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

**BEFORE**

**J.D. HARTY** **K.K. THOMPSON** **R.G. KELLY**

**UNITED STATES**

**v.**

**Jonathan T. MOORE**
**Lance Corporal (E-3), U. S. Marine Corps**

NMCCA 200501126 Decided 25 October 2006

Sentence adjudged 23 July 2004. Military Judge: P.J. Ware. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Combat Service Support Battalion-1, 1st FSSG, MarForPac, Camp Pendleton, CA.

LT RICHARD MCWILLIAMS, JAGC, USNR, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel



HARTY, Senior Judge:

A special court-martial, comprised of officer and enlisted members, convicted the appellant, contrary to his pleas, of wrongfully using methamphetamine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for three months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have considered the record of trial, the appellant's one assignment of error claiming that the military judge erred by granting the Government’s challenge for cause against a member, and the Government's answer. We find that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66(c), UCMJ.

**Government Challenge for Cause**

For his only assignment of error, the appellant claims that the military judge erred when he granted the Government’s

challenge for cause against Staff Sergeant (SSgt) Blanchard. We disagree.

The appellant participated in a battalion-wide urinalysis with 7th Engineering Support Battalion (ESB), and his urine sample tested positive for the presence of methamphetamine. During trial, the assistant substance abuse control officer (ASACO), Sergeant (Sgt) Graak, testified that he was involved in the appellant's urinalysis by briefing the unit coordinators and observers on their duties. He also testified that the substance abuse control officer (SACO), SSgt Griffin, received the samples from the unit coordinators and delivered the samples for testing.

At the end of Sgt Graak's testimony, a member, SSgt Blanchard, submitted a written question to the military judge. That question, in pertinent part, stated as follows: "I was involved in an NJP [p]roceeding involving one of the Marines in my platoon. There was a chain of custody issue involving the sample and SSgt Griffin. Additionally I have [c]onducted NLT 3 H&S Co. 7th ESB [d]rug test[s] as a test coordinator." Appellate Exhibit XIX. An Article 39(a), UCMJ, session was called and SSgt Blanchard was recalled for individual *voir dire*, because of this revelation.

During individual *voir dire*, it was determined that SSgt Blanchard had served as the urinalysis coordinator for Headquarters and Support Company, 7th ESB, and had received his training from SSgt Griffin (SACO) and Sgt Graak (ASACO). He was intimately familiar with the procedures that were supposed to be followed during 7th ESB urinalysis evolutions. Following a 7th ESB urinalysis approximately one month prior to the appellant's urinalysis, a lance corporal (LCpl) in SSgt Blanchard's platoon was called to SSgt Griffin's SACO office because the lance corporal's urine bottle had a master sergeant's label on it, but the label was initialed by the lance corporal. Upon the lance corporal's arrival at the SACO office, the urine bottle was found sitting unattended on top of a desk and no one else was in the office. When SSgt Griffin arrived, he directed the lance corporal to pour the contents from the unattended bottle into another bottle and had the lance corporal put a label on the new bottle identifying it as the lance corporal's urine sample. The sample tested positive for the active ingredient of marijuana. The lance corporal was taken to nonjudicial punishment and exonerated due to the collection irregularities.

The member, SSgt Blanchard, held the opinion that SSgt Griffin did not follow procedure and personally told him that he should have discarded the sample and allowed the lance corporal to provide a new sample in a new bottle. The battalion commander had also expressed his displeasure with SSgt Griffin's handling of the situation. SSgt Blanchard and SSgt Griffin had known each other for a long time, had served as recruiters together, and were personal friends. Even with this personal knowledge of what procedures were supposed to be followed, personal knowledge of

the SACO and ASACO involved, and personal knowledge of prior errors made by the SACO, SSgt Blanchard stated that he could be impartial.

The trial defense counsel's initial position on the Government's challenge was stated as follows:

> Your Honor, again, the Staff Sergeant basically stated to this court that he could listen to the evidence and independently make a decision. I understand he is saying that. But it appears from this side that it would be very, very difficult for him to do that because he appears to have a very negative opinion of that situation . . . .

Record at 98. Moments later, after consulting with the appellant, trial defense counsel changed his mind and objected to the Government's challenge, stating: "Your Honor, we are satisfied with the responses from the Staff Sergeant. He said that he can listen to the testimony in this case and independently make a decision." *Id*. at 99.

The military judge granted the Government's challenge against SSgt Blanchard, stating:

> My concern is that Staff Sergeant Blanchard considered this information to be so important that he had to bring it to the court's attention. It clearly weighs on his mind. And he believes that it is a factor that needs to be considered in this court. And there has been no evidence of this information brought out by this court. And it seems like Staff Sergeant Blanchard would not be able to set it aside despite his best efforts to do so.
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> Ultimately, the issue comes up that members should be free from having any prior knowledge of the witnesses and the events that are surrounding this. The defense has made attempts at cross-examining one witness on the process of educating unit coordinators. And Staff Sergeant Blanchard was a unit coordinator who has gone through that same education process.
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> It would be extremely unfair to ask him to be able to set aside all his past experiences and knowledge. And he appears in the court to be quite uncomfortable with the premise as well . . . .

*Id*.

Military law recognizes that an accused "has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2005)(quoting *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004)(quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)(internal quotation marks omitted)). A fair and impartial panel does not just mean "fair and impartial" to the accused. A member can be challenged by the Government for the same reasons he or she can be challenged by the defense. A Government challenge for cause should be granted if information presented supports a finding that the member should not sit "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." *Id*. (quoting RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (unknown ed.). The Government bears the burden of establishing that grounds exist to support its challenge. R.C.M. 912(f)(3).

When determining whether a challenge has been properly granted, we must recognize that the military judge is in a superior position to evaluate the demeanor of court members during *voir dire*. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 382 (C.A.A.F. 2006)(citing *United States v. McLaren*, 38 M.J. 112, 118 (C.M.A. 1993)). We will not, therefore, reverse a military judge's ruling on a challenge for cause unless there is a clear abuse of discretion. *Id*. An abuse of discretion occurs if the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law. *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006)(citing *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)). We are also mindful that there is "no basis for application of the liberal grant policy when a military judge is ruling on the Government's challenges for cause." *Rodriguez-Rivera*, 63 M.J. at 383 (quoting *James*, 61 M.J. at 139)(internal quotation marks omitted).

The military judge observed SSgt Blanchard during individual *voir dire* and noticed that he appeared very uncomfortable with having to set aside his personal knowledge of the people involved and prior errors that were made. We defer to the military judge on that observation. The trial defense counsel's initial instincts were correct when he observed that "it would be very, very difficult" for SSgt Blanchard to set aside this information even though he said that he could. Record at 98. Certainly, the general language of R.C.M. 917(f)(1)(N) stating that challenges should be granted "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality" applies in this situation.

While the military judge did not specifically state which ground under R.C.M. 917(f)(1) he was relying on for granting the challenge, we cannot say that the military judge clearly abused his discretion in granting the Government's challenge for cause against SSgt Blanchard. We do not find any evidence that the

military judge applied the liberal grant policy in reaching his conclusion. *See James*, 61 M.J. at 139 (upholding a military judge's granting of a Government challenge where there is no showing that the liberal grant policy was applied). The record reflects that the military judge carefully considered all of SSgt Blanchard's responses and his demeanor in reaching his conclusion. His conclusion that SSgt Blanchard would have trouble setting aside his personal knowledge of essential personnel and critical events associated with this case was not clearly erroneous. Allowing SSgt Blanchard to remain on the appellant's panel would have created substantial doubt as to the legality, fairness, and impartiality of the court-martial under all of the circumstances. This assignment of error is without merit.

**Conclusion**

Accordingly, the findings and the sentence, as approved below, are affirmed.

Judge THOMPSON and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court