

**UNITED STATES TRIAL JUDICIARY
FIFTH JUDICIAL CIRCUIT
VILSECK, GERMANY &
BAF, AFGHANISTAN**

UNITED STATES OF AMERICA

v.

**CW4 Stephen C. Madrid
HHC, 82nd STB
Bagram Airfield, Afghanistan
APO AE 09354**

RULING OF THE COURT

**Defense Motion to
Dismiss - UCI**

18 April 2010

Findings of Fact

- 1) Charges were preferred against the accused on 4 November 2009.
- 2) Charges were received by the summary court-martial convening authority, LTC Christopher Eubanks, on 4 November 2009.
- 3) Charges were received by the special court-martial convening authority and an Article 32 investigation was appointed by at least 9 November 2009.¹
- 4) Between the dates of 4 January and 26 January 2010, LTC Eubanks was on R & R leave and MAJ George Walter was in command.
- 5) The Article 32(b) hearing was held on 10 January 2010.
- 6) COL Mark Murray was the accused's senior rater in May of 2009. COL Murray has been on active duty service for 25 years, 16 of those years being spent in the 82nd Airborne Division. The accused received a center of mass OER in May of 2009 with above center of mass language. COL Murray still thinks the accused is in the top 5% of all warrant officers that he has worked with.
- 7) Between late October and early December 2009, COL Murray was the acting Chief of Staff for CJFT-82. He received periodic updates on the status of the accused's case as the Chief of Staff.
- 8) On 4 November 2009, charges were preferred against the accused by his company commander, Captain Christopher Loschiavo. Prior to preferring charges against the accused, CPT Loschiavo had a meeting in his office with CPT Michael Fish, trial counsel. CPT Fish reviewed the AR 15-6 investigation pertaining to the accused and discussed the options available to him under Rule for Court-Martial 406 with CPT Fish. CPT Loschiavo

¹ That is the date military defense counsel requested a delay in the Article 32 hearing.

denies that his Battalion Commander, LTC Christopher Eubanks, was present at this meeting. While CPT Loschiavo does remember meeting with LTC Eubanks prior to preferral, he only remembers talking about the facts of the case and not disposition options. CPT Loschiavo does not specifically recall a meeting prior to preferral where he, LTC Eubanks, and CPT Fish were all present. CPT Banks testified that he was not told how to dispose of the accused's case, did not feel pressured or influenced to dispose of the case in a certain manner, and made an independent decision to prefer charges after reviewing the AR 15-6 investigation.

9) Prior to 4 November 2009, LTC Eubanks recalls a meeting between himself, CPT Loschiavo; and CPT Fish. The purpose of this meeting was to discuss the facts of the case pertaining to the accused as well as disposition options. LTC Eubanks does not believe that there was a "meeting of the minds" as to whether or not charges were going to be preferred, and no one ever specifically stated charges were going to be preferred. LTC Eubanks believes it is possible, however, that the individuals left the meeting believing charges would be preferred.

10) On 4 November 2009, after reviewing the preferred charges and consulting with CPT Fish, LTC Eubanks forwarded the charges to the next superior commander. LTC Eubanks signed the DD Form 458 as the summary court-martial convening authority. For unexplained reasons, the transmittal document accompanying the charges, with recommendation for General Court-Martial was signed by LTC Eubanks's executive officer, Major George Walter.

11) After the referral of charges, the accused contacted COL Murray about possibly being a character witness on his behalf. After much thought, COL Murray declined the accused's invitation stating in an email, "Steve, it is with my most sound rational professional judgment that: It is not in your best interest that I appear as a witness." COL Murray testified that his decision not to be a character witness for the accused was a personal decision based on his knowledge of the allegations and that no one influenced him in his decision. The defense did not submit a formal witness request for COL Murray's production.

Conclusions of Law

In order to maintain an allegation of unlawful command influence, the defense has the initial burden and "must (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)(quoting *United States v. Stombaugh*, 40 MJ 208, 213 (C.M.A. 1994)(citing *United States v. Levite*, 25 MJ 334, 341 (CMA 1987) (Cox, J., concurring)). "Prejudice is not presumed until the defense produces evidence of proximate causation between the acts constituting unlawful command influence and the outcome of the court-martial." *Id.* At the trial level, "any impact of unlawful command influence is a matter of potential rather than actual effect." *Id.*

"Once the issue is raised at the trial level, the burden shifts to the Government, which may either show that there was no unlawful command influence or show that the

unlawful command influence will not affect the proceedings.” *Id.* (citing *United States v. Gerlich*, 45 MJ 309, 310 (1996)). “The Government may carry its burden (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the military judge . . . that the facts do not constitute unlawful command influence; [or] (3) . . . by producing evidence proving that the unlawful command influence will not affect the proceedings.” *Id.* at 151.

The defense’s claim of unlawful command influence rests with the following allegations:

- 1) That CPT Loschiavo did not make an independent decision to prefer charges and was unlawfully influenced by LTC Eubank’s; and,
- 2) Witness intimidation on the part of the command as it specifically applies to COL Murray.

First, as to COL Murray, there simply is no evidence that he was influenced in any way not to testify for the accused. In fact, the accused, to date, has never even requested the government produce COL Murray, notwithstanding its knowledge of his May 2009 rating of the accused. COL Murray is a senior commissioned officer with over 25 years of experience in the active duty Army. In his capacity as Chief of Staff, his only conversations with the convening authority, concerning the accused, were to the extent that the convening authority wanted to ensure the case went “through the proper process.” There is no evidence before this court of direct or indirect influence or intimidation of COL Murray. Further, given COL Murray’s military background and the honest and forthright manner in which he testified this court does not believe that he could be so influenced. He reiterated for the court that he still held the accused in high regards but because of what he knew of the allegations, he made a personal decision not to testify. This court finds neither actual nor apparent UCI. The defense has failed to meet its burden of presenting “some” evidence of UCI as it pertains to COL Murray.

The defense has, however, presented “some” evidence of UCI that CPT Loschiavo was influenced in his decision as to whether or not to prefer charges. The statements of LTC Eubanks, it true, that someone “could” have left the meeting believing that charges would be preferred is enough for this court to conclude that there exists some evidence of unlawful command influence as to the preferral process. The court further finds however, that the defense has failed to meet the second prong of *Biagase* in demonstrating the proceedings are unfair. While LTC Eubanks’s statement could be seen as unlawful command influence, when viewed in isolation, CPT Loschiavo’s testimony makes it clear that there was no unlawful command influence.

Not only did CPT Loschiavo state that he made an independent determination and was never advised by LTC Eubank’s to take any particular action, he didn’t even remember being at any meeting where LTC Eubank’s and CPT Fish were present. While this court cannot, based on the evidence presented, make a determination as to whether or not a meeting actually took place between LTC Eubanks, CPT Loschiavo, and CPT Fish, this court can conclude that CPT Loschiavo was not influenced in his decision making process. CPT Loschiavo was unequivocal that no one advised, encouraged or enticed him to make any particular recommendation as to disposition of the accused’s

charges. Not once did he hesitate in his testimony in stating that he and he alone made the decision to prefer charges in the accused's case. In the face of such confident testimony, this court will not question its author. As the defense has failed to demonstrate that the alleged influence on CPT Loschiavo, if true, rendered these proceedings unfair, this court finds no unlawful command influence and does not shift the burden to the government to demonstrate otherwise.

Improper referral

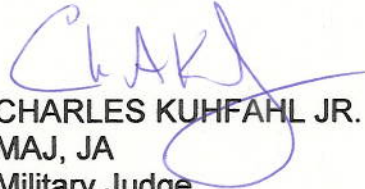
Of specific concern to this court is the whether or not the dictates of R.C.M. 401 have been satisfied by the government. R.C.M. 401(c)(2)(A) states that, "when charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition." R.C.M. 403 states, "Immediately upon receipt of sworn charges, an officer exercising summary court-martial jurisdiction over the command shall cause the hour and date of receipt to be entered on the charge sheet." When these two rules are read in conjunction with one another and applied to the facts of this case, there remains a conflict which causes this court to doubt the correctness of the referral process.

LTC Eubanks signed the charge sheet on 4 November 2009 as the summary court-martial authority. LTC Eubanks testified that he spoke with his legal advisors about possible recommendations for disposition. LTC Eubanks also testified that MAJ Walter was not present during any of those discussions and LTC Eubanks never spoke to MAJ Walter about his decision as to recommendation. On the transmittal sheet that accompanied the charges to the next superior authority, however, LTC Eubanks is not listed as the commander providing the personal recommendation as required by R.C.M. 401. Instead, on 4 November 2009, the same date LTC Eubanks received the charges as the summary court-martial convening authority, MAJ George Walter made a recommendation for General Court-Martial and *apparently* forwarded the charges to the next higher authority. Obviously, LTC Eubanks and MAJ Walter could not have both been the summary court-martial convening authority on 4 November 2009.

Based on the findings of fact, it *appears* as if one of two things happened: 1) LTC Eubanks forwarded the charges to the special court-martial convening authority without recommendation and, while he was on leave, MAJ Walter (then in command) made an "after the fact" recommendation post Article 32 hearing and prior to the charges being forwarded to the general court-martial convening authority for referral; or, 2) MAJ Walter made a recommendation on 4 November 2009, while not in command, and forwarded the charges to the special court-martial convening authority. In either scenario, RCM 401(c)(2)(A) was violated. Either the charges were forwarded without personal recommendation as required or they were forwarded with a recommendation from someone other than the commander exercising summary court-martial jurisdiction. Either way, the proper referral process, guaranteed to an accused under the Manual for Courts-Martial was not followed. This court does not reach this decision lightly. However, if the Rules of Court-Martial are to have any legitimacy at all, and accused service members are to be expected to rely on those rules, then when the government violates those mandatory provisions, the accused must be afforded the relief to which he is entitled.

Ruling

The defense Motion for appropriate relief on the basis of unlawful command influence is **DENIED**. However, the court does find that the charges have been improperly referred to court-martial as the mandatory requirements of RCM 401(c)(2)(A) were not followed. As such, all charges and specifications are **DISMISSED** without prejudice.


CHARLES KUHFAHL JR.
MAJ, JA
Military Judge