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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **M.J. SUSZAN**

UNITED STATES

v.

Jefferson S. BRYANT
Staff Sergeant (E-6), U.S. Marine Corps

NMCCA 200101649 Decided 23 April 2004

Sentence adjudged 8 November 2000. Military Judge: R.C. Harris. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding General, Marine Corps Air Bases Western Area, Miramar, San Diego, CA.

Maj ANTHONY C. WILLIAMS, USMC, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

PRICE, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of dereliction of duty, maltreatment, and assault and battery, in violation of Articles 92, 93, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, and 928. The appellant was sentenced to confinement for 90 days, reduction to pay grade E-1, and a bad-conduct discharge. The military judge recommended that the convening authority suspend automatic forfeitures of pay and reduction in rate below E-4.[1] The convening authority approved the sentence as adjudged, but pursuant to the pretrial agreement, waived automatic forfeitures for six months.[2]

[1] Although not assigned as error, we note that the military judge erred in referring to *suspension* of automatic forfeitures. There is no provision in law or regulation for suspending automatic forfeitures. *United States v. Emminizer,* 56 M.J. 441, 443 (C.A.A.F. 2002). We suspect that the military judge merely misspoke, intending to recommend the *waiver* of automatic forfeitures. *See* Art. 58b, UCMJ.

[2] We note that by the time the convening authority took his action, the appellant was no longer confined, so there were no automatic forfeitures to waive.

We have considered the assignments of error that the guilty plea to dereliction of duty is improvident and that the sentence, including a bad-conduct discharge, is inappropriately severe. We have also considered the Government's response, the Government's supplemental response, and the record of trial. Except as modified, we conclude that the findings and sentence are correct in law and fact and the no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Dereliction of Duty by Willfully Failing to Prevent Strippers from Performing for Students at MOS School

The appellant contends that his guilty plea to dereliction of duty was improvident because a duty to prevent strippers from performing and the requisite knowledge of that duty was not established in the record. The Government concedes that a factual basis for those two elements of the offense cannot be found in the record. Although not required to do so, we accept the Government's concession. *See United States v. Emmons*, 31 M.J. 108, 110 (C.M.A. 1990). The assignment of error having merit, we will provide relief in our decretal paragraph.

Sentence Appropriateness

Citing his outstanding military record, the nature of his offenses and the command climate during the period of his offenses, the appellant argues that a bad-conduct discharge is inappropriately severe. We disagree.

Over a period of nearly two years, the appellant, an instructor at the Stinger/Avenger School, maltreated and assaulted over 30 student Marines. Among other things, the appellant forced students to hold their desks above their heads, struck students in the head, chest and stomach, required a student to carry an 85 pound dumbbell for several days, grabbed a student by the throat and kicked his legs out from under him, and stepped on the back of a sergeant who was lying on the ground.

We have considered the appellant's arguments that he was guilty only of minor physical abuse typical of "the old Corps," Appellant's Brief of 5 Aug 2003 at 12, that his students actually benefited from his instructional techniques, that his superiors knew of his offenses and condoned them, and that his spotless record of highly decorated service warrants sentence relief. We are not persuaded by the appellant's arguments.

We conclude that the appellant received individualized consideration of the nature and relative seriousness of his offenses as well as a careful evaluation of his record of service and personal character. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We further conclude that the approved sentence is not inappropriately severe.

Conclusion

The findings of guilty of the Additional Charge and Specification are set aside. That charge and specification are dismissed. The remaining findings are affirmed.

In view of the remaining serious misconduct, we are confident that the military judge would not have adjudged a lesser sentence in the absence of the dismissed charge and specification. As reassessed, we conclude that the sentence is both appropriate and free of any prejudice accruing from the military judge's erroneous acceptance of the appellant's guilty pleas to the Additional Charge and Specification. *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). The sentence, as approved by the convening authority, is affirmed.

Chief Judge DORMAN and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court