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.

BENJAMIN LUGO
ELECTRICIAN'S MATE FIREMAN (E-3), U.S. NAVY

NMCCA 201200102
GENERAL COURT-MARTIAL

Sentence Adjudged: 23 November 2011.
Military Judge: CDR Lewis Booker, JAGC, USN.
Convening Authority: Commander, Navy Region Northwest, Silverdale, WA.
Staff Judge Advocate's Recommendation: LCDR D.E. Rieke, JAGC, USN.
For Appellant: LT Greg M. Morison, JAGC, USN; LT Jared Hernandez, JAGC, USN.
For Appellee: LT Joseph Moyer, JAGC, USN.

29 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 general court-martial panel of members with enlisted representation convicted the appellant, contrary to his pleas, of one specification of abusive sexual contact with a child in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The panel sentenced the appellant to be confined for two years, to forfeit all pay and allowances, to be reduced to pay grade E-1, and to be discharged from the Navy with a

dishonorable discharge. The convening authority (CA) approved the sentence as adjudged, and with the exception of the dishonorable discharge, ordered it executed.

The appellant alleges that the military judge erred when he denied two defense challenges for cause. 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.

Challenge for Cause and Right to Exercise a Peremptory Challenge

Following group and individual *voir dire,* trial defense counsel (TDC) challenged two members, Chief Hull Maintenance Technician (Chief) SLH and Sonar Technician Submarine Petty Officer First Class (Petty Officer) SJB, for cause due to implied bias. The military judge denied both challenges after finding no bias and applying the liberal grant mandate. TDC then exercised a peremptory challenge to remove Petty Officer SJB, noting that "we would not be exercising this peremptory challenge had our request for challenge for cause been granted[.]" Record at 263.

The appellant now asserts that the military judge abused his discretion in denying the defense challenges for cause against these two members.

1. Waiver

Prior to 2005, the appellate review of a denied challenge for cause was permitted even if the appellant successfully removed the member through use of a peremptory challenge. RULE FOR COURTS-MARTIAL 912(f)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) However, the rule required defense counsel to state on the record that he or she would have exercised the defense's peremptory challenge against another member if the challenge for cause had been granted. *Id.* However, in 2005, the President promulgated amendments to the Manual for Courts-Martial that significantly altered this rule. *See* Executive Order 13387 - 2005 Amendments to the Manual for Courts-Martial, United States (October 14, 2005). The relevant portion of the rule now reads:

> *Waiver*. . . . When a challenge for cause has been denied the successful use of a peremptory challenge

> by either party, excusing the challenged member from further participation in the court-martial, *shall preclude further consideration of the challenge of that excused member upon later review*.

R.C.M. 912(f)(4), MCM (2008 ed.) (emphasis added).

Since the appellant removed Petty Officer SJB from the panel through the use of his peremptory challenge, we are precluded from further review of the military judge's denial of the appellant's challenge for cause. We now turn to the military judge's denial of the appellant's causal challenge against Chief SLH.

2. Implied Bias

In her supplemental member questionnaire, Chief SLH indicated she had served as a Sexual Assault Victim Intervention (SAVI) victim advocate ("SAVI advocate") and a command Sexual Assault Prevention and Response (SAPR) liaison ("SAPR POC") at previous commands in her career. Appellate Exhibit XXXI at 19-20. During individual *voir dire*, TDC questioned her further about her experiences:

> DC: You've been a––a SAPR or, I guess, long enough to have been SAVI, as well.
> MBR: Yes, sir.
>
> DC: Seven years?
> MBR: Yes, sir.
>
> DC: And you said at your last command you had one—one case as the POC, is that correct?
> MBR: Yes, sir.
>
> DC: How many total over all 7 years?
> MBR: I believe I responded to maybe 5 calls, and that was the only one I've had as POC; the rest were as advocates.
>
> DC: And so four advocates and one POC?
> MBR: Yes, sir.
>
> DC: And tell us about your role as an advocate.
> MBR: With those cases or just in general, sir?
>
> DC: In general, I don't want to get into the––
> MBR: Okay. In general, you know, we respond to a

call, and we meet with the—-the victim, and we're there basically just for—-kind of as a sounding board, someone that they can confide in, you know, someone to give them some reassurance that someone's on their side and, you know, make sure that they get to Medical, get a hold of Legal, that they know what their rights are.

DC: Okay, and Chief, over the course of the—-the 7 years, how much training would you say you've had?
MBR: Well, we did the—the annual GMT, and then we do a week initial course, and then we're required to do 10 hours per year, so we do at least an hour a month of additional, training, and then for the POC it was another—I want to say either a day or two of training, ongoing through those 7 years.

DC: And you're trained to never question the believability of—of an allegation, is that correct, as a-–a SAVI or SAPR?
MBR: No, we don't—we don't question them, we don't form any judgment or opinion; we are basically just there for them so we don't ever try to determine whether they're telling the truth or not.

DC: But you support them throughout the process—-
MBR: Right.

DC: --as though they are always telling you the truth.
MBR: Absolutely.

DC: Okay, I have no further questions.

MJ: Anything further; [Trial Counsel]?

TC: Just briefly, sir.
MJ: Go ahead.

TC: In this case, do you think you can be fair and impartial, and listen to the facts specifically in this case?
MBR: Yes, ma'am.

Record at 225-27.

Implied bias addresses the perception or appearance of fairness of the military justice system. *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). "Implied bias exists when, regardless of an individual member's disclaimer of bias,

most people in the same position would be prejudiced [i.e. biased]." *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000) (citations and internal quotation marks omitted). We examine the totality of the circumstances in making judgments regarding implied bias. *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012). But since the focus is through the eyes of the public, "issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than *de novo*." *United States v. Downing,* 56 M.J. 419, 422 (C.A.A.F. 2002) (citations omitted).[1]

The appellant asserts that Chief SLH's prior experiences as a SAVI advocate and a SAPR POC would cause "[m]ost people in [her position to] have been prejudiced at [the appellant's] court-martial." Appellant's Brief of 14 May 2012 at 18. Moreover, he argues her prior experiences directly conflicted with her duties as a court-martial member and the "risk of the public seeing [the appellant's] court-martial as unfair was 'too high'." *Id.* at 19.

Our review of the record does not bring us to the same conclusion. While Chief SLH acknowledged that her training as a SAVI advocate required her to treat victims as if they were telling the truth, she also explained that her understanding of her role was only to provide support and access to services and not to determine whether any victim was actually telling her the truth. She also stated that she could remain fair and impartial despite her experiences. Record at 227. Notably, no one elicited any details of her experiences as a SAVI advocate or how her experiences may have affected her perception of sexual assault offenders or victims.[2]

At trial, the TDC acknowledged that simply serving as a SAVI advocate "in and of itself alone is not a basis for challenge[.]" *Id.* at 251. Despite the absence in the record of any specific details of Chief SLH's past experiences as a SAVI advocate or SAPR POC, the appellant argues that the military judge should have found an implied bias. Certainly experience as a SAVI advocate or a SAPR POC could lead to a finding of

[1] Although the appellant focuses solely on implied bias, we have also reviewed the record and find no evidence of actual bias. *Nash*, 71 M.J. at 88.

[2] When asked by the trial counsel if she knew anyone accused of sexual assault, Chief SLH explained that her one experience as a SAPR POC involved both a victim and an offender from within her command. She later explained that the case was dismissed for a false allegation. *Id.* at 223-24.

implied bias. But without any evidence in the record of Chief SLH's experiences, we cannot arrive at such a conclusion.

Instead, we conclude that Chief SLH's presence on the panel did not create an intolerable risk that "the public [would] perceive that the accused received something less than a court of fair, impartial members[.]" *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (citation and internal quotation marks omitted). We hold that the military judge did not abuse his discretion in denying the defense challenge for cause against Chief SLH.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court