IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	15 June 2018 ANSWER TO APPELLANT'S ASSIGNMENT OF ERRORS AND BRIEF ON BEHALF OF THE UNITED STATES Dkt. No. 1460 Case No. 24962 Before McClelland, Judge, Brubaker
v.	
Francisco J., PACHECO Machinery Technician First Class (E-6) U.S. Coast Guard, Appellant	Tried at Alameda, CA by a special court-martial convened by Commander, Coast Guard Pacific Area, on 31 July–4 August 2017.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

The United States, through undersigned counsel, submits this answer and brief in accordance with Rule 15 of this Honorable Court's Rules of Practice and Procedure.

STATEMENT OF THE CASE

Before a military judge, Appellant, Machinery Technician First Class Francisco J. Pacheco (Appellant), was tried by a military judge alone, at a special court-martial held July 31–August 4, 2017 for one specification under a single charge of abusive sexual contact in violation of Article 120(d), UCMJ, 10 U.S.C. § 920(d) (2016). Contrary to his plea, the Military Judge found Appellant guilty of the charge of abusive sexual contact under Article 120(d), UCMJ. R. at 1254. On August 4, 2017, Appellant was sentenced to reduction to E-1, confinement for 45 days, and a bad-conduct discharge. R. at 1298. On November 27, 2017, the Convening Authority

approved the finding, and sentence, and ordered the sentence executed except for the part of the sentence extending to the bad conduct discharge. (Special Court-Martial Order No. 01-17, November 27, 2017).

STATEMENT OF FACTS

On May 3, 2016, Appellant and GM3 J.D. were both drinking at Bernie's Bar in Kodiak, Alaska. R. at 501. GM3 J.D. was accompanied by her shipmates GM2 [redacted] and ET1 [redacted] as well as other USCGC Morgenthau crew members. *Id.* GM3 J.D. was wearing underwear briefs, thermal "long" underwear, jeans that were oversized and tended to slip low on her hips, a t-shirt, and a North Face Jacket. R. at 695–98, 706–07, 1012. GM3 J.D., GM2 [redacted], and ET1 [redacted] sat at the bar close to the dance floor and music stage. R. at 502. At around 2229, GM3 J.D. walked through the dance floor in order to use the restroom. R. at 503; PE 3 at 10:32:00. Upon returning from the restroom, GM3 J.D. stopped on the dance floor to speak with OS1 [redacted]. R. at 504. While GM3 J.D. was speaking to OS1 [redacted], she had her back to Appellant, who was facing GM3 J.D. and sitting approximately one to two feet from her at the corner of the bar. R. at 508; PE 3 at 10:32:53. Appellant then extended his hand towards the back side of GM3 J.D. and inserted it under her pants, making direct contact with her buttocks and touching GM3 J.D.'s interior butt cheek. R. at 506–07, 940–41. At this time, the dance floor was crowded and poorly lit. R. at 505–06, 719–20, 814; PE 3 at 10:32:53. After Appellant's hand made direct contact with her buttocks, GM3 J.D. froze and then turned around and saw Appellant smiling at her. R. at 507–08; PE 3 at 10:32:58. GM3 J.D. immediately walked back to her seat and looked back at Appellant, who was still staring and smiling at her from across the bar. R. at 511; PE 3 at 10:33:00. GM3 J.D. then informed GM2 [redacted] that Appellant had "stuck his hand down the back of [her] pants and that [she] needed to go." R. at 512. GM3 J.D. then paid her check (PE at

10:39:50), and departed the bar. (PE at 10:41:06).

After returning to the USCGC Morgenthau, GM2 [redacted] notified SK2 [redacted] the ship's victim advocate, about Appellant's actions at the bar toward GM3 J.D. R. at 832–34. In the days that followed, GM3 J.D. did not talk much with her fellow shipmates, could often be found crying, and started smoking again. R. at 838, 897, 902. For the rest of her time underway, GM3 J.D. isolated herself, skipped meals, and became anti-social. R. at 902. GM3 J.D. often slept on the armory floor, because she didn't feel comfortable sleeping in her rack. R. at 902.

I.

THE EVIDENCE WAS FACTUALLY AND LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR ABUSIVE SEXUAL CONTACT UNDER ARTICLE 120(d), UCMJ.

Standard of Review

This Court has a statutory mandate to conduct *de novo* review of both the legal and factual sufficiency of a conviction. Article 66(c), UCMJ, 10 U.S.C. § 866(c). *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

A. The evidence presented at trial was factually sufficient to support Appellant's conviction for abusive sexual contact under Article 120(d), UCMJ.

Sexual contact occurs when there is "any touching, or causing another person to touch, either directly or through the clothing, any body part of any person if done with an intent to arouse or gratify the sexual desire of any person." 10 U.S.C. § 920(g)(2)(B).[1] In order to convict Appellant under Article 120(d), UCMJ, the Government was required to show that:

1) Appellant touched, directly, the buttocks of GM3 J.D.
2) Appellant did so with intent to abuse, humiliate, degrade GM3 J.D. or to arouse or gratify his sexual desire.

[1] Although Appellant was charged with touching, directly, the buttocks of GM3 J.D. with an intent to abuse, humiliate, degrade GM3 J.D. *or* to arouse or gratify his sexual desire, Appellant was found guilty of touching, directly the buttocks of GM3 J.D. with the sole intent to arouse or gratify his sexual desire.

3) Appellant did so by causing GM3 J.D. bodily harm.

In reviewing the factual sufficiency of evidence, courts look to "whether, after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *Rosario*, 76 M.J. at 117. "[R]easonable doubt is not intended as fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in this case . . . the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt." *United States v. Loving*, 41 M.J. 213, 281 (C.A.A.F. 1994).

1. The evidence presented at trial proved beyond a reasonable doubt that Appellant touched, directly, the buttocks of GM3 J.D.

"Touching" under Article 120(g)(2), UCMJ, means "contact . . . made either by an object or by a body part." *United States v. Schloff*, 74 M.J. 312, 313–14 (C.A.A.F. 2015) (stating that Article 120(g)(2), UCMJ "encompasses both body-to-body contact and object-to-body contact). GM3 J.D. testified that while she was standing adjacent to the music stage, she felt and a hand go down her pants and touch "the inside of [her] butt cheek, towards the middle and down." R. at 506–07, 591. GM3 J.D. also testified that when Appellant's hand went down her pants and touched the inside of her butt cheek, it made skin to skin contact. R. at 506. Therefore, GM3 J.D.'s testimony that she felt skin to skin contact established that Appellant touched her buttocks and that this touch was direct.

While Appellant argues that the visual evidence presented in the form of surveillance footage does not show Appellant touching, directly, GM3 J.D.'s buttocks, this is not dispositive of the factual issue of whether or not Appellant touched GM3 J.D.'s buttocks. Brief of Appellant at 9. As Appellant acknowledges in this very same argument, the surveillance footage at issue

was at such an angle that it only captured the individuals at the bar from the waistline and above. Brief of Appellant at 8; PE 3. The fact that the footage could not capture Appellant's touch of GM3 J.D.'s buttocks because it was below her waistline and therefore out of the camera's perspective, does not mean that the touch did not happen.

The surveillance footage does corroborate GM3 J.D.'s testimony. The footage shows Appellant drinking by himself in the moments leading up to the incident (PE 3 at 10:04:20), then sitting within arm's length of GM3 J.D. while she was on the dance floor (PE 3 at 10:32:53), then GM3 J.D. abruptly standing straight and freezing (PE 3 at 10:32:53), then GM3 J.D. turning to face Appellant (PE at 10:32:58). The footage also shows GM3 J.D. turn away from Appellant and immediately leave the dance floor while Appellant smiles and watches her walk away. (PE 3 at 10:33:00). Further, the footage shows GM3 J.D. return to her seat at the bar and pay (PE at 10:39:50) before then departing the bar (PE at 10:41:06).

Appellant's argument that GM3 J.D.'s testimony was not credible because she did not see Appellant touch her buttocks and other witnesses did not corroborate her testimony, is also without merit. Brief of Appellant at 6, 8. There is no requirement that the victim of abusive sexual contact observe an assailant touch them in order for the contact to have occurred or for it to amount to abusive sexual contact. GM3 J.D. testified that she felt skin to skin contact on the inside of [her] butt check, towards the middle and down" and that Appellant's hand touched the inside of her butt cheek. R. at 506–07, 591. As the recipient of Appellant's touch, GM3 J.D. was the best situated individual to describe Appellant's action. GM3 J.D. was able to identify Appellant as the perpetrator of the touch as she immediately turned around and observed Appellant standing a foot or two behind her and smiling. R. at 508–10. The fact that other crew members located near where GM3 J.D. was standing were not focusing on GM3 J.D., but

instead, enjoying the festive bar environment, does not mean that GM3 J.D.'s testimony is less credible. R. at 505–06, 719–20, 814; PE 3 at 10:33:53. Nor is there a requirement that GM3 J.D.'s testimony be corroborated by that of other witnesses in order for it to prove beyond a reasonable doubt that Appellant touched, directly, her buttocks.[2] In any event, surveillance video confirms GM3 J.S.'s testimony as to her reaction and Appellant's location, and testimony of other witnesses confirms GM3 J.D.'s actions in promptly leaving, as well as her demeanor after the assault. Thus, the United States proved there was sufficient evidence to show beyond a reasonable doubt, that Appellant touched, directly, the buttocks of GM3 J.D.

2. The evidence presented at trial proved beyond a reasonable doubt that Appellant had an intent to arouse or gratify his sexual desire when he touched the buttocks of GM3 J.D.

The term "gratify" is defined as "to be the source of or give pleasure or satisfaction to" an individual.[3] The term "sexual" is defined as "of relating to, or associated with sex; having or involving sex."[4] The term "desire" is defined as "to long or hope for; to express a wish for."[5] Courts have found that the manner of the touch, Appellants intentional movements, and the parties' relationship, are all dispositive towards intent to gratify sexual behavior. *See Generally United States v. Hoggard*, 43 M.J. 1, 8 (1995) (referencing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Turner*, 25 MJ 324 (C.M.A. 1987)).

Here, the testimony of GM3 J.D. establishes that Appellant had an intent to arouse or gratify his sexual desire when he touched, directly, GM3 J.D.'s buttocks. Appellant made skin to skin contact with a sexually identifiable portion of GM3 J.D.'s body—i.e., her butt cheeks. R. at

[2] It was well within the Military Judge's role to make a credibility determination regarding GM3 J.D. and rely on her testimony in order to determine, beyond a reasonable doubt, that Appellant committed all of the elements of abusive sexual contact.
[3] *Gratify*, MERRIAM-WEBSTER, https://merriam-webster.com/dictionary/gratify (last visited Jun 11, 2018).
[4] *Sexual*, MERRIAM-WEBSTER, https://merriam-webster.com/dictionary/sexual (last visited Jun 11, 2018).
[5] *Desire*, MERRIAM-WEBSTER, https://merriam-webster.com/dictionary/desire (last visited Jun 11, 2018).

506–07. Immediately after GM3 J.D. felt Appellant touch, directly, her buttocks, Appellant's actions indicated that he received pleasure and gratification as GM3 J.D. turned to find Appellant smiling at her. R. at 507–08. Appellant further indicated his gratification as he watched GM3 J.D. walk to the other side of the bar, and continued to stare at her and smile. R. at 511, 623; PE 3 at 10:33:00. Thus, the United States proved that there was sufficient evidence to show, beyond a reasonable doubt, that Appellant touched, directly, GM3 J.D.'s buttocks with an intent to arouse or gratify his sexual desire.

3. The evidence presented at trial proved beyond a reasonable doubt that Appellant caused bodily harm to GM3 J.D.

Bodily harm is defined as "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." 10 U.S.C. §920(g)(3). GM3 J.D.'s testimony established that Appellant's touch of her buttocks with his hand was both offensive and nonconsensual.[6] In discussing her reaction to feeling Appellant's hand enter her pants and make contact with her butt check, GM3 J.D. testified that immediately upon feeling Appellant's hand make skin to skin contact with the inside middle of her butt cheek, she "froze . . . got scared . . . [and] didn't know what to do" R. at 507. GM3 J.D. also testified that once Appellant removed his hand from her buttocks, she "immediately turned around to see who it was" and upon identifying that it was Appellant, felt "shock, and disbelief [and] anger." R. at 508–10. Upon recognizing that it was Appellant who had placed his hand on her butt cheek and that he was smiling at her, GM3 J.D. responded by saying "[i]f you ever touch me again, I'll fuckin' knock your teeth out." R. at 511. GM3 J.D. then informed GM2 [redacted] that she had to leave the bar because "[t]hat motherfucker just put his hands down the back of my pants and I

[6] As discussed in Section I.A.1., GM3 J.D.'s testimony also establishes that Appellant's touch, directly, of her buttocks constituted sexual contact.

need to go." R. at 512, 822–3. Based on GM3 J.D.'s shock to feeling Appellant's hand make skin to skin contact with her butt cheek as well as her anger towards Appellant upon realizing what he had done, GM3 J.D.'s testimony established that Appellant's touch of her buttocks was both offensive and nonconsensual. Thus, the United States proved that there was sufficient evidence to show, beyond a reasonable doubt, that Appellant caused bodily harm to GM3 J.D.

B. The evidence presented at trial was legally sufficient to support Appellant's conviction for abusive sexual contact under Article 120(d), UCMJ.

The test for reviewing the legal sufficiency of evidence is lower than that used for factual sufficiency. Specifically, courts look to "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014). Further, this Court is required to "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Blocker*, 32 M.J. 281, 284 (C.A.A.F. 1991). As the evidence presented at trial is factually sufficient to support Appellant's conviction for violating Article 120(b)(3)(A), UCMJ, the evidence is equally sufficient to support a similar finding under the lower standard for legal sufficiency.

II.

APPELLANT'S SENTENCE IS APPROPRIATE AND WARRANTS NO RELIEF UNDER ARTICLE 66, UCMJ.

Standard of Review

Courts review questions of sentence appropriateness *de novo*. *United States v. Baier*, 60 M.J. 382, 383–84 (C.A.A.F. 2005); *United States v. Hutchinson*, 57 M.J. 231, 234 (C.A.A.F. 2002). Criminal courts of appeals are provided the authority to review questions of sentence appropriateness under Article 66(c), UCMJ, 10 U.S.C. § 866(c). Article 66(c), UCMJ states that

Court of Criminal Appeals may affirm a sentence only if it finds it to be correct in law, correct in fact, and determines on the basis of the entire record should be approved. *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010). While Courts of Criminal Appeals have the authority to disprove a sentence under Article 66(c), UCMJ, this discretion is not unfettered and may not be made on equitable grounds. *Nerad*, 69 M.J. at 145.

A. Appellant's sentence is correct in law.

The Military Judge found Appellant guilty at a special court-martial of one specification of Article 120(d), UCMJ, and sentenced Appellant to confinement for 45 days, reduction to the rank of E-1, and a bad conduct discharge. R. at 1298. In accordance with Appendix 12 of the Manual for Courts-Martial, if tried at a general court-martial, conviction for violation of a specification of abusive sexual contact under Article 120(d), UCMJ, carries a maximum confinement of seven years, a dishonorable discharge, reduction to the lowest enlisted grade, and total forfeitures. Even with the jurisdictional punishment limitations of a special court-martial, the Military Judge's sentence was well under the maximum authorized punishment at Appellant's special court-martial. While Appellant labels the Military Judge's sentence as "inappropriately severe" and "unjustifiably severe," Appellant fails to articulate any legal errors in the sentence. Brief of Appellant at 15. Undoubtedly, many defendants believe that the sentence they received was "inappropriately severe" or "unjustifiably severe," but this Court's review of sentence appropriateness is not based on the subjective beliefs of an accused, but on the record as a whole. Under such an analysis, it is clear that the Military Judge's sentence was appropriate and should be approved.

B. Appellant's sentence is correct in fact.

Despite Appellant's attempts to minimize the severity of his offense by reference to how quickly it was accomplished, the record also makes clear the impact Appellant's actions had on

the victim. Appellant not only engaged in abusive sexual contact, but did so upon a fellow shipmate in the presence of other shipmates. R. at 501. Appellant's actions caused GM3 J.D. to immediately feel "shock, and disbelief [and] anger." R. at 508–10. As a result of Appellant's actions, GM3 J.D. stopped conversing with her shipmates, was often crying, skipped meals, and was fearful of sleeping in her own rack. R. at 838, 897, 902. Thus, Appellant was found guilty of committing a serious offense and the Military Judge's sentence is correct in fact.

C. Appellant's sentence should be approved based on the entire record.

Despite Appellant's assertion that the Military Judge's sentence is "inappropriately severe" and "unjustifiably severe," when weighed against the entire record, the Military Judge's sentence is appropriate. Brief of Appellant at 15. Specifically, Appellant asserts that when weighing the nature of the offense against his character, the Military Judge's sentence was "unjustifiable severe." *Id.* Appellant claims "sixteen years of honorable service" and to have made only one other prior "misstep" in the form of an alcohol incident—resulting from Appellant driving under the influence—in August 2012. Brief of Appellant at 15–16; R. at 1703; PE 6 at 35. However, when reviewing the entire record, Appellant's history of "missteps" is not limited to these two instances, but also includes non-judicial punishment in May 2015 for Appellant's violation of Article 92, UCMJ, for a failure to obey other lawful order and Article 134, UCMJ, for adultery. R. at 1841; PE 8 at 2. As a result of these proceedings, Appellant was restricted for 60 days and forfeited $4,230.00. R. at 1841.

Additionally, Appellant asserts that a bad conduct discharge is "unjustifiably severe" for his "touching of GM3 J.D.'s butt in a crowded bar" for no longer than two seconds. Brief of Appellant at 15–16. Appellant did not simply "touch GM3 J.D.'s butt in a crowded bar," but instead, committed abusive sexual contact upon a fellow shipmate, in the presence of other shipmates. *Id.* These actions were severe and Appellant's statements to the contrary amount to

little more than an attempt to diminish the seriousness of his actions. *Id.*

Lastly, Appellant's actions are no less severe because they lasted a short period of time. Brief of Appellant at 16. Appellant asserts that his receipt of a bad conduct discharge for a two second act is "unjustifiably severe" in light of his sixteen years of "honorable service." Brief of Appellant at 16. But, Congress has not included a temporal element within Article 120(d), UCMJ. As the evidence presented proved each element of Article 120(d), UCMJ, beyond a reasonable doubt, Appellant committed abusive sexual contact upon GM3 J.D. regardless of the time it took for him to engage in the underlying action. Appellant's suggestion that the Military Judge's sentence is unjustifiably severe due to his act of abusive sexual contact upon GM3 J.D. lasting two seconds epitomizes his lack of remorse and responsibility for his actions and neglects the lasting impact his actions have had on GM3 J.D. R. at 838, 897, 902. The Military Judge obviously weighed all of the evidence, including the exact circumstances of the sexual misconduct, in arriving at a sentence that was still well below the jurisdictional maximum for a special court-martial.

III.

APPELANT WAS NOT PREJUDICED BY SELECTION AND PANELING OF COURT-MARTIAL MEMBERS.

Standard of Review

Whether a convening authority appropriately selected members is a matter of law that is reviewed *de novo*. *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004). A military judge's decision whether or not to excuse a member *sua sponte* is reviewed for an abuse of discretion. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002). A military judge's decision whether to excuse a member based on actual bias is also reviewed for an abuse of discretion.

United States v. Leonard, 63 M.J. 398, 402 (C.A.A.F. 2006); *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2005).

A. The Military Judge had no obligation to dismiss members *sua sponte*.

Military judges have the discretionary authority to excuse members *sua sponte*, but have no duty to do so. *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015). Case law further clarifies that any potential inclination to intervene on the part of the military judge *sua sponte* is reduced when defense counsel is active during *voir dire*. *United States v. Akbar*, 74 M.J. 364, 395 (2015). Civilian defense counsel was active in the member selection, successfully requesting the dismissal of multiple panel members, yet deciding not to request the removal of others. R. at 225, 230, 238, 263, 282–83, 299–300, 310, 339, 344–54, 348, 349.

The vehicle to contest judicial action in member selection is through abuse of discretion. *McFadden*, 74 M.J. at 90. Appellant argues that there was improper member selection, however Appellant's argument is not relevant because this case was not decided by members and abuse of discretion could not have occurred.

B. Members were selected in accordance with Article 25, UCMJ.

Appellant implies 'jury stacking,' without using the term, yet offers no actual evidence to corroborate such an implication. Brief of Appellant at 16–18. The panel, which never sat in judgement of Appellant's case, was compiled by properly selecting the best qualified members by reason of age, education, training, experience, length of service, and judicial temperament in accordance with Article 25(d)(2), UCMJ. AE 24, R. at 1463–68. The Military Judge appropriately dismissed members when motions were made. R. at 344, 345, 348.

Election of trial by military judge makes subsequent objection to the selection process or composition of the panel superfluous, as panel members had no bearing on the case's resolution.

Even if Appellant had been tried by members, the point remains moot, as no actionable motions were proffered by civilian defense counsel. R.C.M. 912(b)(3) provides that "[f]ailure to make a timely motion under this subsection shall waive the improper selection unless it constitutes a violation of R.C.M. 501(a), 502(a)(1), or 503(a)(2)." There was no defect in member selection or *voir dire*.

C. Appellant offers no evidence that any members selected were biased.

The record shows that the Appellant's decision to be tried by military judge alone was prompted by the fact that the government used its preemptory challenge on CAPT [redacted], a member that Appellant felt "gave him the best case." R. at 417. Only after CAPT [redacted] was removed did the Appellant consider a trial by military judge alone. *Id.* The Appellant now argues that "[h]is decision was based on the non-availability of neutral members and his genuine fear of alcohol biases of the three remaining members[7]." Brief of Appellant at 18.

In support of the thesis offered on appeal, Appellant begins by asserting that one of the members who was on the panel at the conclusion of the *voir dire* and challenge process, CDR [redacted], was a "devout Mormon"—extrapolating from that assumption, bias against Appellant since he was in a bar drinking alcohol at the time of the offense. Brief of Appellant at 17 (citing R. at 298). There is no confirmation of CDR [redacted]'s religion anywhere in the record of trial. The member questionnaire does not identify CDR [redacted] as a Mormon, much less a devout[8] Mormon. R. 1464–8; AE 24. Appellant draws this conclusion based on CDR [redacted]'s attendance at Brigham Young University for one academic year. Additionally, being a Mormon is not a requirement to attend Brigham Young University.[9]

[7] This is a new argument that Appellant never raised to the Military Judge at trial.
[8] Devout Mormon. Brief of Appellant at 17 (including language used by Appellant to prove that the members could not be impartial in judging an incident involving alcohol).
[9] "BYU does not unlawfully discriminate against applicants for admission based upon sex, race, creed, religion,

This mischaracterization was previously identified by the Military Judge as an inference, not a substantiated fact. The record of trial at 299–300 outlines this inference:

> TC: She indicated in her member questionnaire she went to Brigham Young University.
> MJ: Brigham Young, okay.
> TC: Correct to my knowledge----
> MJ: You made an inference?
> TC: ----Most Mormons do not consume alcohol as a matter of practice.
> MJ: Ok. So, to be clear you made an inference based on her college, about her religion and therefore her religious practices . . . .

Despite this inference, CDR [redacted] required no rehabilitation. Though not dispositive, a member's unequivocal statement of a lack of bias can carry weight. *United States v. Youngblood*, 47 M.J. 338, 341 (C.A.A.F. 1997). CDR [redacted] unequivocally denied any potential bias toward Appellant due to her attendance at BYU for one academic year. Specifically, CDR [redacted] stated:

> R. at 298.
> Q: If, do you have any personal like, negative feelings one way or another for people who do consume alcohol?
> A: No, I don't.

> R. at 298
> Q: Would you, I guess, hold it against a witness who testified that they consumed a significant alcohol and find it difficult to judge their credibility based on that fact?
> A**:** No, I wouldn't

> AE 24, R. at 1468:
> Q 25: Is there anything in your belief system (religious, moral, etc.) or personal or family history that makes it more difficult for you to sit in judgement of another person? Please explain.
> A. No

Appellant's argument that a biased panel impacted the trial is meritless as Appellant's 'evidence'

national origin, age, or disability who meet the requirements; who agree to abide by the Church Education System Honor Code and Dress and Grooming Standards; and who are otherwise qualified based upon available space." BYU Undergraduate Catalog: Admissions, https://catalog.byu.edu/policy/admissions (last visited June 12, 2018).

of member bias is based solely on conjecture; the record contradicts, and otherwise provides no support for several of the assertions as to why the Military Judge should have, *sua sponte*, excused this particular member.

D. Appellant had opportunity to challenge allegedly biased members, yet chose not to.

Appellant further argues that, due to exhausted challenges, they were left to suffer a member with obvious bias. Brief of Appellant at 18. Challenges for cause are unlimited and thus, inexhaustible. At the conclusion of *voir dire*, civilian defense counsel raised no objection to the remaining panel members' fitness to serve,[10] nor state grounds to challenge them for cause. R. at 300. During the *voir dire* process, civilian defense counsel exercised challenges for three other members. R. at 344, 345, 348. Those three members were excused. *Id*. After the three challenges for cause by the defense, the Military Judge specifically asked civilian defense counsel if the defense wished to exercise any more challenges, to which he responded "no." R. at 348. Civilian defense counsel decided not to make a timely motion to challenge CDR [redacted] when given the opportunity. *Id*. Consequently, there were no challenges for cause to preserve, and waiver occurred. *United States v. Leonard*, 63 M.J. 398, 225 (C.A.A.F. 2006). As indicated earlier, given Appellant's decision at trial to opt for trial by military judge alone, any issues related to the selection of members was waived. R.C.M. 912 (b)(3).

[10] Other than the members properly excused. R. at 345, 346, 348.

PRAYER FOR RELIEF

WHEREFORE, the United States prays that this honorable Court affirm the findings and sentence.

Respectfully submitted,

DATE: 15 June 2018

//s//

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on 15 June 2018.

//s//

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