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

**BEFORE**

**C.L. CARVER** **W.L. RITTER** **R.W. REDCLIFF**

**UNITED STATES**

**v.**

**Derrick L. FULLER**
**Disbursing Clerk First Class (E-6), U.S. Navy**

NMCCA 200301531 Decided 27 May 2004

Sentence adjudged 7 May 2002. Military Judge: K.E. Grunawalt. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Combat Logistics Squadron Two, Naval Weapons Station Earle, Leonardo, NJ.

CDR MICHAEL WENTWORTH, JAGC, USNR, Appellate Defense Counsel
LCDR E.J. MCDONALD, JAGC, USN, Appellate Defense Counsel
LT GUILLERMO ROJAS, JAGC, USNR, Appellate Government Counsel



REDCLIFF, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of dereliction of duty (two specifications), false official statement (two specifications), and larceny, in violation of Articles 92, 107, and 121, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 907, and 921. The appellant was sentenced to confinement for 105 days, reduction to pay grade E-3, forfeiture of $200.00 pay per month for 3 months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended all confinement and all forfeitures of pay pursuant to a pretrial agreement.

The appellant contends that there was an unreasonable multiplication of charges and that his sentence is inappropriately severe.

We have carefully considered the record of trial, the appellant's two assignments of error, and the Government's response. We hold that the first dereliction of duty

specification constitutes an unreasonable multiplication of charges with the larceny specification and charge. Otherwise, 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.

**Unreasonable Multiplication of Charges (UMC)**

The appellant first contends that his convictions for willful dereliction of duty (Specification 1, Charge I), false official statement (Specification 1, Charge II), and larceny (Specification of Charge III) constitute an unreasonable multiplication of charges. We agree, in part.

The appellant, a Disbursing Clerk First Class, failed to terminate his Basic Housing Allowance (BHA) after being assigned to government quarters. Over a period of about 25 months, he collected nearly $30,000 in undeserved allowances. In addition to being charged with the offense of larceny for this fraudulent overpayment, the appellant was convicted of willful dereliction of duty for failing to terminate his receipt of BHA, for submitting false documentation regarding the location of one of his family member dependents, and for lying to a Government investigator about the residence of that family member. Additionally, the appellant was convicted of dereliction of duty unrelated to the BHA fraud he perpetrated, based on his negligent failure to properly complete a standard disbursing form.

We evaluate five factors in determining the issue of unreasonable multiplication of charges: (1) Did the appellant object at trial; (2) Is each specification aimed at distinctly separate criminal acts; (3) Does the number of specifications misrepresent or exaggerate the appellant's criminality; (4) Does the number of specifications unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *United States v. Quiroz*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003).

Although the appellant raised no objection at trial, this factor is not dispositive of our analysis. As to the second and third *Quiroz* factors, we are convinced that the dereliction of duty and larceny offenses are ostensibly aimed at the same criminal conduct and are so closely intertwined that separately charged, they unreasonably exaggerate the appellant's misconduct. As to the fourth *Quiroz* factor, we note that the appellant was prosecuted at general court-martial and, therefore, his punitive exposure was increased by the Government's charging decision. Although we find no evidence of prosecutorial overreaching, we are satisfied that, on balance, our *Quiroz* analysis favors a finding of unreasonable multiplication of charges as to the first dereliction of duty offense and the offense of larceny. We further find that the appellant has not established any of the

*Quiroz* factors to our satisfaction with regard to the offenses of false official statement and larceny.

Under the facts of this case, we hold that dismissal of Specification 1 of Charge I, alleging that the appellant was derelict in his duty by failing to terminate his entitlement to BHA, is required because the dereliction offense underlies the offense of larceny.

**Sentence Appropriateness**

In his second assignment of error, the appellant contends that his sentence was inappropriately severe and that his bad-conduct discharge should be disapproved or his sentence reassessed. We disagree.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 10 C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959)).

The offenses committed by the appellant were indeed serious and deserving of severe punishment--he fraudulently received nearly $30,000 in undeserved housing allowances over a 25-month period and lied to perpetrate and conceal his misconduct. Counter-balancing this misconduct is the extenuating and mitigating evidence presented during trial and the information provided via the post-trial review process, including the appellant's years of otherwise honorable naval service. After careful reflection, we find that the adjudged and approved sentence, well below the maximum allowable by law,[1] was not inappropriately severe under the circumstances of the appellant's case. We, therefore, decline to grant the relief requested.

**Conclusion**

Finding UMC, we note that the appellant pled guilty pursuant to a generous pretrial agreement by which the CA agreed to suspend all adjudged confinement and forfeitures of pay. While we are confident that dismissal of Specification 1 of Charge I would have had no effect on the adjudged sentence, we must reassess the sentence to ensure that it is both appropriate and legal. *See United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), and cases cited therein. We have considered the possible impact of this error on the sentence and conclude that the appellant was not prejudiced in any way.

[1] The maximum authorized sentence included dishonorable discharge, confinement for 15 years and 9 months, reduction to pay grade E-1, and total forfeiture of pay and allowances.

Accordingly, the findings and sentence, as approved by the convening authority, are affirmed, with the following exception: Specification 1 of Charge I is dismissed. We direct that the supplemental promulgating order reflect our decision.

Senior Judge CARVER and Senior Judge RITTER concur.

For the Court

R.H. TROIDL
Clerk of Court