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Military Law - Use of Manual for Courts-Martial by Court-Martial Members Disallowed

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illustrates the need for resorting to legislative history to determine what is meant by coercion in Section 8(b)(1)(A).

If either organizational or recognition picketing is effective, it will result in a loss of business to the employer. When this occurs, employees are confronted with the possibility of loss of their jobs or reduction in pay if the employer cannot withstand the economic loss. The only other alternative is for the employees to join the union. Thus the conflict here is between three parties: the employees who do not want to join the union; the employer who wants to avoid the increased labor costs and other problems that accompany unionization; and the union which is seeking to improve wages and working conditions of its members by strengthening bargaining power and eliminating non-union shops. It is clear that all three parties are seeking legitimate ends. Congress, in the National Labor Relations Act, has set out the rules under which the economic struggle is to be waged. Section 8(b)(1)(A) prohibits the union's use of force, violence, or threats of economic reprisal. It was not intended to deny the union its right to picket the employer premises, urging those sympathetic to the union cause to support the union. If the union is to be deprived of this weapon, the decision should be made by Congress.[22]

Sidney D. Fazio

MILITARY LAW — USE OF MANUAL FOR COURTS-MARTIAL BY COURT-MARTIAL MEMBERS DISALLOWED

The defendant pleaded guilty to and was convicted of several charges under the Uniform Code of Military Justice by a general court-martial.[1] Thereafter the law officer[2] fully advised the

22. See Cox, *Collective Bargaining and Industrial Practices*, 35 L.R.R.M. 56 (1954) wherein the author takes the position that neither picketing for recognition nor organizational picketing should be permitted after the employees have signified in an election whether in truth the union is their organization. However, he apparently feels that the present act does not cover the problem and recommends that Section 8(b)(4)(C) be amended to cover it.

1. UNIFORM CODE OF MILITARY JUSTICE art. 16, c. 1041, 70A STAT. 42 (1956), 10 U.S.C. § 816 (Supp. V 1958): "The three kinds of courts-martial in each of the armed forces are — (1) general courts-martial, consisting of a law officer and not less than five members; (2) special courts-martial, consisting of not less than three members; and (3) summary courts-martial, consisting of one commissioned officer."

Any officer on active duty may serve on a court-martial. Enlisted personnel are also eligible to serve on a court-martial if the accused requests their appointment to the court. See UNIFORM CODE OF MILITARY JUSTICE art. 25, c. 1041, 70A STAT. 45 (1956), 10 U.S.C. § 825 (Supp. V 1958).

2. The law officer is peculiar to the general court-martial. "The authority con-

court of the authorized maximum sentence and the members of the court-martial, each with a copy of the Manual for Courts-Martial at his disposal, retired to deliberate on the sentence. The court later reopened and requested instructions from the law officer on sections of the Manual to which he had not referred them. He refused to give the instructions, considering the sections immaterial in arriving at an appropriate sentence.[3] Subsequently the court arrived at a sentence that the defendant be dismissed from the service and pay a fine of $500. On review by the United States Court of Military Appeals, *held*, reversed on other grounds[4] and remanded to the convening authority for rehearing by another court-martial on the sentence. By rule the court stated that in the future the members of neither a general nor a special court-martial could refer to the Manual during the course of the trial or while deliberating on the findings or the

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vening a general court-martial shall detail as law officer thereof a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State and who is certified to be qualified for such duty by the Judge Advocate General of the armed force of which he is a member." UNIFORM CODE OF MILITARY JUSTICE art. 26(a), c. 1041, 70A STAT. 46 (1956), 10 U.S.C. § 826 (Supp. V 1958).

It is the duty of the law officer to direct the trial along the paths of recognized procedure in such a manner as to bring the hearing to an end without prejudice to either party. Therefore he can make "restrained" comments upon the evidence in order to avoid entangling the proceedings with unnecessary and immaterial issues. He must maintain an impartial attitude, while at the same time exercising control over the proceedings. United States v. Jackson, 3 U.S.C.M.A. 646, 14 C.M.R. 64 (1954).

The president of the special court-martial performs duties analogous to those of the law officer. However, he is a *member* of the court-martial, and seldom is legally trained. MANUAL FOR COURTS-MARTIAL, UNITED STATES, par. 40(a) (1951), provides that "the senior in rank among the members appointed to a . . . special court-martial is the president; however, the senior member present at a trial, whether or not he is the senior member appointed to the court, is president of the court for the trial of that case." It is his duty to check the votes of the members and announce the result of the ballot, rule upon interlocutory questions other than challenges, and instruct the court as to the elements of each offense charged and the presumption of innocence, reasonable doubt and burden of proof. *Id.* at par. 40(b)(2). See United States v. Pulliam, 3 U.S.C.M.A. 95, 11 C.M.R. 95 (1953).

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, par. 76(a)(4) (1951) provides that the members of the court-martial may consider penalties adjudged in other cases for similar offenses. (The law officer ruled that the facts of any other case would be highly prejudicial to the accused.) *Id.* at par. 76(a)(3) provides for consideration of prior convictions in arriving at the sentence. (This section was ruled inapplicable by the law officer because the accused had not been previously convicted of any offense.)

4. Rehearing on the sentence was ordered because of the prejudice arising from the assistant trial counsel's pointing out to the court-martial paragraph 33(h) of the Manual, which states in part that "when any offense charged is not of a purely military nature, he [the commanding officer of the accused when determining to what type court-martial to refer the charges for trial] should take into account the fact that the retention in the armed forces of thieves and persons guilty of moral turpitude injuriously reflects upon the good name of the military service and its self-respecting personnel."

sentence. In the case of special courts-martial an exception was made to the extent that the president of the court-martial can make use of the Manual in performing his duties which are analogous to those of the law officer. *United States v. Rinehart*, 8 USCMA 402, 24 CMR 212 (1957).[5]

Pursuant to authority granted by Congress in the Uniform Code of Military Justice,[6] the President of the United States promulgated the Manual for Courts-Martial, which prescribes the procedure, including the modes of proof, for courts-martial. However, the Manual itself does not state whether it is to be used by the members of a court-martial. The question arose as to what source of law the court-martial was to use. Soon after it came into existence, the Court of Military Appeals stated that the primary source of applicable law for members of the court-martial was the instructions of the law officer in general courts-martial or those of the president in special courts-martial.[7] The duty to instruct could not be satisfied by merely referring members of the court-martial to pertinent sections of the Manual; full instructions on the law had to be given.[8] However, the Court

5. As an aid to the non-military reader, it might be appropriate to set forth the system of review provided for the military. When the convening authority has taken final action on a general court-martial case, he must forward the complete record to the appropriate Judge Advocate General. UNIFORM CODE OF MILITARY JUSTICE, art. 65(a), c. 1041, 70A STAT. 59 (1956), 10 U.S.C. § 865 (Supp. V 1958). A Board of Review is appointed by each Judge Advocate General. This Board of Review is composed of "not less than three commissioned officers or civilians" who must be members of a federal or state bar. It is required that the record of trial of courts-martial in which the sentence, "as approved, affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more" be referred to the Board of Review. *Id.* art. 66. The final step in the military judicial hierarchy is the Court of Military Appeals. This court is composed of three civilian judges appointed by the President of the United States. Review by this court is mandatory in cases wherein the sentence as approved by the Board of Review affects a general or flag officer, or in case the Board of Review affirms a death sentence. In all other cases, only the government can appeal as of right. If the Judge Advocate General of a service deems further review desirable, he may forward a Board of Review case to the Court of Military Appeals. Finally, the Court of Military Appeals may grant an appeal upon petition of the accused "on good cause shown." *Id.* art. 67.

A final conviction by a court-martial is not subject to review by appeal to a federal civilian court. However, collateral attack can be made upon the court-martial conviction. The ordinary form of collateral attack is an application for writ of habeas corpus. See United States v. Ferguson, 5 U.S.C.M.A. 68, 17 C.M.R. 68 (1954); Note, *Military Law — Due Process, Review of Courts-Martial on Petition for Habeas Corpus*, 21 GEO. WASH. L. REV. 492 (1953).

6. UNIFORM CODE OF MILITARY JUSTICE, art. 36, c. 1041, 70A STAT. 50 (1956), 10 U.S.C. 836 (Supp. V, 1958).

7. United States v. Chaput, 2 U.S.C.M.A. 127, 7 C.M.R. 3 (1953); United States v. Ginn, 1 U.S.C.M.A. 453, 4 C.M.R. 45 (1952).

8. United States v. Baguex, 2 U.S.C.M.A. 306, 8 C.M.R. 106 (1953); United States v. Richardson, 2 U.S.C.M.A. 88, 6 C.M.R. 88 (1952).

of Military Appeals saw no reason to criticize the practice of referring the court-martial members to the Manual for pertinent *amplifying* material.[9] The Army Board of Review approved the practice of allowing members of the court-martial to retain possession of the Manual throughout the proceedings.[10] Courts-martial were reversed only upon a finding that the defendant had been prejudiced because of the use of the Manual by the court-martial members.[11] However, in *United States v. Boswell*,[12] decided four months prior to the instant case, the Court of Military Appeals disapproved the practice of providing members of a court-martial with a copy of the Manual for Courts-Martial for use in closed sessions. In that case the court made the statement that it was improper for the members of the court-martial to consult outside legal sources, and that in this respect, the Manual for Courts-Martial was no different from other legal sources.

In the instant case[13] the Court of Military Appeals promulgated the rule that the prior practice of permitting members of a court-martial to make use of the Manual for Courts-Martial during the course of the trial or while deliberating upon the findings or sentence will be prejudicial error, and must be discontinued. The court stated that it would not sanction the practice of permitting court-martial members to "rummage" through a work on military law such as the Manual for Courts-Martial, deciding for itself which of the "myriad" of principles contained therein should be applied. One reason given was that numerous

9. United States v. Gilbertson, 1 U.S.C.M.A. 465, 4 C.M.R. 57 (1952).

10. In United States v. Phillips, C.M. 353183, 9 C.M.R. 186, 198 (1952), the Army Board of Review stated that "in enacting the Uniform Code of Military Justice, the Congress must have known about the long established practice, expressed throughout the years in the various manuals, under which the members of courts-martial may use the Manual during their deliberations. By failing to impose any limitation on this practice, Congress by implication approved it." The Board of Review added that "it appears unreasonable to assume that the members of the court would be familiar with the numerous procedural safeguards which have been set forth in the Manual, without benefit of reference to the Manual (MCM 1951, pars. 74, 76, pp. 114-118, 121-124)."

In United States v. Moses, C.M. 363294, 14 C.M.R. 278 (1953), the Army Board of Review considered the refusal of the Court of Military Appeals to criticize the referral to the Manual for amplifying matter after full instructions in the Gilbertson case, 1 U.S.C.M.A. 465, 4 C.M.R. 57 (1952), as "at least" tacit approval of use of the Manual by members of the court-martial. See also United States v. Doyle, A.C.M. 8768, 17 C.M.R. 615 (1954).

11. Further, the Court of Military Appeals, in the case of United States v. Kunak, 5 U.S.C.M.A. 346, 17 C.M.R. 346 (1954), apparently approved the practice of allowing members of a court-martial access to the Manual. At this time the court felt that references to the Manual by the law officer would be of little assistance to the court-martial members if they were denied access to the Manual.

12. 8 U.S.C.M.A. 145, 23 C.M.R. 369 (1957).

13. United States v. Rinehart, 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957).

passages in the Manual had been invalidated by the court, and a perusal of the Manual might lead to an application of these invalid sections.[14] Further, the court stated that there was no way of knowing whether the court-martial applied the law as given by the law officer or president of the special court-martial, or rejected it in favor of other material found in the Manual.

The armed forces require all officers to meet prescribed standards of training relative to the Manual for Courts-Martial, but the vast majority of the members of courts-martial have had no formal legal training.[15] For this reason the Court of Military Appeals in the instant case was apparently afraid of the consequences of allowing a work on the law in unskilled hands. The court recognized that the Manual gives the members of special courts-martial the right to object to the rulings made by the president on interlocutory questions, but felt that allowing members to peruse casually the Manual during the court-martial sessions would not aid them in making intelligent objections. Objections, stated the court, should be made on the basis of the member's general knowledge of the law. To support further its holding in the present case the court resorted to federal and state court decisions. In the civilian judicial system perusal of law books by a jury is disapproved and considered as misconduct on their part. Nevertheless, in most jurisdictions the complainant is required to show prejudice to his cause as a result of the misconduct before a new trial will be granted.[16] The Court of Military Appeals, however, relied upon the cases reflecting the minority rule that mere use of lawbooks by a jury is prejudicial error.[17]

Some pertinent criticisms of the case were voiced in the dissenting opinion. The dissenting judge felt that the law relative to use of lawbooks by a jury in the civilian system should not

14. For a list of these sections, see FELD, A MANUAL OF COURTS-MARTIAL PRACTICE AND APPEAL, Appendix I, p. 164 (1957).

15. United States v. Rinehart, 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957) (dissenting opinion).

16. For a collection of the cases in civilian jurisdictions, see Annot., 54 A.L.R.2d 710 (1956).

17. It is to be noted that the Court of Military Appeals relied quite heavily upon the case of *United States v. Gordon*, an unreported case of the Seventh Circuit Court of Appeals. In that case the court decided that the use of the handbook for jurors constituted prejudicial error. However, this decision was later discarded in another opinion, the court holding that before the complainant will be given relief, he must present evidence that the jurors had been prejudiced against him by the reading of the handbook. United States v. Gordon, 253 F.2d 177 (7th Cir. 1958). *Accord*: Schoultz v. State, 106 So.2d 424 (Fla. 1958); Ferrara v. State, 101 So.2d 797 (Fla. 1958).

necessarily be applied to the military. Members of a court-martial must act somewhat in the capacity of *both* judge and juror.[18] For example, they have authority to overrule law officers and presidents of special courts-martial on some questions of law,[19] and they must fix the punishment within the limitations set out in the Manual for Courts-Martial.[20] Further, an officer assigned as judge for a summary court-martial must understand and use the Manual. Officers detailed as counsel for the accused must familiarize themselves with the provisions of the Manual to present a defense adequately. As pointed out in the dissenting opinion, the gist of the problem is that members of military courts are familiar with the Manual whereas jurors are not ordinarily learned in the law. Hence it does not appear that military law should be molded in the fashion of civilian law in this area.[21]

The majority felt that intelligent objections by members of a court-martial to a ruling by the presiding officer must arise from background knowledge of the law, and not from perusal of the Manual. Granted that knowledge is a prerequisite to an intelligent objection, it would appear that use of the Manual to refresh the memory and to clarify any misconceptions that a member might have is far better than sole reliance upon memory.[22] Further, as a ground for its decision in the instant case,

18. 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957) (dissenting opinion).

19. The law officer of a general court-martial and the president of a special court-martial are required to rule upon interlocutory questions, other than challenges, arising during the trial. Any such ruling by the law officer of a general court-martial on any interlocutory question other than a motion for a finding of not guilty, or the question of the accused's sanity, is final and constitutes the ruling of the court. However, all rulings made by the president of a special court-martial are subject to objection by any member of the court-martial. In case of such objection, the court is closed and the question voted on by the members of the court-martial. UNIFORM CODE OF MILITARY JUSTICE art. 51(b), c. 1041, 70A Stat. 54 (1956), 10 U.S.C. 851 (Supp. V. 1958).

20. United States v. Boswell, 8 U.S.C.M.A. 145, 23 C.M.R. 369 (1957) (dissenting opinion).

21. The majority of the court seems to think that for military law to advance it must parallel the civilian system as closely as possible. This may be true, but the court should not forget the peculiarities of military justice. The court, itself, has stated what appears to be the most workable solution, as follows: "Absence of legal forms and authorities, inexperience in the details of legal procedure, and interference by other military duties . . . must be considered in weighing the burden to be saddled on military lawyers. If, because of the peculiarities of the military service, a variation from civilian practice is necessary to assure a fair trial, we should unhesitatingly adopt the procedure best suited to the administration of military justice." United States v. Hemp, 1 U.S.C.M.A. 280, 3 C.M.R. 14, 20 (1952).

22. A likely effect of the rule set out in the instant case is that objections will be considerably reduced in number, for a member of the court-martial will be reluctant to voice an objection unless he is absolutely certain that his objection is

the court pointed to the danger of a lawbook in the hands of a non-lawyer. Yet the president of a special court-martial, although not generally legally trained, is permitted to use the Manual, as the court itself acknowledged. To this extent, then, the court's reasoning appears inconsistent, for it struck down the use of the Manual by non-lawyers, while at the same time directing one non-lawyer to use it.

It is submitted that the Court of Military Appeals should have adhered to the pre-existing rule and reversed the court-martial for use of the Manual only in cases where the defendant was prejudiced, rather than formulating a rule which divests the members of the court-martial of an important aid in carrying out their functions.

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NATURAL GAS ACT — CHANGES IN RATES UNDER SECTION 4(d)

United Gas Pipeline Company supplies gas to the City of Memphis' natural gas distribution agency under long term service agreements containing the following pricing provision: "All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule . . . *or any effective superseding rate schedules* on file with the Federal Power Commission." After the agreements had been in effect several years, United, proceeding under Section 4(d)[1] of the Natural Gas Act,[2] filed new rate schedules increasing its prices. The Commission ordered a hearing[3] as to

well founded and can cite the applicable section of the Manual to the presiding officer for support of his position.

1. Section 4(d) provides: "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such [filed] rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

2. Natural Gas Act of 1938, 52 Stat. 821, 15 U.S.C. § 717 (1952).

3. Under Section 4(e): "Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the