IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

W.L. RITTER **K.K. THOMPSON** **J.F. FELTHAM**

Bryan D. BLACK
Lieutenant (O-3), U. S. Navy

Petitioner

v.

UNITED STATES

Respondent

NMCCA 200600043 Decided 15 May 2006

PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

RITTER, Senior Judge:

The petitioner, a Navy lieutenant instructor at the United States Naval Academy, seeks extraordinary relief in the nature of a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). Specifically, he asks this court to: (1) direct the military judge to set aside the referral of charges and disqualify Vice Admiral (VADM) Rempt, the Superintendent of the United States Naval Academy, from convening the court-martial in this case; and (2) order production of a witness, Second Lieutentant (2Lt) Gabriella Swanson, USMC, since the military judge denied the petitioner's motion to compel production of the witness. The petitioner also requested a stay of proceedings pending this court's resolution of these issues, which we granted.

The petitioner contends that VADM Rempt must be disqualified from acting as the convening authority in this case because he is an "accuser" within the meaning of Article 1(9), Uniform Code of Military Justice. That is, he both directed that the charges in

this case be signed and sworn to by another, and has an interest "other than an official interest in the prosecution" of the petitioner. Art. 1(9), UCMJ. The petitioner also asserts that there has been apparent unlawful command influence that has affected this case.

We have carefully considered the excellent briefs presented by both the petitioner and the Government. Additionally, we ordered the Government to provide an authenticated written transcript of the proceedings related to the petition, and have scrutinized that record. We conclude that the Superintendent is not an "accuser" in this case, and that the petitioner has not met his burden to show facts that, if true, constitute unlawful command influence. *See United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999).

As to the petitioner's request for witness production, we conclude this issue is now moot. Because of a series of enlargements requested by both parties and granted by this court, the stay of proceedings has continued past the date 2Lt Swanson was expected to redeploy from Iraq back to the United States. Thus, the stated basis for her unavailability at trial no longer applies.

Facts

The petitioner, an instructor at the United States Naval Academy (USNA), participated in a summer training cruise for midshipmen of both genders during a period of several weeks spanning July and August of 2005. The charges pertain to offensive statements of a sexual nature that he allegedly made to or in front of midshipmen during the cruise. The last offensive comments were allegedly made on or about 13 August 2005.

In September 2004, Congress created the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies to explore ways to significantly reduce sexual harassment and violence at the Academies. The Task Force completed and submitted its report in June 2005. The report was publicized in August, and the USNA public affairs office responded with a press release on 25 August 2005. A meeting of the Naval Academy Board of Visitors[1] was held in September 2005, at which Senator Barbara Mikulski and General Charles Krulak, USMC (Ret.) expressed dissatisfaction with the Naval Academy's efforts to curtail sexual harassment.

In September 2005, Major Chris Thielemann, a U.S. Marine Corps judge advocate, was assigned to conduct a preliminary investigation of the petitioner's conduct during the summer cruise. On 23 September 2005, the petitioner was notified that a hearing would be conducted pursuant to Article 15, UCMJ,

[1] The Naval Academy Board of Visitors is a supervisory group consisting of members of Congress and presidential appointees.

pertaining to charges that had arisen from the preliminary investigation. After consulting with counsel, the petitioner exercised his right to refuse nonjudicial punishment proceedings. LT Anne Marks, JAGC, USNR, preferred the charges on 17 October 2005. The convening authority then referred the case to a special court-martial.

At an Article 39(a), UCMJ, hearing held on 13 January 2006, the petitioner moved to set aside the referral of charges and disqualify the Superintendent from acting as the convening authority in this case, contending that the latter was an accuser and that the charges were tainted by apparent unlawful command influence. The military judge denied the motion, making specific findings of fact, which we find to be fully supported by the record, and therefore adopt as our own. *See* Attachment (1).

Law

Under the All Writs Act, "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This court is thus empowered to grant extraordinary relief where appropriate.

But a Writ of Mandamus is "a drastic remedy that should be used only in truly extraordinary situations." *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993). It is generally disfavored because it disrupts the orderly process of appellate review that occurs only after the completion of a court-martial proceeding in which an accused has been convicted. *McKinney v. Jarvis*, 46 M.J. 870, 873-74 (Army Ct.Crim.App. 1997). For that reason, "the petitioner bears the burden of demonstrating that he is entitled to [the extraordinary relief] as a clear and indisputable right." *Aviz*, 36 M.J. at 1028; *accord*, *Ross v. United States*, 43 M.J. 770, 771 (N.M.Ct.Crim.App. 1995).

Convening Authority as "Type Two" Accuser

The petitioner contends that VADM Rempt is disqualified from acting as the convening authority in his case because: (1) he directed that the charges be prepared for nonjudicial punishment and, (2) after the petitioner refused Article 15, UCMJ, proceedings, VADM Rempt directed that the same charges be disposed of at a special court-martial. The petitioner argues that in so doing, VADM Rempt directed that the charges "nominally be signed and sworn to by another," LT Marks, and became an accuser under the second clause of Article 1(9), UCMJ. We disagree.

An accuser is prohibited from referring charges to a special or general court-martial. RULE FOR COURTS-MARTIAL 601(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Article 1(9), UCMJ, defines an "accuser" as "a person who signs and swears to charges ["type one"], any person who directs that charges nominally be

signed and sworn to by another ["type two"], and any other person who has an interest other than an official interest in the prosecution of the accused ["type three"]." The test for determining whether a convening authority is an accuser is whether he "was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter." *United States v. Gordon*, 2 C.M.R. 161, 167 (C.M.A. 1952). Personal interests are those that relate to the convening authority's ego, family and personal property. *United States v. Vorhees*, 50 M.J. 494, 499 (C.A.A.F. 1999).

LT Marks, who preferred the charges, testified on the motion that she never had a conversation with VADM Rempt about the petitioner's case. And no evidence was presented to suggest VADM Rempt directed that charges be signed and sworn to by either LT Marks or anyone else. In short, there is no factual basis for asserting that VADM Rempt directed that charges nominally be signed and sworn to by another.

The petitioner's argument confuses and blends two very different legal acts: (1) the preferral of charges described in R.C.M. 307; and (2) the commander's disposition decision, described in R.C.M. 306. The commander's decision on forum for disposition is not conceptually the same thing as preferring charges. The latter involves a person swearing under oath that he or she has investigated specific allegations and believes them to be true. R.C.M. 307(b). The former is not a determination as to the truth or falsity of allegations at all, but merely a command assessment of the appropriate level to resolve the allegations.

Moreover, the law is well-settled that a disposition decision does not make the decision maker an accuser. *United States v. Grow,* 11 C.M.R. 77 (C.M.A. 1953); *United States v. Jewson,* 5 C.M.R. 80 (C.M.A. 1952); *United States v. Adams,* 21 C.M.R. 733, 741 (A.B.R. 1955). To hold otherwise would eviscerate the Manual for Courts-Martial scheme, by disqualifying every commander from referring charges against service members under his command after making an initial disposition decision. We thus find that VADM Rempt did not become a "type two" accuser as a result of his disposition decisions in the petitioner's case.

Convening Authority as "Type Three" Accuser

The petitioner next contends that VADM Rempt is also a "type three accuser" in that he has an other than official interest in the prosecution of this case. We disagree.

No evidence has been presented to suggest that VADM Rempt witnessed any of the events upon which the charges were based, that he was a victim of any of the charges, or that he has had any personal connection with either the petitioner, the alleged victim, or other midshipmen who may have overheard the

petitioner's alleged comments. The petitioner asserts only that VADM Rempt was "stung" by criticism from the Task Force report and the Naval Academy Board of Visitors, and asks us to **infer** from the timing of these unrelated events that the Superintendent has taken a personal interest in prosecuting the petitioner.

We decline to infer, on the basis of unrelated events, that the convening authority has acted improperly in this case. More importantly, we find nothing in the record to indicate that he has acted with anything other than an official interest in this case.

Unlawful Command Influence

Although not expressly mentioned in the writ petition, the petitioner inferred that this case was tainted by command influence.[2] The petitioner's reply brief and the motion for appropriate relief litigated below clearly raise an allegation of apparent unlawful command influence. Specifically, the petitioner contends that the Superintendent's "repeated, personal 'zero-tolerance policy' statements distributed to the faculty, published in the press and distributed to all potential court-martial members" is likely to have biased the potential members. We find the appellant has not met his burden to show apparent unlawful command influence.

The test for apparent unlawful command influence is "whether a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair." *United States v. Allen*, 31 M.J. 572, 590 (N.M.C.M.R. 1990), *aff'd,* 33 M.J. 209 (C.M.A. 1991). The petitioner has the burden to "show facts which, if true, constitute unlawful command influence, and that this unlawful command influence has a logical connection to the court-martial, in terms of potential to cause unfairness in the proceedings." *Biagase*, 50 M.J. at 150. "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." *Id*. If the petitioner meets this burden, the Government then has the burden to prove beyond a reasonable doubt either that the facts do not exist, do not constitute unlawful command influence, or that unlawful command influence will not affect the proceedings. *Id*.

Here, despite the petitioner's argument that repeated, personal "zero tolerance" policy statements may have tainted all prospective members, the only policy statement **in evidence** is the

[2] We note that it was this suggestion, implied in the petitioner's pleadings, which led this court to grant the stay of proceedings, and not the petitioner's argument that the procedures for appellate review of a special court-martial for an officer are in some way inadequate. In our view, the fact that an officer cannot be adjudged either a dismissal or confinement at a special court-martial fully explains the lesser opportunity for review by appellate courts. *See* Art. 66(b)(1), UCMJ.

Naval Academy's public release in response to the publishing of the Task Force report, and it does not use that phrase.[3] It states in part: "When necessary, we enforce our standards and hold individuals accountable through counseling, remedial measures and/or punishment." The USNA press release does not direct a particular response to allegations of sexual harassment or limit the exercise of discretion with respect to disposition or adjudication decisions.

We note that it will be incumbent on the military judge to ensure that prospective court-martial members do not act on their understanding of USNA policy instead of the military judge's instructions. But we do not view what the petitioner describes as a "zero tolerance" policy, as outlined in the USNA press release, as having raised the issue of unlawful command influence in this case. *See United States v. Simpson*, 58 M.J. 368, 375 (C.A.A.F. 2003).

We see nothing untoward in the convening authority's handling of this case to date. The disposition decision as to the charges Major Thielemann investigated was the convening authority's to make, and the preliminary inquiry officer's recommendation was only that -- a recommendation. VADM Rempt's decision to consider these charges at a nonjudicial punishment hearing was, in this court's collective experience, a reasonable one. When the petitioner exercised his right to refuse Article 15, UCMJ, proceedings, the convening authority determined to dispose of these charges at the next higher level. The fact that unrelated current events, such as the release of the Task Force report and the Naval Academy Board of Visitors' annual meeting, may have heightened the awareness of USNA staff and midshipmen to the problem of sexual harassment during the same time frame as the petitioner's charges were being processed is simply not enough, in our view, to raise the appearance of unlawful command influence in this case.

We find that the military judge's ruling in this case is not clearly contrary to statute or settled case law and that the

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[3] The defense evidence on the motion relies heavily on Major Thielemann's testimony in which he: (1) explained his general view that the environment at the Naval Academy had changed after the release of the Task Force report and (2) speculated as to the probable impact the Task Force report would have on anyone in VADM Rempt's position. No policy statements were mentioned other than those contained in the USNA press release.

petitioner has not demonstrated a clear and indisputable right to the relief requested. The petition is hereby denied, and the stay of the proceedings below is dissolved.

Judge THOMPSON and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court