

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

**BEFORE**

**C.L. CARVER**

**D.A. WAGNER**

**R.W. REDCLIFF**

**UNITED STATES**

**v.**

**David K. SORENSON  
Electrician's Mate First Class (E-6), U.S. Naval Reserve (TAR)**

NMCCA 200001969

Decided 27 May 2005

Sentence adjudged 12 July 2000. Military Judge: P.J. Straub.  
Review pursuant to Article 66(c), UCMJ, of General Court-Martial  
convened by Commander, Naval Training Center, Great Lakes, IL.

LCDR MARY MCALEVY, JAGC, USNR, Appellate Defense Counsel  
CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Division  
Capt GLEN HINES, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

CARVER, Senior Judge:

A military judge (MJ) presiding over a general court-martial convicted the appellant, pursuant to his pleas, of three specifications of indecent liberties with a child by taking photographs of the nude child in provocative poses, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. Court members sentenced the appellant to a bad-conduct discharge. The pretrial agreement had no effect on the sentence. The convening authority approved the sentence as adjudged.

After carefully considering the record of trial, the appellant's 12 assignments of error, and the Government's response, we conclude that the findings are correct in law and fact. However, we conclude that the MJ erred to the substantial prejudice of the appellant regarding the sentence. We therefore set aside the sentence. We find no other error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

**Failure to Respond to Court Members  
Regarding the Effect of Punitive Discharge  
On Retirement Benefits**

The appellant contends that:

THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT WHEN HE FAILED TO DIRECTLY ANSWER THE MEMBERS QUESTION CONCERNING THE IMPACT OF A PUNITIVE DISCHARGE ON APPELLANT'S RETIREMENT, BUT RATHER GAVE A GENERAL COLLATERAL CONSEQUENCES INSTRUCTION EVEN THOUGH APPELLANT WAS CLOSE TO RETIREMENT.

Appellant's Brief and Assignments of Error of 18 Jun 2003 at 31. We agree with the appellant and reverse as to sentence.

The appellant initially enlisted in the U.S. Navy in 1968 and served in the Vietnam War. After his first enlistment expired, he stayed in the reserves for about 15 years and advanced to pay grade E-6. He then returned to active duty in 1987. At the time of trial, the appellant, age 53, had accumulated about 17 1/2 years of active duty and had over 30 years of total service for pay purposes. In his unsworn statement, the appellant said that his current enlistment had expired and that even if he did not receive a punitive discharge, his command would probably not allow him to reenlist. He said that he would prefer confinement to a punitive discharge, in the hope that if he were retained, his wife would still be able to use some of his medical benefits. Record at 309.

The MJ gave the following standard instruction to the court members regarding punitive discharges:

This court may adjudge a punitive discharge in the form of either a dishonorable discharge or a bad conduct discharge. Such a punitive discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and, for that matter, the Department of the Navy.

*Id.* at 368. The appellant did not request any special instruction regarding the loss of retirement benefits, nor did he object to that portion of the sentencing instructions.

During deliberations on sentence, the court members handed the bailiff a question for the court, "With a bad conduct

discharge, would the member lose all rights to retirement and benefits?" *Id.* at 376; Appellate Exhibit XXXVIII.

At an Article 39(a), UCMJ, sessions, the MJ told counsel that he did not know if the members "quite got" his previous instruction. He offered to repeat the same standard instruction regarding the loss of benefits administered by Veterans Affairs and the Navy. The civilian trial defense counsel (CTDC) objected and preferred that the MJ merely answer, "Yes." Record at 376. The assistant trial counsel (ATC) opposed the direct, affirmative answer stating, "I don't know that I would want to jump straight to[]the assumption that the answer is just a straight 'yes.'" *Id.* at 377. The MJ then stated that he proposed to repeat the standard instruction above, but also give the collateral effects instruction. The CTDC objected again stating that the proposed response would continue to confuse the members. The ATC argued that the proposed response would suffice and that the members should not speculate as to any other effect of a punitive discharge. *Id.* at 378.

The MJ then recalled the court members and gave them the following response to their question:

Members, the question arose what would be the effect of a bad conduct discharge regarding lose [sic] all rights to retirement and benefits. The prior instruction which I read you basically states that "Such a punitive discharge deprives one of substantially all benefits administered by the Department of Veteran Affairs and, for that matter, the Department of the Navy."

What you're talking about is collateral effects of punishment. There are many administrative and practical effects that may result from a conviction or a particular punishment. All effects are not predictable, and it would be speculative for me to instruct you on possible collateral effects.

*Id.* at 379. Thereafter the court members continued to deliberate and eventually sentenced the appellant to a bad-conduct discharge. At the outset we note that our superior court has ruled that an approved and executed punitive discharge terminates a servicemember's military status and any right to receive retirement benefits. *United States v. Sumrall*, 45 M.J. 207, 208-09 (C.A.A.F. 1996).

The facts in our case are similar to the facts in two opinions by our superior court, one of which affirmed the sentence and one of which reversed the sentence. We conclude that the facts are more similar to those in *United States v. Greaves*, 46 M.J. 133 (C.A.A.F. 1997) where our superior court set aside the sentence because the MJ failed to respond properly to a court member's question regarding retirement benefits. In *Greaves*, the court members asked two questions: "First, does confinement, plus a BCD, equal loss of retirement benefits? Second, does hard labor without confinement, plus a BCD, equal loss of retirement benefits?" *Greaves*, 46 M.J. at 134.

The individual trial defense counsel (ITDC) suggested that the MJ simply respond "Yes" to both questions because the court members apparently did not understand the standard instruction regarding loss of veteran's benefits. The trial counsel objected, stating that the court members should not speculate as to the effect of the discharge on benefits. The MJ agreed with the TC, stating that loss of retirement benefits was speculative. The MJ then responded to the court members question as follows:

Members of the court, I can't give you a direct answer to that. That would be invading your providence (sic) as members to determine what an appropriate sentence is for these offenses (and) for this accused. I can tell you and refer you to Prosecution Exhibit 2, which is the personal-data sheet. The last entry on there contains the total active military service date of the accused. I will advise you that retirement benefits, normal retirement benefits, vest after you have reached 20 years. At this point, as you will note, the accused at this point does not have vested retirement benefits.

I will reread part of the instructions. It may help you in your decision. It is the duty of each member to vote for a proper sentence for the offense of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation as well as those in aggravation, you must bear in mind that the accused is to be sentenced only for the offense of which he has been found guilty. You're advised that the ineradicable stigma of a punitive discharge is

commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that he has served honorably. A punitive discharge will affect an accused's future with regard to his legal rights, economic opportunities, and social acceptability.

This court may adjudge either a dishonorable discharge or a bad-conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veteran Affairs and the Air Force establishment. However, vested benefits from a prior period of honorable service are not forfeited by receipt of a dishonorable or bad-conduct discharge that would terminate the accused's current term of service.

. . . .

Do the members have any other questions or does that give you something to work from anyway? Okay. I am not trying to be evasive, but all I can tell the members is that there are certain effects that are collateral to your decision and what those effects are, you shouldn't speculate. Your obligation is to determine, based on this accused's situation and the offenses, what an appropriate sentence for the offense that he has been convicted of would be. Other than that, I really can't give you any more instructions without invading your providence (sic) as the sentencing body in this case.

*Id.* at 136-37. "Despite defense objection, the military judge gave instructions to the members that did not directly answer their questions. He then instructed the members that any effects of a bad-conduct discharge on retirement were collateral consequences of a court-martial sentence, which they should not consider when deciding whether a punitive discharge should be awarded in appellant's case. We hold that these instructional rulings constituted prejudicial error." *Id.* at 137.

We are mindful that there is one significant difference between this case and *Greaves*. In *Greaves*, the appellant did not need to reenlist, as in our case, in order to complete 20 years of active service and become eligible for retirement. We

also note, however, that *Greaves* would not have been automatically eligible for retirement even if he did not receive a punitive discharge since any number of events could have occurred prior to his completion of 20 years' service, including death or administrative separation.

In *United States v. Henderson*, 29 M.J. 221 (C.M.A. 1989),<sup>1</sup> our superior court ruled that it was within the MJ's discretion to find that loss of retirement benefits was speculative and inadmissible where the accused was 3 years from retirement and had to reenlist in order to fulfill 20 years of active service. Our superior court distinguished the case as follows: "Moreover, we noted that none of the panel members in *Henderson* had questions regarding the effects of a punitive discharge, that defense counsel was allowed to argue to the members that Henderson would lose all of his retirement benefits if he received such a punishment, and finally, that defense counsel did not object to the instructions which the military judge actually gave." *Greaves*, 46 M.J. at 138.

We hold that, in similar fashion, the MJ erred in our case by failing to adequately answer the court members question over the objection of the CTDC. We realize that the appellant admitted in his unsworn statement that he probably would not be reenlisted regardless of the adjudged sentence, but we must agree with the CTDC that the court members were obviously confused by the original instructions regarding the effect of a punitive discharge. The MJ's response to the question did not clarify the issue, but rather instructed the members not to consider the collateral consequences. Further, under the circumstances of this case where the appellant had over 17 years of active service and 30 years on total service and argued for retention, we find that the error was materially prejudicial to a substantial right and requires that we set aside the sentence.

### **Conclusion**

We find no merit to the assignments of error that the court-martial lacked jurisdiction because the staff judge advocate excused some of the court members, that the MJ committed prejudicial error by denying the motions to dismiss for illegal prior punishment and lack of speedy trial, that the pleas of guilty were improvident, that the CTDC was ineffective, that there were errors in the staff judge advocate's recommendation, that the sentence was too severe, and that the

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<sup>1</sup> *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001) overruled *Henderson* in part for cases tried after 10 July 2001.

appellant was denied a fair trial due to cumulative errors. We specifically adopt the MJ's essential findings regarding the motions to dismiss. The assignment of error regarding the admissibility of evidence in rebuttal is mooted by our decision to set aside the sentence.

Accordingly, the findings of guilty are affirmed. The sentence is set aside. The record is returned to the Judge Advocate General of the Navy who may remand to a convening authority with a rehearing on sentence authorized.

Judge WAGNER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL  
Clerk of Court