

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
TOZZI, CAMPANELLA, and CELTNIIEKS
Appellate Military Judges

UNITED STATES, Appellee
v.
First Lieutenant JEFFEREY M. FIORITO
United States Army, Appellant

ARMY 20080535

United States Army Central Coalition Forces Land Component Command (trial)
Third Army (rehearing)
United States Army Central (third action)
Edward J. O'Brien, Military Judge (trial)
Tiernan Dolan, Military Judge (rehearing)
Colonel Katherine Spaulding-Perkuchin, Staff Judge Advocate (trial)
Colonel Stephanie L. Stephens, Staff Judge Advocate (rehearing) (recommendation)
Colonel Walter S. Weedman, Staff Judge Advocate (rehearing) (addendum)
Colonel Brendan M. Donahoe, Staff Judge Advocate (third recommendation)

For Appellant: Lieutenant Colonel Jonathan F. Potter, JA; Captain John L. Schriver, JA (on brief & reply brief); Major Peter Kageleiry, Jr.; Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA; Captain Brian D. Andes, JA (on second supplemental brief).

For Appellee: Lieutenant Colonel Amber J. Roach, JA; Major Daniel D. Maurer, JA (on brief); Major Daniel D. Derner, JA; Major John K. Choike, JA; Captain Jaclyn E. Shea, JA (on response to appellant's second supplemental brief).

18 December 2014

SUMMARY DISPOSITION ON FURTHER REVIEW

Per Curiam:

This case is before this court for the third time for review under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. During our first review, on 3 March 2011, we set aside the findings and sentence in this case and authorized a rehearing. *United States v. Fiorito*, ARMY 20080535, 2011 CCA LEXIS 50 (Army Ct. Crim. App. 3 Mar. 2011) (mem. op.).

At the rehearing, an officer panel convicted appellant, contrary to his pleas, of two specifications of failure to obey a lawful regulation and assault upon a commissioned officer, in violation of Articles 92 and 128, UCMJ. The convening authority approved the adjudged sentence to confinement for fourteen days, forfeiture of \$4,000.00 pay and allowances per month for three months, and a reprimand.

On 21 May 2013, we set aside the convening authority's second action in order for the government to create a verbatim record of trial. *United States v. Fiorito*, ARMY 20080535, 2013 CCA LEXIS 482 (Army Ct. Crim. App. 21 May 2013) (summ. disp.). We are now in receipt of a verbatim record. Appellant now raises two issues, both of which warrant discussion and relief.¹

Violation of Army Regulation 600-20

Appellant argues, and we agree, that the evidence is insufficient to sustain portions of his conviction of Specification 1 of Charge I, violating Army Reg. 600-20 [hereinafter AR 600-20], Personnel-General: Army Command Policy, para. 4-14.b.(5) (7 June 2006). That paragraph, *inter alia*, states:

b. Relationships between Soldiers of different ranks are prohibited if they-

. . .

(5) *Create* an actual or clearly predictable adverse impact on the discipline, morale, or the ability of the command to accomplish its mission.

The panel, however, did not find appellant “created” an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission. Instead, the panel found appellant, *inter alia*, by exceptions and substitutions, “contributed” to an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission. The variance between “contributed” and “created” leaves a shortfall of proof between the findings and the requirement of the regulation. Consequently we do not affirm any language relating to appellant violating para. 4-14.b.(5).

However, appellant was not convicted merely with violating that subparagraph. He was also found guilty in Specification 1 of Charge I with violating para. 4-14.b.(1) of the same regulation – by wrongfully compromising or

¹ We have considered all of appellant's raised issues from all briefs filed before this court. We only discuss those issues warranting relief at this stage of the proceedings.

appearing to compromise the integrity of the chain of command by having an improper relationship with Second Lieutenant (2LT) AG. Furthermore, the panel found appellant guilty, in Specification 2 of Charge I, of violating both para. 4-14b.(1) and para. 4-14.b.(5) due to his improper relationship with Private First Class DA. Appellant was also found guilty of assaulting 2LT AG, in violation of Article 128. We have reassessed the sentence in accordance with the principles announced in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013) and are convinced that the panel would have adjudged the same sentence, despite the modified findings. In Specification 1 of Charge I, appellant initially was convicted of violating the same regulation in two different ways for the same conduct. He now stands convicted of violating that regulation in one way. His other, serious convictions are unaltered. The gravamen of his misconduct has not changed.

Dilatory Post-trial Processing

Although we do not alter the sentence based upon the insufficient proof noted above, we must still review the appropriateness of the sentence in light of the unjustified dilatory post-trial processing. UCMJ art. 66(c); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (“[Pursuant to Article 66(c), UCMJ, service courts are] required to determine what findings and sentence ‘should be approved,’ based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay.”). See generally *United States v. Toohey*, 63 M.J. 353, 362-63 (C.A.A.F. 2006); *United States v. Ney*, 68 M.J. 613, 617 (Army Ct. Crim. App. 2010); *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000).

By the government’s own admission, it took 462 days from this court’s 21 May 2013 remand for the convening authority to take action in this case – of which 397 days are attributable to government delay. This delay occurred after we remanded the case for the government to produce a verbatim transcript of appellant’s rehearing (which concluded on 12 January 2012). This unreasonable post-trial delay warrants sentence relief.

CONCLUSION

Upon consideration of the entire record, we affirm only so much of Specification 1 of Charge I as follows:

In that [appellant] between on or about 18 June 2007 and 1 December 2007, did violate a lawful general regulation, to wit: paragraph 4-14(b)(1), AR 600-20, dated 7 June 2006, by wrongfully compromising or appearing to compromise the integrity of the chain of command by having an improper relationship with 2LT AG.

FIORITO—ARMY 20080535

The remaining findings of guilty are affirmed. Given the unreasonable post-trial delay, we only affirm so much of the sentence as extends to confinement for fourteen days, forfeiture of \$4,000.00 pay and allowances per month for two months, and a reprimand. All rights, privileges, and property, of which appellant has been deprived by virtue of this decision setting aside the findings and sentence are ordered restored. *See* UCMJ arts. 58a(b), 58b(c), and 75(a).



FOR THE COURT:

A handwritten signature in black ink that reads "Anthony O. Pottinger". The signature is written in a cursive style.

ANTHONY O. POTTINGER
Chief Deputy Clerk of Court