

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
B.L. PAYTON-O'BRIEN, R.G. KELLY, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JAMES B. HALL, JR.
YEOMAN FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 201200219
GENERAL COURT-MARTIAL**

Sentence Adjudged: 26 January 2012.

Military Judge: CAPT Carrie Stephens, JAGC, USN.

Convening Authority: Commander, Navy Region Hawaii, Pearl Harbor, HI.

Staff Judge Advocate's Recommendation: LCDR K.A. Elkins, JAGC, USN.

For Appellant: LT Kevin Quencer, JAGC, USN.

For Appellee: LT Ian MacLean, JAGC, USN.

31 January 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of two specifications of unauthorized absence, three specifications of violation of a lawful general regulation (government travel charge card regulations), one specification of willful dereliction of duty, five specifications of larceny of military property of a value over \$500.00, and one specification of solicitation of another to commit an offense, in violation of

Articles 86, 92, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 921, and 934. The military judge sentenced the appellant to confinement for one year, reduction to pay grade E-1, a \$30,000.00 fine, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.¹

The appellant avers that it was an abuse of discretion for the military judge to accept a guilty plea to one specification of unauthorized absence because the appellant's command had authorized him to travel to Arizona.²

After carefully considering the record of trial and the submissions of the parties, we are convinced that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Factual Background

The appellant was the Travel Supervisor and Government Travel Card Coordinator at his command in Hawaii. Through an abuse of this position, the appellant created travel orders for himself and fraudulently obtained reimbursements through the Defense Travel System (DTS). The specific offense at question in this case is whether the appellant was absent without proper authority from his organization during the period 4-9 August 2010.

The appellant was authorized by his executive officer (XO) to attend a SmartPay conference in Atlanta, Georgia from 9 to 13 August 2010. The appellant wanted to visit his son in Phoenix,

¹ To the extent that the CA's action purports to direct that the punitive discharge will be executed after final judgment, it is a legal nullity. *United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011). We note that in taking action, the CA indicated he had suspended confinement "in excess of 12 months." The appellant's punishment to confinement was for one year, thus there is no confinement to suspend under the terms of the pretrial agreement.

² Specification 1 of Charge 1 reads:

In that Yeoman First Class James B. Hall, Jr., U.S. Navy, Naval Submarine Support Command, on active duty, did, on or about 4 August 2010, without authority, absent himself from his organization, to wit: Naval Submarine Support Command, located on the island of Oahu, Hawaii, and did remain so absent until on or about 9 August 2010.

Arizona on his way to the conference. He told his XO that he would like to assist local recruiters in Phoenix through the Recruiter Assistance Program (RAP) prior to attending the SmartPay conference. Recruiting duty would allow the appellant to visit his son in the evenings while he was in the area. The XO authorized the appellant's additional travel to Arizona in a temporary additional duty (TAD) status based upon the appellant's representation that he would complete official RAP duty while there.

At trial, the appellant admitted that when he made this request to his XO, he only intended on informally assisting the local recruiters in Phoenix in an unofficial status. He was never planning to conduct official RAP duty, and did not intend to submit any type of a request through appropriate channels for approval of official RAP duty.

Nevertheless, the appellant subsequently generated official orders in DTS for his trip to Arizona so the Government would reimburse him for his travel and he would not have to request leave for the time he wanted to spend in Phoenix visiting with his son. The appellant knew prior to leaving for Arizona that he had not met the requirements for RAP duty and had no intention of performing official or unofficial recruiting duty while in Arizona.

During the providence inquiry, the appellant stated that when he commenced his travel on 4 August 2010, he understood that he was not completing official Government business, that he was traveling for purely personal reasons, and that under the circumstances he did not have authority from his XO to travel to Arizona in either a TAD status or in a leave status.³ Furthermore, the appellant stated that he did not have proper authority to travel to Arizona given that the XO authorized his travel contingent upon official TAD status for RAP duty.

Unauthorized Absence

The appellant now asserts on appeal that he had proper authority to be absent from his organization, which is inconsistent with his guilty plea to being absent without leave for the period 4-9 August 2010. We review a military judge's acceptance of a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). This court should not set aside a guilty plea unless there is a substantial

³ Record at 54-56, 59-61, 71-73. See also Prosecution Exhibit 1 at 2.

basis in law or fact for questioning the guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

The elements for the crime of unauthorized absence are: (a) the appellant absented himself from his organization at which he was required to be; (b) the absence was without authority from anyone competent to give leave; and (c) the absence was for a certain period of time. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 10b(3). The issue is whether the appellant was absent without proper authority under the second element.

The Army Court of Criminal Appeals has held that "[a]n absence from a unit, organization, or place of duty is 'without authority' if it is preceded by the use of false statements, false documents, or false information provided by or on behalf of an accused." *United States v. Duncan*, 60 M.J. 973, 976 (Army Ct.Crim.App. 2005). We find this reasoning persuasive and adopt it for our analysis in this case, because an appellant should not receive the benefit of a legitimate authorization if he procured it through fraud.⁴

Here, the XO's approval of the appellant's TAD assignment to Arizona on 4-9 August was contingent upon the appellant completing RAP duty. Subsequent to the XO's approval, the appellant failed to officially request RAP duty and thereafter failed to complete any recruiting while he was in Arizona. Although the appellant represented to his XO the purpose of his travel to Arizona was for recruiting duty, he never intended to conduct official RAP duty, did not officially request RAP duty, and did not comply with procedures for securing RAP duty responsibilities. In this case, the appellant began traveling on 4 August 2010 for personal reasons, knowing that the travel was not approved by the XO. The appellant knew his XO would not have approved the travel to Arizona for purely personal reasons without requiring the appellant to take leave. Accordingly, we

⁴ We recognize that the Air Force Court of Criminal Appeals has made a distinction between fraud in the *factum* and fraud in the inducement in a *per curiam* opinion for unauthorized absence cases. See *United States v. Legaspi*, No. 30793, 1995 CCA LEXIS 93 at *6 (A.F.Ct.Crim.App. 23 Mar 1995) (holding the appellant's absence was authorized when he generated fake Red Cross message and command approved emergency leave and did not become unauthorized despite the fraud in the inducement). We do not find this distinction persuasive, and adopt the Army Court of Criminal Appeals' rationale in *Duncan*. See 60 M.J. at 976 (whether there was fraud in the inducement or fraud in the factum does not matter, because the appellant "obtained the authority to miss the formation through a knowingly false representation.").

find that the appellant did not have authority to be absent from his organization from 4 to 9 August 2010.

The appellant cites to *United States v. Cary*, 57 M.J. 655 (N.M.Ct.Crim.App. 2002) for support, but *Cary* is not on point. *Cary* addressed the first element of an absence without leave offense: whether or not the accused was actually absent from his command. Here, there is no question that the appellant was absent from his command in Hawaii when he was in Arizona, rather the question is whether he was absent *without authority*, the second element of the offense.

The appellant's statements during the providence inquiry clearly show that his XO only approved his travel to Arizona due to the appellant's representation about the nature of the travel. At no time did the appellant have approval for TAD travel to Arizona or approved leave solely for the purpose of visiting his family. The appellant misrepresented the purpose of the trip, failed to secure the proper approval for RAP duty, and then issued his own DTS orders knowing that the underlying basis for approval was false.

We conclude that the appellant was absent without proper authority when he traveled from his command on 4 August 2010 the second element of absence without leave having been met. Consequently, there is not a substantial basis in law or fact to set aside the appellant's guilty plea to Specification 1 of Charge 1.

Conclusion

Accordingly, the findings of guilty and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court