

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
CAIRNS, BROWN, and VOWELL
Appellate Military Judges

UNITED STATES, Appellee

v.

**Chief Warrant Officer Two EDWIN R. PALAGAR
United States Army, Appellant**

ARMY 9900781

U.S. Army Engineer Center and Fort Leonard Wood (convened);
United States Army Maneuver Support Center (action)
R. F. Holland, Military Judge

For Appellant: Colonel Adele H. Odegard, JA; Major Jonathan F. Potter, JA;
Captain David S. Hurt, JA; Captain Kevin J. Mikolashek, JA (on brief).

For Appellee: Colonel David L. Hayden, JA; Lieutenant Colonel Edith M. Rob, JA;
Major Anthony P. Nicastro, JA; Captain Paul R. Almanza, JA (on brief).

30 March 2001

MEMORANDUM OPINION

CAIRNS, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of signing a false official record, larceny of military property of a value greater than \$100.00, conduct unbecoming an officer and gentleman, and obstruction of justice, in violation of Articles 107, 121, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 921, 933, and 934 [hereinafter UCMJ]. The military judge sentenced the appellant, a commissioned warrant officer, to a dismissal, confinement for two years, and forfeiture of all pay and allowances. In accordance with a pretrial agreement, the convening authority reduced the sentence to confinement to twelve months and approved the remainder of the adjudged sentence.

The appellant asserts as his sole assignment of error that the military judge erred in failing to find the larceny and obstruction of justice offenses multiplicitous with the offense of conduct unbecoming an officer and gentleman. We agree that the obstruction of justice offense was multiplicitous with the offense of conduct

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unbecoming, but we hold that the larceny offense was not multiplicitous with the offense of conduct unbecoming.

Background

As the battalion maintenance officer for his unit, the appellant was issued an International Merchant Purchase Authorization Card (IMPAC), a government credit card. He understood that the card was to be used strictly to procure supplies and services for official use only. Over the course of eight months, the appellant used the IMPAC card to make hundreds of legitimate purchases, as well as \$2,242.19 in unauthorized purchases for personal use. When the command investigated the suspected misuse, the appellant impeded the Army Regulation 15-6* investigation by altering receipts, photocopying them, and submitting them to the investigating officer [hereinafter altered receipts].

While the investigation was pending, the appellant signed and submitted a "Statement of Account" to his IMPAC approving official, falsely attesting that he purchased certain supplies and parts for his unit. He did so in an attempt to cover up the fact that he actually purchased items for personal use. Along with this statement, the appellant submitted phony receipts that he had created on a computer to support his false Statement of Account [hereinafter phony receipts].

In addition to charging the appellant with larceny, the government also charged him with signing the false Statement of Account; obstruction of justice by submitting altered receipts to the AR 15-6 investigating officer; and conduct unbecoming for making unauthorized purchases with a government IMPAC credit card and concealing those personal purchases by submitting altered receipts to the AR 15-6 investigating officer and creating phony receipts which he submitted to his IMPAC approving official.

At trial, the appellant moved to dismiss the larceny and obstruction of justice charges, asserting that these offenses were multiplicitous with the offense of conduct unbecoming. The military judge denied the motion on the basis that, while the charged offenses were factually related, the underlying misconduct described in the conduct unbecoming specification was not identical to the misconduct described in the larceny and obstruction of justice specifications. He also stated that he "considered the clear overlap and relation between the misconduct which makes up the subject matter of all of these offenses. . . . as a matter in extenuation."

* Army Reg. 15-6, Boards, Commissions, and Committees: Procedure for Investigating Officers and Boards of Officers (11 May 1988) [hereinafter AR 15-6].

Discussion

This court has held that an officer may be convicted of larceny under Article 121, UCMJ, and conduct unbecoming an officer under Article 133, UCMJ, for the same act of shoplifting. *United States v. Frelix-Vann*, ARMY 9701014 (Army Ct. Crim. App. 9 Apr. 1999) (unpub.). Citing *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993), our court's holding rested on the rationale that, since there is no clear Congressional intent to the contrary, an officer may be convicted and punished under Article 133 and Article 121 for the same underlying misconduct because each provision requires proof of an element that the other does not. Even though we are not bound by this unpublished opinion, we choose to follow its rationale in this case, recognizing that our superior court granted a petition for review in *Frelix-Vann* on the issue of multiplicity. *United States v. Frelix-Vann*, 52 M.J. 479 (1999). Accordingly, we hold that the military judge did not err when he ruled that the larceny and conduct unbecoming offenses were not multiplicitous.

However, the government concedes, and we accept the concession, that the obstruction of justice offense (Article 134, UCMJ) was multiplicitous with the conduct unbecoming offense (Article 133, UCMJ), but only to the extent that the conduct unbecoming specification alleges the same conduct as alleged in the obstruction of justice specification, i.e., that the appellant submitted altered receipts to the AR 15-6 investigating officer. Both the appellant and the government acknowledge that when the underlying misconduct is the same, the law is clear that such a disorder or service discrediting conduct under Article 134, UCMJ, is a lesser-included offense of conduct unbecoming an officer under Article 133, UCMJ. See *United States v. Cherukuri*, 53 M.J. 68, 71 (2000); *United States v. Harwood*, 46 M.J. 26, 28-29 (1997). We agree with the government's position that the analysis in *Cherukuri* and *Harwood* is limited to cases involving offenses charged under Articles 133 and 134, UCMJ.

We also hold that the portion of the conduct unbecoming an officer specification in this case which alleges that the appellant wrongfully and dishonorably concealed unauthorized purchases by creating phony receipts was not multiplicitous with the obstruction of justice specification because that specific misconduct was not alleged in the obstruction of justice specification. Thus, the conduct unbecoming offense was not based entirely on the same underlying conduct as alleged in the obstruction of justice specification. The conduct unbecoming specification may be affirmed on that basis alone.

With respect to the identical allegations which were pled multiplicitously in both the obstruction of justice and conduct unbecoming specifications, the government wishes to retain the obstruction of justice charge, suggesting that we except out the multiplicitous language from the conduct unbecoming specification.

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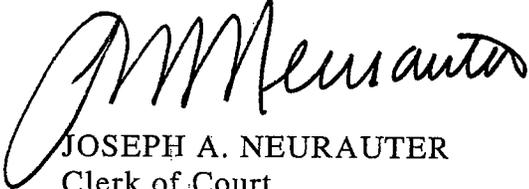
Under the authority of *Cherukuri* (in which the government was allowed to elect between the Article 134 and 133, UCMJ, convictions), we will grant the government's request.

Given the military judge's explicit language that he considered the overlapping nature of the offenses as a matter in extenuation, and in consideration of our conclusions regarding the issues of multiplicity, we are satisfied that the appellant was not prejudiced as to the sentence.

The court affirms only so much of the findings of guilty of Charge IV and its Specification as finds that the appellant did, at or near Fort Leonard Wood, Missouri; St. Robert, Missouri; Rolla, Missouri; Lebanon, Missouri; Springfield, Missouri; Pacific, Missouri; Fort Carson, Colorado; Peterson Air Force Base, Colorado; and Colorado Springs, Colorado, from about 15 December 1997 to about 24 July 1998, wrongfully and dishonorably make over \$1000.00 in unauthorized purchases with a government IMPAC Visa card while serving as the 5th Engineer Battalion Maintenance Officer, and did wrongfully and dishonorably conceal unauthorized purchases by creating phony receipts, conduct unbecoming an officer and a gentleman. The remaining findings of guilty are affirmed. Reassessing the sentence on the basis of the entire record, the principles in *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986), and the entire record, the sentence is affirmed.

Judge BROWN and Judge VOWELL concur.

FOR THE COURT:


JOSEPH A. NEURAUTER
Clerk of Court