DISCHARGE AND SEPARATION

Administrative Discharge - Burden of Proof

We have reviewed the attached case file and, subject to the limitations discussed below, find it legally sufficient to support the recommendation to discharge Respondent with an Under Honorable Conditions (General) service characterization, pursuant to AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, paragraph 3.6.4 (serious or recurring misconduct). Recoupment is not an issue in this case.

Background

Respondent is a 33-year-old Regular Air Force non-probationary officer, assigned as a Program Manager at Base X. He has a Total Active Commissioned Service Date of 9 June 2004, and a Total Active Federal Military Service Date of 4 August 2004. His date of rank is 6 July 2008. He is single with no dependents.

Respondent received Nonjudicial Punishment (NJP), under Article 15, Uniform Code of Military Justice (UCMJ), in 2013 and 2015. His first NJP resulted from an incident in January 2013, while assigned to Base Y. In that case, the wife of a Navy service member accused him of sexual assault, and when Air Force Office of Special Investigations (AFOSI) interviewed him, he made false statements about the sexual acts. Ultimately, the NAF/CC issued Respondent NJP on 11 December 2013 for conduct unbecoming (exposing his genitalia to a married woman in an indecent manner, and wrongfully penetrating the vulva of a married woman with his finger) and the false official statements to AFOSI.

The second NJP resulted from an incident in May 2015, when Respondent was assigned to Base X. He was stopped by police at a checkpoint near Base X and provided a breath alcohol sample of 0.11 percent alcohol. On 18 September 2015, the NAF/CC issued Respondent NJP for physically controlling a vehicle while drunk.

Case Processing

On 21 October 2015, the SQ/CC recommended that Respondent be separated with an Under Honorable Conditions (General) characterization, based on the above misconduct.

On 12 November 2015, the NAF/CC, as the Show-Cause Authority (SCA), notified Respondent that he was initiating show-cause action under AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, paragraph 3.6.4, for serious or recurring misconduct punishable by military of civilian authorities. Specifically, the Show-Cause Notice alleged:

> On or about 1 May 13, at or near [Base Y], you did, with intent to deceive, make to Special Agent [Alpha], official statements, to wit: "I don't remember hooking up with her," "If she said anything happened, it had to have happened on the dance

floor," and "At no point do I remember specifically fingering this girl," or words to that effect, which statements were totally false, and were known by you to be so false.

Between on or about 16 Jan 13 and on or about 17 Jan 13, within the Commonwealth of [Z], you did intentionally expose, in an indecent manner, your genitalia, to wit: exposing your penis to [Mrs. Bravo], a married woman not your wife, such conduct being unbecoming of an officer and a gentleman.

Between on or about 16 Jan 13 and on or about 17 Jan 13, within the Commonwealth of [Z], you did wrongfully penetrate, with your finger, the vulva of a woman then known, or reasonably should have been known, by you to be a married woman not your wife, to wit: [Mrs. Bravo], such conduct being unbecoming of an officer and a gentleman.

On or about 23 Aug 15, at or near [Base X], you did, physically control a vehicle, to wit: a passenger car, while drunk.

On 12 November 2015, Respondent submitted his response through his counsel, electing not to waive any of his rights.

Board Proceedings

A Board of Inquiry (BOI) was convened on 10 December 2015, wherein Respondent was represented by counsel.

The government's documentary evidence at the BOI consisted of the Show-Cause documents, Respondent's nonjudicial punishment actions, Mrs. Bravo's statement to AFOSI investigators, and Respondent's statement to AFOSI. Additionally, the government called Special Agent Alpha, AFOSI, principally to discuss the false official statement allegation.

The evidence introduced at the BOI recounted the following events:

Respondent and Mrs. Bravo met each other on 16 January 2013, through a mutual friend, Ms. Delta. On that day, Mrs. Bravo went to a make-your-own pizza-party with Ms. Delta at Respondent's house. There were approximately 8-10 people at the pizza party where alcohol was also served. Mrs. Bravo drank two glasses of red wine and had two shots of liquor.

The group then walked to a sports bar at approximately 2300 or 2330 hours to continue drinking. While at there, Mrs. Bravo had five to seven (5-7) shots of a clear alcoholic liquid and a mixed drink. Around 0100 on 17 January 2013, Mrs. Bravo, Respondent, Ms. Delta and Mr. Foxtrot (one of the people from the pizza party) left the sports bar and walked to Mrs. Bravo's apartment. At that point, Mrs. Bravo stated she was intoxicated.

On the walk from sports bar, Respondent and Mrs. Bravo held hands, were singing, skipping, and being "drunk and silly." Upon arriving at Mrs. Bravo's apartment, Mrs. Bravo went to her balcony while Respondent fixed two drinks. Ms. Delta joined Mrs. Bravo on the balcony where the two

smoked marijuana. Immediately after smoking the marijuana, Mrs. Bravo felt the effects and decided to go inside the apartment. Once inside, Respondent and Mrs. Bravo started dancing in the living room. Respondent is or was a dance instructor and he was leading the dance. Mrs. Bravo stated she felt like a rag doll and was getting sick with all the movement. At some point, Respondent told Mrs. Bravo her jeans were too restricting for dancing, so she changed into shorts.

At some point, Ms. Delta and Mr. Foxtrot left Mrs. Bravo's apartment. Afterwards, Mrs. Bravo made several trips to the bathroom. Respondent stayed and helped Mrs. Bravo to the bathroom and gave her water. In between the trips to the bathroom, Respondent massaged Mrs. Bravo's back, eventually taking off her clothes.

While Respondent was massaging Mrs. Bravo, he inserted his finger inside her vagina. Mrs. Bravo did not say anything until Respondent sat on her thighs and she saw him "getting himself hard." At that point, she told him to leave, but he didn't respond. She then told him again to leave. He then got up gathered his clothes and left.

The next day, a number of text messages were exchanged between Mrs. Bravo and Respondent. Mrs. Bravo reported the incident to a Navy sexual assault hotline within 2-3 days.

On 30 April 2013, AFOSI interviewed Respondent. During the interview, Respondent stated he did not "hook up" with Mrs. Bravo. After denying anything occurred several times, Respondent then stated that he did insert his fingers inside Mrs. Bravo.

After considering all the evidence, the BOI found that Respondent committed the misconduct contained in the allegations. Specifically, the BOI made the following findings:

> On or about 1 May 13, at or near [Base Y], DID, with intent to deceive, make to Special Agent [Alpha], official statements to wit: I don't remember looking up with her. If she said anything happened, it had to have happened on the dance floor, and at no point do I remember specifically fingering this girl, or words to that effect, which statements were totally false, and were known by the said Respondent to be so false.
>
> Between on or about 16 January 13, and on or about 17 January 13, within the Commonwealth of [Z], DID, intentionally expose, in an indecent manner, his genitalia, to wit: exposing his penis to [Mrs. Bravo], a married woman, not his wife, such conduct being unbecoming of an officer and a gentleman.
>
> Between on or about 16 January 13 and on or about 17 January 13, within the Commonwealth of [Z], DID, wrongfully penetrate with his finger, the vulva of a woman, then known, or that reasonably should have been known by him to be a married woman, not his wife, to wit: [Mrs. Bravo], such conduct being unbecoming of an officer and a gentleman.
>
> On or about 23 August 15, at or near [Base X], DID, physically control a vehicle, to wit: a passenger car, while drunk.

The BOI recommended Respondent be separated with an Under Honorable Conditions (General) service characterization.

Post Board Submission

On 5 February 2016, Respondent's counsel submitted matters, requesting the findings be "adjusted" to reflect that there was insufficient evidence for the government's conduct unbecoming allegations. Specifically, Respondent's counsel stated the government presented no evidence to show that during a consensual encounter, the Respondent's exposure was indecent or that Respondent knew he was with a married woman.

On 22 February 2016, the SCA concurred with the BOI's findings and recommendations, and recommended he be separated with Under Honorable Conditions (General) service characterization. On 13 April 2016, the MAJCOM/CV likewise concurred and recommended Respondent be discharged with a General service characterization.

Authorities

Basis for Separation

"The Air Force judges the suitability of officers for continued service on the basis of their conduct and their ability to meet required standards of duty performance and discipline." AFI 36-3206, Preface. Further, it is Department of Defense policy to administratively separate commissioned officers who do not "[m]eet rigorous and necessary standards of duty, performance, and discipline." DoDI 1332.30, *Separation of Regular and Reserve Commissioned Officers*, paragraph 3(c)(1).

AFI 36-3206, paragraph 3.6.4, authorizes the involuntary separation of an officer when there is evidence of serious or recurring misconduct punishable by military or civilian authorities. "Serious misconduct" is defined as any misconduct punishable by military or civilian authorities. This includes any misconduct that, if punished under the UCMJ, could result in confinement for six months or more, and any misconduct requiring specific intent for conviction under the UCMJ. When directing an officer's discharge in accordance with AFI 36-3206, Chapter 3, the Office of the Secretary of the Air Force may characterize a discharge as Honorable, Under Honorable Conditions (General) or Under Other Than Honorable Conditions. AFI 36-3206, paragraph 3.1.1.

Burden of Proof

Recognizing the distinction between the burden of proof in criminal, as opposed to administrative proceedings, the burden nonetheless remains with the government in either case. Preponderance of the evidence is the standard of proof used in arriving at determinations in administrative discharge proceedings. Findings and recommendations of BOIs must be concurred in by a majority of the voting members of the board and supported by a preponderance of the evidence. AFI 51-602, *Boards of Officers*, 2 March 1994, paragraph 2.2. Generally, an agency is bound by its own rules. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932).

Explaining the basic premise behind the prohibition on burden shifting, the Court of Appeals for the Armed Forces (CAAF) explained that it is a fundamental principle of due process that in order to prove its case, the government must present evidence at trial supporting each element of the charged offenses beyond a reasonable doubt; further, the review of findings, of guilt or innocence, is limited to the evidence presented at trial. A fact essential to a finding of guilty must appear in the evidence presented on the issue of guilt; it cannot be extracted from evidence presented in other proceedings in the case. *United States v. Paul*, 73 M.J. 274 (C.A.A.F. 2014).

Due process precludes shifting the burden of proof from the government to the defense with respect to a fact which the State deems so important that it must be either proved or presumed in order to constitute a crime. *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010). CAAF has held that an improper implication that the accused carries the burden of proof on an issue of guilt violates due process. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004). Use of the words "uncontradicted," "uncontroverted," and "unrebutted" can improperly imply that the accused has an obligation to produce evidence and witnesses to contradict the government's case. These types of comments improperly imply that the burden has shifted to the defense. *United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005). Additionally, the government cannot comment on an accused's failure to call witnesses. *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990); *United States v. Swoape*, 21 M.J. 414 (C.M.A. 1986).

Article 133, UCMJ, prohibiting conduct unbecoming an officer and a gentleman, is constitutional as applied to members of the armed forces, so long as the accused has received fair warning of the criminality of his or her conduct. *United States v. Brown*, 55 M.J. 375 (C.A.A.F. 2001). Not every deviation in conduct constitutes unbecoming conduct; to be actionable, conduct must be morally unbefitting and unworthy. *United States v. Wolfson*, 36 C.M.R. 722 (A.B.R. 1965). See *United States v. Graham*, 9 M.J. 556 (N.C.M.R. 1980); *United States v. Maderia*, 38 M.J. 494 (C.M.A. 1994) (publicly associating with person known by the accused to be a drug smuggler and discussing drug use and possibility of assistance in drug smuggling operations); *United States v. Coronado*, 11 M.J. 522 (A.F.C.M.R. 1981) (even though the offense occurred off the military installation, jurisdiction was properly exercised by general court-martial which convicted accused of conduct unbecoming an officer and gentleman by performing acts of sodomy on an enlisted man); *United States v. Jefferson*, 21 M.J. 203 (C.M.A. 1986) (adultery and fraternization); *United States v. Shobar*, 26 M.J. 501 (A.F.C.M.R. 1988) (sexual exploitation of civilian waitress under the accused's supervision); *United States v. Frazier*, 34 M.J. 194 (C.M.A. 1992) (officer's engaging in open and intimate relationship with wife of enlisted soldier constituted conduct unbecoming an officer).

With respect to the requisite mental state, the existence of a *mens rea* is the rule, rather than the exception to, the principles of Anglo-American criminal jurisprudence. *United States v. Gifford*, 75 M.J. 140 (C.A.A.F. 2016). The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion but is instead universal and persistent in mature systems of law; if, at trial, the government is not required to prove that an accused had knowledge of the facts that make his or her actions criminal in order to secure a conviction, then the underlying crime is properly deemed a strict liability offense. While strict-liability offenses are not unknown to the criminal law, the limited circumstances in which Congress has created, and appellate courts have recognized, such offenses attest to their generally disfavored status. On the

basis of the general disfavor for strict liability offenses, silence in a criminal statute, or a general order, does not prevent *mens rea* from being inferred; while courts should ordinarily resist reading words or elements into a statute that do not appear on its face, the mere omission from a criminal enactment of any mention of criminal intent should not be read as dispensing with it; rather, an indication of congressional intent is required to dispense with *mens rea*. *Id*.

Discussion

The government's theory behind the Article 133, UCMJ, allegations was not that Respondent sexually assaulted Mrs. Bravo, nor that she was intoxicated (such evidence was redacted from consideration by the BOI as irrelevant), but that the private off-duty sexual behavior amounted to conduct unbecoming an officer. The allegations consisted of the following:

> Between on or about 16 Jan 13 and on or about 17 Jan 13, within the Commonwealth of [Z], you did intentionally expose, in an indecent manner, your genitalia, to wit: exposing your penis to [Mrs. Bravo], a married woman not your wife, such conduct being unbecoming of an officer and a gentleman.
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> Between on or about 16 Jan 13 and on or about 17 Jan 13, within the Commonwealth of [Z], you did wrongfully penetrate, with your finger, the vulva of a woman then known, or reasonably should have been known, by you to be a married woman not your wife, to wit: [Mrs. Bravo], such conduct being unbecoming of an officer and a gentleman.

As framed, the government appears to have largely converted the offense of "Indecent Exposure," under Article 120c, UCMJ, paragraph (c), into an Article 133, UCMJ offense, but making criminality dependent on Mrs. Bravo's marital status. Unlike the allegation that Respondent did "wrongfully penetrate" the vulva of Mrs. Bravo, who was "then known, or reasonably should have been known," to be a married women; the indecent exposure specification does not allege that Respondent knew or should have known of her marital status. In the absence of a *mens rea*, the government charged a strict liability offense *i.e.*, indecent exposure to a married woman. It is highly questionable whether this states an offense, which served as the allegation constituting a basis for separation. For example, Article 133, UCMJ, provides, among others, public association with ***known*** prostitutes, as an example of a conduct unbecoming offense. Article 133, UCMJ, paragraph c.(3). (Emphasis added). Likewise, *United States v. Maderia*, *supra*, found sufficient a specification of publicly associating with a person ***known*** by the accused to be a drug smuggler. (Emphasis added). Based on these authorities, in this case the government, as it did in the penetration specification, should have alleged a *mens rea* element. Additionally, the legal advisor during the BOI did not instruct the BOI members with any definition of "indecency" for them to apply to Respondent's conduct.

That said, we need not decide whether the allegation stated conduct cognizable as an Article 133, UCMJ offense, as we determined neither allegation was supported by sufficient evidence at trial. The government's case, with respect to the Article 133, UCMJ, offenses, consisted of Mrs. Bravo's hearsay statement, plus the additional testimony of AFOSI Agent Alpha, which added only that four months after the event, Agent Alpha observed a placard somewhere in Mrs. Bravo's

apartment, that read, "Mr. and Mrs."

In *Louisville & Nashville R.R. Co*, 227 U.S. 88 (1913), the Supreme Court addressed the applicable standard of review of administrative determinations. The Supreme Court noted the permissiveness in admission of evidence, but noted that such proceedings must still meet basic evidentiary requirements and that it would review an agency's conclusions to determine if they were supported by "substantial evidence." Judicial standards, consistent with the Administrative Procedures Act favor the *admission* of hearsay in administrative proceedings. See *United States Steel Mining Co., v. Director Office of Workers' Compensation Programs*, 187 F.3d. 384 (4th Cir. 1999) (observing that agencies are empowered to admit all relevant evidence, erring on the side of inclusion). Consequently, the overriding issue is typically not whether hearsay evidence is *admissible*, but whether its receipt in an administrative proceeding is *sufficient to support the decision* on judicial review. For example, in *Hoska v. U.S. Dept. of the Army*, 677 F.2d 131 (D.C. Cir. 1982), the Army revoked a civilian employee's clearance, based on security violations and other misconduct, resulting in his dismissal. The government's case relied largely on hearsay evidence. The D.C. Circuit Court set aside the dismissal, reasoning that uncorroborated hearsay lacked sufficient assurance of truthfulness and was not overcome by the employee's testimony. The opinion also suggested the hearsay evidence was inconsistent, the declarants not disinterested and the employee was not given access to the statements before the hearing. Similarly, in *Cooper v. United States*, 639 F.2d 727 (Ct. Cl. 1980), a Navy employee was discharged for "disgraceful conduct." The Court of Claims reversed for lack of substantial evidence, as the police reports relied upon amounted to multiple hearsay, admitted without some assurance of its reliability and credibility.

Respondent's defense counsel elected not to object to the admission of Mrs. Bravo's out-of-court statements.[1] However, Respondent's counsel did successfully object to any references to Mrs. Bravo's state of intoxication in her statement. Consequently, any such references in her statement were redacted, and then provided to the BOI members. Regardless, nowhere in her statement did Mrs. Bravo state she told Respondent she was married. In addition, Respondent had just met her on the evening leading to the allegations in the BOI. No evidence of any kind was presented that Respondent was told by anybody, including Mrs. Bravo, that she was married. Additionally, no evidence was presented she was wearing a wedding ring or had photographs in her apartment of her and her husband, who, at the time, was a deployed member of the US Navy. Mrs. Bravo partied and danced with Respondent, held his hand, and skipped down the street to her apartment with him acting "silly." There is no evidence the "Mr. and Mrs." sign was at the

[1] While hearsay is generally admissible in administrative hearings, procedural due process concerns are invariably implicated with the introduction of hearsay evidence because of the inability to confront and cross-examine the declarant. This point was articulated in *Capobianco v United States*, 394 F.2d 515 (Ct. Cl. 1968), reasoning that where the particular hearsay constitutes a major area of support for the administrative decision, the situation may possibly verge on a deprivation of due process. Consequently, hearsay use is evaluated in terms of *procedural due process* and the additional value to the integrity of the proceedings by requiring live testimony. This concept is embodied in § 556(d) of the APA permitting cross-examination "as may be required for a full and fair disclosure of the facts." In the context of a deportation hearing, the court, in *Felzcerek v. I.N.S.*, 75 F.3d 112, 115 (2d Cir. 1996), observed that due process requires that hearsay be "probative" and that "its use be fundamentally fair." *Id*. Fundamental fairness, in turn, "is closely related to the reliability and trustworthiness of the evidence." *Id*. Thus, an opponent to hearsay bears the burden to demonstrate there are serious issues with respect to its reliability such that cross-examination is crucial to the truth finding function.

apartment during Respondent's visit, or that it read "Mr. and Mrs. Bravo," or that it wasn't a blank sign left up by the apartment complex for the tenants to personalize.

While the trier of fact is entitled to draw reasonable inferences from the evidence, there must be some evidence from which to draw those inferences. During the BOI, Respondent's counsel engaged in the following exchange with Agent Alpha regarding Mrs. Bravo's statements:

> Q. And in this statement that you looked at, she did not actually mention that she was married to [Respondent]?
>
> A. In her statement, she did not make any mention of being married.
>
> Q. And in their view, you do not remember her mentioning anything about being married?
>
> A. Correct, based on what I remember, I can't specifically remember her stating that she told [Respondent] that she was married.
>
> Q. And in addition, in the agent notes that you reviewed from her statement, you have nothing about her saying she told him that she was married?
>
> A. Correct.
>
> Q. Now you didn't ask her if she wore a wedding ring?
>
> A. So I can't specifically remember. I will say that that doesn't mean that I didn't ask her.
>
> Q. You don't recall asking her?
>
> A. I don't recall, yes.
>
> Q. And in your agent notes, you don't have anywhere that she told you that she was wearing a wedding ring that night?
>
> A. No.
>
> Q. She also told you several things about that night with [Respondent]?
>
> A. Yes.
>
> Q. She told you that she is a hairdresser?
>
> A. Yes.
>
> Q. She fixed his hair that night?

A. Yes. She did say that.

Q. She told you that she and [Respondent] were holding hands and skipping down the road?

A. Yes.

Q. She told you that she and [Respondent] were dancing?

A. Yes. Record of BOI, pages 88-89.

After the Respondent's counsel argued the lack of evidence as to Mrs. Bravo's marital status in closing argument, the government argued in rebuttal:

> Members, I would just like to address the notion of the preponderance of the evidence standard, and that there is no way, no evidence before you that we would conclude that [Respondent] knew or reasonably should have known Mrs. [Bravo] was married. Yes, there is no evidence that was put before this Board that Mrs. [Bravo] had a wedding ring on, or said, "I am married," or something like that. There is also no evidence that-that didn't happen. There is no evidence of any lack of acknowledgment. There is no evidence of any concealment. It is something that doesn't exist in the evidence. I ask you to use your common sense, and knowledge of the ways of the world, in deciding what [Respondent] could reasonably have known. People generally wear wedding rings and in their homes, people generally have photos of their family. Mrs. [Bravo] is a recently married person. She may have had photos of her and her spouse. I would also ask you to consider the context of the evening. Mrs. [Bravo] was brought along to this party for the first time. She is accompanying her female friends. They wouldn't have alluded to the fact that she is married possibly, possibly they might have. ***
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> RC: Objection. One of the limited objections is alluding to the respondent's Fifth Amendment privileges. So to question what he did not do in his own defense, I think that is a bridge too far.
>
> LA: Government?
>
> REC: I will rephrase, ma'am. [Respondent] did make some statement in that Article 15. You have that before you, and you can consider his statement in response to that Article 15. Thank you, members. Record of BOI, pages 151-152.

The government argued there was no evidence refuting the potential existence of evidence which might exist outside the record. The government's argument is exactly the type of improper burden shifting prohibited by the above case law. Not only did the government essentially place the burden on Respondent to disprove testimony that was not even presented by the government, but the recorder argued Respondent put on no defense to that element. Additionally, the legal advisor failed to provide a proper ruling on defense counsel's objection and did not provide the members a curative instruction.

Again, we do not suggest a BOI is a judicial proceeding governed by formal evidentiary standards. However, the basic underlying principle that the government must prove its case with sufficient evidence of record, of which our review is confined, equally applies. The government's references in argument to the absence of evidence serves to emphasize that the evidentiary record is insufficient to support a substantive finding that Respondent committed the conduct unbecoming allegations. We do not concur with the recommendation Respondent be discharged on those bases. However, the evidence is sufficient to support the BOI's findings that Respondent drove while intoxicated, as well as committed a false official statement to an AFOSI investigator. These acts, resulting in two separate NJP actions, sufficiently support a finding of serious or recurring misconduct, and fall well below the conduct expected of an officer.

When directing an officer's discharge in accordance with AFI 36-3206, Chapter 3, the Office of the Secretary of the Air Force may characterize a discharge as Honorable, Under Honorable Conditions (General), or Under Other Than Honorable Conditions (UOTHC). AFI 36-3206, paragraph 3.1.1. We find Respondent's remaining misconduct significantly outweighs the positive aspects of his military record and recommended an Under Honorable Conditions (General) service characterization.

Conclusion and Recommendation

The case file is legally sufficient to support Respondent's administrative discharge for serious or recurring misconduct under AFI 36-3206, paragraph 3.6.4. Subject to the limitations discussed above, we recommend discharge with an Under Honorable Conditions (General) service characterization.

OpJAGAF 2016/9 8 November 2016