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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ARDEN R. MOORE
SHIP'S SERVICEMAN SEAMAN APPRENTICE (E-2), U.S. NAVY

NMCCA 201200342
GENERAL COURT-MARTIAL

Sentence Adjudged: 26 April 2012.
Military Judge: CDR Donald C. King, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.
Staff Judge Advocate's Recommendation: LT G.W. Eden, JAGC, USN; **Supplemental SJAR:** CDR M.C. Holifield, JAGC, USN.
For Appellant: LT Toren G. Mushovic, JAGC, USN; Capt Jason Wareham, USMC.
For Appellee: Capt David N. Roberts, USMC.

8 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 with enlisted representation convicted the appellant, contrary to his pleas, of two specifications of wrongful sexual contact, in violation of

Article 120(m),[1] Uniform Code of Military Justice, 10 U.S.C. § 920(m). The convening authority (CA) approved the adjudged sentence of confinement for one year.

The appellant raises one assignment of error. He avers that the military judge abused his discretion when he denied the defense challenge for cause against Lieutenant Commander (LCDR) K, because his responses during *voir dire* were inelastic as to punishment and constituted implied bias.

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.

Background

The appellant was convicted of wrongfully engaging in sexual contact with a female Sailor, a fellow "A" School[2] student, while on liberty in a hotel room shared with five other Sailors, by penetrating her vagina with his penis and touching her right breast.

After the military judge ruled on challenges, the appellant's court-martial consisted of six members with LCDR K as the senior member. The appellant asserts that the military judge abused his discretion in denying a challenge for cause against LCDR K. The appellant argues LCDR K's responses during *voir dire* demonstrated implied bias, specifically "an inelastic view as to the necessity of some punishment." Appellant's Brief of 25 Sep 2012 at 5.

During group *voir dire*, the military judge instructed the members that in determining an appropriate sentence, they "must each give fair consideration to the entire range of permissible punishments in this case, from the least severe, *which could be no punishment at all, the conviction itself serving as a punishment*, to the most severe, which could include a dishonorable discharge and confinement for 31 years." Record at

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[1] This statutory provision was repealed and substantially revised in The National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011).

[2] "A School" is a term used in the Navy to describe a post-boot camp specialty school.

84 (emphasis added). All members agreed they could follow this instruction. The military judge further instructed the members that they could "not have any preconceived formula, *or any fixed, inelastic, or inflexible attitude concerning a particular type of punishment* . . . because the accused had been found guilty." *Id.* at 84-85 (emphasis added). Again, all members indicated that they understood and agreed they could follow this instruction. The military judge then asked, has any member "formed or expressed an opinion concerning the sentence to be adjudged in this case, if sentencing is necessary?" *Id.* at 85. All members gave a negative response.

During group *voir dire*, the trial defense counsel asked the members, "if you did find [the appellant] guilty of any of the charges, or Charge and specifications that he faces, could you give fair consideration [sic] the sentence of 'no punishment?'" *Id.* at 94. LCDR K did not respond in the affirmative. *Id.*

During individual *voir dire*, the trial defense counsel then had the following exchange with LCDR K:

> DC: Sir, and when I asked earlier, if you found [the appellant] guilty of any of the charges or specifications, could you actually give a fair consideration to a sentence of 'no punishment?'
> MBR [LCDR K]: If he was found guilty?
>
> DC: Correct.
> MBR [LCDR K]: I'd probably have a rough time doing that, if he's guilty of the offense, for no punishment?
>
> DC: Correct. You'd have a hard time giving consideration to that, if found guilty.
> MBR [LCDR K]: I mean, it has to be some extremely extenuating circumstances, I guess.
>
> DC: In general though, you believe that someone convicted of a crime, there should be some attached punishment?
> MBR [LCDR K]: Yes.

Id. at 106.

The trial counsel then initiated the following colloquy with LCDR K:

> TC: If the military judge instructs you that one of your duties as a member is to consider all the range of

punishments, whether it's no punishment, all the way through to a period of confinement, or whatever he may say, will you be able to follow those instructions and consider the range of punishments that are available to you?
MBR [LCDR K]: Absolutely.

TC: Okay, you said, just in your mind, when someone commits a crime, that more than likely they should have some kind of punishment. Is that correct?
MBR [LCDR K]: I'd consider the entire range, I just don't see the likelihood of no punishment. Though, again, that depends on the circumstances and ----

TC: Certainly. Sure. And, if there is a case in sentencing, and if there are circumstances that come out in the sentencing case, that, in your mind, would be extenuating or, you know, things that may tend to lessen the amount of punishment that you would want to impose on somebody, you could consider that, and consider that, in additional to the possibility of no punishment.
MBR [LCDR K]: Yes.

Id. at 107-08.

The trial defense counsel challenged LCDR K for cause initially on the theory of implied bias, but in a colloquy with the military judge, recognized that he was challenging him for actual bias. *Id.* at 133. Prior to ruling on the challenge, the military judge cited to the proper rule for courts-martial, articulated the different tests for actual and implied bias, and highlighted that the liberal grant mandate applied to defense challenges for cause. *Id.* at 134-35. The military judge denied the defense challenge for cause based upon actual bias against LCDR K, and commenting that he concurred with trial counsel's summary of LCDR K's responses. *Id.* at 135. The appellant exercised his sole peremptory challenge against another panel member. *Id.* at 134-35, 137.

Discussion

RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), requires the removal of a court member "in the interest of having the court-martial free from substantial doubt as to legality, fairness and impartiality." This rule encompasses both actual and implied bias. *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007). Although actual and implied bias are not separate grounds for challenge,

they do require separate legal tests. *Id.* Challenges for both actual and implied bias are based on the totality of the circumstances. *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007). The burden of establishing the basis for a challenge is on the party making the challenge. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996) (citing R.C.M. 912(f)(3)).

A military judge's ruling on a challenge for cause based on actual bias is reviewed for an abuse of discretion. Because the question of whether a member is actually biased is a question of fact, and involves judgments regarding credibility, the military judge is given significant deference in determining whether a particular member is actually biased. *Terry*, 64 M.J. at 302; *Clay*, 64 M.J. at 276.

The standard of review for implied bias is "less deferential than abuse of discretion, but more deferential than *de novo* review." *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006). However, military judges who place their reasoning on the record and consider the liberal grant mandate will receive more deference on review. *Clay*, 64 M.J. at 277.

The test for implied bias is objective. Viewing the situation through the eyes of the public and focusing on the perception of fairness in the military justice system, we ask whether, despite a disclaimer of bias, most people in the same position as the court member would be prejudiced. *Moreno*, 63 M.J. at 134. We ask whether there is too high a risk that the public will perceive that the accused received less than a court composed of fair and impartial members. *United States v. Wiesen,* 56 M.J. 172, 176 (C.A.A.F. 2001). As in actual bias, we analyze implied bias based on the totality of the circumstances. *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004).

Here, the military judge clearly articulated his understanding of the differing tests for actual and implied bias and the liberal grant mandate before ruling on challenges. Record at 134-35. He then granted two defense challenges for cause: one for actual bias, the other for implied bias. *Id.* at 132, 137. He also denied the defense challenge for cause against LCDR K based upon LCDR K's answers that he could "consider the entire range," and "ultimately said he could consider a sentence of no punishment." *Id.* at 108, 134-35. Furthermore, we note that questions asked by the trial defense counsel to LCDR K about his position on punishment could have confused the member. *Id.* at 106. Trial counsel's follow-up

questioning elicited that LCDR K would "absolutely" follow the military judge's instructions, and would consider the entire range of punishment, though a sentence of "no punishment" was unlikely depending upon the circumstances. *Id.* at 107-08, 135.

Based upon the totality of the circumstances, we conclude that the military judge did not abuse his discretion in denying the appellant's challenge for cause as to actual bias. We similarly conclude there was no implied bias. Viewing the totality of the circumstances through the eyes of the public and focusing on the perception of fairness in the military justice system, we conclude there is not a risk that the public will perceive that the accused received less than a court composed of fair and impartial members based upon LCDR K's responses. *Wiesen*, 56 M.J. at 176. On the contrary, we find his responses logical and reasoned in light of the questions asked and offenses charged.

Conclusion

We affirm the findings and the sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court