is usually a possible charge as well. For recent developments in the possible multiplicity issues that may arise from charging violations of both Article 133 and Article 134, see Turney, *supra* note 2, at 97.

35. ACM 32906, 1999 CCA LEXIS 324, \*1 (A.F. Ct. Crim. App. Dec. 27, 1999) (unpublished).

36. *Id.*

37. U.S. DEP’T OF AIR FORCE, PAM. 36-2705, DISCRIMINATION AND SEXUAL HARASSMENT (28 Feb. 1995).

dence. They held that the government could use a copy of the non-punitive pamphlet regarding unprofessional relationships as evidence of an appropriate standard for the panel to use when determining whether or not CPT Brown's conduct violated Article 133.<sup>38</sup>

In *Brown*, the Air Force court did not sufficiently address the issue of notice and opportunity to defend against the substantive misconduct relied upon to prove the Article 133 specifications. It is not clear from the appellate record whether the defense contested the issue of what conduct constituted the basis for the Article 133 charges. If they did so, then the failure of the trial counsel to adequately provide a bill of particulars or to correctly specify the conduct at issue should be a fatal flaw.

A recent decision by the CAAF addressing this issue calls the Air Force court's *Brown* decision into question. In *United States v. Rogers*,<sup>39</sup> the CAAF held that the use of an instructional pamphlet to prove the custom of the service was not necessary. Some type of notice to the defense is required, but previously trial counsel have not sought to use non-binding, non-punitive pamphlets to establish the types of conduct considered violative of Article 133. The choice to use that pamphlet could very well result in an interpretation by the CAAF that CPT Brown did not have sufficient notice and an adequate opportunity to defend against the substantive basis of the Article 133 violations. While Article 133 is broad in scope, some types of conduct simply do not fall under its umbrella.

At issue now is whether the CAAF will allow the Air Force court to interpret the interplay between Article 133 and the non-punitive Air Force pamphlet on improper relationships in a manner that allows a non-punitive instructional pamphlet to identify conduct that violates Article 133. For the present, counsel should carefully consider the ramifications of relying on such materials when proving violations of Article 133. The current DOD standard for defining improper relationships is now covered under each service's applicable regulation. Trial counsel should use those service regulations as a guide for what constitutes misconduct, rather than seeking to expand the

bounds of Article 133 regarding improper relationships. While other forms of conduct may be boorish or in poor taste, that does not mean such conduct should be charged as a violation of Article 133.

*"Romance in Italy!"*

In *Rogers*, the CAAF examined a specification under Article 133, UCMJ, that alleged an unprofessional relationship "of inappropriate familiarity" between a squadron commander and a subordinate officer.<sup>40</sup> Lieutenant Colonel (LTC) Rogers served as the squadron commander for the 90th Fighter Squadron, based at Elmendorf Air Force Base, Alaska. He initially met First Lieutenant (1Lt) Julie Clemm while on temporary duty in Korea in April or May 1995. First Lieutenant Clemm approached him about a possible position in his unit, and he approved her application. Five months later the two of them, along with the rest of the squadron, deployed to Italy in October 1995. Beginning on 21 November 1995, the two started an unprofessional relationship that lasted for a period of nearly a month.<sup>41</sup>

The relationship began when LTC Rogers pursued the intoxicated lieutenant at a squadron Thanksgiving party, changing his weekend travel plans so that he could be "in the mountains with a beautiful woman."<sup>42</sup> They traveled together between the squadron and his hotel, worked out together in the gym, and ate together at local restaurants.<sup>43</sup> Over the next two weeks, the executive officer of the squadron became concerned about LTC Rogers' relationship with 1Lt Clemm. He confronted LTC Rogers, who became combative and attacked the loyalty of the subordinate who thought his relationship with 1Lt Clemm was unprofessional. Eventually LTC Rogers gave the executive officer a poker chip with the squadron's emblem on it, telling the executive officer to cash it in after five years when LTC Rogers would tell him the truth of everything that had been happening.<sup>44</sup>

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38. The Court of Appeals for the Armed Forces (CAAF) has granted review on the issues surrounding the Article 133 specifications. See *United States v. Brown*, No. 00-0295/AF, 2000 CAAF LEXIS 632, at \*1 (C.A.A.F. June 12, 2000). The issues the CAAF has agreed to hear include: whether the military judge abused his discretion in denying appellant's request for a special instruction to ensure a proper verdict by a vote of two-thirds of the members; whether the military judge erred by admitting *AFPAM 36-2705*, which prejudicially invited the members to consider official "Air Force Policy" in adjudging findings and sentence; and whether various specifications of charge II and the additional charge were supported by legally sufficient evidence. *Id.*

39. 54 M.J. 244 (2000).

40. *Id.* at 245.

41. *Id.* at 249.

42. *Id.* at 249-50.

43. *Id.* at 250.

44. *Id.* at 252. Commander's coins or emblems are often used to denote accomplishments by particular individuals within the unit. It is interesting to note that LTC Rogers' promise to tell his executive officer the truth after five years had passed could mean that the statute of limitations would have tolled for any possible offenses committed by LTC Rogers while in Italy.

The executive officer later caught the lieutenant returning to her room very early one morning. He confronted her about her unprofessional relationship with the squadron commander and she admitted that she was having an affair with LTC Rogers.<sup>45</sup> Although First Lieutenant Clemm promised the executive officer that she would break off the relationship, she instead changed rooms in the hotel where the unit was lodged, so that she was residing directly next to LTC Rogers' room. The executive officer informed the higher command and LTC Rogers was removed as the squadron commander.<sup>46</sup> Lieutenant Colonel Rogers contested his guilt at court-martial and was convicted of a violation of Article 133. He lost on his appeal at the Air Force Court of Criminal Appeals,<sup>47</sup> and later raised two substantive issues regarding the Article 133 specification to the CAAF.

Lieutenant Colonel Rogers argued that the Article 133 specification failed to state an offense, since it did not allege specific acts amounting to "inappropriate familiarity," and it failed to specifically identify a relevant custom or regulation prohibiting relationships between officers.<sup>48</sup> The CAAF disagreed with both assertions and affirmed, holding that Article 133 does not require proof of a custom or of a regulation prohibiting the type of conduct committed by the appellant.<sup>49</sup> The CAAF did, however, rely on an Air Force instruction when determining whether or not LTC Rogers was on notice that his conduct violated Article 133. *Air Force Instruction (AFI) 36-2909*<sup>50</sup> was a non-punitive instruction addressing improper relationships between the ranks and was in force at the time of LTC Rogers' misconduct.<sup>51</sup> Paragraph A1.3.1 of the instruction stated:

Personal relationships between members of different grades or positions within an organization or chain of command can easily become unprofessional. Dating and indebtedness commonly get out of hand because

they appear to create favoritism or partiality. Consequently, senior members should not date or become personally obligated or indebted to junior members. This is also because seniors have, or are perceived to have, authority to influence the junior member's career.<sup>52</sup>

*Air Force Instruction 36-2909* served as the Air Force equivalent to *AR 600-20* regarding improper superior-subordinate relationships. It was not punitive, but did provide specific guidelines for defining and identifying appropriate and inappropriate conduct between ranks.

When addressing whether or not Article 133 required proof of a custom or regulation prohibiting the conduct that formed the basis for the charge, the CAAF focused on the issue of notice to LTC Rogers. They relied in part on paragraph A1.3.1 in deciding that he was on notice that the behavior in question was potentially criminal in nature.<sup>53</sup> The court went on to address whether or not Article 133 requires allegation of specific acts constituting an unprofessional relationship within the specification itself. The court determined that there is no such requirement and that the model specification is not void for vagueness.<sup>54</sup> The court noted that the accused received a bill of particulars from the government and that the defense counsel at trial substantively addressed each issue raised by the bill.<sup>55</sup> The court concluded that there was no lack of notice regarding what substantive facts the government would use to prove the Article 133 violation.<sup>56</sup>

At the time of LTC Rogers' misconduct, the Air Force defined "unprofessional relationships" in their former superior-subordinate relationship policy.<sup>57</sup> Since *AFI 36-2909* was not punitive, the command did not have the option of charging an Article 92 offense and chose instead to use Article 133. Trial

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45. *Id.* at 252-53.

46. *Id.* at 254.

47. *United States v. Rogers*, 50 M.J. 805 (A.F. Ct. Crim. App. 1999).

48. *Rogers*, 54 M.J. at 245.

49. *Id.* at 255-57.

50. U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2909, para. A.1.3.1 (20 Feb. 1995) [hereinafter *AFI 36-2909*].

51. The misconduct addressed in *Rogers* occurred before the adoption of the current improper superior-subordinate relationship policy now in effect throughout the Air Force. For an excellent analysis of the Air Force's current policy, see Turney, *supra* note 2.

52. *AFI 36-2909*, *supra* note 50, para. A.1.3.1.

53. *Rogers*, 54 M.J. at 257.

54. *Id.* at 257-58.

55. *Id.*

56. *Id.*

counsel facing similar charging decisions now can use both Article 92 and Article 133 when disposing of cases similar in nature to the ones discussed above. While Article 133 does not require language within the specification alleging specific acts by the accused, the CAAF has sent a clear signal in *Rogers* that they are going to closely review the issue of notice to the accused in these cases. This is particularly true in cases involving what might otherwise be considered dating or other types of normal social interaction between the sexes. When counsel choose to charge violations of both Article 92 and Article 133, they should make certain that, where applicable, they use the substantive language of the service-specific improper superior-subordinate relationship policy to establish the type of misconduct upon which the Article 133 violation is based. Additionally, trial counsel should provide the defense counsel with a bill of particulars outlining the specific conduct upon which the government will rely when proving the Article 133 violation at trial.

### Conclusion

Over the last year we have begun to see the first reported cases dealing with the issue of improper superior-subordinate relationship policies and their interplay with Article 133. The trial counsel in *Brown* used a non-punitive, non-binding pamphlet to establish notice to CPT Brown of what constituted violation of Article 133. The trial counsel in *Rogers* used an Air Force instruction to establish that same notice, and provided a bill of particulars to defense counsel, thereby satisfying the notice requirement for what conduct the government would use

to prove the violation of Article 133. While the use of pamphlets to establish notice for possible violations of Article 133 has not yet been affirmed by the CAAF, trial counsel should take notice of the standard found in *Rogers* and consider citing to the appropriate service regulation when arguing that conduct violates Article 133. They should stick to the model specification for Article 133 violations and ensure that adequate notice is given to the defense counsel as to the type of conduct that substantively forms the basis for the Article 133 violation. Defense counsel should consider the CAAF's holding in *Rogers* when making trial strategy decisions regarding notice, discovery, and requests for bills of particulars.

Both of these cases occurred prior to the change in the DOD improper superior-subordinate relationship policy. Still, they assist counsel in defining what military personnel should consider as appropriate conduct between the ranks. They also exemplify ways that military personnel are placed on notice regarding those service norms. Finally, they provide substantive guidance on the requirements for a valid Article 133 violation, at least concerning what constitutes notice of the substantive misconduct and how the applicable service regulations apply to improper relationship issues.

Future cases should address shortcomings in the generic benchbook instruction for Article 92 violations<sup>588</sup> in light of the need for a more closely-tailored instruction based on *AR 600-20*, *DA Pamphlet 600-35*, and other service-specific regulations, instructions and directives. As long as there are soldiers, one can rest assured that trial counsel will be briefing, developing, and charging these types of offenses.

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57. AFI 36-2909, *supra* note 50, para. A.1.3.

58. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK, para. 3-16-1 (1 Apr. 2001).