



5810
31 May 2012

MEMORANDUM

From: [REDACTED]

Staff Judge Advocate

To: [REDACTED]

CG FORCECOM

Subj: ARTICLE 34 ADVICE ICO ITC [REDACTED]

USCG

Ref:

- (a) Article 32, Uniform Code of Military Justice; 10 U.S.C. § 832
- (b) R.C.M. 404, Manual for Courts-Martial (2008 ed.)
- (c) Article 34, Uniform Code of Military Justice; 10 U.S.C. § 834
- (d) R.C.M. 406, Manual for Courts-Martial (2008 ed.)

1. Summary. I recommend that you refer to a general court-martial certain charges against ITC [REDACTED], as discussed below. The Commanding Officer, TRACEN Cape May ordered an investigation into the charges per reference (a). That investigation took place on 2 May 2012. On 17 May 2012 the Commanding Officer acted upon the report of investigation and forwarded the charges to you for disposition per reference (b). He noted that the seriousness of the allegations warranted consideration of a general court martial. The report of investigation and forwarding memo are enclosed. The decision on the disposition of the charges is solely within your discretion; you are not bound by any of the recommendations made in this matter.

2. Charges. The charges preferred against ITC [REDACTED] are summarized below and the actual charge sheet is enclosed.

a. Charge I: Violation of UCMJ, Article 92

(1) Specification: Violation of lawful general regulation Coast Guard Personnel Manual COMDTINST M1000.6A dated 08 January 1998, section 8.H.2.g for wrongfully engaging in a prohibited personal relationship with then [REDACTED] a recruit in his Company, and having sexual intercourse with the same [REDACTED] in a Coast Guard-controlled workplace.

b. Charge II: Violation of UCMJ, Article 93

(1) Specification 1: Maltreatment by means of wrongfully engaging in sexual acts with then [REDACTED] a recruit in his recruit company and therefore subject to his orders.

(2) Specification 2: Maltreatment by means of sexual harassment of then [REDACTED] by subjecting her to degrading and inappropriate comments while she cleaned his office after hours by inquiring about her sex life, asking what her bra size was, informing her, "Your nipples are hard," and stating, "I want to be inside you," or words to that effect.

(3) Specification 3: Maltreatment by means of sexual harassment of then [REDACTED] by subjecting her to degrading and inappropriate comments or actions while

she cleaned his office after hours by instructing her to scrub the floor of his office on her hands and knees in such a manner that required she place her head near his crotch, standing over her in a manner that placed his crotch near her buttocks, and stating, "Let the show begin" or words to that effect, after she dropped to her hands and knees to scrub his office floor.

(4) Specification 4: Maltreatment by means of sexual harassment of then [REDACTED] by subjecting her to degrading and inappropriate comments while she cleaned his office after hours by inquiring about her sex life, asking, "What do you girls talk about while you are naked in the shower?" or words to that effect, telling her that he looked forward to swim workouts because he, "looked forward to seeing the female recruits in their swimsuits," or words to that effect.

(5) Specification 5: Maltreatment by means of sexual harassment of then [REDACTED] by subjecting her to degrading and inappropriate comments while she cleaned his office after hours by asking her about her love life, asking her the size of her bra, accusing her of watching his buttocks when he ran, and stating "Let the show begin," or words to that effect, as she leaned over to clean the desk in his office.

(6) Specification 6: Maltreatment by means of sexual harassment of then [REDACTED] by subjecting her to degrading and inappropriate comments while she cleaned his office after hours by stating, "What would everyone say about you being in the lead Company Commander's shower?" or words to that effect, while she was cleaning his shower, and by standing in uncomfortably close proximity to her while she was alone with him.

c. Charge III: Violation of UCMJ, Article 120

(1) Specification 1: Sexual Assault of then [REDACTED] causing her to engage in sexual intercourse by placing her in fear that if she refused to comply or reported the incident the accused would negatively influence her career.

d. Charge IV: Violation of UCMJ, Article 134

(1) Specification: Adultery for wrongfully having sexual intercourse with then [REDACTED] when ITC [REDACTED] was married.

3. Advice. My advice concerning the attached charges is furnished per references (c) and (d).

a. As to Charge I:

(1) The language properly alleges an offense under the UCMJ.

(2) I believe that the allegation is warranted by the evidence in enclosure (2), the report of investigation.

(3) A court-martial would have jurisdiction over the accused and the offense.

(4) I recommend this charge and specification be referred to trial by general court-martial.

b. As to Charge II:

(1) The language of the six specifications properly allege offenses under the UCMJ.

(2) I believe that the allegations are warranted by the evidence in enclosure (2), the report of investigation. Specifically, the evidence indicates that ITC [REDACTED] engaged in a pattern of sexually harassing female recruits after hours and while they were assigned to clean his private office. Further, he engaged in a sexual act with one of the recruits, and reasonable grounds exist to believe that his conduct caused mental pain and suffering of the victim and was unjustified. During her testimony [REDACTED] noted that she did not want the sexual acts to happen even though she let them happen. ITC [REDACTED] position as her company commander contributed to her "letting" the sexual acts occur (she testified that she felt like she could not say "no"). Because she did not want these acts to occur, these acts caused her mental suffering then, and continue to cause her suffering to this day.

(3) A court-martial would have jurisdiction over the accused and the offenses.

(4) I recommend that this charge and six specifications be referred to trial by general court-martial.

c. As to Charge III:

(1) The language properly alleges offenses under the UCMJ.

(2) I believe that the evidence in support of this allegation is weak and it is very unlikely that this charge could be proved at a court-martial because the testimony of [REDACTED] negates one element of the charge. The elements of the charge require that (1) ITC [REDACTED] caused [REDACTED] to engage in a sexual act, and (2) that he did so by threatening or placing her in fear that if she failed to comply or reported the sexual act, he would negatively influence her military career. The evidence is strong that a sexual act occurred. However, for several reasons I disagree with the Investigating Officer that [REDACTED] was placed in fear. During his interview with CGIS, ITC [REDACTED] acknowledged that his position may have influenced [REDACTED] decision to consent to engage in sex. However, there is no evidence that before, during or after the sexual act that he verbally or physically threatened [REDACTED] in order to engage in the sexual act with her or have it remain secret. In addition, [REDACTED] testified that although she knew it was wrong for ITC [REDACTED] to engage in sexual intercourse with her, she was not afraid of him. Most importantly, she stated that she never felt threatened by him, and was not afraid of negative repercussions to her personally or to her career if she had refused to have sexual intercourse. Moreover, she consistently noted that at times she believed the accused was kind to her and she considered him a friend, even though there were other occasions that he did things she did not appreciate or she thought were inappropriate. These facts coupled with her testimony will make it very difficult to prove this charge. It is important to note that the fear element in this charge is the victim's subjective fear when considering the totality of the circumstances. If it were an objective standard, one could consider the awesome power that a company commander wields over recruits, which could inherently establish an element of fear.

(3) A court-martial would have jurisdiction over the accused and the offense.

(4) I recommend that this charge and specification be dismissed.

d. As to Charge IV:

(1) The language properly alleges an offense under the UCMJ.

(2) I believe that the allegation is warranted by the evidence in enclosure (2), the report of investigation.

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(3) A court-martial would have jurisdiction over the accused and the offense.

(4) I recommend that this charge and specification be referred to trial by general court-martial.

4. Recommendation. I recommend that Charges I, II and IV, along with their supporting specifications be referred to a general court-martial. Although my opinions and recommendations are submitted pursuant to references (c) and (d), the disposition of the charges in this case is solely within your discretion. Your consideration and disposition of the charges should be based upon your independent exercise of discretion. You may lawfully order the charges dismissed for any reason. You may choose to order the charges tried by an inferior type of court-martial or initiate administrative action, with or without nonjudicial punishment.

5. Action. Once you have considered this advice with its enclosures, please indicate your concurrence with respect to the charges and specifications by signing block 14 on the original charge sheet provided as enclosure (3) and return it to me. I will ensure Charge II and its sole specification is dismissed without prejudice. If you disagree with my recommendation please inform me of your desired course of action and I will prepare the necessary paperwork to carry out your decisions.

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Enclosures: (1) [REDACTED] Memo 5811 of 16 May 2012
(2) [REDACTED] Memo 5830 of 10 May 2011
(3) Original Charge Sheet