IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. John C. Riesbeck Boatswain's Mate Second Class United States Coast Guard, Appellant.	APPELLANT'S REPLY BRIEF USCA Dkt. No. 17-0208/CG Crim. App. No. 1374

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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Argument

Boatswain's Mate Second Class John C. Riesbeck, United States Coast Guard (USCG), through counsel, hereby replies to the United States' Answer of July 14, 2017.

1. Personal signature does not mean personal selection.

Based on the Government's brief, it appears the Government and Appellant agree (Rear Admiral) RADM Ryan and RADM Colvin did not exercise the legal power of a convening authority when they selected members for amendments to the convening order in this case. (Gov't Brief at 2-4.) Rather, the question at hand is whether ADM Zukunft properly selected the members he detailed when he signed the amending orders. Personal signature is not necessarily proper selection. *United States v. Benedict*, 55 M.J. 451, 455 (C.A.A.F. 2001) (Baker, J. concurring).

2. ADM Zukunft did not rely on subordinate recommendations.

While it is true convening authorities may rely on subordinate recommendations to inform their selection, ADM Zukunft received no such recommendations. The Government compares this case favorably with *Benedict* and *United States v. Marsh,* 21 M.J. 445 (C.M.A. 1986).

This comparison is unsupportable. In those cases, the convening authorities received recommendations from subordinates and relied on them in making their selections. They knew who had chosen the candidates and they relied on the judgment of those subordinates as well as their own review of supporting materials. In *Benedict*, it was normal practice for member questionnaires to be included in the selection materials and the Admiral "went through the package." 55 M.J. at 454. In *Marsh*, the staff judge advocate provided the convening authority names the convening authority had previously selected for other panels and advised him he could choose any officer under his command. 21 M.J. at, 448-49. In this case, ADM Zukunft received no advice, only a drafted order and instructions to sign the order, which contained no mention of his subordinates making selections. (J.A. at 518, 522.) He signed the order without knowing who chose the names. He conducted no Art. 25, UCMJ analysis.

The problem present in this case that sets it apart from *Benedict* and *Marsh* is both the admirals and the staff judge advocate here acted as if they believed the necessary application of an Article 25, UCMJ analysis was completed when RADM Ryan and RADM Colvin made

their selections. We know this because the instructions presented to ADM Zukunft on July 8 and July 11, 2012 omitted both the rosters of personnel available to choose members from and information about how to make the choice applying the Article 25, UCMJ factors.

Admiral Zukunft's instructions assumed the person who would sign the order was same the person who had chosen the candidates and could therefore sign the order without further consideration or application of the Article 25, Uniform Code of Military Justice (UCMJ) factors. That is precisely what ADM Zukunft did. While he personally signed the order, he did not personally choose the members as he was required to do.

The Government asserts "the materials provided to those detailing or identifying members included a recitation of the criteria in Article 25(d)(2) and a title indicating that the task was to choose 'best-qualified' members." (Gov't Brief at 13.) This is incorrect. The digests provided to ADM Zukunft on June 8, 2012 and June 11, 2012 did not contain any recitation of the Art. 25, UCMJ factors and the titles did not mention a best-qualified process. (J.A. at 518, 522.) Nor is it particularly relevant the staff judge advocate testified it was his practice to provide a copy of

the Art. 25 factors to convening authorities (Gov't Brief at 13) when the paper trail shows he did not provide them to ADM Zukunft in this case. (J.A. at 518, 522.)

3. ADM Zukunft misunderstood the Art 25, UCMJ factors.

Even if this Court accepts ADM Zukunft could validly rely on his subordinate's selections without knowing which subordinates made the selections, he still misapplied the Art. 25, UCMJ factors. We know this because he testified to that effect in his responses to submitted questions. He declared member selection was not a best-qualified process and he did not assess judicial temperament. (J.A. at 524-27.) It is true that ADM Zukunft is not a lawyer and it is not surprising he misunderstood the law. That is why the system provides for a staff judge advocate. But in this case, the staff judge advocate did not advise the convening authority on what standard to apply. In the absence of proper legal guidance, ADM Zukunft applied his wrong understanding of Art. 25, UCMJ. This was error. An impartial observer of this proceeding would be forced to conclude that Petty Officer Riesbeck was tried and convicted without the benefit of the protections of Art.25,

UCMJ. This creates an unresolved appearance of unfairness. Further, as argued below, he was convicted by a panel that was actually unfair.

3. This was an impermissible *fait accompli*

The Government asserts ADM Zukunft was not presented with an impermissible *fait accompli.* (Gov't Brief at 11-12.) It is true that the digest accompanying the draft amendments informed him he had the option not to concur with the order as drafted. However, because he was not instructed to apply the Article 25, UCMJ factors and did not know them, it is still a *fait accompli* as described in *Marsh*. The order and the digest did not give the Admiral enough information to meaningfully concur or not. Besides, ADM Zukunft did not follow the instructions in the digest and select either "concur" or "non-concur" or sign the digest as his subordinates and predecessor had done. It suggests he did not read the instructions before he signed the amendments. This was a *fait accompli.*

4. The personnel rosters were insufficient.

The Government argues the information on the rosters used by VADM Brown, RADM Colvin, and RADM Ryan to pick members was adequate to meet the Article 25 criteria. (Gov't Brief at 12-15.) But in

United States v. Dowty, this Court held that it was "deficient" for the convening authority to be advised that he needed to consider only age, training, length of service, and judicial temperament. 60 M.J. 163, 170 (C.A.A.F. 2004). The Court viewed this deficiency as not prejudicial given the convening authority also used member questionnaires provided in the selection package, which contained detailed information about education and experience. *Id.* By that measure, the rosters in this case were sorely deficient.

5. The totality of the circumstances test.

The Government acknowledges implied bias challenges are to be evaluated in light of the totality of the circumstances, yet argues this Court should not consider overall panel composition as one of the relevant circumstances. (Gov't Brief at 19.) LCDR KO was not challenged "solely to change panel composition," (*Id.*) but for several interrelated grounds which should be evaluated together. These included her experience as a victim advocate and her recent experience as victim of unwanted sexual attention in the workplace. The context of the panel composition is part of the totality of those circumstances as envisioned in *United States v. Peters*, 74 M.J. 31, (C.A.A.F 2015) and *United States*

v. Dale, 42 M.J. 384, 386 (C.A.A.F. 1995) and it was improper for the military judge to declare he would not consider that context.

Conclusion

For the foregoing reasons and those previously stated, the decision of the Court of Criminal Appeals should be reversed and the findings and sentence should be set aside.

Respectfully submitted,

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Certificate of Filing and Service

I certify that the foregoing Reply Brief was electronically filed with the Court and served on Appellate Government Counsel on 03 August 2017.

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Certificate of Compliance

This Reply Brief complies with the page limitations of Rule 24(c) because it contains less than 7000 words. Using Microsoft Word 2013 with 14-point-Century-Schoolbook font, it contains 1,579 words.

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