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

BEFORE

D.A. WAGNER **E.B. STONE** **P.G. STRASSER**

UNITED STATES

v.

Robert J. KOSAKOWSKI
Private (E-1), U. S. Marine Corps

NMCCA 200501566 Decided 16 May 2006

Sentence adjudged 4 February 2005. Military Judge: S.B. Jack. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Security Battalion, Marine Corps Base, Quantico, VA.

CDR TED YAMADA, JAGC, USNR, Appellate Defense Counsel
LT J.L. GOLDSMITH, JAGC, USN, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
LCDR R.W. SARDEGNA, JAGC, USNR, Appellate Government Counsel

STRASSER, Judge:

In accordance with his guilty pleas, the appellant was convicted by a special court-martial of two specifications of unauthorized absence (UA), in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. Both UA's were terminated by apprehension; the first UA was nine months long, the second UA commenced three months later and lasted for almost a year. The military judge sentenced the appellant to confinement for 90 days and a bad-conduct discharge. The convening authority approved the sentence. Based on our examination of the record of trial, the appellant's assignments of error, and the Government's response, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the appellant's substantial rights was committed. Arts. 59(a) and 66(c), UCMJ. Due to an error in the court-martial order, however, we direct that it be corrected. We comment briefly on the assignments of error.

Comparison to Other Cases

The appellant contends that a bad-conduct discharge is inappropriately severe because the convening authority may not have considered and compared the dispositions or sentences awarded to other Marines who committed the offense of unauthorized absence. We disagree.

Variations on this issue have previously been addressed by this court. *See*, *e.g.*, *United States v. Stotler*, 55 M.J. 610 (N.M.Ct.Crim.App. 2001), and cases listed therein at 612. Unauthorized absence is generally a solitary crime; thus, there will rarely be "companion" cases for the convening authority to note in his action.[1] There is no requirement under the law for the convening authority to consider and compare every UA case ever held under his jurisdiction. Convening authorities are accorded broad discretion in deciding whether a case should be dismissed, handled administratively, or by court-martial. Decisions on how to process a case are not considered *de novo* at the reviewing court level. Ordinarily, leniency towards one accused does not necessarily flow to another, nor should it. Disparity that results from a convening authority's inexperience or even bad judgment does not necessarily entitle a service person to some form of appellate relief. Our discretion is exercised only in cases in which an alleged disparity in disposition or sentence results from a factor that seriously detracts from the appearance of fairness and integrity in military justice proceedings. Post-trial remedies may not result from whim or caprice, mere suspicion or innuendo of undefined wrongdoing, or unstated reasons. *United States v. Kelly,* 40 M.J. 558, 570 (N.M.C.M.R. 1994). It is incumbent upon the appellant to rise above the level of mere suspicion and actually demonstrate the existence of a factor detracting from the integrity of the proceedings. In the instant case, however, appellate counsel has not so much as provided even a hint of such a factor. This issue is wholly without merit.

Sentence Appropriateness

The appellant further contends that, regardless of any disparate treatment, a bad-conduct discharge is too severe for his crime. He only went UA, he claims, to help out his mother in paying bills. Unauthorized absence, however, has long been recognized as a serious breach of military discipline. *United States v. Fitzgerald*, 13 M.J. 643, 646 (N.M.C.M.R. 1982). In this case the appellant went UA twice, with each UA being terminated by apprehension. The two UA's were separated by a period of only three months. Normally a sentence should not be disturbed "unless the harshness of the sentence is so

[1] The requirement to note companion cases is contained in the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7D § 0151a(2)(15 Mar 2004).

disproportionate as to cry our for sentence equalization." *United States v. Usry,* 9 M.J. 701, 704 (N.C.M.R. 1980). We do not believe the sentence in this case, as adjudged and approved below, was inappropriately severe. Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *United States v. Healy,* 26 M.J. 394, 395-96 (C.M.A. 1988).

Error in the Court-Martial Promulgating Order

Although not raised by the appellant, we note that the court-martial promulgating order lists an incorrect date for Charge I, Specification 2. The appellant's second unauthorized absence began on 24 January 2004 instead of the listed 24 January 2003. His first UA began on 27 January 2003. We direct that this error be corrected in the supplemental court-martial order.

The findings and sentence, as approved by the convening authority, are affirmed.

Senior Judge WAGNER and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court