OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 35

1944

R
16
B63
v.35

Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XXXV

including

CM 253604 to CM 254880

(1944)

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

Office of The Judge Advocate General

Washington : 1944

01977

CONTENTS OF VOLUME XXXV

CM No.	Accused	Date	Page
253604	Mann	26 Apr 1944	1
253638	Kent, J.	21 Apr 1944	9
253642	West	26 May 1944	17
253660	Brown	5 May 1944	31
253661	Stevens	5 May 1944	45
253674	Terry	21 Apr 1944	59
253683	Filipow	24 Apr 1944	65
253686	Lane	16 May 1944	69
253693	Bean	2 Jun 1944	81
253726	Eichar	9 Jun 1944	89
253783	Fleming	2 Jun 1944	97
253795	Muston	26 Apr 1944	111
253862	Schulz	26 Apr 1944	119
253868	Barrette	2 Jun 1944	125
253900	Kent, T.	27 May 1944	131
253974	Prusinowski	31 May 1944	137
253984	Edwards	26 Apr 1944	143
254006	McCann	25 Apr 1944	147
254026	Johnson	24 May 1944	155
254054	Bunch	20 May 1944	161
254055	Madden	28 Apr 1944	167
254157	Seymour	26 Apr 1944	171
254182	Roessel	4 May 1944	179
254202	Roby	26 May 1944	185
254312	Buchanan	9 Jun 1944	205
254313	Drozd	13 Jun 1944	217
254348	Harper	31 May 1944	227
254349	Willetts	4 May 1944	231
254423	Gonzalez	3 Jul 1944	243
254429	Ehrlinger	19 May 1944	251
254498	Miller	25 May 1944	267
254517	Bryant	9 Jun 1944	271
254548	Harmon	19 May 1944	279
254601	Thibault	5 May 1944	285

CM No.	Accused	Date	Page
254639	Benjamin	11 May 1944	291
254692	Lamar, Riley, Ballard, Golden, Green, Brooks, Broughton, Buckingham, Currie, Evans, Haggard, Harper, Hill, James, Newborn, Pate, Wilson, Wright (Lee), Bailey, Barber, Phifer, Shumaker, Wright (Alonzo)	26 May 1944	299
254703	Robertson	2 Jun 1944	323
254704	Thompson	22 Jul 1944	329
254722	Grimstad	30 May 1944	341
254783	Hall	12 May 1944	359
254809	Pavlus	12 May 1944	365
254814	Mullins	27 Jun 1944	371
254870	Baggett	8 Jun 1944	379
254879	Kelly	4 Aug 1944	387
254880	Williams	1 Jun 1944	395

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 253604

26 APR 1944

UNITED STATES	)	SACRAMENTO AIR SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Reno Army Air Base, Reno, Nevada, 9 March 1944. Dismissal, total forfeitures and confinement for twenty (20) years.
First Lieutenant RUSSELL E. MANN (0-1285966), 511th Parachute Infantry.	)	

- - - - - - - - - - - - - - - - -

OPINION of the BOARD OF REVIEW
LIPSCOMB, CAMBRELL and GOLDEN, Judge Advocates.

- - - - - - - - - - - - - - - - -

1. The Board of Review has examined the record of trial in the case of the officer above named and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that First Lieutenant Russell E. Mann, Company B, 511th Parachute Infantry, Camp Mackall, North Carolina, did, at Camp Mackall, North Carolina, on or about 21 October 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Reno, Nevada, on or about 2 February 1944.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Russell E. Mann, Company B, 511th Parachute Infantry, Camp Mackall, North Carolina, did, at Newkirk, Oklahoma, on or about 17 December 1943, wrongfully and unlawfully contract a bigamous marriage with one Donna J. Smith, without first having obtained a legal divorce from his lawful wife, Mary Schlotterbeck Mann who was at said time living and still his lawful wife.

Specification 2: In that First Lieutenant Russell E. Mann, Company B, 511th Parachute Infantry, Camp Mackall, North Carolina, did, at Reno, Nevada, on or about 27 January 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Main Branch, First National Bank of Nevada, Reno Nevada, a certain check, in words and figures as follows, to-wit:

(2)

January 27, 1944 No.
The Somerville National Bank
Somerville, Ohio

Pay to the
order of CASH $25 00/

Twenty five and - - - - - - - - - - - - - - - xx/100 Dollars

/s/ Russell E. Mann 01285966
Co B 511 Prcht Inf. Camp Mackall, N.C.

and by means thereof, did fraudulently obtain from said Main Branch, First National Bank of Nevada, $25.00, lawful money of the United States, he, the said Russell E. Mann, then well knowing that he did not have and not intending that he should have any account with The Somerville National Bank, Somerville, Ohio, for the payment of said check.

Specification 3: Same form as Specification 2, but alleging check drawn on same bank, same date, payable to order of Cash, made and uttered to Harold's Club, Reno, Nevada, and fraudulently obtaining thereby $30.00.

Specification 4: Same form as Specification 2, but alleging check drawn on same bank dated 28 January 1944, payable to order of Cash, made and uttered to First and Virginia Branch, First National Bank, Reno, Nevada, and fraudulently obtaining thereby $15.00.

He pleaded guilty to Specification 1, Charge II, and not guilty to all other Specifications and to all Charges. He was found guilty of all Charges and Specifications and was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to twenty years and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution consisted entirely of documentary evidence admitted without objection. The duly authenticated extract copy of the accused's organization's morning report shows that he was given a five day leave on 16 October 1943, that he was absent without leave as of 0001 o'clock on 22 October 1943 and that on 3 February 1944 he was in such status confined by military authorities at Reno, Nevada. The remainder of the prosecution's evidence, except the accused's sworn statement, was by stipulation as to what certain witnesses would testify if present in court. Accordingly, Mary Schlotterback Mann, conceded to be the lawful and living wife of the accused,

testified that she and the accused were married about 28 October 1942 at Gainesville, Florida, by the Reverend U. S. Gordon, that one child, Russell E. Mann, Jr., had been born of their union, that the accused, who had been on leave, left them in Collinsville, Ohio, on 21 October 1943, that since his departure she had neither seen him nor heard from him, and that no divorce had been sought or secured by either of them. It was also stipulated that Reverend U. S. Gordon, would testify that he united Mary Schlotterbeck and the accused in marriage on or about 28 October 1942 (R. 7-8; Exs. "D", "E", "F").

It was further stipulated that Donna Smith would testify that she was married to the accused, after they had secured a license, by the Reverend G. C. Hutchins at Newkirk, Oklahoma, on or about 17 December 1943, and the minister, likewise would so testify. In like manner it was stipulated that the persons cashing the three checks described in Specifications 2-4, Charge II, would testify that the accused as alleged made and presented the checks in the presence of each, respectively, identified himself by his AGO card and secured the cash therefor and that thereafter the checks were dishonored because the accused had no account with the drawee bank. The checks were attached to the stipulations and show that payment thereof was refused for such reason. It was stipulated that the accused never had an account with the drawee bank, that he had never had a joint account with his wife with such bank, that his wife, Mrs. Russell E. Mann, had had an account with the bank but that it had been closed 6 January 1944 and that the bank had never honored any of the accused's checks by payment from his wife's account (R. 7-9; Exs. "G", "H", "I", "J").

The accused's sworn statement, reciting full warning of his constitutional rights, was admitted into evidence without objection and in effect amounts to a full confession. It gives a history of the accused's Army experience prior to about 10 October 1943 when he was physically disqualified for overseas duty. His chagrin over such disqualification was not mitigated by his five days leave ending on 21 October 1943 when he started to return to his organization but, instead he commenced a prolonged course of traveling through various states financed by the profligate use of checks drawn upon a so-called "joint account" with his wife with the drawee bank. In the course of his wanderings he had married Donna J. Smith, whom he had left, and he was finally apprehended in Reno, Nevada, in company with one Freda Schroder who was under the impression that she and the accused were to be married. He admitted cashing the checks described in Specifications 2-4, Charge II, and that when he cashed them, he had begun to doubt that he had any funds in the bank. He disclaimed any intention to desert (R. 7; Ex. "C").

4. The evidence for the defense consists of the testimony of the accused, who after explanation of his rights as a witness, elected to take the stand solely with reference to Charge I and its Specification. He denied any intention to desert, contending that he had merely been absent without leave from his organization at Camp Mackall, North Carolina, because he had started to return upon the expiration of his five day leave, that

he had left most of his clothes and personal effects with his organization, that one officer in the regiment owed him $250 which he had made no effort to collect, that he never was out of uniform, and that, while heping he would be "picked up and brought back", he had "just rather hesitated about going back". He stated that his pay amounted to about $400 per month and that $250 thereof went to the bank as an allotment to his wife (R. 9-13).

Upon cross-examination he admitted being in numerous cities in about 13 different states and having pretended to be a captain. He also had given false information when questioned by an FBI agent to whom he did not surrender himself as he did not to military authorities in the vicinity of many of the places that he had visited. Upon the theory that his actions during the time in question were material to the issue of the alleged desertion, the prosecution was permitted to cross-examine him about his itinerary, how he financed it and his other activities. He admitted writing numerous checks aggregating more than $500 upon the so-called "joint account" although he had received no pay since October 1943, and failing to correspond either with his wife or his organization. He also admitted that he had not previously written checks on the bank because the account for his wife had only been created in October 1943 which was the first month his wife's allotment became effective (R. 13-22).

5. The Specification, Charge I, alleges that the accused on or about 21 October 1943 at Camp Mackall, North Carolina, deserted the service of the United States and remained absent in desertion until he was apprehended at Reno, Nevada, on or about 2 February 1944. "Desertion is absence without leave accompanied by the intention not to return, * * * ", and some of the circumstances from which the intention not to return can be inferred are apprehension at a place distant from his station, failure to surrender to available military authorities, dissatisfaction with his service, and other circumstances inconsistent with an intention to return. The accused's testimony that he intended to return and circumstances consistent therewith are not compelling upon the court as the court may believe or reject such evidence (MCM, 1928, par. 130a).

The evidence for the prosecution conclusively shows that the accused absented himself without leave from his organization on or about 21 October 1943 by failing to return upon the expiration of his five day leave and that he was not returned to military authority until on or about 2 February 1944 when he was apprehended at Reno, Nevada. During this period of over three months, although he wore his uniform and disavowed any intention not to return, his actions were inconsistent with any conclusion except that he did not intend to return. He was disgruntled because he had been disqualified for overseas service and traveled widely in a manner apparently calculated to avoid apprehension. His travels were financed by cashing checks upon a nonexistent bank account. He failed to surrender to available military

authorities, pretended to have the rank of captain and evaded apprehension on one occasion by making false statements to an "FBI" agent. He wholly failed to communicate with either his family or his organization and in dereliction of his marital status contracted a bigamous marriage with a woman whom he promptly left and thereafter established relations with another woman who was led to believe that he also intended to marry her. The prosecution's evidence sufficiently established the corpus delicti of the offense of desertion, as it did for the other offenses charged, to make admissible the accused's confession which was admitted without objection and which with his own testimony supplied any lacking details so that the combined effect of the evidence shows beyond a reasonable doubt the accused's guilt of the offense of desertion as alleged which fully warranted the court in finding him guilty of Charge I and its Specification.

6. Specification 1, Charge II, alleges that the accused on or about 17 December 1943 at Newkirk, Oklahoma, wrongfully and unlawfully contracted a bigamous marriage with Donna J. Smith without first having obtained a divorce from his lawful wife, Mary Schlotterback Mann, who was at said time living and still his lawful wife. The offense alleged is that of bigamy which "is committed by a party who, when already legally married to one person, marries another person" (Wharton's Criminal Law, 12th Ed. Vol. 2, sec. 2030 at page 2343). According to the law of the State of Oklahoma the Specification alleges the commission of the crime of bigamy in such jurisdiction, which is punishable by penitentiary confinement not exceeding five years (Oklahoma Statutes Annotated, Vol. 21, secs. 881-883). The Specification, therefore, alleges conduct prejudicial to good order and military discipline, which is also of a nature to bring discredit upon the military service (MCM, par. 152c, CM 138903 (1920) and CM 197574 (1931) Dig. Ops. 1912-40, JAG sec. 454 (1), CM 118397 (1918) Id. sec. 454 (17)).

It was stipulated that Mary Schlotterbeck Mann was and is the present living and lawful wife of the accused. Her stipulated testimony, as does that of the minister who married them, fortifies such stipulation and shows that at all material times involved such marital status existed, undissolved. The stipulated testimony of Donna Smith and that of the minister, who performed the marriage ceremony between her and the accused, shows that her marriage to the accused on 17 December 1943 was celebrated. The second marriage was, therefore, bigamous which the accused admits both in his confession and in his testimony. All of the evidence, therefore, shows beyond a reasonable doubt the accused's guilt of the offense alleged in Specification 1, Charge II, and amply supports the court's findings of guilty thereof.

7. Specifications 2-4, Charge II, allege that on specified dates at Reno, Nevada, the accused with intent to defraud, wrongfully and unlawfully made and uttered to each of three different designated persons a described check and fraudulently obtained thereby money therefor when he knew that he did not have and not intending that he should have an account with the drawee bank for the payment thereof. These offenses are clearly violative of Article of War 96 because the acts alleged

certainly comprise conduct of a nature to bring discredit upon the military service (MCM, 1928, par. 152b).

The stipulated evidence for the prosecution conclusively shows that the accused made and uttered the three checks as alleged, that he did not have and never had had an account with the drawee bank and that consequently the checks were dishonored after he had acquired the cash therefor. His fraudulent intent, of necessity, under such circumstances follows and it is undiminished by his suggestion of a non-existent so called "joint account" with his wife at the drawee bank which was created only in the month of October 1943, with his first allotment to his wife. His other proven actions during the period involved belie his claim and confirm his guilt. The evidence therefore fully warrants and amply supports the court's findings of guilty of Charge II and Specifications 2-4 thereunder.

8. The accused is about 27 years old. The War Department records show that he has had enlisted service from 15 October 1940 until 25 June 1942 when he was appointed a temporary second lieutenant upon completion of Officers Candidate School, that he has had active duty as an officer since the latter date, and that he was promoted to first lieutenant on 8 January 1943.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of either Article of War 58 or Article of War 96.

Abner E. Lipscomb, Judge Advocate.

William H. Brumbrell, Judge Advocate.

Fabrice H. Golden, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 8 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Russell E. Mann (0-1285966), 511th Parachute Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority and legally sufficient to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed but that the period of confinement be reduced to ten years, that the sentence as thus modified be ordered executed and that the Federal Reformatory, El Reno, Oklahoma, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl. 1 - Record of trial.
Incl. 2 - Dft. ltr. for sig. S/W.
Incl. 3 - Form of action.

(Sentence as approved by reviewing authority confirmed but confinement reduced to ten years. G.C.M.O. 395, 18 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ
CM 253638

21 APR 1944

UNITED STATES	)	NEW ORLEANS PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at
	)	New Orleans, Louisiana, 4
Second Lieutenant JIM H.	)	March 1944. Dismissal and
KENT (0-1314498), Infantry.	)	total forfeitures.

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Jim H. Kent, Company "K", 355th Infantry, 89th Light Division, did, without proper leave, absent himself from his organization at Bivouac Area, near Camp Polk, Louisiana from about 28 January 1944 to about 19 February 1944.

CHARGE II: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Jim H. Kent, Company "K", 355th Infantry, 89th Light Division, did, at New Orleans, Louisiana, on or about 17 February 1944, with intent to defraud wrongfully and unlawfully make and utter to The Leon Godchaux Clothing Company Limited a certain check in words and figures as follows to wit,

---

PROGRESSIVE INDUSTRIAL BANK

No. 28 New Orleans, La., 17 February 1944

PAY TO THE ORDER OF: Godchaux's $60.55

Sixty _____ 55/100 Dollars

/s/ Jim H. Kent
2d Lt. Inf. 0-1314498

---

he the said Second Lieutenant Jim H. Kent, then well knowing that he did not have and not intending that he should have any account with the Progressive Industrial Bank for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check dated 19 February 1944, payable to the order of Mrs. Ruth Kelieher, in the amount of $30.00, made and uttered to Mrs. Ruth Kelieher at New Orleans, Louisiana.

CHARGE III: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Jim H. Kent, Company "K", 355th Infantry 89th Light Division, did, at New Orleans, Louisiana, on or about 17 February 1944, with intent to defraud wrongfully and unlawfully make and utter to The Leon Godchaux Clothing Company Limited, a certain check, in words and figures as follows, to wit:

PROGRESSIVE INDUSTRIAL BANK

New Orleans, La., 17 February 1944 No. 28

PAY TO THE ORDER OF Godchaux's $60.55

Sixty ----------55/100 Dollars

/s/ Jim H. Kent
2d Lt. Inf 0-1314498

---

and by means thereof did attempt to fraudulently obtain from The Leon Godchaux Clothing Company Limited, certain merchandise of the value of $60.55, he the said Second Lieutenant Jim H. Kent, then well knowing that he did not have and not intending that he should have any account with the Progressive Industrial Bank.

Specification 2: Same form as Specification 1, but alleging check dated 17 February 1944, payable to the order of Terry & Juden, made and uttered to Terry & Juden Company, Limited, at New Orleans, Louisiana, thereby fraudulently obtaining $20.00 lawful money of the United States.

Specification 3: Same form as Specification 1, but alleging check dated 18 February 1944, payable to the order of Terry & Juden, in the amount of $25.75, made and uttered to Terry & Juden Company, Limited, at New Orleans, Louisiana, thereby fraudulently obtaining certain merchandise of the value of about $25.75.

Specification 4: Same form as Specification 1, but alleging check dated 18 February 1944, payable to the order of Mrs. Ruth Kelieher, in the amount of $50.00, made and uttered to Mrs. Ruth Lelieher at New Orleans, Louisiana, thereby fraudulently obtaining $30 lawful currency of United States, the balance in payment of room rent.

Specification 5: Same form as Specification 1, but alleging check dated 19 February 1944, payable to the order of Mrs. Ruth Kelieher, in the amount of $30.00, made and uttered to Mrs. Ruth Lelieher, at New Orleans, Louisiana, thereby attempting to fraudulently obtain $30 lawful currency of United States.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved of only so much of the sentence as provides for dismissal and total forfeitures and forwarded the record of trial for action pursuant to Article of War 48.

3. The competent evidence for the prosecution may be summarized as follows:

On or about 28 January 1944 the accused, a second lieutenant of Company K, 355th Infantry, stationed at Bivouac Area, Camp Polk, Louisiana, absented himself without leave from his organization as shown by a duly certified extract copy of the morning report of that organization (Ex. I) and the written admission of the accused (Ex. X). Accused's voluntary written confession discloses that on 19 February 1944 he was apprehended in New Orleans, Louisiana, and confined that same date at Camp Plache, Louisiana, as shown by the certified copy of the morning report of the Detachment of Prisoners at that station (Ex. II).

Sometime during the latter part of January 1944 accused registered at the St. Joseph Hotel, 725 St. Joseph Street, in New Orleans, Louisiana, owned and operated by Mrs. Ruth Kelieher. He remained as a guest in that hotel on a day to day rental basis until 19 February 1944. On 18 February 1944 the accused made a check naming therein Mrs. Ruth Kelieher as payee, in the sum of $50, dated 18 February 1944, and drawn on the Progressive Industrial Bank of New Orleans, Louisiana (Ex. III, IV), which he personally presented to Mrs. Kelieher as payment of $20, which she had previously loaned him and also of $30 room rent which was then due and owing (Pros. Ex. III, X). Mrs. Kelieher indorsed the check and presented it the next

morning at the drawee bank. This check was never cashed, and was given by Mrs. Kelieher to Captain Schank of the Military Police (Pros. Ex. III).

On 19 February 1944 accused wrote out in her presence and delivered to Velma Hammond (now Velma Pratt), the night clerk at the St. Joseph Hotel, his personal check in the sum of $30, dated 19 February 1944, payable to Mrs. Ruth Kelieher, and drawn on the Progressive Industrial Bank of New Orleans, Louisiana. Accused requested Miss Hammond, when he handed her this check, to ask Mrs. Kelieher to cash it, and deliver the money to him the following morning (Pros. Exs. III, VI). This check was delivered by Miss Hammond to Mrs. Kelieher but the latter advanced no money upon it.

On 1 February 1944 accused purchased merchandise in the sum of $28 from Terry & Juden, tailors in New Orleans, and paid for the merchandise with cash (R. 20). On 17 February 1944 the accused returned to the shop of Terry & Juden and presented his personal check in the sum of $20 payable to their order, drawn on the Progressive Industrial Bank of New Orleans, Louisiana. Upon accused's request, Mr. Terry gave the accused $20 in cash in exchange for the check (R. 20, Pros Ex. VIII).

On 18 February 1944 the accused again returned to the shop of Terry & Juden and purchased merchandise of a total value of $25.75, giving in exchange therefor his personal check dated 18 February 1944 in the same amount, drawn on the Progressive Industrial Bank of New Orleans, Louisiana (R. 21-22; Pros. Ex. IX). The merchandise was delivered to the accused at the time but was subsequently recovered and returned through the F.B.I. (R. 22).

On 17 February 1944 the accused purchased merchandise from Godchaux's Clothing Company in New Orleans, Louisiana, giving the salesman in payment therefor his check dated 17 February 1944 for $60.55, payable to the order of Godchaux's and drawn on the Progressive Industrial Bank of New Orleans (R. 17; Ex. VII). The check was presented at the bank on which it was drawn and payment was refused for the reason that the bank could find no account in the name of the accused. Accused did not call for, nor receive, the merchandise (R. 17-18).

Carlos A. Casler, cashier of the Progressive Industrial Bank testified that although a thorough search of the records of that bank was made such records failed to disclose that the accused had ever had an account with that bank or that accused had ever deposited funds therein (R. 23-26).

Shortly after the accused was apprehended on 19 February 1944 he voluntarily signed a written confession (Pros. Ex. X), wherein he

admitted that he was a second lieutenant and a member of Company K, 355th Infantry; that he absented himself without leave from his organization on or about 19 February 1944; that on 17, 18 and 19 February 1944 he made and uttered the checks alleged in the Specifications of Charge II and received therefor the cash or merchandise as averred. Lieutenant Sherman M. Kaplan and Sergeant James A. Filipkowski testified that this written confession was obtained without duress or promise of reward or immunity, and was voluntarily signed by the accused after he had been fully informed of his rights (R. 29).

At the request of the court the appointing authority detailed a Board of Medical Officers to inquire into the accused's sanity. This board convened on 27 March 1944 and found that the accused was "(1) So far free from medical defect, disease or derangement, so as to be able, concerning the particular act charged both to distinguish right from wrong and to adhere to the right and (2) sufficiently sane intelligently to conduct or cooperate in his defense". (R. 62, 72).

Major Wilson F. Smith, Medical Corps, presented to the court the findings of the board and, upon examination by the court, explained the proceedings of the board and the manner of its examination of the accused (R. 65-72).

5. The accused elected to remain silent. Mrs. Mose Kent of Phoenix, Arizona, testified that she was the mother of the accused and that the accused had lived with her all during his lifetime until he entered the Army. Accused's conduct during that time was no different from other children other than he did not display any interest in sports and was a bit nervous. During this period the accused suffered three severe blows on his head as a child and always exhibited fear of darkness (R. 57-59).

6. With reference to Charge I and its Specification it was clearly established by the morning reports and by the voluntary confession of the accused that he was absent without leave from his organization from 28 January 1944 until 19 February 1944.

With reference to the remaining Charges and Specifications the accused was charged with, and found guilty of, either passing or attempting to pass five worthless checks drawn on a bank in which he had never had an account. The evidence of the prosecution, plus the voluntary confession of the accused, clearly establish that the accused did in New Orleans, Louisiana on the dates specified make and utter the five checks, and did thereby, in one instance obtain $20 in cash, in another obtain merchandise of the value of $25.75, and, on two other occasions, attempt to obtain $30 in cash and merchandise valued at $60.55. In the remaining instance he gave his worthless check in payment

of a past due obligation. The intent to defraud was properly inferred from the acts of the accused. All of the essential elements of the offenses charged were clearly proven by competent evidence.

The giving of two of the worthless checks in an attempt to obtain merchandise and cash was charged under Article of War 95. These same offenses, together with the three other offenses of a like nature, were charged under Article of War 96.

The circumstances of this case are such as to fall squarely within the previous decision of The Judge Advocate General that the giving of worthless checks by an officer of the Army of the United States, whether in exchange for something of value, or in payment of a pre-existing debt, or even as a gift, may constitute such conduct as to bring discredit upon the service in violation of Article of War 96. This office has also held that such conduct may also be unbecoming an officer and a gentleman, in violation of Article of War 95. Therefore, accused's actions in this case constitute a violation of both Article of War 95 and Article of War 96. C.M. 249006, Vergara; C.M. 202027, McElroy; C.M. 220160, Faulkner; C.M. 202601, Specter.

The fact that the same offense is charged as a violation of both Articles of War is immaterial (C.M. 244212; par. 151, M.C.M.). The evidence is legally sufficient to support the findings of guilty of all of the Charges and the Specifications thereunder.

7. The records of the War Department show the accused to be 22 years of age. He was born in Wyoming, the son of an Army officer. He graduated from Southern High School, Salt Lake City (1940), attended college for two years and then enlisted in the service on 18 June 1942. He was commissioned a second lieutenant, Infantry, on 16 March 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

William A. Pounds, Judge Advocate.

Charles Stephen, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 22 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Jim H. Kent (0-1314498), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed, that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
1 - Record of trial.
2 - Dft. ltr. for sig. S/W.
3 - Form of Execution action.

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 342, 5 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGV
CM 253642

26 MAY 1944

UNITED STATES v. Second Lieutenant WALTER C. WEST (0-1059325), Coast Artillery Corps.	ANTIAIRCRAFT ARTILLERY TRAINING CENTER Trial by G.C.M., convened at Camp Stewart, Georgia, 27 and 28 March 1944. Dismissal, total forfeitures and confinement for six (6) years.

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification 1: (Finding of guilty disapproved by the reviewing authority).

Specification 2: In that Second Lieutenant Walter C. West, Antiaircraft Artillery Officers' Replacement Pool, Camp Davis, North Carolina, attached to 841st Antiaircraft Artillery Automatic Weapons Battalion, Camp Stewart, Georgia, did, without proper leave absent himself from his organization at Camp Stewart, Georgia, from on or about 6 February to on or about 12 February 1944.

CHARGE II: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Walter C. West, * * *, did, at Atlanta, Georgia, on or about 12 February 1944, with intent to deceive Henry Burrell and Willis M. Golden, of the Robert Fulton Hotel, Atlanta, Georgia, wrongfully and falsely register in the said Robert Fulton

Hotel and represent as his wife a woman who was not his wife and by means whereof did obtain a room at said hotel and occupy same with a woman not his wife.

Specification 2: (Finding of not guilty).

Specification 3: In that Second Lieutenant Walter C. West, * * *, being indebted to the Hotel DeSoto, J. B. Pound Hotel Co., Savannah, Georgia, in the sum of $96.23, which amount became due and payable on or about 2 February 1944, did, at Savannah, Georgia wrongfully and dishonorably fail and neglect to pay said debt.

Specification 4: In that Second Lieutenant Walter C. West, * * *, did, at Hinesville, Georgia, on or about 26 January 1944, with intent to defraud wrongfully and unlawfully make and utter to Harry's Military Store, Hinesville, Georgia, a certain check in words and figures as follows, to wit;

"Walter C. West No. 14

Chicago, Ill. 26 Jan. 1944

Pay
to the
order of Harry's Military Store $15.00

Fifteen and No/100 Dollars
To
The First National Bank F
of Chicago Walter C. West
Chicago, Ill. 01059325"

and by means thereof, did fraudulently obtain from Harry's Military Store, cash and merchandise of the value of $15.00 he, the said Second Lieutenant Walter C. West, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Chicago, Chicago, Illinois, for the payment of said check.

Specification 5: (Finding of guilty disapproved by the reviewing authority).

Specification 6: Same form as Specification 4, but alleging check dated 29 January 1944, payable to the order of Harry's Military Store, made and uttered to Harry's Military Store, Hinesville, Georgia, and fraudulently obtaining thereby $25 in cash and merchandise.

Specification 7: (Finding of guilty disapproved by the reviewing authority).

Specification 8: Same form as Specification 4, but alleging check dated 1 February 1944, payable to the order of cash, made and uttered to Hotel DeSoto, J. B. Pound Co., Savannah, Georgia, and fraudulently obtaining thereby $10 in cash.

CHARGE III: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: In that Second Lieutenant Walter C. West, * * *, did, at Atlanta, Georgia, on or about 12 February 1944 with intent to deceive First Lieutenant Dexter E. Larson of the 4478 S.C.U., Military Police Detachment, Fort McPherson, Georgia, who was then in the execution of his office, state to the said First Lieutenant Dexter E. Larson that he was on a fifteen day leave, authorized by Special Orders No. 46, Paragraph 6, Headquarters, Camp Stewart, Georgia, which said statement was known by said Second Lieutenant Walter C. West to be untrue.

ADDITIONAL CHARGE:. Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Walter C. West, * * *, did, at Savannah, Georgia, on or about 5 February 1944, with intent to defraud, wrongfully and unlawfully make and utter to Western Auto Stores, a certain check in words and figures as follows, to wit:

"Walter C. West No. 38

Chicago, Ill. 6 Feb 1944

Pay to the order of ----Cash--------$15.00

Fifteen and 00/100----------Dollars

To
The First National Bank
of Chicago
Chicago, Ill.

/s/ Walter C. West
01059325"

and by means thereof, did fraudulently obtain from Western Auto Stores, cash to the value of $15.00, he, the said Second Lieutenant Walter C. West, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank of Chicago, Chicago, Illinois, for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check dated 7 February 1944, payable to the order of cash, made and uttered to Western Auto Stores, Savannah, Georgia, and fraudulently obtaining thereby $10 in cash.

Specification 3: Same form as Specification 1, but alleging check dated 8 February 1944, payable to the order of Western Auto Store, made and uttered to Western Auto Stores, Savannah, Georgia, and fraudulently obtaining thereby $20 in cash.

Specification 4: Same form as Specification 1, but alleging check dated 5 February 1944, payable to the order of Western Auto Stores, made and uttered to Western Auto Stores, Savannah, Georgia, and fraudulently obtaining thereby $15 in cash.

Specification 5: (Finding of guilty disapproved by the reviewing authority).

Specification 6: (Finding of guilty disapproved by the reviewing authority).

He pleaded not guilty to all Charges and Specifications. He was found guilty of all Specifications and Charges, except Specification 2, Charge II, and Specifications 1 and 2 of Charge III, of which he was found not guilty, and of Specification 3, Charge III he was found guilty, except the words "authorized by Special Orders No. 46, Paragraph 6, Headquarters, Camp Stewart, Georgia", of the excepted words, not guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six years. The reviewing authority disapproved the findings of guilty of Specification 1 of Charge I, Specifications 5 and 7 of Charge II, and Specifications 5 and 6 of the Additional Charge, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence pertaining to the Specifications of which accused was found not guilty, and the Specifications disapproved by the reviewing

authority will be discussed only to the extent that such evidence may be relevant to the Specifications of which the findings were approved.

The evidence for the prosecution was substantially as follows:

a. Specification 2, Charge I.

Technical Sergeant Dominick E. Corazzi testified he was personnel sergeant for the 841st Antiaircraft Artillery Automatic Weapons Battalion, Camp Stewart, Georgia. The accused was attached unassigned to Headquarters Battery of that battalion. Upon being shown a carbon copy of the morning report of the above-mentioned battery Sergeant Corazzi said the report was prepared by the First Sergeant who was at the time of trial sick in the hospital, and signed by Captain James E. Horton, who was on leave. In the course of his duties he checked each battery's incoming report as it came through headquarters. The defense objected to the admission of this report in evidence on the ground that Sergeant Corazzi was not the custodian thereof. The president overruled the objection and the morning report showing accused "Fr Dy to AWOL 31 Jan 44 incl Fr AWOL to Sick Hosp 'NLD AW 107' 2 Feb 44 to 5 Feb 44 incl; Fr Sick Hosp (NLD) to AWOL 6 Feb 44 to 10 Feb incl" was received in evidence (R. 9, 10; Pros. Ex. 2). Defense counsel called to the attention of the court that certain entries on this report were hearsay, but the law member ruled that such would not "make it ineligible as evidence" (R. 10).

Captain Milo S. Gardner testified he was Adjutant of the Officers Training Detachment, Camp Stewart, Georgia, from the latter part of January through February 1944. The accused was on special duty with this organization during February 1944, assigned to Battery C, Provisional Officers Training Detachment, which battery was commanded by Captain William C. Loder. The Provisional Officers Training Detachment kept no morning reports, but merely notified the organization to which each officer was assigned or attached and that organization entered the information on its morning report. After receiving information from the Station Hospital, Hunter Field, that accused had been let out of the hospital 6 February, this fact was reported to the 841st Antiaircraft Artillery Automatic Weapons Battalion and accused was carried as AWOL from that date. He does not know the accused personally (R. 46-51).

Without objection a report from the Station Hospital, Hunter Field, Georgia, dated 27 March 1944, addressed to the Commanding Officer, Headquarters First Provisional Officers Training Battalion, Camp Stewart, Georgia, showing that accused was admitted to the hospital on 2 February and discharged 6 February 1944 was received in evidence (R. 10; Pros. Ex. 3).

Without objection a properly authenticated extract copy of the morning report of the Detachment of Prisoners, Fort McPherson, Georgia, showing accused's confinement in that stockade on 12 February 1944, and his release on 16 February 1944 was received in evidence (R. 11; Pros. Ex. 4).

Captain Alexander S. Pierce, Assistant Adjutant, Camp Stewart, Georgia, testified that his records contain information as to leaves granted all officers at Camp Stewart, Georgia, and that he had examined his records and found that no leave had been granted to accused during February 1944 (R. 44).

First Lieutenant Dexter E. Larson, Military Police Detachment, Fort McPherson, Georgia, testified by deposition that he had arrested accused in a hotel in Atlanta, Georgia, on 12 February 1944 because he was registered in a room with a woman not his wife after having obtained the room upon representations that the woman was his wife. At the time of his arrest accused told Lieutenant Larson that he was on a 15-day leave which had begun the previous day (R. 12; Pros. Ex. 8).

Warrant Officer Solomon I. Bard, personnel adjutant for the 841st, further identified the morning report received in evidence as "P2" as being the morning report of the Headquarters and Headquarters Battery, 841st Antiaircraft Artillery Automatic Weapons Battalion (R. 57).

The morning report was improperly received in evidence. The testimony of Captain Gardner clearly shows that the entries thereon were based on information furnished accused's organization by Captain Gardner. The entries were therefore hearsay because they recite events which transpired at a station other than the station where the entry was made. However, the record discloses that on 12 February 1944 accused was apprehended in the Robert Fulton Hotel in Atlanta, Georgia. At this time he justified his presence there, away from his organization, by stating that he was on a 15-day leave which had begun the previous day. Thus, by his own declaration he was not then on a duty status. The fact that accused had no authorized leave of absence during February 1944 was shown by the testimony of Captain Pierce, the Assistant Adjutant of Camp Stewart, Georgia. The foregoing plus the evidence that he was discharged from the Station Hospital, Hunter Field, Georgia, on 6 February 1944 and failed to return to his own organization, is sufficient to establish accused's absence without leave as charged in Specification 2, Charge I.

b. Specification 1, Charge II, and Specification 3, Charge III.

Henry Burrell, cashier, and Willis M. Golden, night manager, Robert Fulton Hotel, Atlanta, Georgia, testified by deposition that accused approached Burrell about 11:30 on the night of 17 February relative

to obtaining rooms in the hotel. Later that night accused appeared with a sailor and two WAVES whom he represented to be his brother and their respective wives. Accused signed registration cards for himself and the sailor to read "Lt. Paul West and wife" and "Lt. Walter West and wife". It was only upon such representations that the rooms were rented. All four went to one room and never used the second room. Mr. Golden saw all four in one room when he went there to get accused to make corrections in a check he had given for the rooms. Golden became suspicious of the accused and called the military police. Burrell testified that the accused was intoxicated at the time he registered for the room but not boisterous (R. 11, 12; Pros. Exs. 5, 7).

First Lieutenant Dexter E. Larson, Military Police Detachment, Fort McPherson, Georgia, testified by deposition that in answer to a call he went to the Robert Fulton Hotel on 12 February 1944 and there found accused, a sailor and two WAVES in a room in which accused was registered. Accused told witness he was on a 15-day leave, and had just left the day before. Accused had no orders but stated they were in his bag at the Tremont Hotel. Upon his stating he was not married to the WAVE accused was placed under arrest by Lieutenant Larson and taken to the Atlanta Military Police Headquarters (R. 12; Pros. Ex. 8). In connection with accused's statement concerning his leave it should be noted that Captain Pierce testified that accused had not been granted any leave during the month of February 1944 (p. 6, supra).

c. Specifications 3 and 8, Charge II.

E. T. Courtney testified that he was assistant manager of the DeSoto Hotel, Savannah, Georgia. He identified the original bill in the amount of $96.23 owed by accused to the hotel covering room, long distance telephone and valet charges from 29 January 1944 through 2 February 1944. This bill has not been paid, and when a search was made for accused at the hotel it was found he had left the hotel without checking out. A duplicate of this bill, together with six memorandums evidencing the long distance calls were received in evidence without objection (R. 13, 17; Pros. Exs. 10, 12-18).

Without objection the original registration card of the DeSoto Hotel on which was written "Walter C. West, 2nd Lt. C.A.C., 1st Prov. Off. Tng Bn, Camp Stewart" was received in evidence (R. 14; Pros. Ex. 10). Mr. Courtney testified he did not see accused sign this registration card (R. 16).

Major George H. May, Jr. testified that he went to the DeSoto

Hotel during the afternoon of 29 January and obtained a key to the room he had occupied the night before with a Mr. Dobson. At the door there were two lieutenants going into the same room, and it developed that Major May's friend had released the room. One of the lieutenants told Major May he had another place he could stay and the major could occupy the room with another lieutenant with whom he had obtained the room. This other lieutenant was the accused, who came to the room about 2 o'clock on the morning of 30 January 1944. Witness and accused had a couple of drinks together and chatted about things in general. As the accused was not checking out the next morning witness paid accused his share of the cost of the room (R. 36-39).

There was received in evidence a letter received by the hotel purportedly from accused which letter was in handwriting and is as follows:

"Camp Stewart, Georgia

March 25, 1944

De Soto Hotel
Savannah
Georgia

Dear Sirs:

Enclosed please find a check in the amount of $25.00 to apply against my account.

I assure you this account will be cleared up as soon as I can possibly same.

I also regret this has happened as it has.

Sincerely

/s/ Walter C. West
2nd Lieut C.A.C."

It was also shown by the testimony of Mr. Courtney that a check in the amount of $10 drawn on the First National Bank of Chicago,

dated 1 February and signed Walter C. West was deposited in its bank after being endorsed by the hotel. This check was returned because of insufficient funds. It was sent through the second time and again returned for the above reason. He did not see this check until it was returned the first time. This check was received in evidence over the objection of defense based on the ground that the person who received the check should identify it (R. 15; Pros. Ex. 11).

Clarence W. Weldon, Assistant Vice-President, First National Bank, Chicago, Illinois, identified a photograph attached to his deposition as being Walter C. West whom he met on 15 December 1943. At that time accused, Second Lieutenant Walter C. West, opened an account with the bank. On 26, 27 and 29 January 1944 the accused's balance with the bank was $2.15. Bank records indicate that on 2 February 1944 a check dated 29 January 1944 drawn by accused on the bank was not paid because of insufficient funds, and on 3 February a check drawn on the bank for $15 was not paid for the same reason. The particular check described in Specification 8, Charge II, was presented to the bank on 9 February 1944, and was not paid for the reason that there were insufficient funds for its payment (Pros. Ex. 20).

No evidence directly proving that accused signed the registration card or the check deposited by the hotel was presented by the prosecution. However, during the course of the trial other checks issued by accused to Harry's Military Stores, and Western Auto Stores were received in evidence. Mr. I. H. Pearlman, operating Harry's Military Storestestified that he knew absolutely that accused gave these checks as he had handled his checks before (R. 23) and the clear inference from the testimony of Miss Bertha Jones, cashier of the Western Auto Stores is that she saw the accused write the check given to the Western Auto Stores received in evidence as Prosecution's Exhibit 27 (R. 35). The court therefore had before it known handwriting of the accused as a basis for determining the signature of the accused appearing on the check and on the registration card. Additional evidence that accused was a guest in the hotel is furnished by the testimony of Major May who occupied a room with the accused on the night of 31 January 1944 and paid accused his share of the cost of the room for that night. The handwritten letter received by the hotel purportedly from the accused also acknowledged an indebtedness to the hotel.

In connection with the check deposited by the hotel and not paid because of insufficient funds it is to be noted that Mr. Weldon, Assistant Vice-President of the bank on which the check dated 1 February

1944 was drawn, does not testify as to the status of accused's account on 1 February 1944. He did testify that the accused's balance on 27, 28 and 29 January 1944 was $2.15, that several other checks drawn on accused's account were not paid because of insufficient funds on 2 and 3 of February 1944, and that the check in question was not paid when it reached his bank on 9 February 1944, because of insufficient funds. A member of the military establishment is under a particular duty not to issue a check without maintaining a balance sufficient to meet it. Proof that a check given for value by such person is returned because of insufficient funds places on him the burden of showing that his action was the result of an honest mistake, and not due to his own carelessness or neglect (CM 249232, Norren). No such showing was attempted by the accused in this case. Also the failure to prove that the check was originally issued to the hotel is not fatal. The gravamen of the offense with which accused was charged in Specification 8, Charge II lies in the making, uttering and cashing of the check with fraudulent intent (CM 226219, Rickards, 15 B.R. 27). The Board of Review is, therefore, of the opinion that the evidence is legally sufficient to sustain the findings of guilty as to Specifications 3 and 8 of Charge II.

d. Specifications 4 and 6, Charge II.

I. H. Pearlman, operating Harry's Military Stores in Hinesville, Georgia, testified that he received two checks from accused in payment for merchandise or cash. Both checks were drawn on the First National Bank of Chicago, one dated 26 January 1944 in the amount of $15, and one dated 29 January 1944 in the amount of $25, and both were signed by the accused. Witness was positive that accused gave him these checks, and he had handled checks for accused previously. Pearlman deposited these checks in the Hinesville Bank, and they were returned. These checks were later returned with two slips attached from First National Bank of Chicago indicating insufficient funds (R. 20-23). The two checks were received in evidence as Prosecution's Exhibits 21 and 22 (R. 22).

Clarence W. Weldon, Assistant Vice-President, First National Bank of Chicago, testified by deposition that accused's balance in the bank was $2.15 on 26 January and 29 January 1944, and that the two above-mentioned checks were not paid when presented to the bank on 2 and 3 February 1944 respectively because of insufficient funds in accused's account (R. 20; Pros. Ex. 20).

e. Specifications 1, 2, 3 and 4, Additional Charge.

Miss Bertha Corine Jones testified that as cashier for the Western Auto Stores, Savannah, Georgia, she cashed four checks for

accused. These checks received in evidence as Prosecution's Exhibits 27, 28, 29 and 30 are drawn on the First National Bank of Chicago, Chicago, Illinois, dated 5, 6 (2 checks), and 7 February 1944 respectively, and in the amounts of $15, $20, $15 and $10 respectively. As to the checks introduced as Prosecution's Exhibits 27, 28 and 29 Miss Jones testified that they were "returned", and the check introduced as Prosecution's Exhibit 30 was "Returned * * * account-insufficient funds" (R. 33, 34). The stamps on the back of each of the above checks show that these checks went through bank channels to the First National Bank of Chicago, and that one of the checks reached the bank on 9 February and three checks reached the bank on 11 February 1944.

In his deposition heretofore mentioned Clarence W. Weldon, Assistant Vice-President of the First National Bank of Chicago, testified that between the dates 2 February and 25 February 1944 bank records indicate that ten checks in the amounts of $15 each, drawn by Walter C. West were not paid because of insufficient funds, and between 3 February and 14 February 1944 five checks in the amount of $20 signed by Walter C. West were not paid for the same reason.

The Board is of the opinion that the court was justified in concluding that the accused did not have on deposit sufficient funds in the First National Bank of Chicago within the time that the checks described in the Specifications under the Additional Charge could reasonably be expected to reach the bank in due course. The statements made in discussing Specification 8 of Charge II concerning the duty of military personnel not to issue checks without maintaining a sufficient balance to insure its payment is equally applicable to the four Specifications now being discussed.

4. The defense offered no evidence, and the accused after having his rights as a witness explained to him elected to remain silent (R. 32).

5. In support of Specification 2, Charge I, the evidence shows that accused was absent without leave from his organization at Camp Stewart, Georgia from on or about 6 February 1944 to on or about 12 February 1944.

In support of Specifications 3 and 8, Charge II, the evidence shows that accused was a registered guest at the DeSoto Hotel, Savannah, Georgia, from 29 January through 2 February, and that he left this hotel without checking out, leaving unpaid his bill of $96.23. The hotel deposited in due course of business a check for $10 given by the accused while he was a guest, which was not paid by the drawee bank because of insufficient funds.

In support of Specification 1, Charge II, and Specification 3, Charge III, the evidence shows that on the night of 11-12 February 1944,

accused represented to the cashier and to the night manager of the Robert Fulton Hotel, Atlanta, Georgia, that a sailor and two WAVES accompanying him were his brother and their respective wives, and thereby obtained rooms in the hotel. When accused was arrested in the room by military police he stated to First Lieutenant Dexter E. Larson, M.P., that he was on a 15-day leave. Accused had not been granted leave, and by his own admission to Lieutenant Larson was not married to either of the WAVES who was found in the room with him.

In support of Specifications 4 and 6, Charge II, the evidence shows that on 26 and 29 January 1944 accused gave two checks to Harry's Military Stores, Hinesville, Georgia, in the amounts of $15 and $25 respectively. Both checks were dishonored by the drawee bank because of insufficient funds.

In support of Specifications 1, 2, 3, 4, Additional Charge, the evidence shows that between 5 and 7 February 1944 accused gave to Western Auto Stores, Savannah, Georgia, four checks in amounts of $15 (two checks), $20 and $10, and these checks likewise were dishonored by the drawee bank because of insufficient funds.

6. War Department records show that accused is 29 years of age. He graduated from high school (name not shown) and attended the International Accountants Society School for three years. He entered the military service 10 April 1942 and after completing Antiaircraft Artillery Officer Candidate School, Camp Davis, North Carolina, was commissioned second lieutenant, Army of the United States, 26 August 1943.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority, legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 61 or 96.

Thomas H. Taffy, Judge Advocate.

Herbert W. Kuchner, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 253642

1st Ind.

War Department, J.A.G.O., 12 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Walter C. West (0-1059325), Coast Artillery Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority, legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures and confinement imposed be remitted and that the sentence as thus modified be carried into execution.

3. Consideration has been given to the attached letter from accused requesting that he be given an opportunity to remain in military service regardless of rank, to the first indorsement by Major Deuward S. Waldrep, Police and Prison Officer, forwarding the accused's letter, and to certificate of the Custodian of Prisoners' Personal Funds that accused has paid the indebtedness and dishonored checks constituting the basis of the charges against him.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls.
Incl.1-Record of trial.
Incl.2-Ltr. fr. accused 10 May 1944.
Incl.3-Dft. ltr. for sig. S/W.
Incl.4-Form of action.

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 390, 18 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 253660

5 MAY 1944

UNITED STATES	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	)	
Second Lieutenant ROBERT J. BROWN (O-751252), Air Corps.	)	Trial by G.C.M., convened at Chico Army Air Field, Chico, California, 2 March 1944. Dismissal, total forfeitures and confinement for five years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant Robert J. Brown, Air Corps, Headquarters and Headquarters Squadron 97th Basic Flying Training Group, AAF Pilot School (Basic) Chico Army Air Field, Chico, California, was, at Chico, California, on or about 20 January 1944, drunk and disorderly while in uniform, in a public place, to wit: Silver Room under such circumstances as to bring discredit upon the military service.

Specification 2: In that 2nd Lieutenant Robert J. Brown, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, did, in conjunction with 2nd Lieutenant George B. Stevens, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, at AAF Pilot School (Basic) Chico Army Air Field, Chico, California, on or about 20 January 1944, wrongfully take and use, without authority, a certain aircraft, to wit: a BT 13 A airplane, Serial No. 41-22840, the property of the United States, of a value of more than $50.00.

CHARGE II: Violation of the 69th Article of War.

(32)

Specification: In that 2nd Lieutenant Robert J. Brown, Air Corps, Headquarters and Headquarters Squadron 97th Basic Flying Training Group, having been duly placed in arrest at the Station Hospital, on or about 20 January 1944, did, at AAF Pilot School (Basic) Chico Army Air Field, Chico, California, on or about 20 January 1944, break his said arrest before he was set at liberty by proper authority.

ADDITIONAL CHARGE I: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant Robert J. Brown, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, did, at or near AAF Pilot School (Basic) Chico Army Air Field, Chico, California, on or about 20 January 1944, in conjunction with 2nd Lieutenant George B. Stevens, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, wrongfully and unlawfully operate a certain Army Aircraft, to wit: a BT 13-A airplane, Serial No. 41-22840, while he was intoxicated.

Specification 2: In that 2nd Lieutenant Robert J. Brown, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, AAF Pilot School (Basic) Chico Army Air Field, Chico, California, did, in conjunction with 2nd Lieutenant George B. Stevens, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, at or near Rose Creek, Nevada, on or about 20 January 1944, wrongfully violate Paragraph 16 of Army Air Forces Regulations 60-16 by flying a BT-13-A Army Aircraft at an altitude of less than 75 feet striking an electric transmission line causing damage to said Aircraft and cutting the said transmission line.

Specification 3: In that 2nd Lieutenant Robert J. Brown, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, AAF Pilot School (Basic) Chico Army Air Field, Chico, California, did, in conjuction with 2nd Lieutenant George B. Stevens, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, at or near a point 12 miles east of Winnemucca, Nevada, on or about 20 January 1944, wrongfully violate Paragraph 16 of Army Air Forces Regulations 60-16 by operating a BT-13-A Army Aircraft in a careless and reckless manner, at an altitude less than 50 feet above U.S. Highway No. 40 so as to endanger vehicles which were traveling on said highway at said time and place.

Specification 4: (Finding of not guilty).

ADDITIONAL CHARGE II: Violation of the 69th Article of War.

Specification: In that 2nd Lieutenant Robert J. Brown, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, having been duly placed in arrest at AAF Pilot School (Basic) Chico Army Air Field, Chico, California, on or about 20 January 1944, did, at AAF Pilot School (Basic) Chico Army Air Field, Chico, California, on or about 29 January 1944, break his said arrest before he was set at liberty by proper authority.

He pleaded guilty to Specification 1 of Charge I and to Charge I with respect to such Specification, and guilty to Additional Charge II and its Specification; not guilty to Specification 2 of Charge I and to Charge I with respect to such Specification, not guilty to Charge II and its Specification and not guilty to Additional Charge I and all its Specifications. He was found not guilty of Specification 4 of Additional Charge I, but guilty of Specifications 1,2, and 3 of such Charge and guilty of the Charge, and guilty of all other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for five years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

The offenses will be narrated in the order in which they were committed, rather than as they appear on the Charge Sheets. Evidence in behalf of accused will be set forth, where offered, in connection with the particular offense charged, as will also be the pertinent portions of a statement made by accused to Major Henry Howard, II, Air Corps, who was the investigating officer in this case. It clearly appears from Major Howard's testimony and from the preamble of the statement itself that the statement was made voluntarily by accused, and that he was fully apprised of his rights to speak or remain silent (R. 75,77-79; Pros. Ex. Q). Charged with identical offenses as was accused, but tried at a later date, Second Lieutenant George B. Stevens, Air Corps, testified as a witness for accused. It likewise clearly appears from the record that his rights under Article of War 24 were fully and correctly explained to him by the law member of the court before witness testified (R. 105).

a. Specification 1, Charge I.

Accused pleaded guilty to the offense of being drunk and disorderly in a public place while in uniform, and under such circumstances as to bring discredit upon the military service. No evidence was offered by the

prosecution or by defense upon this Specification.

b. Specification, Charge II.

Testimony concerning accused's breach of arrest from the Station Hospital at Chico Army Air Field, on the morning of 20 January 1944 was offered by Lieutenant Colonel Charles W. Thaxton, Air Corps, Captain Louis G. Booth, Medical Corps, and First Lieutenant Russell S. Broad, Air Corps, all of that station. Lieutenant Broad, the officer of the day, went to the dispensary at about 0115 that morning at the telephone request of the post Provost Marshal, "Major Dimes". Arrriving there he found Major Dimes, some enlisted military policemen, accused, Lieutenant Stevens, and Captain Booth, who was medical officer of the day. Captain Booth was giving accused sobriety tests (R. 17-19,22-23). Lieutenant Broad stated that neither Stevens nor accused was in "shape to * * * carry on * * * an intelligent conversation". Captain Booth testified that accused was unable to perform most of the routine sobriety tests, that he smelled of alcohol, that his eyes were blurred, that he was "entirely uncooperative, boisterous, noisy, argumentative (and) disrespectful", and, in summary that he was "very drunk". Witness was of the opinion, however, that both accused and Stevens "probably" knew what they were doing, but did not appreciate the consequences of their acts (R. 20,23,24,28,29). He estimated that it would have taken accused from four to six hours from that time to regain his sobriety (R. 24,25,27).

Meanwhile, Lieutenant Colonel Thaxton had arrived. He testified that he was the "second ranking officer of the field". The senior officer, "Colonel Hoyle", was at his home in Chico, but no orders had ever been issued relieving him of his command (R. 21, 30-32, 35). Colonel Thaxton asked accused whether he would go to his quarters and remain there until he was sober, and accused said he would not do so (R. 32). Colonel Thaxton thereupon ordered accused and Stevens to go with the officer of the day to a designated room in the hospital, there to remain under guard until they sobered up, and to report to him the first thing in the morning. He then turned them over to Lieutenant Broad, who, with Captain Booth, took them to Ward 1. Lieutenant Broad testified that in his opinion accused and Stevens understood at that time that they were "under arrest" (R. 18,20,25, 32).

Accused and Stevens requested and received permission to go to the latrine. They were quite noisy when they entered it, but became silent, and noticing this, Captain Booth and Lieutenant Broad tried the door and found it locked from the inside. They ran around to the side porch of the hospital, where they found the screen unlatched and lifted out, the window open, and the room empty. This was at about 0200. A "roving patrol" made a "strict search" of the post, but did not find accused or Stevens (R. 18, 19,21,23,25,26).

Colonel Hoyle was notified by telephone that accused had been placed in arrest at some unspecified time after Colonel Thaxton's order (R. 21,35).

In his statement to Major Howard accused admitted that he "escaped from the hospital", but stated that he did not remember at any time being informed that he was to consider himself under arrest (Pros. Ex. Q).

b. Evidence for defense, Specification, Charge II.

Accused stated as a witness that he did not remember Colonel Thaxton's ordering him into arrest, but only that "he said we were to sleep in the hospital that night and I think he would see us in the morning - something to that effect" (R. 84). He remembered being in the latrine, but did not recall locking the door (R. 91). He could not remember going to the ward, nor undergoing the sobriety tests given by Captain Booth (R. 90).

c. Specification 2, Charge I, and Specification 1, Additional Charge I.

That accused, acting in conjunction with Lieutenant Stevens, wrongfully took and used a military airplane without authority, and that he operated it while intoxicated, was proved by the testimony of Colonel Thaxton, Captain Booth, Lieutenant Broad, accused's admissions to Major Howard, and testimony of Lieutenant Stevens.

After the search for accused and Lieutenant Stevens had failed to find them, Captain Booth and Lieutenant Broad were talking in the hospital dispensary. At about 0230 they heard the noise of an airplane leaving the airfield (R. 19,26). Captain Booth ran outside and saw it leave (R. 27). Colonel Thaxton testified that he checked the records to determine whether a clearance had been issued for an airplane to leave the field, as required by paragraph 24, Army Air Forces Regulation 60-16, and learned that none had been issued (R. 31,33,35; Pros. Ex. A). Technical Sergeant Randell D. Butts, 79th Basic Flying Training Squadron, Chico Army Air Field, testified that as assistant line chief at the line maintenance hangar, he checked the "line" for missing aircraft that morning, and found "Number 412", bearing serial number 41-22840, missing. All other airplanes at the field had ceased flying at 2100 on the previous day (R. 36,37).

Captain William V. Cowan, Air Corps, Director of Aircraft Maintenance at Chico Army Air Field, testified that plane number "M-412", bearing serial number 41-22840, is a BT-13 type plane, belongs to the United States Army, and costs $25,700 (R.60).

Accused, in his statement to Major Howard, admitted that after he and Lieutenant Stevens escaped from the hospital, "we went down to the line and, without authorization, took and used a basic trainer" (Pros. Ex. Q). Captain Booth testified that flying in an airplane at a high altitude would tend to

enhance drunkenness, due to the decreased oxygen supply (R. 24,27).

d. Evidence for defense, Specification 2, Charge I, and Specification 1, Additional Charge I.

Lieutenant Stevens testified that he and accused got into the plane on the morning of 20 January and that he (witness) was at the controls (R. 106). Accused stated that he did not remember how he and Lieutenant Stevens reached the field, nor who suggested that they go there (R. 84). He admitted, however, that he and Stevens knew what they were going to do when they went to the line, and remembered obtaining his own parachute and getting in the plane, Stevens in the front cockpit and himself in the rear (R. 84,85,92). Speaking of Lieutenant Stevens, accused said, "I wouldn't say it was all his idea" (R. 88).

e. Specification 2, Additional Charge I.

Accused was charged with flying the plane, in conjunction with Stevens, at an altitude of less than 75 feet, striking and cutting an electric transmission line, and causing damage to the aircraft, all in violation of paragraph 16 of Army Air Forces Regulation 60-16. The mentioned regulation, introduced as Prosecution's Exhibit A, forbids operation of aircraft at less than 1000 feet above any obstruction to flight except when landing or taking off (R. 31).

Wallace Kennedy, a civilian telegraph operator for the Southern Pacific Railroad Company at Rose Creek, Nevada, was on duty in his station from 0001 to 0800 of 20 January. About 150 feet east of the station is a bridge crossing the railroad tracks at a height of about 30 feet, and at an approximately equal height above the bridge are the railroad's block signal high tension wires. At about 0450 witness heard, but did not see, an airplane pass the station, headed in an easterly direction. It "sounded so low I thought it was coming through the depot", and as though it were flying at an altitude of 75 or 100 feet. There was no indication that it was in any mechanical difficulty. It did not sound like the small, privately owned ships stationed at a nearby civilian field 13 miles away at Winnemucca, Nevada, and was the only airplane heard by Kennedy during his duty hours (R. 38-40). The instant after the ship passed east of the station, there was a bright flash of light, and all the electric current in the station, including the signal system, went off (R. 38).

Leland Morby, a civilian signal maintenance man for the railroad company, testified that he was called to Rose Creek to repair the signal system. When he arrived at 0615 on 20 January he found two 11,000-volt line wires, which crossed the bridge on the same cross-arm at a height of 30 feet, broken. Four similar wires on a cross-arm 5 feet below them were undamaged. The broken ends of the two wires were bent into the shape of a U, from which witness deduced that they were broken by an object moving at a high rate of speed, and that the object had been traveling in the same direction as the

highway, that is to say, east or west (R. 41,42).

Captain William V. Cowan, Air Corps, the Director of Aircraft Maintenance at Chico Army Air Field, with 22 months' experience in airplane maintenance, testified that on the afternoon of 20 January he had examined the plane flown by accused and Lieutenant Stevens after it had been landed by them. He stated that the "Form 1" in the plane showed it to have been in good mechanical condition prior to that date. He found that the vertical stabilizer on the left wing had been dented at the tip, that the antenna mast was bent to the right at the point where it was attached to the fuselage, that the "left brake hose on the oleo strut was cut into the fabric", that the "free air temperature bulb and bracket (were) sheared off", and that both propeller blades were nicked at several spots on the leading edge of the blades. Photographs admitted to be fair reproductions of this damage were introduced by the prosecution (R. 60-64; Pros. Exs. K,L,M,N,O and P). The damage to the propeller, the wing stabilizer, and the antenna mast was also observed by Constable Andrew D. Bruce, of Battle Mountain, Nevada, where the plane later landed (R. 55).

Captain Cowan also testified that he had computed the distance and flown from Chico Army Air Field to Rose Creek, and stated that a BT-13 type plane would fly the 220 miles in approximately 1 hour and 50 minutes, so that if it left Chico at 0230 it ought to arrive at Rose Creek about 0420 (R. 65,66).

In his statement to Major Howard, accused admitted that "at some point during that flight, we were flying pretty low looking for a place to land, and were conscious of encountering an obstruction. I do not know where this occurred" (Pros. Ex. Q).

f. Evidence for defense, Specification 2, Additional Charge I.

Accused stated that he recalled when the airplane flew through the wires, and having seen a telephone pole flash by, but denied being in control of the ship at that time. He did not know what their altitude was at the time. Lieutenant Stevens "pulled up" immediately when they struck the wires (R. 85,93,95,96).

Lieutenant Stevens testified that he recalled striking the wires at Rose Creek, and that he was at the controls of the ship at that time (R. 106,108).

g. Specification 3, Additional Charge I.

A map introduced as Prosecution's Exhibit D shows that United States Highway 40 runs in a generally northeasterly direction from Rose Creek to a point beyond the town of Winnemucca, Nevada (which is about 10 miles

from Rose Creek) whence the highway curves and runs southeasterly through the town of Battle Mountain (R. 39,40,66).

Lester W. Ford, a bus driver for the Burlington Transportation Company, was driving a bus westward on Highway 40 between Battle Mountain and Winnemucca on the morning of 20 January. At 0445, at a point 14 miles east of Winnemucca, an airplane suddenly loomed up about 75 yards directly in front of him. It was going eastward, apparently following the highway. The plane flashed its landing light directly in Ford's face, and cleared the top of the bus by about 6 feet, the headlights of the bus reflecting on it so clearly that he observed that its landing gear was down, and he "could determine its full form". It was a single-motored monoplane, similar in appearance to a photograph of plane number 41-22840, which was exhibited to witness and introduced in evidence. The motor was working perfectly. As the plane passed over the bus, its motor was accelerated, causing a tremendous vibration and shaking of the bus (R. 45,46; Pros. Ex.F).

Cleo G. Yohey, also a bus driver for the Burlington Transportation Company, had left Battle Mountain en route to Winnemucca over the same highway, about 8 or 10 minutes after driver Ford. He was approaching Golconda Summit, about 22 miles east of Winnemucca, about 0500, when a bright light was turned in his face. He perceived an airplane break over the summit of the hill about 75 or 100 yards ahead of his bus, at an altitude of "not more than 30 feet from the ground". The plane was losing altitude, and as it passed over the bus, flying east, it cleared the bus by "not more than 10 feet". It was the only plane he saw that morning, and was a low-winged, single-motored monoplane, of the same type as number 41-22840, a picture of which was exhibited to witness (R. 47-49; Pros. Ex. F).

Stipulations concerning testimony which would have been given by Frank D. Fenton and E. I. Merrill, were entered into by counsel (R. 49,50). Fenton, another bus driver for the Burlington Transportation Company, was driving up Golconda Hill between 0445 and 0500, when a high-powered, single-motored plane came diving at his bus at a high rate of speed. About 30 or 40 feet in front of him a bright light came on, and as the plane pulled out of its dive some part of it touched the top of the bus in the rear left-hand side. Merrill, presumably an inspector for the bus company, made an examination of the top, and found "a smooch, apparently rubber, about three feet long, on the top of the bus at the left rear corner". There was no physical damage to the bus (R. 49,50).

The flight of the two aviators ended at Battle Mountain, Nevada. Details were supplied by Constable Bruce and S. S. Rounds, an oil dealer of that town. Bruce testified that a plane had "buzzed" the town three times, while Rounds stated that he heard it approaching the town from the west at 0510 and that it circled the town so much that he thought it was in trouble or lost, and so he went to the airport (R. 50-52; 53,56,57).

It landed at 0525, occupied by accused and Stevens, neither of whom was wearing flying clothes. Stevens, in the front cockpit, was piloting. He asked Rounds, "Where the hell are we at?", while Brown, in the rear, wanted to know if there was a hotel in town (R. 51,53,57,58).

While both accused and Stevens talked coherently and were able to walk properly, both "looked like they had been getting over a drunk" (R. 56,57). One of them said that they had had a map when they started, but had gotten into an argument and had thrown it away (R. 55). Accused said that they had "hit some wires down below here somewhere", to which Stevens replied that accused "wasn't supposed to tell that" (R. 56,57).

Captain Cowan testified that the distance from Rose Creek to the point 14 miles east of Winnemucca was 24 miles, and from Rose Creek to Battle Mountain was approximately 60 miles, and that a BT-13 passing Rose Creek at 0450 would arrive at those places at 0502 and 0520, respectively (R. 66,67).

In his statement to Major Howard, accused said that it was "impossible to state which of us may have been in actual control (of the plane) at any given time" and that they eventually landed the plane safely at Battle Mountain, Nevada (Pros. Ex. Q).

Colonel Thaxton testified that according to Army Air Forces Regulations the senior of two Air Corps flying officers is in command, and is responsible for actions of accompanying personnel inferior to him in rank, and "for any acts or omissions * * * which would endanger the aircraft or safety of persons in the airplane or of other private property". It is customary, however, for a junior in rank to be at the controls (R. 34-36). It was stipulated that accused outranked Lieutenant Stevens (R.59).

h. Evidence for defense, Specification 3, Additional Charge I.

Accused testified that they were flying "by contact" (which is defined by paragraph 38 of Army Air Force Regulations 60-16 to be flight using ground and water within gliding distance of the craft as a means of visual reference) and not by chart, and denied having seen or thrown away a map. He denied being in control of the ship when it "buzzed" the busses, did not remember hitting the top of the third bus, and did not look at the altimeter at those times (R. 85,86,93,96). He "may have dozed off", but was conscious most of the time of what was going on. He took over the controls only once, for a period of "not more than two minutes", when, shortly before they landed, the plane started to reel off to one side, and he "had to straighten it up". This was the only time he remonstrated with Stevens, telling him that he "had better get it down" (R. 94,95,97).

Lieutenant Stevens testified that he and accused agreed jointly upon following Highway 40, and that they were using it as a guide in looking

across the terrain for a place to land. They flew at an altitude of 100 or 150 feet, and though they flashed their lights on two busses, they did not dive at or touch either of them (R. 106-108, 111-113). Witness corroborated accused's version of the latter's taking the controls in the one instance, when witness fell asleep. They were then at an altitude of 2000 feet (R. 106,107,111).

i. Specification, Additional Charge II.

Accused pleaded guilty to this Charge and its Specification, and neither prosecution nor defense introduced any evidence bearing directly thereupon. It clearly appears, however, from testimony introduced in connection with a Specification of which accused was found not guilty, that on the night of the day upon which he was charged with having breached his arrest, he was in the jail of the City of Willows, California (R. 67-74, 86-89, 107-109).

j. Other evidence for defense.

Second Lieutenant John C. Sawyers, Air Corps, and First Lieutenant Robert F. Avis, Air Corps, both of the 97th Basic Flying Training Group, testified that they had known accused for one year and for six months, respectively, and that his general reputation for peace, quiet, sobriety and morality, and the character of his military service had both been "very good" (R. 101,102). Stipulated testimony of "Captain Kimsey" and "Lieutenant Estroda", accused's squadron commanders, was to the effect that his reputation was "good" (R. 102,103). He received an efficiency rating of "Excellent" in his performance as a Basic Flying Instructor from 8 September 1943 to 31 December 1943 (R. 103). Defense Exhibits 3 and 4 are, respectively, letters from Daniel T. Burke, Recording Secretary of Local 230 of the United Automobile, Aircraft and Agricultural Implement Workers of America, and from John F. Allard, Educational Director of Region 6 of the same organization, attesting to accused's reliability, conscientiousness, and trustworthiness, and requesting clemency for him.

Accused stated that upon graduation from a rural high school in Kansas he had worked on his father's farm and then in a factory in California; that he had served as a private in the Infantry from June 1941 until July 1942, at which time he became an Aviation Cadet, and that during his flying training he had been cadet squadron commander. While attending Instructors' School at Randolph Field he had been barracks commander, in charge of about 200 men, and thought that he could still "do the Army a lot of good as an officer" (R. 82-84,87).

4. That accused committed and participated with Lieutenant Stevens in the commission of the various offenses alleged in the Charges and

Specifications, is clear beyond all doubt, and it remains only to discuss his legal responsibility for those to which he pleaded not guilty.

5. It is the opinion of the Board of Review that accused was aware of the fact of his arrest, in spite of his drunkenness, and that the arrest was legal. There is in the record testimony from which the court could properly conclude that while drunk to the extent of being disorderly, insubordinate, and bent on mischief, accused was sufficiently cognizant of Colonel Thaxton's rank and authority that he quieted down when the Colonel arrived. Likewise, his outspoken refusal to promise to remain in his quarters until sober, his request to go to the latrine, his calculated locking of the door, and his departure through a side window, all indicate a mind not too befuddled by drink to be incapable of comprehending Colonel Thaxton's order. So does his selection of his own parachute.

While it is provided in paragraph 20, Manual for Courts-Martial, 1928, that officers may be placed in arrest "by commanding officers only, in person, through other officers, or by oral or written orders or communications", and that "the authority to place such persons in arrest or confinement will not be delegated", the Board of Review holds that under all the circumstances shown by the evidence Colonel Thaxton was authorized to order accused's arrest. The condition and conduct of the accused at the hospital at 1:30 o'clock in the morning were such as to require immediate action. The record discloses that Colonel Hoyle, the post commander, was at his quarters in Chico - some distance from the post. Clearly, in such a situation, the officer next in command had the power to order accused in arrest. Furthermore, accused's conduct at the time of his arrest constituted a disorder within the meaning of Article of War 68, which authorizes all officers to quell frays, disorders and quarrels among persons subject to military law and to order officers who take part in them into arrest.

Defense counsel contended that the Specification alleging wrongful taking and use of the plane, and that alleging its operation while intoxicated constituted an illegal multiplication of charges. The court overruled his contention. The Board of Review is of the opinion that the court ruled correctly. It is sufficient to say that this is analogous to an instance of unauthorized use of an automobile, and the offense of driving it while drunk. Either could exist independently of the other, nor would the commission of one be a defense to the other charge. They differ considerably in their elements of proof, and there was no unreasonable duplication of charges.

Accused contended that in view of the fact that Lieutenant Stevens occupied the pilot's seat, and was at the controls at all times except for a period of from two to five minutes, at which time the plane was at an altitude of 2000 feet, he was not responsible for the offenses charged in Specifications 1, 2 and 3 of Additional Charge I. It was shown, however,

that accused was senior to Lieutenant Stevens in rank, that the applicable Army Air Forces Regulations place responsibility for acts and omissions of crew members upon the senior officer, that accused and Stevens agreed upon the route to be followed, and that accused remonstrated with Stevens only when Stevens fell asleep at the controls. Title 18, United States Code, Section 550, defines as a principal, "whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission * * *". The Board of Review holds accused equally guilty with the principal pilot, Lieutenant Stevens.

Accused impliedly contended that the violations of paragraph 16, Army Air Forces Regulations 60-16, forbidding operation of aircraft below 1000 feet over an obstruction to flight except when landing or taking off was excused by their actual efforts to make landings at the times they dove at the busses. It is true that on at least two of these occasions their landing gear was down. It appears, however, that they were at all times aware of and following the highway, and that they saw the lights of the busses before their dives. Nevertheless they deliberately came down in front of the busses, did not turn on their landing lights until they were within a few yards of the vehicles, and actually did not land until approximately 20 minutes after the last such incident, and then at an established airfield. None of these acts indicate any particular attempt in good faith to land on the highway.

6. War Department records show that accused is 27 years of age and single. He was graduated from high school. He was inducted into the Army 10 August 1941, and served as an enlisted man and as an aviation cadet until 28 July 1943, when he was honorably discharged and commissioned a second lieutenant, Air Corps, Army of the United States. He graduated from the Basic Instructors' Course at Randolph Field, Texas, on 31 August 1943, with the academic rating, "Excellent".

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Articles of War 69 and 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK
CM 253660

1st Ind.
18 MAY 1944

War Department, J.A. G.O., - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert J. Brown (O-751252), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Attached hereto is a memorandum prepared for The Judge Advocate General and signed by General Henry H. Arnold, Commanding General, Army Air Forces, in which General Arnold discusses the offenses in detail, including therein information to be found in the records compiled by the investigating officer, but not found in the record of trial because of accused's pleas of guilty to certain Charges and Specifications. General Arnold states that in view of the character of the offenses committed he considers accused totally unfit for commissioned service, but suggests that "by analogy to the strictest standards of sentence in drunken driving cases", two years at hard labor would "best promote the objects of punishment". He recommends that so much of the sentence of confinement as is in excess thereof be remitted. I recommend that the sentence be confirmed but that the forfeitures be remitted; that the period of confinement be reduced to two years; that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Memo. fr.CG, AAF.

(Sentence confirmed but forfeitures remitted and confinement reduced to two years. G.C.M.O. 351, 15 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 253661

5 MAY 1944

UNITED STATES v. Second Lieutenant GEORGE B. STEVENS (0-753561), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Chico Army Air Field, Chico, California, 3-4 March 1944. Dismissal, total forfeitures, and confinement for six (6) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant George B. Stevens, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, AAF Pilot School (Basic) Chico Army Air Field, Chico, California, was, at Chico, California, on or about 20 January 1944, drunk and disorderly while in uniform, in a public place, to wit: Silver Room, under such circumstances as to bring discredit upon the military service.

Specification 2: In that 2nd Lieutenant George B. Stevens, * * * did, in conjunction with 2nd Lieutenant Robert J. Brown, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, at AAF Pilot School (Basic) Chico Army Air Field, Chico, California, on or about 20 January 1944, wrongfully take and use, without authority, a certain aircraft, to wit: a BT-13A airplane, Serial No. 41-22840, the property of the United States, of a value of more than $50.00.

CHARGE II: Violation of the 69th Article of War.

Specification: In that 2nd Lieutenant George B. Stevens, * * * having been duly placed in arrest at the Station Hospital, on or about 20 January 1944, did, at AAF Pilot School (Basic)

Chico Army Air Field, Chico, California, on or about 20 January 1944, break his said arrest before he was set at liberty by proper authority.

ADDITIONAL CHARGE I: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant George B. Stevens, * * * did, at or near AAF Pilot School (Basic) Chico Army Air Field, Chico, California, on or about 20 January 1944, in conjunction with 2nd Lieutenant Robert J. Brown, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, wrongfully and unlawfully operate a certain Army Aircraft, to wit: a BT 13-A airplane, Serial No. 41-22840, while he was intoxicated.

Specification 2: In that 2nd Lieutenant George B. Stevens, * * * did, in conjunction with 2nd Lieutenant Robert J. Brown, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, at or near Rose Creek, Nevada, on or about 20 January 1944, wrongfully violate Paragraph 16 of Army Air Forces Regulations 60-16 by flying a BT-13-A Army Aircraft, at an altitude of less than 75 feet striking an electric transmission line causing damage to said Aircraft and cutting the said transmission line.

Specification 3: In that 2nd Lieutenant George B. Stevens, Air Corps, * * * did, in conjunction with 2nd Lieutenant Robert J. Brown, Air Corps, Headquarters and Headquarters Squadron, 97th Basic Flying Training Group, at or near a point 12 miles east of Winnemucca, Nevada, on or about 20 January 1944, wrongfully violate Paragraph 16 of Army Air Forces Regulations 60-16 by operating a BT 13-A Army Aircraft, in a careless and reckless manner, at an altitude less than 50 feet above U.S. Highway No. 40 so as to endanger vehicles which were traveling on said highway at said time and place.

Specification 4: In that 2nd Lieutenant George B. Stevens, * * * was, at Willows, California, on or about 30 January 1944, drunk and disorderly while in uniform, under such circumstances as to bring discredit upon the military service.

ADDITIONAL CHARGE II: Violation of the 69th Article of War.

Specification: In that 2nd Lieutenant George B. Stevens, * * * having been duly placed in arrest at AAF Pilot School (Basic) Chico Army Air Field, Chico, California, on or about 20 January 1944, did, at AAF Pilot School (Basic) Chico Army Air Field, Chico, California, on or about 29 January 1944, break his said arrest before he was set at liberty by proper authority.

He pleaded guilty to Charge I and both Specifications thereof, guilty to Additional Charge II and its Specification, guilty to Specification 1 of Additional Charge I, guilty to Specification 4 of Additional Charge I except for the words, "drunk and", of which excepted words he pleaded not guilty, and guilty of Additional Charge I insofar as it pertained to Specifications 1 and 4. He pleaded not guilty to Specifications 2 and 3 of Additional Charge I and of such Charge as it pertained to Specifications 2 and 3 thereof, and not guilty to Charge II and its Specification. He was found guilty of all Charges and Specifications, except the words, "drunk and", in Specification 4, Additional Charge I. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for six years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

The offenses will be narrated in the order in which they were committed, rather than as they appear on the Charge sheets. Evidence in behalf of accused will be set forth, where offered, in connection with the particular offense charged, as will also be the pertinent portions of a statement made by accused to Major Henry Howard, II, Air Corps, who was the investigating officer in this case. It clearly appears from Major Howard's testimony and from the preamble of the statement itself that the statement was made voluntarily by accused, and that he was fully apprised of his rights to speak or remain silent (R. 59,60,62; Pros. Ex. O). During the trial, accused was advised of his rights as a witness by the law member, and elected to make an unsworn statement concerning those specifications to which he pleaded not guilty, that is to say, the Specification of Charge II and Specifications 2 and 3 of Additional Charge I. In the course of his statement accused made admissions as to other Charges and Specifications, all of which will be included below (R. 70,71).

a. Specification 1, Charge I.

Accused pleaded guilty to the offense of being drunk and disorderly in a public place while in uniform, and under such circumstances as to bring discredit upon the military service. The only evidence offered by the prosecution concerning this Specification was accused's statement to the investigating officer, of which the applicable portion is as follows:

> "On the night of the 19th of January 1944, Lieutenant Brown and I went into town with the intention of having a few drinks and coming back to the post. As the evening went on, one drink led to another. There can be no question that I drank too much, and as a result, do not believe that I was responsible for my words or actions.

"I did use improper language to the waitress and I did give the M.P.'s and Major Dimes quite a bit of trouble" (Pros. Ex. O).

b. Evidence for defense, Specification 1, Charge I.

In his unsworn statement during trial, accused said that he and Lieutenant Robert J. Brown had gone "into town" on the night of 19 January to celebrate the fact that accused was to leave Chico Army Air Field. Accused stated that "I drank past capacity and am guilty of the charge which incurred (sic) from that" (R.71).

c. Specification, Charge II.

Testimony concerning accused's breach of arrest, from the Station Hospital at Chico Army Air Field, on the morning of 20 January 1944, was offered by Lieutenant Colonel Charles W. Thaxton, Air Corps, Captain Louis G. Booth, Medical Corps, and First Lieutenant Russell S. Broad, Air Corps, all of that station. Lieutenant Broad, the officer of the day, went to the hospital dispensary early that morning as a result of a telephone call, and found there the post Provost Marshal, "Major Dimes", Captain Booth, Lieutenant Brown, and accused. Accused and Lieutenant Brown had been brought in at about 0120 (R. 18,21,23). Captain Booth was attempting to give accused a sobriety test, for accused was "very drunk". His eyes were "blurry", his breath smelled of alcohol, and his conversation was incoherent. The attempt to give the sobriety test was unsuccessful (R. 23-26).

Colonel Thaxton, the Director of Training at Chico Army Air Field, and the second ranking flying officer at the field, arrived at the hospital, and accused quieted down somewhat. Colonel Thaxton asked him and Lieutenant Brown "what they had been doing and why they were in trouble", and they both told him that they were tired of basic training and wanted to get out to combat. Accused gave no answer to Colonel Thaxton's question whether he would return to his quarters and remain there until he became sober, and finally the colonel ordered accused and Brown placed in arrest and confined in a hospital ward for the night, and to report to him the next morning. Accused answered, "Yes, sir" (R. 18,20,22,24,25,29). Captain Booth stated that in his opinion the order made little impression upon accused, and that while accused understood the words he did not realize their implication (R. 25,26). Lieutenant Broad testified, however, that when ordered to march down to the ward, accused did so in a satisfactory manner (R. 21).

Captain Booth and Lieutenant Broad took accused and Lieutenant Brown to the ward. Arriving there, accused and Lieutenant Brown asked and received permission to go to the latrine. Within five minutes Captain Booth and Lieutenant Broad found the door locked from the inside and the two men gone. They ran around to the side porch over which the window of the latrine looked out, and found the screen removed and the window open. A search failed to

find Lieutenant Brown or accused (R. 19,20,24,25).

After he found that the plane had taken off (as hereafter related), Colonel Thaxton notified "Colonel Hoyle", the commanding officer of the field, that accused had been ordered into arrest, had escaped, and had taken the plane (R. 30,31).

In his statement to the investigating officer, accused stated that "I did leave the hospital window, as charged, early on the morning of 20 January 1944", but that he did "not remember that I was at any time told that I was under arrest" (Pros. Ex. O).

d. Evidence for defense, Specification, Charge II.

No evidence was offered by the defense concerning this Specification.

e. Specification 2, Charge I, and Specification 1, Additional Charge I.

That accused, acting in conjunction with Lieutenant Brown, wrongfully took and used a military airplane without authority, and that he operated it while intoxicated, was proved by the testimony of Colonel Thaxton, Captain Booth, Lieutenant Broad, Technical Sergeant Randell D. Butts, and by his admissions to the investigating officer and his pleas of guilty to both specifications.

At approximately 0230 Captain Booth and Lieutenant Broad heard an airplane leave the field (R. 19,20,25). Colonel Thaxton also heard it, and went to Post Operations Headquarters. He found that no clearance for its departure had been received, as was required by paragraph 24 of Army Air Forces Regulation 60-16. He ordered emergency warnings dispatched by radio concerning the plane, and called the Post Maintenance Department (R. 30; Pros. Ex. A). Sergeant Butts, of the 79th Basic Flying Training Squadron, Chico Army Air Field, testified that he was assistant line chief at the line maintenance hangar, and that he checked "the line" for missing aircraft early that morning. He found "number M-412", bearing serial number 41-22840, missing (R. 32).

Captain William V. Cowan, Air Corps, Director of Aircraft Maintenance at Chico Army Air Field, testified that plane number M-412, or 41-22840, is a BT-13 type plane, belongs to the United States Army, and cost approximately $25,000 (R. 53). In his statement to the investigating officer accused admitted that after he and Lieutenant Brown escaped from the hospital, he "did take and use, without authorization, a basic trainer from this field" (Pros. Ex. O).

f. Evidence for defense, Specification 2, Charge I, and Specification 1, Additional Charge I.

No evidence was offered by the defense concerning these Specifications.

g. Specification 2, Additional Charge I.

Accused was charged with flying the plane, in conjunction with Lieutenant Brown at an altitude of less than 75 feet, striking and cutting an electric transmission line, and causing damage to the aircraft, all in violation of paragraph 16 of Army Air Forces Regulation 60-16. The regulation, introduced as Prosecution's Exhibit A, forbids operation of aircraft at less than 1000 feet above any obstruction to flight, except when landing or taking off (R. 31).

Wallace Kennedy, a civilian telegraph operator for the Southern Pacific Railroad Company at Rose Creek, Nevada, was on duty in his station from 0001 to 0800 of 20 January. About 150 feet east of the station is a bridge crossing the railroad tracks at a height of about 30 feet, and at an approximately equal height above the bridge are the railroad's block signal high tension wires. At about 0450 witness heard, but did not see, an airplane pass the station headed in an easterly direction. It "sounded so low I thought it was coming through the depot", and as though it was flying at an altitude of 75 or 100 feet. There was no indication that it was in any mechanical difficulty. It did not sound like the small, privately owned ships stationed at a nearby civilian field 13 miles away, at Winnemucca, Nevada, and was the only plane heard by Kennedy during his duty hours (R. 34,35). The instant after the ship passed east of the station there was a bright flash of light, and all the electric current in the station, including the signal system, went off (R. 34,35).

Leland Morby, a civilian signal maintenance man for the railroad company, testified that he was called to Rose Creek to repair the signal system. When he arrived at 0615 on 20 January he found two 11,000-volt line wires, which crossed the bridge on the same cross-arm at a height of 30 feet, broken. Four similar wires on a cross-arm 5 feet below them were undamaged. The broken ends of the two wires were bent into the shape of a U, from which witness deduced that they were broken by an object moving at a high rate of speed, and that the object had been traveling in the same direction as the highway, that is to say, east or west (R. 36-38).

Captain Cowan, who stated that he had had 22 months' experience in airplane maintenance, testified that he had examined the plane flown by accused and Lieutenant Brown on the afternoon of 20 January, after it had been landed by them. He stated that the "Form 1" in the plane showed it to have been in good mechanical condition prior to that date. He found that the vertical stabilizer on the left wing had been dented at the tip, that the antenna mast was bent to the right where it was attached to the fuselage, that the "left brake hose on the oleo strut was cut into the fabric", that the "free air temperature bulb and bracket (were) sheared off", and that both propeller blades were nicked at several spots on the

leading edge of the blades. Photographs admitted to be fair reproductions of this damage were introduced by the prosecution (R. 52-56; Pros. Exs. I,J,K,L,M and N). The damage to the propeller, the wing stabilizer, and the antenna mast was also observed by Constable Andrew D. Bruce of Battle Mountain, Nevada, where the plane later landed (R. 46,47,50).

Captain Cowan also testified that he had computed the distance from Chico Army Air Field to Rose Creek, and stated that a BT-13 type plane would fly the 220 miles in a direct air line in approximately 1 hour and 50 minutes, so that if it left Chico at 0230 it ought to arrive at Rose Creek about 0420 (R. 56,57).

In his statement to the investigating officer, accused said that:

> "At some undetermined point en route we were conscious of encountering an obstruction, probably wires, while flying low in an effort to locate a place to land. I do not know where this took place, or the extent of damage, if any, to property of others" (Pros. Ex. O).

h. Evidence for defense, Specification 2, Additional Charge I.

In his unsworn statement during trial accused stated that "at the time I went over Rose Creek I went lower * * * than at any other time during the flight" (R. 71).

i. Specification 3, Additional Charge I.

A map introduced as Prosecution's Exhibit B shows that United States Highway 40 runs in a generally northeasterly direction from Rose Creek to a point beyond the town of Winnemucca, Nevada (which is about 10 miles from Rose Creek) whence the highway curves and runs southeasterly through the town of Battle Mountain (R. 33,57).

Lester W. Ford, a bus driver for the Burlington Transportation Company, was driving a bus westward on Highway 40 between Battle Mountain and Winnemucca on the morning of 20 January. At 0445, at a point 14 miles east of Winnemucca, an airplane suddenly loomed up about 75 yards directly in front of him. It was going eastward, apparently following the highway. The plane flashed its landing light directly in Ford's face, and cleared the top of the bus by about 6 feet, the headlights of the bus reflecting on it so clearly that he observed that its landing gear was down, and he "could determine its full form". It was a single-motored monoplane, similar in appearance to a photograph of plane number 41-22840, which was exhibited to witness and introduced in evidence. As the plane passed over the bus, its motor was accelerated, causing a tremendous vibration and shaking of the bus (R. 40-41; Pros. Ex. E).

Cleo G. Yohey, also a bus driver for the Burlington Transportation Company, had left Battle Mountain en route to Winnemucca over the same highway, about 8 or 10 minutes after driver Ford. He was approaching Golconda Summit, about 22 miles east of Winnemucca, about 0500, when a bright light was turned in his face. He saw an airplane coming over the summit of the hill about 75 or 100 yards ahead of his bus, at an altitude of "not more than 30 feet from the ground". The plane was losing altitude, and as it passed over the bus, flying east, it cleared the bus by "not more than 10 feet". It was the only plane he saw that morning, and was a low-winged, single motored monoplane of the same type as number 41-22840, a picture of which was exhibited to witness (R. 42-44; Pros. Ex. E).

Stipulations concerning testimony which would have been given by Frank D. Fenton and E. I. Merrill were entered into by counsel (R. 45). Fenton, another bus driver for the Burlington Transportation Company, was driving up Golconda Hill between 0445 and 0500, when a high-powered, single-motored plane came diving at his bus at a high rate of speed. About 30 or 40 feet in front of him a bright light came on, and as the plane pulled out of its dive, some part of it touched the top of the bus on the rear left hand side. Merrill, presumably an inspector for the bus company, made an examination of the top, and found "a smooch, apparently rubber, about three feet long, on the top of the bus at the left rear corner". There was no physical damage to the bus (R. 45).

The plane landed shortly thereafter at Battle Mountain, Nevada, after "buzzing" the town three times, and was thereafter taken care of by Constable Andrew D. Bruce, who arrived shortly after it did, at 0530. He identified it as being a single-engined monoplane, bearing the number M-412. From their conversation generally, Bruce testified, he knew that accused was the pilot (R. 46,50,51). They both told witness that they had had a map when they started, but had gotten into an argument and "one of them" had thrown it away, and that they did not know where they were. Lieutenant Brown told Bruce that they had hit some wires "down below here somewhere", and accused said that Brown "wasn't supposed to tell that" (R. 47,48). Accused later told several people in the lobby of a local hotel that they had come from San Diego and were en route to Seattle. Bruce testified that accused's manner of walking was satisfactory, and that his speech was coherent, but that both accused and Brown "looked like they had been getting over a drunk" (R. 47,50).

Captain Cowan testified that the distance from Rose Creek to the point 14 miles east of Winnemucca was 24 miles, and from Rose Creek to Battle Mountain was approximately 60 miles, and that a BT-13 passing Rose Creek at 0450 would arrive at those places at 0502 and 0520, respectively (R. 57, 58).

In his statement to the investigating officer accused said:

"* * * We both at times acted as * * * pilot; * * * it is impossible to state which of us may have been in actual control at any given time",

and that "we eventually landed at Battle Mountain, Nevada" (Pros. Ex. O).

It was stipulated that at the trial of Lieutenant Brown, accused had testified voluntarily as a witness for Brown, after a full explanation of his right to refuse to answer incriminating questions, and that he had testified that during the flight he (accused) had piloted the plane at all times, with the exception of an interval of five minutes, at which time the plane was at an altitude of 2000 feet (R. 62,63).

j. Evidence for defense, Specification 3, Additional Charge I.

In his unsworn statement at the trial, accused said:

"At no time during the course along Highway 40 did I ever dive on the bus. My altitude when I passed over those busses was anywhere between 100 feet to 200 feet above the ground. I am positive it couldn't have been any lower than that because I was rather * * * 'wire happy' after I had the accident at Rose Creek.

"I had the lights turned on some of the way up the highway. I was attempting to find a landing place - flying along the road in case there might be a wide spot * * * where I could pull off the highway if I landed on the highway" (R. 71).

k. Specification, Additional Charge II.

Accused pleaded guilty to this Specification, alleging breach of arrest at Chico Army Air Field on 29 January 1944. No evidence was introduced by the prosecution concerning the offense. In his unsworn statement at the trial, accused said:

"I can't find any * * * excuse, or * * * any reason whatsoever for breaking my arrest. I did it without thinking and without reasoning it out" (R. 71).

l. Specification 4, Additional Charge I.

With the exception of the words "drunk and", accused pleaded guilty to this Specification, alleging that he was drunk and disorderly while in uniform at Willows, California, on 30 January 1944, under such circumstances as to bring discredit upon the military service. He was found guilty of being disorderly, the court excepting the same words from its finding. No evidence was introduced by either prosecution or defense concerning this Specification.

m. Other evidence for accused.

Captain John Henry Saunders, Jr., Air Corps, Second Lieutenant Bert C. Smith, Air Corps, and Second Lieutenant Kenneth Payne, Air Corps, had known accused for periods of from two to nine months. They testified that his reputation for peace, quiet, sobriety and good morals, and the character of his military service were "all right", "good", and "very satisfactory", respectively (R. 64-68). Accused's honorable discharge from the Army as an aviation cadet, given him on 29 August 1943, and introduced as Defense Exhibit 1, rated his character as "excellent". The defense offered as its Exhibits 2,3,4 and 5, letters from J. J. Michlitch, Isabel F. Mount, E. P. Whiting, and C. E. Feltis, all of Seattle, Washington, attesting to the writers' knowledge of accused's sobriety, integrity, and industry, and requesting clemency. Similar testimony of H. J. Grimlund, principal of a school which accused had attended, was also introduced by stipulation (R. 68-70).

In his unsworn statement accused said that he desired to go into combat (R. 71).

4. Most of the issues of law and of fact which are to be found in this case are identical to those discussed and decided in the companion case of CM 253660, Brown, recently considered by this Board of Review. The issues of accused's capability of forming the intent to commit the offenses alleged, the bona fides of his attempt to land the plane at the times when he dived at the busses, and the question of multiplicity of the charges involved in Specification 2, Charge I and Specification 1, Additional Charge I, will not be further labored.

The issue of direct responsibility for all the offenses involving the plane does not arise in this case, for it is admitted that this accused was at the controls during all of the flight except for a brief period of time, when the plane was at an altitude of 2000 feet.

The Board of Review is of the opinion that accused's arrest by Colonel Thaxton was valid, and of a nature such that his escape from it constituted a violation of Article of War 69. In the first place, he pleaded guilty to the Charge and its Specification. Such a plea would not be conclusive upon accused if the evidence revealed that the arrest was unlawful and under such circumstances it would be the duty of the court to relieve accused of its consequences, as having been improvidently made. But the Board of Review is entitled to consider the evidence in the record in the light of the plea made prior thereto and to draw certain inferences therefrom.

It may properly be inferred from the testimony that at the time accused was ordered into arrest he had been and was then engaged in a public disorder of sufficient seriousness to justify Colonel Thaxton's action (A.W. 68).

He was very drunk and his conversation was incoherent. It was impossible to give him a sobriety test. He told the colonel that he was tired of basic training and wanted to get out to combat. He failed or refused to answer the colonel's question whether he would go to his quarters and remain there until sober. In his statement to the investigating officer he stated that he had (previously) used improper language to a waitress, and that he did "give the M.P.'s and Major Dimes quite a bit of trouble". It may be inferred that Colonel Thaxton had been informed of this at the hospital, for he testified that he asked accused what he had been doing, and why he was in trouble.

Taken by its four corners, all this evidences past, present, and probable future disorder on accused's part. The Board of Review is of the opinion that Colonel Thaxton owed a duty to avoid further excesses on accused's part, that these were reasonably to be expected if arrest was not effected, and that a valid arrest was accomplished. Moreover, as decided in the Brown case, Colonel Thaxton had the right to arrest as the ranking officer present and on duty.

There remains only to note an irregularity in the proceedings, which the court corrected of its own volition. After the findings were made the court sentenced accused "to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor * * * for six years". This was an inappropriate, but not illegal, sentence (CM 249921, Maurer). The next day the court reconvened, all the members of the court, the personnel of the prosecution and defense, and accused being present. The court closed, revoked its former sentence, and upon secret written ballot sentenced accused "to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor * * * for six years". No new evidence was received and no new findings made. "A record of trial, * * * which in the opinion of the reviewing authority shows improper action by the court as to a finding or sentence, may be returned to the president of the court * * *, directing that the court reconvene for such action as may be appropriate" (MCM,1928, par. 87b, p. 75). There is no need for the court to wait to be told to do so by the reviewing authority. Its action was in all respects correct and proper, and injured no right of accused.

5. War Department records show that accused is 20-1/2 years of age. He finished the second year of high school and enlisted in the Army of the United States on 13 December 1941. He was appointed an aviation cadet on 3 November 1942, and was honorably discharged from that status on 29 August 1943 to accept a commission, dated 30 August 1943, as Second Lieutenant, Air Corps, Army of the United States. The records also disclose that accused accepted punishment by Major General Ralph P. Cousins, United States Army, Commanding General, Army Air Forces Western Flying Training Command, on 5 January 1944, for a previous failure to report to his station for duty.

The punishment imposed was forfeiture of $75 of his pay for the month of January 1944.

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Articles of War 69 and 96.

Perry G. Gow, Judge Advocate.

John Trumbull, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

SPJGK
CM 253661 1st Ind.

War Department, J.A.G.O., 18 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant George B. Stevens (0-753561), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Attached hereto is a memorandum signed by General Henry H. Arnold, Commanding General, Army Air Forces, in which General Arnold discusses the offenses in detail, including therein information to be found in the records compiled by the investigating officer, but not found in the record of trial because of accused's pleas of guilty to certain Charges and Specifications. General Arnold states that in view of the character of the offenses committed he considers accused totally unfit for commissioned service, but suggests that "by analogy to the strictest standards of sentence in drunken driving cases" two years at hard labor would "best promote the objects of punishment". He recommends that so much of the sentence of confinement as is in excess thereof be remitted. I recommend that the sentence be confirmed but that the forfeitures be remitted; that the period of confinement be reduced to two years; that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to a number of letters attached hereto, all written by residents of Seattle, Washington, attesting accused's previous good civilian record, his integrity, sobriety and wholesome family life, and requesting that clemency be extended to him. Addressed to the President are letters dated 12 March from Anna J. Hales, 14 March from Aileen E. Terry, 16 March from Alice M. Stevens, accused's widowed mother, 18 March from Myrtle M. Musser, and 24 March from Harry J. Grimlund. Other letters, written to the Honorable Henry M. Jackson, Member of Congress, and forwarded by him on 27 March and 19 April to The Judge Advocate General, are one dated 24 March from Harry J. Grimlund, one dated 6 April from Mrs. Don Pence, one dated 6 April from Geraldine Randolph, one dated 7 April from R. B. and Mrs. Alice Lesher, one dated

7 April from Edith Fisher, and one of the same date from Mrs. J. B. Andrews.

4. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer,
Major General,
The Judge Advocate General.

11 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. to Pres. fr. Anna T. Hales.
Incl.5-Ltr. to Pres. fr. Aileen E. Terry.
Incl.6-Ltr. to Pres. fr. Alice M. Stevens.
Incl.7-Ltr. to Pres. fr. Harry J. Grimlund.
Incl.8-Ltr. to Pres. fr. Myrtle M. Musser.
Incl.9-Ltr. fr. Hon. Henry M. Jackson, 27 Mar. 1944, w/incl.
Incl.10-Ltr. fr. Hon. Henry M. Jackson, 19 Apr. 1944, w/incls.
Incl.11-Memo. fr. CG, AAF.

(Sentence confirmed but forfeitures remitted and confinement reduced to two years. G.C.M.O. 372, 17 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 253674

21 APR 1944

UNITED STATES v. Second Lieutenant WILLIAM W. TERRY (O-1018900), Infantry.	69TH INFANTRY DIVISION Trial by G.C.M., convened at Camp Shelby, Mississippi, 4 and 6 April 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL and GOLDEN, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant William W. Terry, Service Company, 272d Infantry, Camp Shelby, Mississippi, did, without proper leave, absent himself from his post and duties at Service Company, 272d Infantry, Camp Shelby, Mississippi, from about 2 March, 1944, to about 19 March, 1944.

He pleaded guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, supplementing the accused's plea of guilty, shows that the accused was given a three day pass on or about 28 February 1944, effective either on such date or 29 February 1944 and that he failed to return at the expiration of the three day pass. His company commander testified that he had been given the three day pass at his request and that upon its expiration the accused was absent without leave from 2 March 1944 until 19 March 1944. An appropriate extract copy of the organization's morning report showing the accused's absence without leave as alleged was admitted into evidence (R. 6-10, Ex. 1-2).

4. The evidence for the defense consisted of the testimony of the accused who, after explanation of his rights as a witness, testified that he received a three day pass on 28 February 1944 and left the post, returning, however, on 1 March 1944 for the purpose of receiving his pay. After receiving his pay he immediately left and accompanied his wife to Seattle, Washington, because she was an expectant mother and her physician had advised him to take her to her home in Seattle, Washington, at such time unless he desired that she remain in the State of Mississippi for the birth of the baby, as it would not be advisable to make the trip at a later date. After reaching Seattle, Washington, and leaving his wife with relatives there, he started back to Camp Shelby, Mississippi, by plane but was grounded en route because of the weather, and after being en route about ten days and having reached Bowman Field, he turned himself in for the purpose of securing funds in order to complete the journey by bus. Prior to leaving Camp Shelby he had attempted to secure leave but had been refused because more than seven percent of the officers of his organization were already on leave. The birth of the baby was not expected until sometime in May and for such reason he had not requested emergency leave. Neither had he sought the assistance of the Red Cross in securing an emergency leave because while serving overseas he had lost confidence in the Red Cross (R. 11-17).

5. In rebuttal, the prosecution adduced the testimony of the accused's company commander who admitted that the accused had made a request for leave about the middle of February, that he had not been able to grant the request but had sent it to the "regiment" and had never received any further action thereon. This witness also stated that the accused, when requesting leave, had given as his reason his wife's pregnancy and his desire to accompany her to her home (R. 17-21).

6. The court, after both the prosecution and the defense had rested, found the accused guilty of the Charge and its Specification and after the personal data concerning the accused had been read from the charge sheet, granted a two day adjournment, in order for the defense to secure further evidence. When the court reconvened, pursuant to adjournment, the defense offered the testimony of Chief Warrant Officer Park M. Fellers, Assistant Adjutant of the accused's organization. This witness testified that on or about 28 February 1944, the accused had asked him about a leave for the purpose of taking his wife home because she was an expectant mother and that he, the witness, took the matter up with the regimental commander upon such basis but that the regimental commander had refused the leave requested and had suggested that the accused re-submit his request after the completion of the organization's impending "march to the Gulf". The witness communicated this information to the accused and was of the opinion that the regimental commander's written refusal of the requested leave had been sent to the accused's company. The accused's

company commander and the executive officer of the company likewise testified further that they did not recall having seen the regimental commander's written refusal of the requested leave but that it was possible that such written refusal had been received at the company's headquarters. The executive officer also testified that during the accused's brief period of service in the company he had performed his duties in an excellent manner (R. 24-29, 29-33, 35-36).

The defense introduced in evidence a portion of the accused's service record showing the ratings which had been given him during his commissioned service as follows: 31 July 1943 to 3 August 1943 - very satisfactory; 10 September 1943 to 27 October 1943 - excellent; 2 November 1943 to 31 December 1943 - very satisfactory; and 1 January 1944 to 31 January 1944 - satisfactory. The accused, being recalled as a witness by the court, testified that he knew that his application for leave had been refused and that the regimental commander had suggested that he re-submit his application for leave after the organization had returned from the impending "march to the Gulf" and that he had seen the written refusal of his requested leave in the company commander's basket in the company office, but that he did not know the exact date when his organization would commence the "march to the Gulf" as he had only been in his present company since 14 February 1944 (R. 34, 36-38).

7. The Specification alleges that the accused without proper leave absented himself from his post and duties at Service Company, 272nd Infantry, Camp Shelby, Mississippi, from about 2 March 1944 to about 19 March 1944. The elements of the offense of absence without leave and the proof required for conviction thereof according to applicable controlling authority are as follows: "* * * That the accused absented himself from his command, guard, quarters, station, or camp for a certain period, as alleged; and (b) that such absence was without authority from anyone competent to give him leave" (M.C.M., 1928, par. 132).

The evidence for the prosecution conclusively establishes the accused's guilt of the offense and supplements the accused's plea of guilty thereto. The accused's testimony frankly admits his commission of the offense as alleged and offers in explanation and in extenuation the refusal of the leave which he had requested for what he considered a meritorious reason. Such reason, however, sounds only in mitigation and not in defense, as does also the evidence adduced subsequent to the court's findings of guilty and prior to the court's assessment of the penalty. The evidence, therefore, beyond a reasonable doubt establishes the accused's guilt as alleged, fully supplements his plea of guilty and amply supports the findings of guilty of the Charge and its Specification.

8. The accused is about 27 years of age. The War Department records show that he has had enlisted service from 16 September 1940 until 31 July 1943 when he was commissioned a second lieutenant upon completion of Officers Candidate School and that he has been on active duty as an officer since the latter date.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings of guilty of the Charge and its Specification and the sentence and to warrant confirmation thereof. Dismissal is authorized upon a conviction of Article of War 61.

Abner E. Lipscomb, Judge Advocate

William H. Bamberger, Judge Advocate

Gabriel H. Goldberg, Judge Advocate

1st Ind.

War Department, J.A.G.O., 9 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William W. Terry (0-1018900), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. In view of an official report from the Commanding General, 69th Infantry Division, that the accused has, subsequent to his present offense, absented himself without leave for two days, I recommend that the sentence of dismissal be confirmed and ordered executed.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl. 1 - Record of trial.
Incl. 2 - Dft. ltr. for sig. S/W.
Incl. 3 - Form of action.

(Sentence confirmed. G.C.M.O. 258, 3 Jun 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 253683

24 Apr 1944

UNITED STATES	)	III CORPS
v.	)	Trial by G.C.M., convened at Camp Beale, California, 31 March 1944. Dishonorable discharge and confinement for five (5) years. The Federal Correctional Institution, Englewood, Colorado.
Private BOHDAN FILIPOW (36686642), Company A, 556th Engineer Heavy Ponton Battalion.	)	

HOLDING by the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Bohdan Filipow, Company "A", 556th Engineer Heavy Ponton Battalion did, at Marysville, California, on or about 21 January 1944, feloniously take, steal, and carry away one Chevrolet Coupe, Model 1937, value of more than $50.00, the property of Herman E. Townsend, Route 3, Yuba City, California.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five (5) years. The reviewing authority approved the sentence, designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on the night of 21 January 1944, Mr. Herman E. Townsend locked and parked his 1937 Chevrolet coupe, California license number 65D280 on First and D Streets in Marysville, California. Returning about 10:30 he discovered that his car was gone and he immediately reported to the police department that it had been stolen. Mr. Townsend next saw his car in a lot at Twelfth and M Streets, Camp

Beale, California, on 28 February 1944. The door and the ignition lock had been broken and the battery was down (R. 7,8,10, 28,29).

First Lieutenant Donald D. Russell, Company A, 556th Engineers Heavy Ponton Battalion, stated that on 24 February 1944 one of his lieutenants reported "that he thought there was a stolen car in the battalion parking lot and gave the license number and description of the car". Lieutenant Russell had the sergeant major call the provost marshal's office and check the license number of this car. The provost marshal's office "sent word back that the car was stolen and that the provost marshal wanted it impounded in the lot" (R. 12). Unfortunately the record does not disclose the description and license number of this car. Sergeant Francis W. Powers was detailed to watch this car with instructions that "whoever approached" it should be brought to Lieutenant Russell (R. 13, 32). About 5:30 p.m. the following Saturday (presumably 26 February) (R. 25), the accused with three or four other men approached this car (R. 13). The accused "opened the door and was maneuvering wire underneath the dash * * * trying to turn on the ignition". Two men were in the front of the car pushing it (R. 13,22). While this was going on Sergeant Powers stepped up and told accused that he would have to report with him to "the day officer at battalion headquarters". When the accused arrived at headquarters he was asked by Lieutenant Russell where he got this car and if he knew it was a stolen car. Accused replied that the car had been loaned to him by a man at "Alabam's" and that he did not know it had been stolen (R. 13, 30). Private Walter L. Johnson of accused's organization, testified to a conversation with accused on 29 January 1944 in the course of which he told accused that "two fellows" had told him (Johnson) that accused had a car which had been stolen in Marysville. Accused replied that he had the car and that he got it in Marysville but he did not say that he had stolen the car (R. 15,16). When recalled by the court, witness testified that accused told him on 29 January that he had stolen the car (R. 28). Johnson also testified that on one or two occasions between 29 January and 26 February 1944 he had seen the accused driving the car and that on one occasion he rode with accused to Lower Lake. It appears that Johnson and Private First Class Fred A. Shuda, Company A, 550th Engineers Heavy Ponton Battalion, were in the parking lot assisting accused in starting the car when accused was taken into custody by Sergeant Powers (R. 12-21, 25).

4. Thus the evidence very clearly established that on the night of 21 January 1944, Herman E Townsend's 1937 Chevrolet coupe automobile was stolen from First and D Streets in Marysville, California, and that Mr. Townsend recovered his car in a lot at Twelfth and M Streets, Camp Beale, California, 28 February 1944. The evidence also shows that between 29 January and 26 February accused was seen driving an undescribed car which accused said he had stolen in Marysville, California, and that on 26 February accused was caught in this car in the battalion parking lot at Camp Beale. A careful analysis of this record discloses no evidence that the car which accused had stolen was the identical car described in the Specification. Certainly the fact that accused at some

time prior to 29 January 1944 stole an undescribed car in Marysville, California, is not sufficient basis for a finding that accused stole the 1937 Chevrolet coupe of Herman E. Townsend, as alleged in the Specification. We strongly suspect that the accused is guilty. However, the Board of Review is under the duty of safeguarding the basic principle of criminal law that in order to have a legal conviction an accused must not only be guilty but he must be proved guilty. Here we have a finding of guilty which is necessarily based upon an inference of fact unsupported by legal evidence. As was held in the case of CM 212505, Tipton:

> "The Board of Review, in scrutinizing proof and the bases of inference does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A.W. 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference. (CM 150828, Robles; CM 150100, Bruch; CM 150298, Johnson; CM 151502, Gage; CM 132797, Viens; CM 154854, Wilson; CM 156009, Green; CM 206322, Young; CM 207591, Nash, et al.)".

The following has been quoted with approval by the Board of Review:

> "While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence, which under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions * * *. It would be dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens" (Buntain v. State, 15 Texas, App. 490; CM 207591, Nash).

5. For the reasons indicated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Terry A. Lyon, Judge Advocate

John Warren Hill, Judge Advocate

Fletcher R. Andrews, Judge Advocate

1st Ind.

War Department, J.A.G.O., 15 May 1944.

TO: Commanding General, III Corps,
Presidio of Monterey, Monterey, California.

1. In the case of Private Bohdan Filipow (36686642), Company A, 556th Engineer Heavy Ponton Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. I concur in the holding by the Board of Review and for the reasons therein stated recommend that the findings of guilty and the sentence be vacated.

2. Under the provisions of Article of War 50½, the record of trial is transmitted for vacation of the sentence in accordance with the foregoing holding and for a rehearing or such other action as you may deem proper. In this connection if witnesses are available by whom it can be established that the car stolen by accused is the identical car described in the Specification, I recommend a rehearing before another court composed of officers not members of the court which first heard the case.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 253683).

Myron C. Cramer,

Myron C. Cramer,
Major General,
The Judge Advocate General.

1 Incl.
Record of trial.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ
CM 253686

16 MAY 1944

UNITED STATES	SAN BERNARDINO AIR SERVICE COMMAND
v.	Trial by G.C.M., convened at San Bernardino Army Air Field, California, 13 and 28 March 1944. Dismissal.
Second Lieutenant HOWARD P. LANE (0-744384), 843rd Bombardment Squadron (H)	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMERELL and FREDERICK, Judge Advocates.

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification: In that 2nd Lt. Howard P. Lane, 843rd Bombardment Squadron (H), 488th Bomb Group (H), MacDill Field, Tampa, Florida, did, without proper leave, absent himself from his station and command at Westover Field, Massachusetts, from 10 September 1943 to on or about 8 December 1943.

CHARGE II: Violation of the 95th Article of War.

Specification 1: In that 2nd Lt. Howard P. Lane, 843rd Bombardment Squadron (H), 488th Bombardment Group, did, at Hollywood, California, on or about 4 December 1943, with intent to deceive, wrongfully and unlawfully make and utter to the Parisian Florist, Hollywood, California, a certain check, in words and figures as follows, to wit:

New York December 4 1943 No _____

CORN EXCHANGE BANK TRUST COMPANY E-9
Grand Central Branch

Pay to the
Order of Parisian Florist $15.00

Fifteen and no/oo Dollars

/s/ Howard P. Lane

and by means thereof did fraudulently obtain from the Parisian Florist, merchandise to the value of fifteen dollars ($15.00), he the said 2nd Lt. Howard P. Lane, then well knowing that he did not have and not intending that he should have any account with the Corn Exchange Bank Trust Company for the payment of the said check.

Specification 2: Same form as Specification 1, but alleging check dated 4 December 1943, in the amount of $122.78, made and uttered to Silverwood's, Los Angeles, California, at Los Angeles, California, thereby fraudulently obtaining merchandise to the value of $122.78.

Specification 3: Same form as Specification 1, but alleging check dated 3 December 1943, in the amount of $28.80, made and uttered to Desmond's, Los Angeles, California, at Los Angeles, California, thereby fraudulently obtaining merchandise to the value of $28.80.

Specification 4: Same form as Specification 1, but alleging check dated 3 December 1943, in the amount of $100.00, made and uttered to the Garden of Allah Hotel, Hollywood, California, at Hollywood, California, thereby fraudulently obtaining $50.00 in cash and services of the value of $50.00.

Specification 5: Same form as Specification 1, but alleging check dated 4 December 1943, in the amount of $500.00, made and uttered to the Garden of Allah Hotel, Hollywood, California, at Hollywood, California, thereby fraudulently obtaining $60.00 in cash.

CHARGE III: Violation of the 96th Article of War.

(The Specifications under this Charge are five in number and identical, both in form and substance, with the five Specifications of Charge II, except that there is added at the end of each of the Specifications of Charge III the following clause: "contrary to good order and military discipline thereby bringing discredit upon the military service".)

He pleaded not guilty to and was found guilty of all the Charges and Specifications. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution may be briefly summarized as follows:

The accused was an officer of the 843rd Bombardment Squadron, Heavy, stationed at MacDill Field, Florida, when, on 10 September 1943, he absented himself without leave from said organization and station. The initial, unauthorized absence is shown upon an extract copy of the morning report of the 843rd Bombardment Squadron, Heavy, submitted at MacDill Field, Florida on 10 September 1943, which extract copy was received in evidence (R. 12; Pros. Ex. A).

During the subsequent unauthorized absence, the accused was in Los Angeles, California, in the early part of December 1943, and while there became involved in a series of transactions whereby he purchased merchandise and obtained hotel accomodations and cash in return for checks which he issued and tendered to various persons.

On 3 December 1943 accused ordered some orchids to be delivered to the clerk of the hotel, "Garden of Allah", where the accused was a guest. He gave Mrs. Nellie C. Brown, the clerk, a check dated 3 December 1943, drawn upon Corn Exchange Bank Trust Company, Grand Central Branch, New York City, in the amount of $15.00, payable to "Parisian Florist" and signed "Howard Lane", for the purpose of paying for the flowers upon delivery. Mrs. Brown received the check from accused and gave it to the delivery man in payment for the flowers (R. 38, 39; Pros. Ex. F). Jack Litoff, driver for "Parisian Florists", testified that he received the check and turned it in at the office of the florist shop on his return (R. 40). On the same day the accused, who had just registered as a guest at the Garden of Allah Hotel, presented his check dated 3 December 1943, drawn upon Corn Exchange Bank Trust Company, Grand Central Branch, New York City, in the sum of $100, payable to the order of the Garden of Allah, with the request that Mrs. Brown, the clerk, cash the same for him, which she did. The check was deposited in the bank on the following morning and, after passing through the regular channels, it was returned unpaid (R. 31, 32; Pros. Ex. D).

On 4 December 1943 the accused went to a haberdashery known as "Silverwood's Store" and purchased a blouse, "pinks" (slacks), shirts and other articles of clothing and gave in payment a check dated 4 December 1943 drawn upon the Corn Exchange Bank Trust Company, Grand Central Branch, New York City, in the sum of $122.78, payable to the order of "Silverwoods" and signed "Howard P. Lane". Karl Stuckerman, manager of Silverwoods Store, testified that the check was tendered by the accused in his presence and that the accused stated it was his personal check. It was deposited to the company's account at the bank (R. 16, 17; Pros. Ex. B).

On 4 December 1943 the accused likewise purchased sundry articles of wearing apparel at Desmond's, a haberdashery in Los Angeles, California, and in payment tendered to Anthony J. Subira, an employee, his check dated 4 December 1943, drawn upon Corn Exchange Bank Trust Company, Grand Central Branch, New York City, in the sum of $28.80, payable to the order of Desmonds (R. 21; Pros. Ex. C).

Also on 4 December 1943 the accused requested the management of the Garden of Allah Hotel to cash a check for him and presented his check, dated 4 December 1943, drawn upon the same bank in the sum of $500.00 payable to the order of the Garden of Allah. However, only $60.00 of the total was advanced to the accused and Frank A. Griffin, manager of the hotel, who "was a little leery" of the check, telephoned the Corn Exchange Bank Trust Company on the following Monday morning (the check having been presented on Saturday). As a result of information he received, he got in touch with the Los Angeles police department (R. 32, 33; Pros. Ex. E).

Meanwhile Lieutenant Detective R. R. Coppage of the Los Angeles Police Department had received information that the accused was wanted in New York City, regarding checks he had issued there and when he received the additional information about the checks given by the accused to the Garden of Allah he sent two police officers to the hotel to take the accused into custody (R. 13, 32).

After his apprehension at the Garden of Allah hotel the accused was taken to the City Hall and examined by Lieutenant Detective Coppage. In this examination the accused admitted that he was absent without leave from his organization and had been so absent since September 1943. He had opened an account with the Corn Exchange Bank in New York City, depositing a pay check of $250.00 and claimed that he had made arrangements with his commanding officer to deposit two subsequent pay checks of his in this account. Against this account he had drawn checks aggregating $3000 while he was in New York, Rhode Island and Massachusetts. He then came to Los Angeles where he had given checks to the Garden of Allah, Silverwoods, Desmonds and the May Company for merchandise and cash. These latter checks he admitted were worthless and he knew they were worthless at the time he issued them, knowing that his account would not be sufficient to meet them (R. 13, 14). Detective Coppage had not, at any time prior to or during the interview with the accused, held out to him any promise of reward nor did he threaten him with any punishment (R. 15).

The accused was taken to the Garden of Allah Hotel on the following day where Mr. Griffin, the manager, stated in the presence of the accused, that he had received a number of checks from the

accused among which was one in the amount of $100 and one in the amount of $500. Although requested to cash the checks for the accused he had been hesitant because "he was a little afraid of the checks" and had advanced only a small portion on each and had then sent them on to New York for payment (R. 14).

They then proceeded to the bungalow which the accused was occupying as a guest of the hotel and there the accused pointed out to Detective Coppage the various articles of merchandise which he had purchased from Los Angeles stores to whom he had given checks and they were segregated in groups. These articles were then delivered to the Store Protective Association, an organization maintained by merchants and industries in Los Angeles for the purpose of handling bad check cases arising in business (R. 15).

Meanwhile Sergeant Robert C. La Touche, Chief of the Criminal Investigation Section, Service Command Unit 1917, stationed at Los Angeles, having been informed by the Los Angeles Police Department that the accused was in their custody, went to see Detective Coppage who promised to release the accused to the military authorities on the next day and he was so released on 7 December 1943 (R. 23).

On 8 or 9 December 1943 Sergeant La Touche had a conversation with the accused in the presence of Lieutenant Hearne of the Provost Marshal's office, during which accused admitted he had issued checks in certain stores in Los Angeles but that he had no account in the bank upon which they were drawn (R. 25, 26). As a result of this conference and at the accused's request, $250 was sent by the accused's mother to the Provost Marshal's office for the purpose of paying certain checks issued by the accused while in Los Angeles. This sum of money was turned over to Sergeant La Touche who distributed it among the holders of various checks given by the accused. In this fashion and in cooperation with the Stores Protective Association various cash amounts were paid to the holders of all the checks issued in Los Angeles by the accused in settlement of his various transations in that city. In addition merchandise valued at $105.51 and purchased from Silverwoods haberdashery by accused, was returned to that store (R. 17, 21, 24, 26).

By deposition Paul A. Herrmann, who was selected by mutual agreement of the prosecution and defense as the representative of the Corn Exchange Bank Trust Company, testified that the accused and Mervin A. Levy (accused's father) opened a joint account in that bank on 2 July 1943. At that time there was no agreement of any kind with any person to honor checks drawn on the account when there were not sufficient funds in the account to assure payment thereof. Between 1 September 1943 and 31 December 1943 only two deposits were made, one of $27.48 and one of $4.00, both on 24 September. Because of the unsatisfactory use of the account by drawing checks against it with insufficient funds on hand to meet them, the bank closed the account on 24 September 1943. A final statement showing closed balance was mailed to the accused and Mervin Levy on or about 27 September 1943.

The two checks, one dated 3 December 1943 in the amount of $100 and one dated 4 December 1943 in the amount of $500, both given by the accused to Garden of Allah as payee, were presented to the bank for payment on 9 December 1943 and that payment was refused for the reason that the account had been closed (R. 43, Pros. Ex. G).

4. For the defense two depositions were received in evidence. The first is that of Gertrude S. Lane, the mother of the accused, who testified that she knew a joint account had been opened in the Corn Exchange Bank Trust Company by her husband Mervin A. Lane ("Levy"; see deposition of Paul Herrman, supra) some time in May or June 1943, but she had made no agreement with the bank to pay checks drawn on the account, although she did make a "deposit" to this account on 22 September 1943 (R. 44, Def. Exs. 1 and 3).

In the second deposition, Mervin A. Lane (Levy) states, in substance, that he is the accused's father, and he and accused opened a joint account in the Corn Exchange Bank Trust Co. in the latter part of May or early June 1943. Although he had no agreement with the bank respecting the deposit of funds to the account, or the payment by him of checks drawn on the same, he believed he was "liable for a deposit against the account" and "for checks drawn against the account". On 22 September 1943 Mr. Lane had received notice from the bank that the account was overdrawn $27.48 and arranged to have a check sent to cover the insufficiency. (See: Def. Ex. 3). This check is the one Mrs. Lane claims to have "deposited". On 24 September 1943 he received further notice from the bank that the account was closed (R. 44; Def. Ex. 2).

A check made by Gertrude S. Lane, dated 22 September 1943 in the amount of $27.48 and marked "for deposit to the account of Howard P. Lane only", was introduced in evidence (R. 44; Def. Ex. 3).

The accused having been informed of his rights elected to be sworn as a witness and testified substantially as follows:

After detailing many immaterial facts regarding the nature of his military service since his enlistment he stated, in reply to the suggestion of his counsel that he explain why he absented himself without leave:

> "Well, it's a hard thing to explain because--maybe if I knew why I wouldn't have gone. It was so much against everything that I had done or worked for in the past, that I had certainly striven as hard as anybody could have to get a commission and I could only attribute it to the---- well, I know that there is no excuse for going AWOL in the first place, so anything I say will have to be taken with a grain of salt because there is no excuse. I couldn't condone it in any person regardless

what the excuse is. But I was flying anti-submarine --- well, I better start further back. I went to school and became actually part of a bomb sight because that was the main thing I studied and I chose Anti-submarine because I expected it to be some sort of combat, which was what I was working for. When I got out there all I did was fly over the ocean without a bomb sight, not doing what I was trying to do, and the amount of training I had put in for it, the strain attached to the schooling and you are just flying out over the ocean--- it was just probably more than I could stand at the time" (R. 48, 49).

In reply to the question: "Lieutenant, when you got out here to Los Angeles, you wrote those checks over there at the Garden of Allah, did you honestly believe you had money in the bank to cover those checks?", he said:

"I would like to say now that I honestly believed that money would be in the bank to cover those checks, I had absolutely no idea of defrauding anybody or attempting to defraud anything and I honestly believed that it was a joint account and that my parents would see those checks were covered by the bank" (R. 49).

Later, to the question: "Lieutenant, when you discovered that there was some difficulty with these checks that you had given to the Garden of Allah and the others, what is the first thing you did?", he replied: "Paid them whatever money I happened to have with me and immediately wired home and called home--did both, in order that these checks--to see that these checks were paid" (R. 51).

On cross-examination the accused admitted that he made no effort to communicate with his command from 10 September 1943 until his apprehension in Los Angeles on 6 December 1943. When asked whether he had "any idea of how much money there was in the bank" when he drew the Los Angeles checks he replied that he did not but thought all checks would be honored by his parents when the checks "got back East". (R. 52). He did not get in touch with his parents until he was apprehended by the police of Los Angeles (R. 53, 54) and was informed that he was to be held for issuing fraudulent checks, nor had he made any attempt to communicate with them between 10 September and 31 November 1943 and when in New York, just before leaving for the West, he had failed to visit them though they lived there. He admitted his absence from his station on 10 September 1943 (R. 52, 54) and stated that when he left Westover Field, Massachusetts, he went to New York and remained there for approximately a week where he "wandered back and forth in the vicinity * *". Then he went to Rhode Island and stayed about a week after which he possibly returned to New York, although

he did not remember. On about 21 November 1943 he started West (R. 54, 55). He also admitted that he had received statements from the Corn Exchange Bank Trust Company but had seen none since 10 September 1943 nor had he made any deposits since then and did not know how much money there might be to his credit in the bank after that date (R. 57).

5. By his own testimony the accused confessed that he was absent without leave during time of war from his duty station at Westover Field, Massachusetts, from 10 September 1943 until his return to military control in Los Angeles, California, on or about 7 December 1943, a period of three months. A duly certified extract copy of the morning report of his organization, 343rd Bombardment Squadron (H), submitted at Westover Field, Massachusetts and admitted in evidence without objection, shows the initial absence and the testimony of civil police and military officials prove his return to military control. There is consequently not the slightest doubt of accused's guilt with regard to Charge I and its Specification.

During this unauthorized absence accused travelled extensively and in doing so crossed the continent so that in December 1943 he was in Los Angeles, California. Suspicion attached to him there because of reports received regarding checks the accused had issued in the East. When apprehended by the Los Angeles police he freely admitted his absence without leave and that he had, during said absence, and in various states through which he had passed in his tour, cashed checks aggregating approximately $3000. These were drawn against an account with the Corn Exchange Bank Trust Company, New York City. According to the accused he had opened this account by the deposit of one of his former pay checks in the sum of $250.00. He claimed to have made arrangements with his commanding officer to deposit two of his subsequent pay checks to the account but there is no corroboration of such agreement nor any evidence of its fulfillment. This statement is incredible. Notwithstanding this precarious financial status, the accused lodged himself at the Garden of Allah Hotel in Los Angeles and on 3 and 4 December tendered checks drawn by him upon said bank in the sums of $100 and $500, respectively, and requested the manager of the hotel to cash them for him. This the manager refused to do and only partial sums were advanced on each. On 3 December 1943 the accused made purchases at Desmonds store and received goods and merchandise of the value of $28.20 for which he gave a check drawn upon the Corn Exchange Bank Trust Company. On 4 December 1943 he made purchases of wearing apparel at Silverwoods store and ordered and received delivery of two orchids from Parisian Florist, tendering in payment for these items checks drawn upon the same bank in the sums of $122.78 and $15.00 respectively.

Only two of the checks so issued by the accused in Los Angeles were presented to the Corn Exchange Bank Trust Company for payment. Both the $100 and $500 check given to the Garden of Allah Hotel were presented on 9 December 1943 and payment was refused for the reason

that the account had been closed. It is apparent from what transpired after the accused was apprehended that presentation to the bank for payment would have been a vain gesture. The accused admitted to the civil police officer who arrested him that he knew the checks he had given to merchants, tradesmen and the hotel were worthless when he gave them because he knew his account would not be sufficient to assure the payment of any of them.

At the trial the accused asserted his innocence of any intent to defraud in the giving of the checks and offered in naive and implausible explanation that he "honestly believed that money would be in the bank to cover the checks * * * that it was a joint account and that (his) parents would see those checks were covered by the bank".

Little comfort can be found by the accused in the depositions of his mother and father which were introduced by the defense in his behalf. Mr. Levy, his father, testified that he had opened a joint account with his son, the accused, in late May or early June 1943, but that he had no agreement with the bank respecting deposits of funds in the account or the payment by him of checks drawn on the same. There is no evidence of record that the father ever deposited a penny in the account or that he ever paid a check drawn upon the account by his son when the funds were insufficient. The mother testified that she knew of the joint account but had no agreement with the bank to pay any checks drawn upon the account. On 22 September 1943, after accused's father had been notified by the bank of an insufficiency of funds, and an overdraft of $27.48, she drew her own check payable to the bank in that amount, and endorsed it "for deposit to account of Howard P. Lane only". Two days thereafter the bank closed the account because of the unsatisfactory use of the account by drawing checks against insufficient funds and on 27 September 1943 mailed the accused and his father a final statement showing a closed balance.

Under these circumstances it is inconceivable that the accused should have "honestly believed" that his parents would care for his improvident use of the hypothetical credit. Not once, during his long absence from his organization and station did he attempt to communicate with either military authorities or his parents and he even failed to visit his mother and father at his home during the weeks when he was "wandering back and forth" in New York and its vicinity. It was only after his apprehension in Los Angeles, California, and in the face of prosecution for the issuing of worthless checks, that he finally turned to his mother and prevailed upon her to send sufficient money to the Provost Marshal of the Los Angeles district to settle with the victims of his bad checks in Los Angeles.

It is evident that the accused knew, or by the exercise of ordinary prudence, should have known, that his account had been closed in September 1943. It is equally apparent that there is nothing in

the evidence which shows the slightest justification for the accused's hope that his parents would honor his spurious checks.

The defense appears to have relied with considerable assurance, with respect to three of the checks given by the accused (Specifications 1, 2 and 3, Charges II and III), upon the fact that they were never presented for payment to the drawee bank and that therefore there can be no legitimate legal determination of an insufficiency of funds in the bank with which to pay them. This is specious reasoning. The checks were all drawn on 3 and 4 December 1943 and two of them were sent on to New York for payment, which was refused because the account was closed. No further action was necessary by any other holder of the accused's checks to determine this fact nor would any other action have produced any other effect. The accused himself admitted the checks were worthless when he issued them and he knew they were worthless and the reason why. His request to his mother after his apprehension was not to deposit sufficient money in his account to meet the checks issued upon presentment for payment, but to send the money necessary to the military authorities at Los Angeles under whose supervision the settlements were finally effected. Indeed, not a cent had been deposited to the credit of his joint account with his father subsequent to 24 September 1943. On 27 September 1943 this account was closed and the accused and his father were so notified.

Under all of the circumstances it would be absurd to give serious consideration to the legal theory that accused could obtain merchandise and cash whenever he was so inclined by giving checks upon a bank account which did not exist, in reliance upon the pretense, admittedly false, that he "honestly believed" someone would be charitable enough to redeem his false promises if the checks were dishonored by the drawee bank.

There is no valid legal objection to charging the issuance of worthless checks with intent to defraud as violations of both Articles of War 95 and 96. Article of War 95 includes any acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentlemen (par. 151, M.C.M. 1928). The conduct of the accused portrayed in this case is clearly conduct unbecoming an officer and a gentleman and justifies prosecution under both Article of War 95 and Article of War 96.

6. Records of the War Department disclose that the accused was born in New York City on 17 July 1918 and is now 25 years and 9 months of age. He was graduated from high school and attended Columbia University for two years. He enlisted in the 102nd Medical Regiment in October 1940. He became an aviation cadet in July 1942 and thereafter received preflight, primary training, preflight bombing and bombardier training. On 8 May 1943, having been graduated as a bombardier at Deming Army Air Field, Deming, New Mexico, he was commissioned

a second lieutenant, Army of the United States and on the same day was attached to Headquarters and Headquarters Squadron, 321st Bombardier Training Group.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95, and is authorized upon conviction of violations of Article of War 61 and Article of War 96.

William A. Pounds, Judge Advocate.

William H. Gambrell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 26 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Howard P. Lane (0-744384), 843rd Bombardment Squadron (H).

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
1 - Record of trial.
2 - Dft. ltr. sig. of S/W.
3 - Form of action.

(Sentence confirmed. G.C.M.O. 410, 27 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGV
CM 253693

2 JUN 1944

UNITED STATES	)	ANTIAIRCRAFT ARTILLERY TRAINING CENTER
v.	)	Trial by G.C.M., convened at Camp Haan, California, 1 April 1944. Dismissal, total forfeitures and confinement for one (1) year.
Second Lieutenant DAWN G. BEAN (0-1053047), Coast Artillery Corps.	)	

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification: In that 2nd Lieutenant Dawn G. Bean, CAC, 62nd Antiaircraft Artillery Group, did, without proper leave, absent himself from his command at Camp Haan, California, from about 1800, 11 March 1944, to about 1030, 21 March 1944.

CHARGE II: Violation of the 64th Article of War.

Specification: In that 2nd Lieutenant Dawn G. Bean, CAC, 62nd Antiaircraft Artillery Group having received a lawful command from Colonel C. D. Hindle, his superior officer, to remain with the 330th Antiaircraft Artillery Searchlight Battalion in vicinity of Muroc, California until said battalion returned to Camp Haan, California, and to return to Camp Haan, California with the said battalion, did, in vicinity of Muroc, California on or about 11 March 1944, willfully disobey the same.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specification. He was found guilty of Charge I and its Specification and guilty of the Specification of Charge II by excepting the words "command", "his superior officer", and "willfully disobey", substituting therefor respectively the words "order", "the said Colonel C. D. Hindle being in the execution of his office", and "fail to obey", of the substituted words guilty, of the excepted words not guilty; not guilty of Charge II, but guilty of a violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. The reviewing authority approved the sentence, remitted one year of the confinement imposed and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution is substantially as follows:

a. Specification, Charge I.

Extract copies of the morning report of accused's organization were identified by the acting adjutant and received in evidence showing accused's absence without leave from 11 March to 21 March, on which latter date he voluntarily returned to his station (R. 8-10; Exs. 1, 2).

b. Specification, Charge II.

Shortly after 8 o'clock on the morning of 7 March 1944, Colonel C. D. Hindle, 62nd Antiaircraft Artillery Group, Camp Haan, California, ordered accused and another officer, Second Lieutenant J. V. Cook, to report at once to Major G. T. Kesler, Commanding Officer of the 330th Searchlight Battalion in the vicinity of Muroc, California. The accused was told that he was to act as Colonel Hindle's representative with the 330th Searchlight Battalion and was to remain with the battalion until its return to Camp Haan about a week later. Accused and the other officer were advised to learn all they could about the spread beam searchlight and the operation of the lights during simulated strafing attacks. At the same time Colonel Hindle notified Major Kesler by longhand note that he was sending accused and Lieutenant Cook to him, and requested Major Kesler to see that the two officers received some instructions in searchlight work.

He also advised him that accused and the other officer were to remain with the searchlight battalion until it returned to Camp Haan. Substantially the same instructions that had been given to accused were included in the note to Major Kesler. He apprised Major Kesler of what he had told accused and the other officer who went with him. Accused and Lieutenant Cook left Camp Haan about 9:30 a.m., 7 March 1944, arriving at Muroc Maneuver Area just before noon where they reported to Major Kesler, Commanding Officer of 330th Antiaircraft Artillery Searchlight Battalion. Accused was assigned to Battery C and Headquarters Battery while Lieutenant Cook was assigned to Batteries A and B. Accused took part in the activities of the two batteries to which he was assigned and on the night of 9 March the last mission of the maneuver training took place, and the maneuvers terminated. The next morning orders were issued by battalion headquarters to make preparations for return to Camp Haan and to dispatch an advance detail with part of the battalion equipment on the afternoon of 11 March 1944. Accused learned of these orders and after obtaining permission from his battalion commander, Captain William T. Zaldo, Jr. to see Major Kesler, asked if he could accompany the advance detail and remain at Camp Haan. The battalion commander refused his request because of previous instructions of the group commander, Colonel Hindle, that accused was to remain with the battalion until it returned to Camp Haan. Following this conversation with the battalion commander, accused asked his battalion commander, Captain Zaldo, if he could accompany the advance detail to Camp Haan and return with the truck to Muroc Maneuver Area the following morning, 12 March. As maneuvers had terminated and there was no activity at the time, Captain Zaldo thought it was all right for accused to go with the understanding that he was to return with the truck the following morning. Accordingly he gave accused permission to make the trip. The advance detail left Muroc for Camp Haan about 1300 on the afternoon of 11 March 1944. Accused rode in one of the trucks driven by Private Edward J. Krajewski of Battery C. Upon arrival at Camp Haan about 6:15 p.m. accused told Private Krajewski that he would meet him the following morning at 8 o'clock, and accompany him back to Muroc. He did not appear at the appointed place the following morning and Private Krajewski left for Muroc about 9:30 a.m., without him. Accused was not seen again until 10:30 a.m. on 21 March when he was observed by Major Keith F. Cordrey going into the officers' quarters located near group headquarters. He went immediately to the officers' quarters building and asked accused, "Are you Lt. Bean?" and accused answered, "I am, sir". He placed accused in arrest of quarters. Later on that afternoon accused was called to Colonel Hindle's office and certain passages of the Manual for Courts-Martial as well as the Army Regulations governing the limitations of

restriction were read to him by Colonel Hindle. He likewise explained to accused his rights and told him with what he was charged. Accused stated to Colonel Hindle "that any remarks that he would have, he (accused) would give at the time of trial, or words to that effect" (R. 35).

When accused left Muroc Maneuver Area with the advance detail on the afternoon of 11 March 1944 he did not take with him any personal property or belongings (R. 32). After the battalion returned to Camp Haan, Second Lieutenant James R. Wallis, acting adjutant of the 62nd Antiaircraft Artillery Group, went to the 330th Searchlight Battalion area and picked up accused's bedding roll, barracks bag and personal belongings and removed them to the 62nd Group Area. After accused returned to his organization on 21 March this property was delivered to him by Lieutenant Wallis.

4. After having his rights as a witness fully explained, accused elected to make a sworn statement substantially as follows:

On 7 March 1944, at about 0800 accused and Lieutenant Cook were ordered by Colonel Hindle to proceed immediately to the Muroc Maneuver Area and report to Major Kesler, the commanding officer of 330th Searchlight Battalion. There they were to remain for a few days and perform certain duties. On their return to Camp Haan they were to submit to Colonel Hindle a memorandum of their observations and knowledge gained. On their way to Muroc he discussed the order with Lieutenant Cook, because to accused the instructions they had received from the colonel were very vague. Accused and Lieutenant Cook decided that they were to act as observers of tactical problems (R. 39). They reported to Major Kesler and accused was assigned to Battery C and Headquarters Battery while Lieutenant Cook was assigned to the other two batteries. He participated in the activities of C Battery and Headquarters Battery but spent most of his time with C Battery because it was a tactical battery. The tactical problems ended the night of 9 March and believing that his presence at Muroc was no longer necessary he sought Major Kesler's permission to return permanently to Camp Haan. Major Kesler refused to permit him to return to Camp Haan and he then asked and received permission from Captain Zaldo to go to Camp Haan with the advance detail, and return the following morning (R. 42). He left Muroc about 1300 and arrived at Camp Haan about 6:30 on the afternoon of 11 March 1944. He had a conversation with the driver of the truck that brought him to camp and told the driver that he would meet him the next morning at 8 o'clock for the return trip. At the time he had this conversation with the truck driver he fully intended

to be at the appointed place and return to Muroc the next morning. He left camp by bus for Los Angeles, California about an hour after he arrived, reaching there about 10:30 that night. He went to Los Angeles to see the girl he intended to marry. Her home was in Nebraska, but she was living temporarily at a hotel in Los Angeles. He was in Los Angeles the week end previous to this occasion and learned that his girl was pregnant. She had been so advised by her physician and accused had learned of it through one of her friends, and then she admitted it to accused. He felt that it was very urgent that he get to Los Angeles as soon as possible and see her. It had been on his mind the whole time he was at Muroc. After seeing his girl he retired about 1:30 or 2:00 o'clock on the morning of 12 March, intending to catch a bus leaving Los Angeles at 4:45 that morning for Camp Haan. This bus would have arrived at Camp Haan around 7:30 in the morning or before. He overslept and did not get back to Camp Haan in time to catch a ride to Muroc on the truck leaving at 8 o'clock, so decided to stay in Los Angeles for the week end. It took him from 11 March to 21 March to settle his affairs with his girl and on the latter date he returned by bus to Camp Haan.

5. The evidence shows that on 7 March 1944 accused was ordered to proceed from Camp Haan, California and report for duty with the 330th Searchlight Battalion then on maneuvers in the vicinity of Muroc, California. This order provided among other things that accused was to remain with the 330th Searchlight Battalion until it returned to Camp Haan. On the afternoon of 11 March 1944 accused left Muroc for Camp Haan with the consent of his battery commander, but with the definite understanding that he was to return to Muroc the following morning on the truck that brought him to Camp Haan. This truck was scheduled to leave Camp Haan for Muroc at 8 o'clock the morning of 12 March. Shortly after accused arrived at Camp Haan on the evening of 11 March he left for Los Angeles, California, to see his girl, and overslept the following morning which caused him to miss the bus to Camp Haan and consequently missed the truck back to Muroc. He voluntarily returned to his station at Camp Haan in the afternoon of 21 March 1944 after an unauthorized absence of nine days. The proof fully sustains both Charges and Specifications.

6. All members of the court signed a written recommendation for clemency based upon accused's age, his length of service, his ability to rehabilitate himself and the circumstances which contributed to the commission of the offenses.

7. Accused is about 24 years of age and single. He was inducted into the military service 14 October 1941 and served as an enlisted man until 11 March 1943, when upon graduation from Antiaircraft Artillery Officer Candidate School, Camp Davis, North Carolina, he was appointed second lieutenant, Army of the United States, and entered upon active duty the same date.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or 96th Article of War.

Thomas N. Tappy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trueblood, Judge Advocate.

SPJGV
CM 253693

1st Ind.

War Department, J.A.G.O., 12 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Dawn G. Bean (0-1053047), Coast Artillery Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority, and to warrant confirmation of the sentence. The accused was punished under Article of War 104 on 11 February 1944 for absence without leave from 7 February 1944 to 9 February 1944. I recommend that the sentence as approved by the reviewing authority be confirmed but in view of accused's youth, his previous good record and the recommendation for clemency signed by all members of the court, I recommend that so much thereof as involves forfeiture of all pay and allowances due or to become due and confinement be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence as approved by reviewing authority confirmed, but forfeitures and confinement remitted. G.C.M.O. 361, 17 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 253726

9 JUN 1944

(89)

UNITED STATES	)	FOURTH AIR FORCE
v.	)	Trial by G.C.M., convened at Los Angeles, California, 9 March 1944. Dismissal.
Second Lieutenant JOHN L. EICHAR (0-755899), Air Corps.	)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

---

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant John L. Eichar, formerly 430th Fighter Squadron, now Headquarters, Los Angeles Fighter Wing, did, at or near Los Angeles, California, on or about 22 January 1944, violate paragraph 1, Army Air Force Regulation Number 60-16, dated 9 September 1942, by willfully and wrongfully operating an Army Airplane in a reckless and careless manner.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: In that Second Lieutenant John L. Eichar, formerly 430th Fighter Squadron, now Headquarters, Los Angeles Fighter Wing, did, at Headquarters, Los Angeles Fighter Wing, Los Angeles, California, on or about 24 January 1944, with intent to deceive Major Elmer J. Peck, A-2 Officer, Los Angeles Fighter Wing, officially state to the said Major Elmer J. Peck, that he did not "fly over the Los Angeles area" and "especially over the area in the vicinity of South Western Avenue and Santa Barbara Boulevard" during the evening of 22 January 1944, or words to that effect, which statement was known by the said Second Lieutenant John L. Eichar to be untrue.

He pleaded not guilty to all Specifications and the Charge. He was found not guilty of Specifications 2 and 3, guilty of Specifications 1 and 4 and of

the Charge, and was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. a. Specification 1: Paragraph 1, Army Air Forces Regulation No. 60-16, 9 September 1942 (Ex. 1) provides: "An air force pilot will not operate aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons or property on the ground". Operations Order No. 99, 430th Fighter Squadron (TE), 474th Fighter Group (TE), Oxnard Flight Strip, Oxnard, California, 22 January 1944 (Ex. 5) scheduled accused to fly a local mission in a P-38 plane from 4:30 p.m. to 6:30 p.m. on that date. A flight report of the same date (Ex. 4) showed that accused made the flight described (R. 6).

At about 5:30 or 5:45 p.m. on 22 January 1944, Mrs. Mary Jump, 1841 Browning Boulevard, Los Angeles, California, heard and saw an explosion in her yard. Just before the explosion she had heard an airplane going over, apparently flying low, and when she went out in the yard she saw a P-38 plane going south. It returned and when near her home "went into a dive, then a * * * pull-up and proceeded on". The dive was demonstrated and the court described it as "Moderate dive". After demonstration of the pull-up, the court described it as "Moderate climb - approximately 30 degrees". After the plane pulled up it "seemed to level out". Mrs. Jump saw no numbers on the plane because it was too high and she could not estimate its altitude. Mr. Angelo Mistone, 1848 Browning Boulevard, who was in his yard at the time, saw the plane approaching from the north in a dive. It made a pull-up and shortly afterward Mr. Mistone heard the explosion across the street. The plane returned, again made a dive and a pull-up, and continued north. He demonstrated the dive, which the court described as "shallow dive". Both dives were the same. The plane was travelling at a normal speed. When it passed over Mr. Mistone's head, it was flying level. He could not judge the altitude, but "According to my eyes I would say it was a long ways up". He could not read the numbers. When the pull-up was demonstrated, the court described it as "moderate climb" (R. 22-27).

It was stipulated that Mr. Irwin Martin, 1801 West 43rd Street, about six blocks south of Mrs. Jump's home, would testify that at about 5:45 p.m. on 22 January he saw and heard an explosion in an alley behind his home. He then saw a plane going south, but did not know what type it was. The Martin and Jump homes are one or two blocks west of Western Avenue, and Santa Barbara Avenue lies between them (R. 23).

It was stipulated that Major Elmer J. Peck, assistant A-2 officer, Los Angeles Fighter Wing, would testify that on 24 January he questioned accused, of the 430th Fighter Squadron based at Oxnard, California, about the incident of bombs dropped in the vicinity of Western Avenue and Santa Barbara Boulevard. Accused stated that after taking off at about 5:15 p.m. he had

done high altitude acrobatics over the field for about 15 minutes at the request of a member of the crew, and then completed his mission (R. 6-7).

Major Eugene E. Wilson, air inspector of the Los Angeles Fighter Wing, testified that on 24 January he interviewed accused and explained to him his right not to incriminate himself. Major Wilson then stated to accused that it was obvious to him that it was the ship of accused that had dropped two practice bombs over a residential area in Los Angeles, and asked accused whether he wanted to make a statement. Accused stated that he had been flying over the "general area in question" in Los Angeles, the southwestern part of the city, near Western Avenue and Browning Boulevard, but that he was not aware that there were any bombs in his ship, nor did he touch the bomb release. Since this was probably his last flight before going overseas, accused thought he would fly over his home. Accused said he made one or two "violent maneuvers" over the general area of his home. During their conversation Major Wilson stated to accused that he had received a communication by telephone that the armament man had inspected the ship and one ratchet was found to be mechanically defective. Accused did not state that he had dropped any bombs. A copy (Ex. 6) of a statement signed by accused was admitted in evidence for the sole purpose of refreshing the recollection of Major Wilson, and the court sustained an objection to a signed original of this document when it was offered (R. 7-22, 27-29).

b. Specification 4: When Major Peck questioned accused on 24 January, accused stated that he had not been flying over the Los Angeles area, especially the area in the vicinity south of Western Avenue and Santa Barbara Boulevard, and that he had not flown south of the "edge of mountains running East-West of" Oxnard (R. 6-7).

When Major Wilson interviewed accused the same day, he explained to accused that making a "false sworn statement" was one of the worst offenses an officer could commit and asked whether accused was sworn when he made a previous statement that he had not been over Los Angeles. Accused replied that he was not, and asked what the outcome of that statement would be. Major Wilson then stated "in my opinion that would not be a false sworn statement, as he had not been sworn". During their conversation, accused stated to Major Wilson that he had been flying over the area in question in Los Angeles, near Western Avenue and Browning Boulevard. Accused admitted that he had denied to Major Peck that he had been over Los Angeles, and stated that "taking due recognition of the seriousness of a false sworn statement, he desired voluntarily to make a statement outlining his exact actions" on 22 January (R. 7-9, 15-16).

(In a letter attached to the record, dated 28 March, Major Wilson states that it is his belief, based on personal observation at the time of the interview, that accused was not fully aware of the seriousness of his

offense until Major Wilson explained thoroughly the serious consequences of an officer making a false statement, and that the conduct of accused immediately following his infraction of flying regulations was due to his nervous condition at the time and his failure to realize the seriousness of the situation.)

4. Accused testified that he had been interested in aviation since he was in high school, secured a pilot's license when he was 16, tried to enlist in the Royal Canadian Air Force at 17, attended college for the purpose of obtaining two years credit so he could enlist in the Air Corps, took a primary civilian pilot training course, and upon completion enlisted in the Air Corps. He was commissioned 1 October 1943, completed his combat training, had about 500 hours as a pilot, was 21 years of age, and his unit had already moved to the theater for which it was trained. Accused had never before received censure, criticism or reprimand, nor been tried by court-martial. He had never had a flying accident. Two brothers are in the Air Corps (R. 32, 36).

On 22 January accused was assigned a plane but "had to sign it out" because of failure of the brakes. Later in the afternoon he was assigned another but it was "signed out" because of excessive "mag drip". He was preparing to go to Los Angeles when he was given another plane and told to fly in formation if possible with any other "P-38's" he might find in the area, and then to make an after dusk landing. He took off at about 5:00 p.m. At the request of a mechanic who serviced the ship, accused did acrobatics for about 15 minutes. He then flew "up the valley", and thought of flying over his home in Los Angeles, as it would probably be one of his last flights in this country. He started at an altitude of about 9,000 feet and made a "shallow" descent over the area of his home, then levelled off and went over his house, pulled up into a "shallow" climb, turned, and repeated the same maneuver. He then flew northwest back to the base at Oxnard, "joined formation" with another officer, and landed at 6:30 p.m. (R. 33).

The next morning accused was questioned in connection with the dropping of a bomb in Los Angeles. He did not know that his ship contained any bombs, so denied that he had been over Los Angeles, as his first thought was "this" incident would keep him from going overseas with his group. On 24 January he was interviewed by Major Wilson, who told him it was a far greater offense to make a false official statement than to violate flying regulations, that the best thing to do would be to admit "it", and that accused would probably "get off with a fine". At first accused did not answer questions, and asked whether "these former statements" would "bear any weight". Major Wilson then asked whether they were sworn statements and whether the rights of accused had been explained, and, upon receiving a negative answer, stated that they "would not bear or carry any weight" if accused made out a new statement "to the effect of what" he had done. Accused then told Major Wilson just what had happened. Major Wilson stated that "so far as he could see it" the bombing was due to mechanical failure,

"we would have to put something in the statement to prove directly the cause of these bombs being released", and asked "if a violent pull-up could have been the reason for the bombs coming from the ship". Accused told him that "it could", and also that he had no knowledge that bombs were in the plane and that he had at no time touched the bomb release button. The type bomb was a three pound practice bomb. The only reason he could give for having denied the flight over Los Angeles was that he wanted to go overseas with the group with which he had trained and it "meant everything" to him to go with them (R. 34-36).

On cross-examination accused stated that at no time while flying over Los Angeles did he make a violent pull-up. He admitted making and signing a statement on 2 February for First Lieutenant Robert F. McDermott, investigating officer, after being advised of his rights. The statement (Ex. 7) was in pertinent part that on 22 January he did acrobatics over the field at Oxnard, flew over the area of his home in Los Angeles at about 5:45 p.m., "dove down" from north to south, reaching a minimum altitude of 500 feet, then made a "violent pull-up", turned, flew back over the same course from south to north at a minimum altitude of 500 feet, then climbed "straight up into the sun", and returned to Oxnard. The next day he learned that a bomb was missing from his ship. The plane contained no bombs, to his knowledge, prior to the take-off; he did not touch the bomb release or charge the bombs; and he had no knowledge of any bomb being dropped until the next day. On further cross-examination accused stated that the vicinity of his home is a residential area, and that there is an open field about a mile west of his home in which a plane could be landed in emergency. The part of the statement to Lieutenant McDermott about a violent pull-up was taken "direct" from the statement to Major Wilson (R. 36-38, 42-43).

On examination by the court accused testified that his parents did not know he was going to fly over their home. The conversation with Major Peck was about a half hour before that with Major Wilson. Accused did not fly below 500 feet. He had flown over Los Angeles for years, and in event of engine trouble could have reached a place to land. Major Peck told him he did not have to make a statement that would incriminate himself. When accused started his first dive from about 9,000 feet he was approximately over Hollywood, and when he "pulled up" afterward to make a turn he was at about 6,000 feet (R. 38-42).

Mr. Edmond Crooker, flight instructor, who had been flying for 22 years and had over 5,000 hours, had known accused for two or three years and had instructed him. Mr. Crooker considered the ability of accused as above average for his age and experience, that he was of "sterling" character, and that he had always been truthful. Reverend Phillip T. Soderstrom, an Episcopal minister, and Mrs. Margaret Spalty, a neighbor of accused, both of whom had known him for several years, testified to the good reputation of accused. Second Lieutenant Hugh F. Dexter, who had known accused since

November 1942 and gone through training with him, testified that accused had always been "at the top of the class" and was the "best pilot in the squadron". He considered the character of accused "very high". It was stipulated that "Major Durham", senior controller of the Los Angeles Fighter Wing, would testify that he had found accused to be superior in the performance of his duties and eager to accept responsibility and to do his job (R. 45-48).

5. a. Specification 1: On 22 January 1944 accused, a pilot at Oxnard Flight Strip, Oxnard, California, took off in a P-38 plane at about 5:00 p.m. for a scheduled practice flight. After doing high altitude acrobatics over the field for about 15 minutes, he flew "up the valley". He then decided to fly over his home in Los Angeles, and at about 5:30 or 5:45 p.m. approached it from the north at an altitude of about 9,000 feet. Accused came down in a "moderate" or "shallow" dive until he was at an altitude of about 500 feet near his home, then continued south in a "moderate" climb of about 30 degrees until he reached about 6,000 feet, turned, and repeated the maneuver from south to north. When accused passed in the neighborhood of his home the first time, two three-pound practice bombs fell to the ground and exploded, at a distance of about six blocks from each other. They apparently dropped because of some mechanical failure. Accused testified that he did not know that there were any bombs in the plane, did not touch the bomb release button, and did not know that bombs had been dropped until the next day.

Accused is not charged with violation of low flying regulations, but with operating a plane in a "reckless and careless manner" in violation of Army Air Forces regulations. Although accused performed acrobatics over the field, it is obvious that he was neither charged with nor found guilty of reckless flying in so doing. The offense of which he was found guilty was in connection with the bomb dropping incident. The only evidence submitted on the point shows that accused did not know the plane contained bombs, did not touch the bomb release button, and did not know until the next day that the bombs had been dropped. Therefore, if the finding of guilty of the Specification is to be sustained, it must be on account of the manner of operating the plane, without regard to the presence of the practice bombs.

Although accused testified that he did not make a "violent pull-up" in the plane when passing near his home, and the testimony of eyewitnesses tended to corroborate him, yet there was placed in evidence a signed statement in which accused admitted that he did make a "violent pull-up", and an officer who interviewed him testified that accused said he made one or two "violent maneuvers". Accused made an explanation of how the reference to a "violent pull-up" happened to be included in his statement, although he had not in fact made one. As the Board views it, there is no necessity of determining whether the evidence shows that accused did in fact

make a violent pull-up, for the reason that accused was found not guilty of Specification 2, which charged him with violating a group memorandum by "performing a violent maneuver, to-wit: a violent pull-up, over the city of Los Angeles". The effect of this finding was to establish that accused did not make a violent pull-up.

There remains only the fact established that accused made two flights across a residential area of Los Angeles, in each of which he came down in a moderate dive to an altitude of about 500 feet and then proceeded away in a moderate climb. In the opinion of the Board, proof of these facts does not establish operation of the plane in a reckless and careless manner in violation of the regulation.

b. Specification 4: On 24 January when accused was questioned by Major Elmer J. Peck, assistant A-2 officer, Los Angeles Fighter Wing, about the bomb dropping incident, accused denied that he had flown over the Los Angeles area, especially the area in which the bombs had fallen. This statement by accused was false. About a half-hour later, after Major Eugene E. Wilson, an inspector of the Los Angeles Fighter Wing, had explained to him that making a false official statement was a far greater offense than violating flying regulations, accused admitted to Major Wilson that he had flown over Los Angeles and the area referred to. The finding of guilty of Specification 4 is sustained.

6. The accused is 21 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation cadet from 16 November 1942; appointed temporary second lieutenant, Army of the United States, and active duty, 1 October 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 1, legally sufficient to support the findings of guilty of Specification 4 and of the Charge, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Samuel M. Drivers, Judge Advocate

Robert C. Connor, Judge Advocate

J. J. Sotteuhas, Judge Advocate

1st Ind.

War Department, J.A.G.O., 14 AUG 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John L. Eichar (0-755899), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1, legally sufficient to support the findings of guilty of Specification 4 and of the Charge, and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused was found not guilty of Specifications 2 and 3. He made a false official statement that he did not fly over Los Angeles, when in fact he had flown there on the occasion referred to (Spec. 4).

3. Attached to the record of trial are a recommendation of clemency by one member of the court, a statement of the training, experience and record of accused, and a letter in behalf of accused from Major Eugene E. Wilson, Air Corps, a witness for the prosecution. Consideration has also been given to a letter from accused requesting clemency which accompanies the record.

The accused was found guilty of operating an airplane in a reckless and careless manner (Spec. 1), but the evidence does not support this finding. Although he flew near his home in Los Angeles at an altitude of about 500 feet, he was not charged with violation of the regulation forbidding flying below 1,000 feet over houses and buildings. He was found not guilty of performing a violent maneuver over Los Angeles (Spec. 2). It appears that accused made the false statement (Spec. 4) during an investigation of an incident in which two practice bombs had fallen from a plane; that accused did not know at the time that there were any bombs in his plane (from which in fact the bombs dropped on account of some mechanical failure); and that about a half hour later, after the seriousness of a false official statement had been explained to him, accused admitted that he had flown over Los Angeles. I recommend that the sentence be confirmed but, in view of all of the circumstances and of the previous excellent record of accused, that the execution thereof be suspended during good behavior.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Ltr. fr. accused.

(Finding of guilty of Specification 1 disapproved. Sentence confirmed but execution suspended. G.C.M.O. 469, 1 Sep 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

2 JUN 1944

SPJGH
CM 253783

UNITED STATES v. First Lieutenant THEDDEUS A. FLEMING, JR. (0-1286811), Infantry.	)	INFANTRY REPLACEMENT TRAINING CENTER CAMP FANNIN, TEXAS Trial by G.C.M., convened at Camp Fannin, Texas, 20 March 1944. Dismissal, total forfeitures and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 94th Article of War.

Specification 1: In that First Lieutenant Theddeus A. Fleming, Jr., did, at Longview, Texas, on or about 6 October 1943, make a claim against the United States by causing to be presented to Colonel Herbert Baldwin, Finance Officer, at Fort Worth, Texas, an officer of the United States, duly authorized to pay such claim in the amount of One Hundred and Ninety-six Dollars ($196.00), for services alleged to have been rendered to the United States by him, the said First Lieutenant Theddeus A. Fleming, Jr., which claim was false and fraudulent, in that he, the said First Lieutenant Theddeus A. Fleming, Jr., had theretofore on 12 June 1943, authorized a Class "E" Allotment in the amount of One Hundred and Fifty Dollars ($150.00) per month for an indefinite period of time payable to the United States National Bank, Medford Branch, Medford, Oregon, and did fail to subtract said Class "E" Allotment from said claim, and did receive on said claim the sum of One Hundred and Fifty Dollars ($150.00) more than the amount to which he, the said First Lieutenant Theddeus A. Fleming, Jr., was entitled to receive for services from 1 September 1943 to 30 September 1943, which said claim was then known by the said First Lieutenant Theddeus A. Fleming, Jr., to be false and fraudulent.

Specification 2: Similar to Specification 1, except that it alleges that the claim was made on or about 31 October 1943 in the amount of $196.70 for October 1943.

Specification 3: Similar to Specification 1, except that it alleges that the claim was made on or about 6 January 1944 at Camp Fannin, Texas, in the amount of $431.33 for November and December 1943, was caused to be presented to Major J.B. McNeely, Finance Officer at Camp Fannin, and exceeded the amount due accused by $300.

CHARGE II: Violation of the 95th Article of War.

Specification: In that First Lieutenant Theddeus A. Fleming, Jr., did, at Camp Fannin, Texas, on or about 14 January, 1944, with intent to deceive Colonel James J. Hea, officially state to the said Colonel James J. Hea, that his Class "E" Allotment of One Hundred and Fifty Dollars ($150.00) had been deducted on his October pay voucher, or words to that effect, which statement was known by the said First Lieutenant Theddeus A. Fleming, Jr., to be untrue in that his Class "E" Allotment for One Hundred and Fifty Dollars ($150.00) had not been deducted from his October pay voucher.

CHARGE III: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Theddeus A. Fleming, Jr., did, at Longview, Texas, on or about 4 December 1943, with intent to defraud, wrongfully and unlawfully make and utter to Hilton Hotel, a certain check in words and figures as follows, to wit:

Written at Longview, Texas 4 Dec 1943

PAY TO THE ORDER OF HILTON HOTEL $ 15.00

Fifteen and 00/----------DOLLARS

To United States Nat'l Bank T.A. Fleming, Jr.
Medford, Branch, Medford, Ore. Signature
(Name of Bank)

Branch O-1286811 1st Lt Inf
Address (Street)

City Harmon Gen Hosp
(City)

and by means thereof did fraudulently obtain from the said Hilton Hotel, Fifteen Dollars ($15.00), lawful currency of the United States, he the said First Lieutenant Theddeus A. Fleming, Jr.,

then well knowing that he did not have and not intending that he should have sufficient funds in the United States National Bank, Medford Branch, Medford, Oregon, for the payment of said check.

Specification 2: Similar to Specification 1, except that it alleges that the check was made and uttered on or about 5 December 1943.

Specification 3: Similar to Specification 1, except that it alleges that the check was made and uttered on or about 11 December 1943 in the amount of $45.

Specification 4: Similar to Specification 1, except that it alleges that the check was made and uttered on or about 11 December 1943 to Hospital Fund, Harmon General Hospital, in the amount of $11, in payment of an indebtedness.

Specification 5: Similar to Specification 1, except that it alleges that the check was made and uttered on or about 12 December 1943 in the amount of $5.

Specification 6: Similar to Specification 1, except that it alleges that the check was made and uttered on or about 13 December 1943 in the amount of $20.

Specification 7: Similar to Specification 1, except that it alleges that the check was made and uttered on or about 13 December 1943 in the amount of $18.88, for lawful currency or its equivalent.

Specification 8: Similar to Specification 1, except that it alleges that the check was made and uttered on or about 14 December 1943 to First Lieutenant Aloysius H. Haas in the amount of $56, in payment of a debt and with intent to deceive.

Specification 9: Similar to Specification 1, except that it alleges that the check was made and uttered at Camp Fannin, Texas, on or about 5 January 1944 to Fourteenth Regimental Officers' Mess in the amount of $22.10, in payment of an account.

He pleaded not guilty to and was found guilty of all Specifications and Charges. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution:

a. Specifications 1, 2 and 3, Charge I: By stipulation there was introduced in evidence a photostat (Ex. 1) of an authorization for allotment

of pay, signed by accused on 12 June 1943, providing a Class "E" allotment of $150 per month for an indefinite period, beginning 1 August 1943. The allotment was made to United States National Bank, Medford Branch, Medford, Oregon, for deposit to the credit of accused. By further stipulation there was introduced in evidence a true copy (Ex. 3) of the bank statement of the account of accused from 14 September 1943 to 14 January 1944, showing deposits as follows: 14 September, $150; 6 October, $150, 6 November, $141.20; 7 December, $150; and 7 January, $150. The deposits "as shown for" October, December and January of $150 each "except the deposit of 6 November 1943, which was in the amount of $141.20", were amounts deducted from his pay under the allotment. Also by stipulation, a photostat (Ex. 2) of the pay voucher signed by accused on 7 October 1943 for September was placed in evidence. It discloses a claim for $196 less a Class "E" allotment of $9.40, or a net amount of $186.60, and is stamped paid in the name of Colonel Herbert Baldwin, Finance Department. Accused duly received a check for $186.60 in full payment of his pay and allowances for September. In like manner copies of pay vouchers signed by accused were introduced as follows: photostat (Ex. 4) of voucher dated 31 October for October in the amount of $196.70 less a Class "E" allotment of $9.40, or a net amount of $187.30, stamped paid by Colonel Baldwin; and photostat (Ex. 5) of voucher dated 6 January for November and December in the amount of $431.53 less a Class "E" allotment of $9.43, or a net amount of $422.10, stamped paid by Major J. B. McNeely, Finance Department. Major McNeely testified by deposition (Ex. 6) that at Camp Fannin officers' pay vouchers are prepared in the finance office as a courtesy; that accused presented his pay data card showing a Class "E" allotment of $9.43; that payment was made by check to accused on 7 January in the amount of $422.10, which was $300 more than should have been paid; and that Major McNeely had no knowledge of the $150 allotment until later (R.10-14).

b. Specification, Charge II: Colonel James J. Hea, commanding 14th Training Regiment, Infantry Replacement Training Center, Camp Fannin, Texas, the organization of accused, testified that on 14 January 1944, in the investigation of certain checks of accused which had been referred to him sometime before, and after having learned that the $150 allotment had not been deducted from the voucher for November and December, he interviewed accused. After explaining to accused his right not to incriminate himself, Colonel Hea asked accused whether the $150 allotment had been deducted from his October voucher, and accused replied that it had been deducted from that pay voucher. The conversation lasted about five minutes. When recalled as a witness for the court, Colonel Hea testified that the statement of accused that he deducted the $150 from his October voucher was in answer to a direct question. When asked what finance officer "paid it", accused advised Colonel Hea that it was paid at Harmon General Hospital. In a subsequent conversation with Colonel Hea accused did not change his statement, nor claim that he had misunderstood the question (R.9, 15-18, 48-50).

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

c. Specifications 1, 2, 3, 5, 6 and 7, Charge III: Mr. Madison Schwer, manager of the Hilton Hotel, Longview, Texas, who had cashed several checks for accused which he had seen accused sign personally, identified the following checks of accused drawn on the Medford Branch of the United States National Bank, payable to the Hilton Hotel, and presented to the Hotel: check (Ex. A) dated 4 December for $15; check (Ex. B) dated 5 December for $15; check (Ex. C) dated 11 December for $45; check (Ex. D) dated 12 December for $5; check (Ex. E) dated 13 December for $20; and check (Ex. F) dated 13 December for $18.88. Each of the checks except Exhibit F has on the back a rubber stamped receipt for the amount of the check, signed by accused. Mr. Schwer stated that the check for $18.88 was in payment of an account in that amount. These checks were deposited for collection in regular course of business, and returned unpaid with the notation "Insufficient Funds" or "Refer to Maker". Mr. Schwer did not know whether he personally had cashed these particular checks, although he had cashed a number of checks for accused. Four of the checks came back from the bank at the same time, and Mr. Schwer redeposited them at the request of accused, but they were not paid. It was stipulated that an employee of Western Union Telegraph Company would testify that there was a company record of the transfer of $148 from accused to the Hilton Hotel at 6:13 p.m. on 19 March 1944 (R. 18-23).

The bank statement of accused (Ex. 3) shows the following pertinent facts: 14 September 1943, deposit $150, debit $150, balance ".00"; 6 October, deposit $150, debit $150, balance ".00"; 6 November, deposit $141.20; in November and December, numerous debits; 4 December, overdraft of $2.25; 7 December, deposit $150, balance $100.40; 9 December, balance $5.40; 11 December, balance $4.40; 14 December, balance $3.40; 15 December, balance $2.40; 18 December through 6 January, an overdraft; and on dates in December not specifically referred to above, no entries (R. 11-12).

d. Specification 4, Charge III: Captain J. M. Fuller, Medical Administrative Corps, Harmon General Hospital, Longview, Texas, identified a check (Ex. G) drawn by accused on the Medford Branch of the United States National Bank, payable to Hospital Fund, Harmon General Hospital, in the amount of $11. The check, dated 11 December, was given by accused in payment of a mess bill. It was given to the bookkeeper, and Captain Fuller did not see accused sign it. The check was deposited for collection in regular course, and was returned marked "Insufficient Funds". The statement of the bank account of accused for December has been summarized above (see par. 3c). At some time in February Captain Fuller received payment of the check (R. 24-25).

e. Specification 8, Charge III: First Lieutenant Aloysius H. Haas identified a check (Ex. H), dated 14 December 1943, drawn by accused to Lieutenant Haas on the Medford Branch, United States National Bank, for $56. The check was given to him by accused in payment of a loan. Lieutenant Haas

cashed the check at the Longview National Bank, but had to redeem it a week or two later when the bank notified him that the check had been returned marked "Insufficient Funds". The condition of the bank account of accused has been shown above (par. 3c). The check was subsequently paid by accused about 17 March 1944 (R. 26-27).

f. Specification 9, Charge III: First Lieutenant Thomas A. Inteso, custodian of funds of the officers' mess and club of the 14th Training Regiment, identified a check (Ex. I) dated 5 January "1943" (1944) which accused gave him in payment of a mess bill. The check, drawn on the Medford Branch, United States National Bank, was for $22.10. After being deposited in regular course of business, it was returned marked "Insufficient Funds". The check was made good on 28 January. The statement of the account of accused in the bank (Ex. 3) shows that on 5 January 1944 it was overdrawn, on 7 January $150 was deposited and the balance was $74.54, the balance remained in excess of $22.10 through 10 January, but was less than that amount from 11 January to 14 January (R. 11-12, 27-29).

4. Accused testified that while he was stationed at Camp White, Oregon, he opened a bank account with the Medford Branch of United States National Bank and made an allotment (Ex. 1). A deduction of the allotment was made from his pay voucher for August. About 1 September accused had a shoulder "smashed up" and was sent to Barnes General Hospital, Vancouver, Washington. About 17 September he received a deposit slip from the bank showing that $150 had arrived. Accused left Barnes General Hospital about 28 September, and went to Harmon General Hospital, where he remained until 11 December, except from about 5 November to 28 November when he was on sick leave. He admitted signing the pay vouchers (Exs. 2, 4 and 5) which were introduced in evidence. It was his "idea" that the vouchers were paid by the local finance office. When he went to Harmon General Hospital (Longview, Texas) he "couldn't see any sense" in keeping a checking account at Medford, Oregon, so he did not deduct the allotment from the pay voucher, and "didn't think they would send it there". He did not receive notice of deposit of the allotment for September until about 5 November, as the deposit slip was sent to the 91st Division on maneuvers, then back to Camp White, and finally to accused. By that time he had signed a voucher for "November". He went home on leave the day he received the notice, and while there wrote a letter to the bank about 20 November stating that he wanted to close his account. When he returned to the hospital he received notice of a deposit of $150 for the month of October. He received his first bank statement some time in January. On 11 December he was released from the hospital, had another leave, and went to a new assignment at Camp Fannin. When he came to Camp Fannin he realized that he "needed to make the pay good" (R. 31-33, 35).

The only amount he had spent was "for the first month". After he arrived at Camp Fannin he went to Major McNeely at the finance office, made out his voucher, and "left the allotment off". He "sent for the money" and "meant to make it good in one payment". Colonel Hea called him in and censured him about some checks that had been returned. About a week later Colonel Hea called him in again and for the first time "actually" talked to accused about the checks. Colonel Hea asked him "if the deductions had been made and I stated no, that I intended to go to the Finance Office and return the money". About a week later, approximately 22 January, Colonel Hea asked accused whether he had returned the money, to which accused replied that he had not, as he had not had "a minute of time" to attend to it. Colonel Hea placed him in arrest. Shortly afterward, in February, accused went to see "Major Vaccaro", who wanted him to make an allotment to "make up" the money he was overpaid. Accused agreed to a suggestion that he make an allotment of his January pay, $276, and "get" the remaining $324. Later, near the end of February, when he had not acquired the necessary money, Major Vaccaro and Major McNeely decided to deduct his February pay also, which would leave him owing only about $50. Accused told them this would be all right but did not sign anything. He did not receive pay for January and February, and understood it was being withheld "for that purpose" (R. 33-35).

When he signed the first two vouchers accused did not know the money was going to the bank and thought that if he signed the voucher, leaving off the allotment, the money would not go to the bank. After he received the deposit slip he realized the money was going to the bank and for that reason wrote the letter to the bank. When he "got over here" he did not have $150 "to make it up", so he "didn't deduct that" and was going to "get it together and turn it in" in one lump sum (R. 35-36).

As accused recalled it, Colonel Hea asked him if the allotment had ever been deducted and he did not realize that the month of October was referred to. He used the money from the various checks introduced in evidence for general expenses. He used counter checks, had no check book from the bank, kept no record of the checks he wrote, and in making out the checks "understood" that he had money in the bank. It was never his intention to defraud either the United States or the payees of the checks. It was his understanding that his pay was withheld for the purpose of reimbursing the Government. When he returned from leave in December he wrote Lieutenant Haas, after he tried to close the account, that the check might come back and he would make it good, and told Mr. Schwer that one of the checks might come back. As soon as he "got" the money, accused made the checks good. He had been in the Army nearly four years, and had never been tried by court-martial before (R. 36-38).

On cross-examination accused stated that he knew the September allotment was deposited after he received the "bank slip" about 5 November, and after that drew against "that allotment". He also drew checks against

the October "deduction". When asked whether he knew that the allotments for August, September, October, November and December were deposited in the bank, he replied that he did not know that the September and October deposits had been made until he received the deposit slip. He did not write checks until he received the deposit slip on 5 November. Prior to that time he thought that if the allotment was not on the voucher it would not be paid. He was paid for October prior to 5 November. He had made the allotment when he thought he would be in Oregon, as he had previously lost some money when he carried his pay in cash. After he knew the money was going to the bank, after 5 November, accused wrote checks. He wrote none before November. He admitted that the deposits on the bank statement were from the allotment. When he signed a voucher for November and December he did not mention his allotment of $150. He knew that the money had been deposited but knew that he was going to pay the whole amount back in a lump sum at one time.. Before Colonel Hea's investigation, accused told him that he (accused) had been overpaid and was going to pay "them" back. Colonel Hea asked if any "deduction had been made" and accused replied "yes"; he asked "had the money been deducted" and accused replied "no". On a later occasion Colonel Hea asked "if any deductions had been made" and accused replied that they had not, except for August. Accused believed that Colonel Hea was confused (R. 38-42).

Accused admitted writing the nine checks and stated he thought he had enough money in the bank to cover them. He did not keep a record of them and did not realize they came to "such an amount". He did not learn that the check to the officers' mess was returned until shortly before 1 February and made it good at once. He paid the Haas check on 17 March. He learned that the Hilton Hotel checks had been returned, some time in January, and gave the money to the guard to pay them on 17 March. The money was telegraphed to the hotel on 19 March. He knew it is the responsibility of an officer to know that his pay voucher is correct, and in signing the first two he thought "it was correct". When he wrote the bank about closing the account, he stated that after the funds had been used he would not deposit any more. He did not write to the finance officer about the allotment (R. 42-43, 48).

On examination by the court accused stated that he did not read the voucher he signed in January, but realized then that the money was going to the bank, and knew that the deduction should be made. He was going to get $600 in one lump sum and return it to Major McNeely. When Colonel Hea talked to him, accused was excited, and did not understand the conversation as Colonel Hea did. He did not remember making the statement about October, but remembered stating that the allotment had been deducted for August. He had been an officer since 6 July 1942 (R. 43-48).

It was stipulated that a Western Union receipt showed payment by accused to the Hilton Hotel of $148 at 6:09 p.m. on 19 March (R. 50).

5. a. Specifications 1, 2 and 3, Charge I: On 12 June 1943, while stationed at Camp White, Oregon, accused made a Class E allotment to the United States National Bank, Medford Branch, Medford, Oregon, for credit to his account, in the amount of $150 per month for an indefinite period beginning 1 August 1943. Proper deduction of the allotment was made from his August voucher, and $150 was credited to his account in the bank on 14 September. The allotment for the next four months was duly paid to the bank and credited to his account as follows: 6 October $150, 6 November $141.20, 7 December $150, and 7 January $150. About 5 November accused received a deposit slip from the bank showing the deposit of 6 October, and about 28 November received notice of the deposit of 6 November. About 1 September accused had gone to Barnes General Hospital, Vancouver, Washington, as a result of a shoulder injury. He went to Harmon General Hospital, Longview, Texas, about 28 September, and remained there until 11 December, except from about 5 November to 28 November when he was on sick leave. On 11 December he was released from the hospital, took another leave, and went to a new assignment at Camp Fannin, Texas.

About 7 October, while at Harmon General Hospital, accused signed and submitted his September pay voucher, without deducting the allotment, and received payment thereon. About 31 October he signed and submitted his October voucher without deducting the allotment. After going to Camp Fannin, he signed and submitted his pay voucher for November and December, about 6 January 1944, without deducting the allotment and received payment thereon. While his allotment was in effect, so that the amount thereof was being paid to the bank each month to the credit of accused, it was his responsibility to deduct the amount of the allotment from his pay vouchers (see AR 35-5520). By failing to make the deduction for the months stated above, accused submitted false claims against the Government to the extent that he was being paid by allotment.

Accused admitted that when he submitted his voucher for November and December at Camp Fannin (Spec. 3), he knew the allotment should be deducted, but claimed that it was his intention to obtain $600 and repay the double payment of $300 included in that voucher, along with the double payment in the two preceding vouchers, in one lump sum. His fraudulent and wrongful act of knowingly submitting a false claim for pay is not excused by any intention he may have had thereafter to reimburse the Government.

Accused testified that, prior to receiving notice (about 5 November) of the deposit of his September allotment of $150 to his credit in the bank, he thought that if he signed a voucher, leaving off the allotment, the money would not go to the bank. If this testimony stood alone, it might be acceptable as showing want of knowledge that his vouchers (Specs. 1 and 2) as submitted (prior to 5 November) were false, although it is difficult to believe that an officer who had held his commission and been on active duty for about 15 months could have a bona fide belief to that effect. However,

when it is noted that accused drew checks against his allotment when he learned that it had been deposited, and that, approximately two months after he admittedly knew that he was under the obligation of deducting the allotment, he went to a new station and again submitted a voucher without making the deduction, the Board of Review is satisfied that the vouchers for September and October were known to be false when submitted. Otherwise, accused would not have drawn checks against the allotment and would have made proper deductions for November and December after learning that he had erroneously submitted the first vouchers. When he submitted the voucher at Camp Fannin (about 6 January) accused had not yet been questioned by his commanding officer about the double payments, and he did not consult with finance officers about reimbursing the Government until after such questioning.

The deposit of 6 November (October allotment) was in the amount of $141.20 for some undisclosed reason, when the allotment in effect at the time was $150. The Board is of the view that the variance was immaterial.

The Board of Review is of the opinion that the guilt of accused under these Specifications was shown beyond any reasonable doubt.

b. Specification, Charge II: Colonel James J. Hea, commanding officer of accused at Camp Fannin, testified clearly and positively that on 14 January 1944, after learning that accused had not deducted his allotment from his voucher for November and December, he asked accused whether the $150 allotment had been deducted from his October voucher. Accused replied that it had been deducted from that voucher. In fact, accused had not made the deduction on his October voucher submitted at Harmon General Hospital. The denial of accused that he made this false statement to Colonel Hea was not clear cut, but consisted of various comments, such as that he did not realize that Colonel Hea was referring to October, that he (accused), told Colonel Hea he had not made the deduction except for August, that Colonel Hea was confused in his testimony, and that accused was excited when Colonel Hea talked to him. The Board of Review is satisfied from the evidence that accused made the false statement as alleged. The making of a false official statement is a violation of the 95th Article of War.

The court found accused guilty of Specification 1 and Specification 2, Charge II, when in fact he was arraigned on and pleaded to only a single Specification under Charge II. This error is not prejudicial, as the findings of guilty of two Specifications obviously include that on which accused was arraigned, and that part of the findings referring to a non-existent Specification is a nullity and will be ignored.

c. Specifications 1, 2, 3, 5, 6 and 7, Charge III: Accused drew and uttered to the Hilton Hotel, Longview, Texas, checks drawn on his account in the United States National Bank, Medford Branch, Medford, Oregon,

as follows: 4 December 1943 for $15 (Spec. 1), 5 December for $15 (Spec. 2), 11 December for $45 (Spec. 3), 12 December for $5 (Spec. 5), 13 December for $20 (Spec. 6), and 13 December for $18.88 (Spec. 7). Accused received cash for the checks, except the last, which was given in payment of an account. The checks were deposited for collection in regular course of business, but were returned to the payee unpaid. From 4 December through 6 January the account of accused was either overdrawn, or contained a balance less than $5, except that on 7 and 8 December the balance was $100.40 and on 9 and 10 December the balance was $5.40. Accused reimbursed the hotel on 19 March 1944.

Accused testified that the only amount he had spent was "for the first month" (presumably the August allotment) and that he drew no checks on his account until he received a deposit slip on 5 November showing the deposit of his September allotment ($150 on 6 October). He also testified that after 5 November he drew checks against his September allotment and his October allotment. The bank statement (Ex. 3) corroborates his testimony that he began drawing checks after 5 November. All of the checks drawn against the account during November and December are shown to have been charged against the allotment deposit of $141.20 on 6 November (for October) and $150 on 7 December (for November), resulting in an overdraft of $11.46 at the end of December. The deposit of $150 on 14 September (for August) and the deposit of $150 on 6 October (for September) are offset by debits of the same amount on the same dates, as shown by the bank statement, resulting in a net balance of ".00" on these two dates. The nature of these two debits is completely unexplained in the record, so that it is not shown whether they were made by authority of accused or came to his notice. Accused testified that he was notified of these deposits, but did not refer to the offsetting debits. He also testified that in drawing the checks he "understood" that he had money in the bank, and did not intend to defraud. He admitted that he kept no record of the checks he wrote and stated that he did not realize they came to "such an amount". The checks involved in the Specifications under discussion amounted to $103.88, and those involved in all Specifications, including these, $207.98. If accused knew that the deposits of 14 September and 6 October had been withdrawn, he obviously drew these checks with knowledge that they would not be paid. To the contrary, if he knew only that these deposits had been made to his credit, and not that they had been withdrawn, it would appear that he reasonably believed that his checks would be honored.

An accused is properly chargeable with knowledge of the status of his bank account (CM 202601, Sperti, 6 B.R. 171). Although the debits to the account of accused on 14 September and 6 October are not explained in the record, the Board of Review is of the opinion that the facts lead to the inference that accused knew that the deposits of those dates had been withdrawn, and that he had no remaining balance, in accordance with the rule stated above. Accused inferentially admitted that he had spent the

August allotment, deposited to his account on 14 September, which the bank statement shows was withdrawn on the same day. If accused used the money, he knew it did not remain in the bank regardless of the absence of explanation of how the money was withdrawn. The entries of 6 October were the same as those of 14 September, and were undoubtedly records of similar transactions. Having knowledge of one, accused is bound to have had knowledge of the other. His drawing of numerous checks only after 5 November is accounted for by the fact that he knew that on or about that date his October allotment would reach the bank.

This result is not in conflict with the Board's opinion in CM 236070, Wanner (2 Bull. JAG 384-385), where the record showed affirmatively that the account had been closed by a debit entry made by the bank and that accused had no knowledge of it. In the present case, the proof did not show such facts, and accused made no claim that the two deposits had been cancelled without his knowledge. The Board of Review is of the opinion that under the circumstances accused was chargeable with knowledge of the status of his account, and that the record of trial sustains the findings of guilty of these Specifications.

d. Specifications 4, 8 and 9, Charge III: Accused drew and uttered checks drawn on his bank account as follows: 11 December to the Hospital Fund, Harmon General Hospital, for $11, in payment of a mess bill (Spec.4); 14 December to First Lieutenant Aloysius H.Haas for $56, in payment of a loan (Spec. 8); and 5 January 1944 to the officers' mess for $22.10, in payment of a mess bill (Spec. 9). The checks when deposited for collection were returned marked "Insufficient Funds". Accused subsequently paid the checks. The bank balance of accused was less than $11 from 11 December through 6 January, in excess of $22.10 from 7 January through 10 January, and less than that amount thereafter. For the reasons stated above (par. 5c) the Board of Review is of the opinion that the record of trial sustains the findings of guilty of these Specifications. The fact that there was sufficient money in the bank from 7 January to 10 January to pay the check drawn on 5 January does not constitute a defense, as it was not kept there sufficiently long to make the check good on presentation in regular course of business. Since accused did not leave this deposit available to meet this check, it cannot be assumed that he intended the check to be paid. The balance was inadequate when the check was drawn.

6. The accused is 25 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 19 July 1940; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 6 July 1942; temporarily promoted to first lieutenant, Army of the United States, 18 November 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 94th or 96th Article of War, and mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Drewes, Judge Advocate

Arthur A. Clemmer, Judge Advocate

H. Lottlichos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 8 - JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Theddeus A. Fleming, Jr. (0-1286811), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused submitted three pay vouchers which were known to be false in that a Class E allotment of $150 per month was not deducted (Chg. I), made a false official statement that he had deducted the allotment from one of the vouchers (Chg. II), and wrongfully made and uttered nine checks aggregating $207.98 with knowledge that his bank balance was insufficient to pay them (Chg. III). I recommend that the sentence to dismissal, total forfeitures, and confinement at hard labor for five years be confirmed but that the period of confinement be reduced to two years, and that the sentence as thus modified be carried into execution.

Consideration has been given to a letter dated 25 March 1944 from Honorable Kenneth McKellar, United States Senator, to The Adjutant General, inclosing a letter from the father of accused requesting clemency.

3. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls.
Incl.1-Record of trial.
Incl.2-Drft. of ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Ltr. fr. Hon. McKellar, 25 Mar.44, w/incl.

(Sentence confirmed but confinement reduced to two years. G.C.M.O. 364, 17 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN
CM 253795

26 APR 1944

UNITED STATES	)	SECOND AIR FORCE
	)	
V.	)	Trial by G.C.M., convened at
	)	Army Air Base, Sioux City,
Second Lieutenant VERNON D.	)	Iowa, 25 March 1944. Dis-
MUSTON (0-686198), Air Corps.	)	missal and total forfeitures.

OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL and GOLDEN, Judge Advocates

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Vernon D. Muston, Replacement Pool, 393rd Combat Crew Training School, did, at Sioux City, Iowa, on or about 12 February 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to-wit:

Woodbury County Savings Bank 41-6 No._____

Sioux City, Iowa 2/12 1944

Pay to the Order of J. C. Penney Co. $25.00

CUSTOMERS DRAFT

Twenty Five and no/100----------Dollars
With Exchange and collection charges

To Woodbury Co. Saving Bank)
)
Sioux City, Iowa) Irving C. Goldfarb
S C Army Air Base

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 2: In that Second Lieutenant Vernon D. Muston, Replacement Pool, 393rd Combat Crew Training School, did, at Sioux City, Iowa, on or about 12 February 1944, with intent to defraud, wilfully, unlawfully, and feloniously utter as true and genuine a certain check in words and figures, as follows:

Woodbury County Savings Bank 41-6 No____

Sioux City, Iowa 2/12 1944

Pay to the Order of J. C. Penney Co. $25.00

CUSTOMERS DRAFT

Twenty-Five and no/100----------Dollars
With Exchange and collection charges

To Woodbury Co. Saving Bank)
)
Sioux City, Iowa) Irving C. Goldfarb
S C Army Air Base

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said Lieutenant Vernon D. Muston then well knew, falsely made and forged.

He pleaded not guilty to and was found guilty of the Charge and its Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that between 1730 and 1800 o'clock on 12 February 1944 a second lieutenant entered the J.C. Penney Store in Sioux City, Iowa, and requested the assistant manager of the store to cash a check for him to be drawn upon a blank check which he presented. Being asked for identification, he presented an Army Air Base pass bearing the written name of Irving C. Goldfarb which was under the plastic glass cover of a compartment in his billfold. The assistant manager, at the second lieutenant's request, filled out the check; the second lieutenant signed it with the name Irving C. Goldfarb; and it was then cashed for the full sum of $25 in which amount it had been drawn. This required about five or six minutes during which the assistant manager engaged the second lieutenant in conversation and had ample time to observe him carefully. The check was dishonored by the bank upon which it was drawn because there was "no account" with such bank for its payment and the J. C. Penney Company paid its bank the amount of the check when it was returned on 14 February 1944. On the latter date the assistant manager by telephone conversed with Second Lieutenant Irving C. Goldfarb who was stationed at the Army Air Base, Sioux City, Iowa, and, after explaining how the check had been cashed, was advised that Second Lieutenant Irving C. Goldfarb had not signed or cashed the check and that the assistant manager should contact the Provost Marshal at the base. Thereafter, on 11 March 1944, the assistant manager recognized the accused on the street in Sioux City and caused his apprehension. He was positive in his identification of the accused as the person who had cashed the check, which was admitted into evidence (R. 6-21; Ex. "A").

Second Lieutenant Irving C. Goldfarb testified that on or about 3 February 1944 he had left his Class A pass, bearing his written name thereon but not his signature, in accordance with the rule of his organization, in the pass box in the orderly room. He had not thereafter seen or used the pass and, after the telephone conversation with the assistant manager on 14 February 1944, he had ascertained that his pass on such date was missing. He denied ever having seen the check involved before except during the investigation, that he had written the check or had authorized the accused or any one else to write it and that he had an account with the bank upon which the check was drawn. He wrote his signature five times upon a sheet of paper which was admitted into evidence (R. 21-24; Ex. B).

During the investigation the accused, after explanation of his rights under Article of War 24, wrote in his own hand the name Irving C. Goldfarb nine times upon a sheet of paper which was also admitted into evidence. A bank teller with limited experience and qualifications as

a handwriting expert was permitted, over the objection of the defense, to testify that in his opinion the signature on the check was the same as that written by the accused and that they were written by the same person (R. 27-32; Ex. C).

4. The accused, after explanation of his rights as a witness, testified. He denied ever having been in the J. C. Penney Store and having signed the name Irving C. Goldfarb to the check. He presented three of his checks in the amounts of $15, $15 and $20 dated 16, 18 and 19 February 1944 drawn on his bank at Bronte, Texas, which had been cashed by the Sioux City Army Air Base Officers' Mess and paid by his bank. Also telegraphic money order receipts showing the transmission of $100 on 4 February 1944 and $200 on 28 February 1944 to his bank were admitted into evidence as was also his bank statement showing balances of $209.75 on 29 February 1944 and $159.75 on 15 March 1944. The perforated paid stamps on the three checks and the bank statement show that the three checks above mentioned were paid after 1 March 1944. A telegram from his bank advising that on 11 February 1944 his balance was $72.50 was also admitted into evidence (R. 33-38; Def. Exs. A-G).

Upon cross examination the accused admitted that his bank account had been initiated with the deposit on 4 February 1944. He, while denying that he had been in financial difficulties between 1 and 12 February 1944, also admitted having borrowed $50 from the Red Cross in January 1944, which he had paid soon after 1 February 1944 (R. 36-38).

5. Specifications 1 and 2, respectively, allege that the accused at a designated time and place with intent to defraud, falsely made in its entirety a certain described check and that at like time and place with intent to defraud, willfully, unlawfully and feloniously he uttered the same described check as true and genuine knowing that it was falsely made and forged. The offenses alleged are, therefore, those of forgery and uttering a forged instrument which are two separate and distinct offenses even though arising out of the same transaction (CM 129113 (1913) Dig. Ops. JAG 1912-40, Sec. 451 (25)). Forgery is defined as "the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice" and, consequently, "signing another's name to a check with intent to defraud is forgery" (M.C.M., 1928, par. 149j). The offense of uttering a forged instrument requires that the accused have knowledge that the instrument is a forgery and that he have an intent to defraud which may be implied where knowledge of the falsity of the instrument is shown (M.C.M., 1928,

par. 152c). The latter offense is violative of Article of War 96 and the former, although appropriately chargeable as violative of Article of War 93, is likewise violative of Article of War 96 because it is clearly conduct of a nature to bring discredit upon the military service (M.C.M., 1928, par. 152b, and CM 181657, 182433, 182706 (1928), Dig. Ops. JAG, 1912-40, Sec. 454 (96)).

The evidence for the prosecution establishes conclusively every element of the offenses charged. The assistant manager of the store where the check was cashed positively identified the accused as the officer who represented himself as Irving C. Goldfarb and who signed such name to the check which had been filled out by him at such officer's direction. The check was therefore made in its entirety by the accused acting in part through the assistant manager as his agent. The testimony of Second Lieutenant Goldfarb definitely brands the check as a forgery and shows the manner in which his pass could have been acquired by the accused to aid him in his unlawful design. The handwriting samples were undoubtedly compared by the court and such comparison with the testimony of the bank teller, which was admittedly of limited value, supplemented the testimony of Lieutenant Goldfarb so that the accused's guilt of the alleged forgery was established beyond a reasonable doubt. His guilt likewise, of the offense of uttering such forged check, was similarly established by the same evidence because having forged the signature of the check, the accused knew it was a forgery and from such knowledge his fraudulent intent is compellingly implied even if it had not been directly shown by his having secured the cash for the forged instrument. The accused sought to fortify his denial of the commission of the two offenses by showing that he had no motive to commit them because he was not financially embarrassed at the time. The evidence submitted by him, when examined and analyzed not only wholly fails to establish his contention but on the contrary shows that at the time he quite probably was without adequate funds which is further confirmed by his admission, upon cross-examination, that during the preceding January he had been required to borrow $50 from the Red Cross. Even the accused's categorical denial of the offense was therefore weakened and the court, as it was entitled, elected to disbelieve his testimony. It follows, therefore, that the evidence conclusively supports the findings of guilty of the Charge and its two Specifications.

6. The accused is about 27 years old. The War Department records show that he has had enlisted service from 3 March 1942 until 15 July 1943 when he was commissioned a temporary second lieutenant upon completion of Officers' Candidate School and that he has had active duty as an officer ~~since the latter~~ date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specifications and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

William H. Gambrell, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 253795

1st Ind.

War Department, J.A.G.O., 6 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Vernon D. Muston (0-686198), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be ordered executed.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 381, 18 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ
CM 253862

26 APR 1944

UNITED STATES	)	44TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 44, c/o Postmaster, Shreveport, Louisiana, 28 March 1944. Dismissal.
Second Lieutenant CARL C. SCHULZ, JR. (01183760), Field Artillery.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

---

1. The Board of Review has examined the record of trial in the case of the officer named above, and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 85th Article of War.

Specification: In that Second Lieutenant Carl C. Schulz Jr., Battery "C", 217th Field Artillery Battalion was, at Leesville, Louisiana on or about 4 March 1944, found drunk while on duty, conducting two enlisted men to Camp Polk, Louisiana, for physical examinations and returning them to their organization.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Carl C. Schulz Jr., Battery "C", 217th Field Artillery Battalion, having received a lawful order from Major Harrison Garrett to take two enlisted men to Camp Polk, Louisiana, for physical examinations and to return directly to the Battalion area upon completion of the examinations, the said Major Harrison Garrett being in the execution of his office, did, at Leesville, Louisiana, on or about 4 March 1944, fail to obey the same.

Specification 2: (Finding of not guilty.)

Accused pleaded not guilty to all Charges and Specifications, and was found not guilty of Specification 2, Charge II, but guilty of all other Specifications and Charges. No evidence of previous convictions was introduced. Accused was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but remitted so much thereof as relates to forfeiture of all pay and allowances due or to become due, and forwarded the record of trial for action under Article of War 48.

3. The competent evidence for the prosecution may be summarized as follows:

On 4 March 1944, First Lieutenant Roy A. Clardy, Battery Commander of "C" Battery, 217th Field Artillery Battalion, with which organization accused was assigned to duty (R. 7, 14), placed accused in charge of a detail of two enlisted men who were being sent from their battery area, APO 44 in the vicinity of Shreveport, Louisiana, into Camp Polk, Louisiana, for physical examinations for paratroops (R. 7-14). Before leaving for Camp Polk, accused reported to Major Harrison Garrett, Executive Officer of the 217th Field Artillery Battalion, at approximately 9:30 or 9:45 a.m., advised that he (accused) was taking two men from his battery to Camp Polk, and asked if he should have a pass or other authorization (R. 7). Major Garrett replied that he would need no pass, as he would be on duty status while taking these soldiers for physical examinations, and instructed him in these words: "You shall return immediately upon completion of the physical examinations", and "indicated to him that returning immediately meant there would be no stops on the way" (R. 10, 11). The agreed route of travel passed through Leesville, La. Major Garrett asked accused if he understood the instructions (R. 7) and accused replied that he did. Accused departed for Camp Polk, Louisiana, at approximately 10:00 a.m. (R. 7).

Their attention having been attracted by military police from another organization talking to three men from the 44th Division on the main street of Leesville, Louisiana, near the Victory Cafe, at approximately four o'clock in the afternoon of 4 March 1944, Second Lieutenants Melvin Nadel and Herman L. Brake, 44th Division Military Police Platoon, Louisiana Maneuver Area, who were together, approached and saw that accused and two enlisted men were the persons involved (R. 18, 19, 27, 28). Lieutenant Nadel described accused's condition at that time as being quite "upset", he was swaying and swaggering, his "manner of speech was very hazy", his appearance unkempt, and he did not seem to have control of any of his faculties. In Nadel's opinion accused was drunk (R. 20). Lieutenant Brake testified that

on this same occasion accused's face was flushed, his uniform disheveled, he was weaving back and forth, saying nothing, and in his opinion accused was drunk (R. 29, 30).

Either Lieutenant Mossener (R. 31) or Lieutenant Nadel (R. 20), or both, told accused to leave town and return to his organization. This he agreed to do (R. 21), and his enlisted companions said they would take him (R. 31). However, ten minutes later, Lieutenants Nadel and Brake discovered accused and the two enlisted men at the bar in the Victory Cafe, with drinks before them. One of the enlisted men either had his arm around accused (R. 21) or tucked under the arm of accused (R. 31). Lieutenant Brake told accused that he was going to return him to his organization. Accused mumbled some incoherent reply that Brake was unable to understand (R. 31). Lieutenants Nadel and Brake then took accused and the two enlisted men to their military police truck, where accused was placed in the front seat and the enlisted men in the rear, and left them there while they (Nadel and Brake) completed their check of the city (R. 22, 32). When Nadel and Brake returned to the truck they found accused had "passed out" and Lieutenant Brake picked him up bodily and placed him in the rear seat (R. 23, 32).

Major Garrett and Lieutenant Clardy saw accused just after he had been returned to his battalion by the military police (R. 8, 14). Major Garrett testified that the time was five o'clock p.m. (R. 8), while Lieutenant Clardy testified it was seven o'clock p.m. (R. 16, 17). Major Garrett testified that accused was then "thick in his speech and rather unsteady on his feet"; and the odor of alcohol upon him was quite evident (R. 8); his necktie was loose and his collar unbuttoned; that one of the two soldiers with whom accused returned was not one of the two with whom he left (R. 9); and that accused was drunk (R. 12, 13). Lieutenant Clardy also testified that accused had very little control of his faculties; he "was rather teetery, and his mind seemed to be more or less blank;" and his speech rather hesitant (R. 15); and was drunk (R. 16).

4. Defense evidence:

Lieutenant Colonel Charles R. Murray (R. 35), Major Harrison Garrett (R. 36, 37), and First Lieutenant Ray A. Clardy (R. 37), officers of the 217th Field Artillery Battalion, each testified that, prior to 4 March 1944, accused's reputation in the organization for being a sober and obedient officer had been good. Colonel Murray further testified that he would rate accused among the lower one-third on the basis of his value to the military service (R. 36).

Accused, having been advised of his rights, elected to be sworn as a witness. He testified substantially as follows: He is 21 years and 10 months of age, married, and the father of a 14-month-old

daughter and has been in the military service since 30 October 1942, and an officer since 8 July 1943. He was aware that, as shown by the evidence, he had been guilty of reprehensible conduct, but he very much desires to remain in the military service of the United States. If permitted to do so, his attitude would not be adversely affected by anything that had transpired since 4 March 1944. He had not been in any kind of difficulty before, either in civil life or during his Army career, and was sure that he would not again be guilty of conduct similar to that reflected by the evidence (R. 38, 39).

5. Charge I and its Specification (Drunk while on duty - violation of Article of War 85): The legally competent and undisputed evidence of record shows beyond reasonable doubt that on the morning of 4 March 1944, accused was placed by his military superior in charge of, and ordered to conduct two enlisted men of "C" Battery from the Battalion Maneuver area to Camp Polk, Louisiana, for physical examinations for paratroops, and to return them to the Battalion area immediately after the examinations had been completed. Pursuant to such orders and instructions, accused left the Battalion area with the enlisted men at approximately ten o'clock. While on this mission, and before it had been completed by the return of the enlisted men to their organization, accused became so drunk that he "passed out" in the city of Leesville, Louisiana, an intermediate point on his return journey, after having been taken in charge by military police, and became not only incapable of exercising command, but also was unable to speak or to walk. And, when he was returned to his organization in the evening of that day, by the military police, he did not have with him the same detail of enlisted men with whom he had left camp that morning.

The duty of conducting the two enlisted men to Camp Polk and of returning them to their organization upon completion of their physical examinations, was one that had been legally imposed upon accused by superior military authority, and for the proper execution of which he was answerable to such authority. Therefore, until he had completed such assignment, or had been relieved therefrom, accused was engaged upon a military duty within the contemplation of Article of War 85. Par. 145, M.C.M. 1928, p. 159. Since the evidence shows beyond a reasonable doubt that he was found drunk before he either completed, or was relieved from, such assignment, it is legally sufficient to sustain the findings of guilty of being drunk on duty (Charge I and its Specification).

Specification 1, Charge II (failure to obey order of superior officer - Article of War 96): The order which accused is alleged to have failed to obey was that given him by Major Garrett to take the enlisted men into Camp Polk for physical examinations and to return directly and immediately to his Battalion upon completion thereof. The evidence of record does not disclose the hour set for the examinations in question, whether they were completed or whether accused ever arrived at Camp Polk with the men. But the competent evidence of record conclusively establishes that accused failed to obey the order

given him by his military superior, Major Garrett. The order was clearly stated and understood that accused should proceed directly to, and return directly from, Camp Polk, with the enlisted men in his charge. Not only did Major Garrett direct him to return to the Battalion "immediately" upon completion of the physical examinations of these soldiers, but he further informed accused that by "immediately" he meant there should be no stops on the way. Accused did not deny that those were the exact terms of his orders and instructions, nor did he offer any explanation of why en route to Camp Polk he stopped in Leesville, Louisiana. By stopping, without a legitimate excuse, and by his failure to return the enlisted men, who had been placed under his command, immediately thereafter to the Battalion area, accused patently failed to obey the orders that had been given him. The order was a legal one, given to him by his superior officer in the execution of his office, and accused's failure to obey the same constitutes a violation of Article of War 96. Par. 134b, M.C.M. 1928, p. 148.

6. War Department records disclose that this officer is 21 years of age, married, and has one child. He is a high school graduate and attended San Benito County Junior College for one and one-half years. He worked for a construction company before being inducted into the Army, on 31 October 1942. He attended the Field Artillery Officers Candidate School at Fort Sill, Oklahoma, was appointed and commissioned a temporary second lieutenant, Army of the United States, on 8 July 1943, and entered upon active duty the same date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 85 in time of war and is authorized upon conviction of a violation of Article of War 96.

William A. Hounde, Judge Advocate.

Earle Ashburn, Judge Advocate.

Herbert B. Bredemeier, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 8 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Carl C. Schulz, Jr. (0-1183760), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Because of his prior good record I recommend that the sentence as approved by the reviewing authority be confirmed but suspended during good behavior.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl. 1 - Record of trial.
Incl. 2 - Dft. ltr. for sig. S/W.
Incl. 3 - Form of action.

(Sentence as approved by reviewing authority confirmed but execution suspended. G.C.M.O. 255, 3 Jun 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

(125)

SPJGV
CM 253868

2 JUN 1944

UNITED STATES	)	13TH ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Camp Bowie, Texas, 22 March 1944. Dismissal.
Lieutenant Colonel JOSEPH M. BARRETTE (0-338720), Finance Department.	)	

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Lieutenant Colonel Joseph M. Barrette, Finance Department, Headquarters (RE-Finance), 13th Armored Division, did, at Camp Bowie, Texas, on or about February 23, 1944, by betting at cards, wrongfully and unlawfully gamble with Master Sergeant (then Technical Sergeant) Anthony Cefalo, Technical Sergeant Milton Mintzer, Technician Third Grade William E. Langdon, Technician Third Grade Murray Mondschein, Technician Fourth Grade John H. Atkinson, Technician Fifth Grade James A. McConnell, and Private First Class Ernest W. Hudson, all members of Headquarters (RE), 13th Armored Division.

Specification 2: In that Lieutenant Colonel Joseph M. Barrette, * * *, did, at Camp Bowie, Texas, on or about February 24, 1944, by betting at cards, wrongfully and unlawfully gamble with Master Sergeant (then Technical

Sergeant) Anthony Cefalo, Technical Sergeant Milton Mintzer, Technician Third Grade Murray Mondschein, Technician Fifth Grade (then Master Sergeant) Mervin Bercovich, Technician Fifth Grade Harold L. Hanson, and Private First Class Ernest W. Hudson, all members of Headquarters (RE), 13th Armored Division.

He pleaded not guilty to and was found guilty of the Charge and both Specifications. No evidence of prior convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, but recommended that the sentence be commuted to a forfeiture of $100 of his pay per month for a period of six months and that accused be restricted to the limits of the station where he may be serving for a period of three months.

3. The evidence for the prosecution is substantially as follows:

On the night of 23 February 1944 several enlisted members of Headquarters (RE-Finance-13th Armored Division), including Master Sergeant Anthony Cefalo, Technical Sergeant Milton Mintzer, Technician Third Grade William E. Langdon, Technician Third Grade Murray Mondschein, Technician Fourth Grade John H. Atkinson, Technician Fifth Grade James A. McConnell, Master Sergeant Mervin Bercovich, Private First Class Ernest W. Hudson, and Technician Fifth Grade Harold L. Hanson, were engaged in a gambling game known as Blackjack (R. 12-14, 22, 24, 29, 33). The accused, Disbursing Officer of the 13th Armored Division, after watching for a short while entered the game and participated therein for about 30 or 45 minutes (R. 18, 20). The bets during the entire game were limited to five and ten cents (R. 12, 14, 53).

Again on the night of 24 February accused participated in a Blackjack game with Cefalo, Mintzer, Mondschein, Bercovich, Hanson and Hudson, the stakes again being limited to five and ten cents (R. 35, 46-48, 63, 69, 70). This game was of short duration (R. 34).

Both games were played in a CP tent in the field on the Camp Bowie Military Reservation while the 13th Armored Division was conducting D Series exercises (R. 16, 19).

The only question raised by the record is whether the substantial rights of the accused were injuriously affected by the admission of evidence showing that accused was Disbursing Officer of the 13th Armored Division. In the Specifications accused was not charged with gambling with enlisted

men in such capacity, but only in the capacity of a commissioned officer. Captain Ralph C. Long, Jr., Finance Department, 13th Armored Division, was asked by the prosecution who was the disbursing officer on 24 February 1944. The defense objected to this question on the grounds that accused was not charged as disbursing officer, nor under the "statute" relating to disbursing officers. The law member ruled that the evidence sought to be adduced was immaterial under the Specifications as drawn, but nevertheless would be admitted. He further stated that it made no difference under the Specifications whether accused was or was not a disbursing officer. Defense counsel replied:

> "If the evidence is received with that understanding, we don't object further to it and may I ask that it also be understood we have objection to this regulation; however, if this regulation is not taken into consideration under the specification as it is drawn, I will make no further objections under the regulation."

The witness did not answer the question above-mentioned. However, prosecution next offered in evidence a certified copy of the letter appointing accused disbursing officer of the 13th Armored Division:

> "Defense: No objection. The same objection to the . . .
>
> "Law Member: The same ruling."

The letter was then received in evidence as Exhibit A.

Thereafter the prosecution read AR 35-120, paragraph 6, with the request that the court take judicial notice of same (R. 8, 9).

Paragraph 6, AR 35-120 provides:

> "If any disbursing officer shall bet at cards or any game of hazard, his commanding officer will suspend his functions, require him to turn over all public funds in his keeping, and will immediately report the case to the corps area commander and to the Chief of Finance. The corps area commander will at once cause the matter to be investigated with a view either to the trial of the officer, or such other disciplinary action as, in his judgment, the case may require."

After the prosecution had rested the defense made a motion to strike all of the testimony relating to accused being a disbursing

officer, which motion was denied by the court (R. 71).

Clearly the accused was not charged as a disbursing officer under the Specifications. The evidence as to accused's status as disbursing officer, and paragraph 6 of AR 35-120 was therefore irrelevant to the issues raised by the Specifications as drawn. The law member apparently recognized the irrelevancy of such evidence but strangely ruled that such evidence would be admitted. The law member stated that he saw "no point in it whatsoever", and that "it makes no difference under this specification whether or not he was a disbursing officer". With this understanding the defense stated that no further objections would be made to such evidence. The law member's interlocutory ruling upon the admissibility of evidence showing accused's status was not only inconsistent with his remarks concerning its relevancy, but was erroneous. However, in view of the compelling proof of accused's guilt and the clear inference from the law member's remarks that the court would not consider accused's status as a disbursing officer in arriving at its findings, the Board of Review is of the opinion that accused's substantial rights were not injuriously affected by such evidence.

4. The defense offered no evidence, and rested upon completion of prosecution's case (R. 71).

5. The evidence shows conclusively that accused, a lieutenant colonel, participated in a card game known as Blackjack with several enlisted men on the nights of 23 and 24 February 1944. The bets were limited to five and ten cents. On 23 February the accused played for only about 30 or 45 minutes, and on 24 February the game was of short duration. Both games took place in a tent on the Camp Bowie Military Reservation while the 13th Armored Division was in D Series exercises.

6. War Department records show that accused is 33 years of age. He graduated from Lowell High School, Lowell, Massachusetts. He enlisted in the regular Army in 1929 and served continuously until 31 May 1941 when he was discharged in grade of technical sergeant and ordered to active duty as first lieutenant, Finance-Reserve; promoted to captain, 1 February 1942; major 26 December 1942; lieutenant colonel 9 December 1943.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the

substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Tappy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert E. Trueblood, Judge Advocate.

SPJGV
CM 253868

1st Ind.

War Department, J.A.G.O., 12 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Lieutenant Colonel Joseph M. Barrette (0-338720), Finance Department.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. In his action approving the sentence the reviewing authority recommends that the sentence be commuted to a forfeiture of $100 per month for six months and restriction of accused to his station for a period of three months. The evidence shows that accused, a lieutenant colonel, on two successive nights engaged in a Blackjack game with enlisted personnel of his organization. The stakes were small, being limited to five and ten cent bets. The games occurred while accused's organization was on D Series exercises on the Camp Bowie Military Reservation. The accused's record as an officer has been good. In view of all of the above circumstances I recommend that the sentence be confirmed but commuted to a reprimand, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig. S/W.
Incl.3-Form of action.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 338, 27 Jun 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

27 MAY 1944

SPJGH
CM 253900

UNITED STATES	)	THE INFANTRY SCHOOL
	)	
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 6 April 1944. Dismissal, total forfeitures and confinement for one (1) year.
	)	
Second Lieutenant THEODORE G. KENT (O-1058282), Infantry.	)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Theodore G. Kent, Officers' Special Course #5, 26th Company, Fifth Battalion, Third Student Training Regiment, The Infantry School, did, on or about 29 January 1944 in an envelope addressed to Mr. Steve Sugalski, 2052 24th Street, Detroit, Michigan at Camp Davis, North Carolina, dispatch, or cause to be dispatched through the United States mails an obscene, lewd, and lascivious letter in violation of Section 334, Title 18, United States Code, containing words and language as follows, to wit: Glad to receive your letter - don't be so free with your ass fucking - I'm liable to stick a dick in your rear... Yeah!! Man - got the situation well in hand here - Pussy to the right of me - Pussy to the left of me... Yeah tomorrow I shall be in town lying in a hotel room with some cute cunt...She and I shall make love like mad - Then I'll tell her "The hell with this love making lets fuck", or words to that effect.

CHARGE II: Violation of the 96th Article of War.

Specification: Similar to the Specification, Charge I, with the added words "to the prejudice of good order and military discipline".

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five (5) years. The reviewing authority approved the sentence, remitted four years of the confinement imposed, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution:

On or about 14 March 1944, Colonel John D. Hill, commanding officer of the Third Student Training Regiment at Fort Benning, Georgia, received through official channels a file containing two envelopes and a letter (Ex. 1). One envelope was addressed in typewriting to the Postmaster, Detroit, Michigan. The second envelope was addressed in handwriting to Mr. Steve Sugalski, 2052 - 24th Street, Detroit, Michigan, bore the postmark of Camp Davis, North Carolina, dated 29 January 1944, and had the name and return address of accused at Camp Davis on it. The letter, contained in the second envelope, stated in part: "Glad to receive your letter - don't be so free with your ass fucking - I'm liable to stick a dick in your rear * * * Yeah!! Man - got the situation well in hand here - Pussy to the right of me - Pussy to the left of me * * * Yeah tomorrow I shall be in town lying up in the hotel room with some cute cunt * * * She & I shall make love like mad - Then I'll tell her 'The hell with this love making lets fuck'". The accused, after being advised of his rights, stated to Colonel Hill and First Lieutenant Paul G. Hudgins that he was stationed at Camp Davis, North Carolina, on 29 January 1944, and that he knew Steve Sugalski in Detroit. The accused, after examining the letter and envelope, admitted writing them, and stated that he was "just ribbing" his friend, that it was the first time he ever sent a letter of that nature through the mail, and that he did not know it was a violation of the Federal Code. The accused did not say he mailed or posted the letter but according to Colonel Hill said "I sent this letter". Lieutenant Hudgins testified that nothing was said about posting the letter and that accused stated that it was a letter he had written to his friend "ribbing" him (R. 6-14).

The court took notice that the postmark on the envelope indicated that it had been cancelled by the postal authorities (R. 15).

4. For the defense:

Second Lieutenant George M. Peterson testified that he was a close friend of accused and had been acquainted with him since 11 April 1943. He stated that the letter (Ex. 1) was written by accused on or about 28 January 1944, near the end of the month when everyone was "about broke" and stayed in camp over the week-end. The officers had been receiving letters

from friends telling about the good times they were having in civilian life and he believed that accused wrote the letter to show that there was as much "fun" in Army life. Lieutenant Peterson was of the opinion that accused meant the letter as a joke and nothing else. Two second lieutenants who had been acquainted with accused for approximately eight months testified that his reputation as an officer and a gentleman was very good. Two other character witnesses were not called, when the court stated that it would "accept" that they would testify "along the same lines". It was stipulated that Major Walter C. Peters, Coast Artillery Corps, Camp Stewart, Georgia, would testify (Def. Ex. A) that accused had served as an instructor under him from 16 August to 28 October 1943, that his conduct and performance of duty were satisfactory, and that he showed no unfavorable traits in either character or performance of duty (R. 16-20).

Second Lieutenant Russell B. Holloway testified that when investigating the charges against accused he did not determine whether the letter written by accused ever reached the addressee. The letter was sent to the postmaster in Detroit by some unknown individual, was referred to the War Department, and reached the regiment through military channels (R. 21-23).

The accused testified that before enlisting on 12 August 1942 he worked for about fifteen months for the Bohn Aluminum and Brass Company as a trimmer. After entering the Army he was assigned to the Coast Artillery at Camp Wallace, and from there went to Officer Candidate School at Camp Davis. He was commissioned on 5 August 1943, and went to Camp Stewart. He returned to Camp Davis to attend an automotive course and was there on 28 January 1944 (R. 25-26).

With reference to the letter (Ex. 1) accused stated this was the first time he had ever written a letter "like that". He had received a letter from Sugalski, with whom he had worked, in which Sugalski told about parties over the holidays and "laughed" at accused for being at Camp Davis. Sugalski had been in the Coast Artillery prior to his discharge from the Army and knew "how it was" at Camp Davis as far as entertainment was concerned. Accused wrote the "stupid" letter in reply and did not intend it to be published or brought to the public's attention. He described Sugalski as a "rough and ready" person who did not care what he said or did. Sugalski was not a regular associate of accused. He further stated that he did not mail the letter himself, but left it on a table in the barracks with the intention that it should be posted. Outgoing mail was usually left on a shelf at the other end of the barracks but he knew his letter would be "picked up". He did not instruct anybody else to mail it, but "figured" it would be mailed, and intended it to reach his friend in Detroit. It was not his purpose in writing the letter to commercialize vice, and he did not realize he was breaking any law. Accused further stated that he had never had any prior trouble (R. 23-27).

5. It is shown by the evidence and admitted in the testimony of accused that on or about 29 January 1944 he wrote a letter addressed to a Mr. Steve Sugalski, 2052 - 24th Street, Detroit, Michigan, containing language as follows: "Glad to receive your letter - don't be so free with your ass fucking - I'm liable to stick a dick in your rear * * * Yeah!! Man - got the situation well in hand here - Pussy to the right of me - Pussy to the left of me * * * Yeah tomorrow I shall be in town lying up in the hotel room with some cute cunt * * * She & I shall make love like mad - Then I'll tell her 'The hell with this love making lets fuck'". The envelope containing the letter carried the name and return address of accused and the postmark showed that it was deposited in the United States mail at Camp Davis, North Carolina, on 29 January 1944.

Though the accused testified that he did not personally mail the letter or request that it be deposited in the mail, the evidence clearly shows that the letter was placed in the mail as alleged. The evidence shows that the accused left the letter on a table in his barracks intending that it be mailed and that he knew someone would deposit it in the mail for him. It is not essential to the commission of the offense of depositing an obscene letter in the mail that the objectionable matter be deposited in the mail by the offender himself, or by another acting under his express direction, he being equally responsible if it is deposited therein as a natural consequence of an act intentionally done by him with knowledge of its probable effect (Demolli v. U.S., 144 F. 363, 75 C.C.A. 365).

The evidence clearly shows that accused sent an obscene, lewd, and lascivious letter through the United States mail, in violation of Section 334, Title 18, United States Code, as alleged. Such conduct was of a nature to bring discredit upon the military service as well as a criminal offense under the mentioned statute and was, therefore, a violation of the 96th Article of War (Spec., Chg. II).

There remains for consideration the question whether the sending of the obscene letter constituted "conduct unbecoming an officer and a gentleman" within the meaning of the 95th Article of War (Spec., Chg. I). The letter involved in the charges was a personal and private communication sent by accused to a male civilian acquaintance with whom he had associated as a fellow workman in a factory. The Board of Review accepts as true the testimony of the accused to the effect that the letter was written in a spirit of raillery, without any ulterior motive, and in ignorance of the statute which its transmission through the mail violated. Its most objectionable statements were not intended literally and should not be taken as an indication that the accused had indulged in perverted sexual practices or contemplated doing so in the future. Nevertheless aside from his violation of a federal criminal statute the conduct of accused in employing in a written communication language of such coarse and gross obscenity was highly discreditable, seriously compromised him as a gentleman and as an

officer, and in the opinion of the Board of Review constituted a violation of the 95th Article of War.

It is not error to charge the same offense under different Articles of War when one charge is based on the civil aspect of the offense and the other is based on its military aspect (CM 241597, Fahey; 3 Bull. JAG 10).

6. The accused is 23 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 12 August 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 5 August 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War and is authorized upon conviction of a violation of the 96th Article of War.

Samuel W. Drowes, Judge Advocate.

Robert H. Cannon, Judge Advocate.

F. H. Lotthuss, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 12 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Theodore G. Kent (0-1058282), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused sent an obscene letter through the mails in violation of a federal statute. Although the letter contained offensively salacious language it was a private and personal communication thoughtlessly written in ignorance of the federal statute, to a civilian, male acquaintance with whom accused had worked in a factory before his entry into the service. Accused is a temporary officer appointed after approximately a year of enlisted service. His previous record is good. I recommend that the sentence to dismissal, total forfeitures and confinement for one year be confirmed, that the confinement and forfeitures adjudged be remitted and, in view of all of the circumstances, that the execution of the sentence as thus modified be suspended during good behavior.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. of ltr. for sig. of S/W.
Incl.3-Form of Action.

(Sentence confirmed but forfeitures and confinement remitted. Execution suspended. G.C.M.O. 330, 27 Jun 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 253974

31 MAY 1944

UNITED STATES	)	76TH INFANTRY DIVISION
v.	)	Trial by G. C.M., convened at Camp McCoy, Wisconsin, 11,17, and 18 January 1944. Dismissal.
Second Lieutenant STANLEY J. PRUSINOWSKI (0-1301875), Infantry.	)	

OPINION of the BOARD OF REVIEW
LYON, ANDREWS and SONENFIELD, Judge Advocates.

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon two Charges and eight Specifications. As to all except Specification 1 of Charge I and of Charge I, a motion by defense counsel for a finding of not guilty was sustained (R. 39). Charge I alleged a violation of the 95th Article of War. Specification 1 thereof reads as follows:

> Specification 1: In that Second Lieutenant Stanley J. Prusinowski, Company G, 385th Infantry, did at Camp McCoy, Wisconsin, on or about 6 December 1943, with intent to deceive Lieutenant Colonel Percy O. Forgy, 385th Infantry, officially state to the said Lieutenant Colonel Percy O. Forgy, 385th Infantry, that he ate breakfast at said company about 0800 on 14 November 1943, which statement was known by the said Second Lieutenant Stanley J. Prusinowski to be untrue, in that he did not eat breakfast at said company about 0800 on 14 November 1943.

Accused pleaded not guilty to the Charges and Specifications and was found guilty of Charge I and Specification 1 thereof. No evidence of previous conviction was introduced. Accused was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On 9 November 1943, certain standing orders for duty officers in accused's company were posted, and the company commander called the orders to the attention of all the officers in the company. Among other provisions, the orders required that the duty officer inspect at least one meal during

the serving thereof. Beneath the orders the names of the officers were typed, above which appeared the words "ALL OFFICERS INITIAL". Accused's initials appeared after his name, but the company commander could not positively identify them as having been placed there by accused (R. 18-25; Pros. Ex. A).

Accused was duty officer on Sunday, 14 November. Having received a report shortly thereafter from the accused's company commander, indicating a failure by accused to perform his duties on 14 November, the battalion commander, Lieutenant Colonel Percy O. Forgy, sent for accused on 29 November in order to ascertain what accused had done during 14 November. Upon accused's arrival, Lieutenant Colonel Forgy told accused that he wanted to know everything which accused had done on 14 November. Accused replied that at 0800 he "'ate breakfast at the company. I had a cup of coffee'". According to Lieutenant Colonel Forgy, accused did not appear frightened and did not hesitate in his answer. The duty officer was not required to eat breakfast at the company mess (R. 10-18, 39-47).

Technician 5th Grade William J. McCarthy and Private 1st Class William H. Unger were on duty as cooks at the company mess on the morning in question. As far as McCarthy knew, accused was not there, although possibly he could have been there without being noticed by witness. A front and back door led into the kitchen. During part of the time while witness was serving breakfast, his back was toward the back door. Attention is called when an officer enters the mess hall (R. 26-29). Unger did not see accused in the mess hall or kitchen, either, and so far as witness knew, accused did not have breakfast in the mess hall and did not drink a cup of coffee in the mess hall or kitchen. Had accused done so, witness "should have" seen him, although it is possible that he would not. During part of the time, witness had his back to the back door of the kitchen (R. 30-32).

Accused testified as follows: He went to the company mess about 0800, where he saw McCarthy and Unger. He asked McCarthy for a cup of coffee. McCarthy pointed to a pitcher on the stove. Accused poured himself a cup, drank it, looked around the mess hall, and left. He had nothing for breakfast except the coffee. He was in the mess hall between five and seven minutes. He was not certain whether McCarthy turned around and looked at him. He told Lieutenant Colonel Forgy that he went to the company for breakfast and had a cup of coffee. He was referring to the cup of coffee as his breakfast (R. 54-62).

Recalled by the court, McCarthy testified that he did not see accused, had no conversation with him, and did not point out a pitcher of coffee to him (R. 70-71).

Unger was called by the defense, and again stated that to his knowledge accused was not in the mess hall. Witness was not in one place during the serving of breakfast. He served at the serving table and went back and

forth between the table and the stove several times. It would have been possible for some one to have come in the back door of the kitchen and stayed five or ten minutes without witness' knowing it (R. 49-53).

Testifying for the defense, the company commander stated that there was no requirement that duty officers eat any meal at the company mess and that the regimental commander did not want them to do so, but that in inspecting the mess, it is a good idea for the duty officer to eat some of the food to see that it is properly prepared (R. 47-49).

The prosecution produced as witnesses two officers who had served with accused for approximately a year in another company. Each testified that accused's reputation for truth and veracity was bad (R. 65-68). Since accused had testified as a witness, the above character evidence was proper (MCM, 1928, p. 112).

4. It is clear that accused stated in substance to Lieutenant Colonel Forgy that at about 0800, 14 November 1943, he ate breakfast at the company mess, having a cup of coffee. The fact that he did not intend to imply that he had anything except the coffee is immaterial and a mere quibble. It is equally clear that his statement was official in nature, being made in connection with an investigation of his activities during his tour as duty officer, and that he was aware of its official nature. That his statement was untrue is proved beyond a reasonable doubt. McCarthy, who had no reason for lying, completely denied accused's obviously fabricated story that he came to the kitchen and asked McCarthy for a cup of coffee. Undoubtedly accused knew that his statement was untrue and he made it for the purpose of deceiving Lieutenant Colonel Forgy as to his activities as duty officer.

The Specification alleged 6 December as the date of making the statement, whereas the evidence proved its making on 29 November. The discrepancy arose from the fact that on 6 December accused signed a written statement, which the prosecution evidently wished to use as the basis of its case. The written statement was rejected by the court. The variance is immaterial. The offense was proved and constituted a violation of Article of War 95 (MCM, 1928, par. 151).

5. War Department records show that accused is 25 years old. He attended high school for two years, but did not graduate. He served as an enlisted man from 7 June 1938 to 6 June 1941. He was inducted into the military service on 31 March 1942 and served as an enlisted man until 30 November 1942, when, upon graduation from the Infantry School, Fort Benning, Georgia, he was appointed a second lieutenant, Army of the United States.

6. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the

opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Dismissal is mandatory for violation of Article of War 95.

Percy G. Fox, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.
Samuel Sonnenfeld, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 6 - JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Stanley J. Prusinowski (0-1301875), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. In addition to his present service as an enlisted man and an officer, accused served an enlistment in the Regular Army from 1938 to 1941. The making of a false official statement by an officer is, of course, a serious offense, but under all the circumstances in this case it is believed that the ends of justice would be subserved by confirming the sentence and commuting it to a reprimand, and I so recommend.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 328, 27 Jun 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN
CM 253984

26 APR 1944

UNITED STATES	)	SEVENTH ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 9 and 29 March 1944 and 3 April 1944. Dismissal and total forfeitures.
Second Lieutenant JOHN H. EDWARDS, Jr. (0-1316734), 48th Armored Infantry Battalion.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, GAMBRELL and GOLDEN, Judge Advocates

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant John H. Edwards Jr. AUS at Camp Wheeler, Georgia, did, on or about 12 January 1944, borrow the sum of Fifty dollars ($50.00) from Corporal Willis Herren, Headquarters and Headquarters Company, IRTC, Camp Wheeler, Georgia.

Specification 2: (Disapproved by the reviewing authority).

He pleaded not guilty to the Charge and its Specifications and was found

guilty of Specification 1, Specification 2 with certain exceptions and substitutions, and the Charge. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority returned the record of trial to the court for reconsideration of its sentence and for proceedings in revision without regard to the finding of guilty of Specification 2 of the Charge which by the communication returning the record of trial was disapproved. Pursuant to such communication the court reconvened to reconsider its sentence and by unanimous vote adhered to the original sentence. The action of the reviewing authority disapproved the finding of guilty of Specification 2, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows, by the testimony of Corporal Willis Herren that on 12 January 1944 the accused borrowed $50 from him and that he had known the accused when they were both members of the same organization. The accused was going on leave and solicited the loan which was made by the witness giving his check to the accused for $50 and the accused giving his check to the witness for a like amount with instructions that the latter check be held for a few days when the accused promised to "wire" the money and that if the money was not "wired", the check was to be presented to the bank for payment. The accused at the time told the witness that the accused's account was not adequate to pay the check but that the accused would have the money there in a few days. The witness had made no gift to the accused of the $50 which the accused secured by cashing the former's check, and was not indebted to the accused in any sum. The money was not "wired" and shortly after 1 February 1944 the witness presented the check to the bank, upon which it was drawn, which refused payment thereof because the accused's account did not contain sufficient funds. Shortly after the check had been dishonored the accused repaid the $50 ($. 6-15; Ex. A).

4. The evidence for the defense, elicited by the testimony of the accused who after explanation of his rights as a witness elected to testify, shows that the transaction with Corporal Herren was substantially as stated by him; that the accused prior to going on leave had been promised by one of his debtors that such debtor would make a payment to him of $400 by depositing such amount to his credit at his bank; that such debtor, although well known by the accused to be reliable, had failed to make the deposit as agreed; that upon his return from leave he found that the deposit had not been made and that his checks issued while on leave, including the one held by Corporal Herren, had been dishonored; that he interviewed his battalion commander about his financial difficulties thus occasioned and agreed to prorate his pay among his creditors until he was current; and that he promptly wrote Corporal

Herren that he would meet him on 13 February 1944 at a designated place and pay the $50 but, upon finding that he was unable to keep the appointment, he sent Corporal Herren a money order for $50. He further testified that he had made no effort to evade the payment of the $50 debt or any other debt and that his debtor's delinquency had caused accused's embarrassment which he was rectifying as rapidly as possible (R. 27-32).

5. Specification 1 alleges that the accused at Camp Wheeler, Georgia, on or about 12 January 1944 borrowed $50 from Corporal Willis Herren. The mere act of an officer borrowing from an enlisted man is an offense under Article of War 96 (CM 122920 and CM 117782 (1918) Dig. Ops. JAG. 1912-40, Sec. 453 (5)).

The evidence for the prosecution which is not only uncontroverted but fully corroborated by the testimony of the accused himself establishes beyond a reasonable doubt the accused's commission of the offense as alleged. The exchange of checks under the circumstances shown amounted to the corporal making the accused a loan with the accused's check evidencing the indebtedness. Except for the accused's debtor failing to make the deposit as agreed a mere technical offense in all probability would have been committed but the result of the entire transaction was a loan by the corporal to the accused of $50 for about 30 days. Neither the accused's good faith reliance upon his debtor's promise nor the debtor's dereliction obliterates the offense. All of the evidence, therefore, beyond a reasonable doubt supports the court's findings of guilty of the Charge and Specification 1 thereunder.

6. The accused is about 29 years old. The War Department records show that he has had enlisted service from 10 June 1941 until 8 April 1943 when he was commissioned a temporary second lieutenant upon completion of Officers' Candidate School and that he has had active duty as an officer since the latter date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specification 1 thereunder and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

William A. Bumbrell, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(146)

SPJGN
CM 253984

1st Ind.

War Department, J.A.G.O., 22 MAY 1944 To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John H. Edwards Jr. (O-1316734), 48th Armored Infantry Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority, legally sufficient to support the sentence and to warrant confirmation thereof. The Commanding General of the 69th Infantry Division has reported to The Judge Advocate General that subsequent to the trial of the accused, he absented himself without leave for four days and until he was apprehended, and that he also issued worthless checks in an amount exceeding $300. In view of this information it appears that the accused is unworthy of clemency. I recommend that the sentence be confirmed and ordered executed.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.

(Sentence confirmed. G.C.M.O. 362, 17 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGQ
CM 254006

25 APR 1944

UNITED STATES	)	ARMY AIR FORCES EASTERN TECHNICAL TRAINING COMMAND
v.	)	
Second Lieutenant ROBERT G. MCCANN (0-582848), Air Corps.	)	Trial by G.C.M., convened at Jefferson Barracks, Missouri, 6 April 1944. Dismissal, total forfeitures, and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification 1: In that Second Lieutenant Robert G. McCann, Air Corps, attached 21st Training Group, AAFTTC, did, without proper leave, absent himself from his command at Jefferson Barracks, Missouri, from about 0001, 5 March 1944 to about 1945, 5 March 1944.

Specification 2: In that Second Lieutenant Robert G. McCann, Air Corps, attached 21st Training Group, AAFTTC, did, without proper leave, absent himself from his command at Jefferson Barracks, Missouri, from about 0730, 24 March 1944 to about 1000, 24 March 1944.

CHARGE II: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Robert G. McCann, Air Corps, attached 21st Training Group, AAFTTC, did, at Jefferson Barracks, Missouri, on about 14 March 1944, feloniously take, steal and carry away One Hundred Dollars ($100.00) in United

States currency, value about One Hundred Dollars ($100.00), the property of Second Lieutenant Walton Kurz, Air Corps.

CHARGE III: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Robert G. McCann, Air Corps, attached 21st Training Group, AAFTTC, did, at Jefferson Barracks, Missouri, on or about 18 March 1944, with intent to deceive Lieutenant Colonel Joseph R. Gilman, Air Corps, Provost Marshal of Jefferson Barracks, Missouri, officially report to the said Lieutenant Colonel Joseph R. Gilman that he, the said Second Lieutenant Robert G. McCann had Fifty Dollars ($50.00) stolen from him in Building 42 of Jefferson Barracks, Missouri, on 14 March 1944, which report was known by the said Second Lieutenant Robert G. McCann to be untrue.

Specification 2: In that Second Lieutenant Robert G. McCann, Air Corps, attached 21st Training Group, AAFTTC, did, at Jefferson Barracks, Missouri, on or about 23 March 1944, with intent to deceive Lieutenant Colonel Joseph R. Gilman, Air Corps, Provost Marshal of Jefferson Barracks, Missouri, officially state to the said Lieutenant Colonel Joseph R. Gilman that he, the said Second Lieutenant Robert G. McCann, had borrowed $50.00 from 1st Lieutenant Bart A. Casey, Air Corps, on 12 March 1944, which statement was known by the said Second Lieutenant Robert G. McCann to be untrue.

Specification 3: In that Second Lieutenant Robert G. McCann, Air Corps, attached 21st Training Group, AAFTTC, did, at Jefferson Barracks, Missouri, on or about 23 March 1944, wrongfully request 1st Lieutenant Bart A. Casey, Air Corps, to officially state to Lieutenant Colonel Joseph R. Gilman, Air Corps, Provost Marshal of Jefferson Barracks, Missouri, that he, the said Second Lieutenant Robert G. McCann, had borrowed some money from him, the said 1st Lieutenant Bart A. Casey, which said requested statement was false and was known by the said Second Lieutenant Robert G. McCann to be false.

He pleaded guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence for the prosecution may be summarized as follows:

A five-day leave of absence of the accused ended at midnight 4 March 1944. He failed to return on time, and was absent without leave from his organization at Jefferson Barracks, Missouri, during 5 March 1944 until 1945 on that date, when he entered station hospital at Jefferson Barracks. On 24 March 1944, he was again absent without leave from his organization at Jefferson Barracks, Missouri, from 0730 to 1000 of said date (Morning Report - Exhibit 1).

The accused, Second Lieutenant Walton Kurz, and Lieutenants Crowell and Ewell were, on 14 March 1944, quartered together in the Bachelor Officers' Quarters No. 42 at Jefferson Barracks (R. 7). Second Lieutenant Kurz, at about 1000 or 1100 on that date, left his "pink" trousers hanging over the bed next to his, under his blouse, with his wallet containing $156.00 in his trousers' pocket, while he went to the washroom for a shower (R. 8). The accused was already in the shower when Second Lieutenant Kurz entered the washroom, and Lieutenant Ewell followed the latter to the washroom. The accused left the washroom approximately ten minutes before Second Lieutenant Kurz, and returned to their room to dress (R. 7), where he was located when Second Lieutenant Kurz returned there. Kurz then changed his wallet from his "pinks" to another pair of trousers and as he did so he observed that he had only $51.00 left in his wallet. He immediately announced to the accused and Lieutenants Ewell and Skidmore, who were in the room, "I just lost $100.00." The accused then reported a loss of $50.00. Kurz reported the loss to the Provost Marshal's Office and a representative from that office came to the barracks (R. 8). The accused made the statement that he had only $2.00 left and was wondering how he could clear the post. He then recalled that he had a $30.00 money order and that he was entitled to some per diem pay. The accused and Lieutenants Kurz and Ewell then left their barracks for the Post Exchange for luncheon. On the way there the accused asked Kurz if he had a secret compartment in his wallet. When Kurz replied in the negative, the accused stated that he did have such a compartment and that "they at least didn't get all of his money and that he still had $100.00 left". (R. 9). The accused left before Kurz and Ewell had finished eating and later the accused saw the other two officers outside the Post Exchange and told them that the "Lennox Hotel was holding up his shipment and that he had to go to town to take care of it" (R. 9). Kurz at no time authorized anyone to take any money from his wallet (R. 10).

On the afternoon of 14 March 1944, the accused went to the Adjutant of his organization, Captain W. A. Jones, with three checks totaling $95.00, which had been returned unpaid and which the accused had stated were holding up his shipment (R. 11).

The Provost Marshal, Lieutenant Colonel J. R. Gilman, testified that after receiving a report of some larcenies in Building 42, Bachelor Officers' Quarters, on 14 March 1944, he sent one of his investigators to the building, and that thereafter, on 18 March 1944, he had occasion to discuss the matter with the accused. He first read the accused the 24th Article of War. Thereafter, the accused stated to him that he had had $50.00 taken from his billfold in Building 42 at the same time that Lieutenant Kurz had had $100.00 taken. (R. 12). He again interviewed the accused on 23 March 1944, at which time the accused stated to him that he had borrowed $50.00 from Lieutenant Casey on 12 March while they were in a hotel downtown, and that this accounted for the fact that the accused had $50.00 on 14 March. The accused stated that he had only $1.15 when he went to the hospital (R. 13).

The accused was identified by Major J. M. Pound as the person interviewed by him 24 March 1944, at the request of the Provost Marshal. He stated that after warning the accused of his rights, the accused voluntarily made a statement to him to the effect that he had taken $100.00 from the billfold or wallet of Lieutenant Kurz and that the statement made by the accused was reduced to writing, being Exhibit 2. (R. 14-15). The signature thereto (Exhibit 2) was identified as that of the accused. (R. 15). The accused therein stated that after becoming an officer he had undergone a tremendous change socially, his wife requiring him to make a $150.00 per month allotment to her, which resulted in financial difficulties for him. This resulted in his giving the three checks totaling $95.00, which he knew that he would have to make good. He became so worried that he lost control of himself and when he saw the contents of the billfold of Second Lieutenant Kurz on 11 March 1944, he took ten $10.00 bills without actually realizing that he was stealing the money, changed these bills for two $50.00 bills and then proceeded to take up the three checks. He admitted making several conflicting and false statements in connection therewith. He has never been in any trouble before and has had twenty-five months of overseas' duty in the Aleutian Islands (Exhibit 2).

The deposition of First Lieutenant Bart A. Casey, taken shortly before his impending departure for another assignment, was received in evidence, to the effect that on 23 March 1944, while on his way to the office of Lieutenant Colonel J. R. Gilman, the Provost Marshal, he was met by the accused and the accused at that time asked him to state to Colonel Gilman that he had loaned the accused $50.00 in the event Colonel Gilman asked him about such a loan (Exhibit 3).

4. The accused was fully apprised of his rights and elected to be sworn and testify in his own behalf only as to Specification 1 of Charge I, and to remain silent as to all of the other Specifications and Charges. (R. 17). He stated in substance that he had enlisted 24 September 1940 and had served as an enlisted man thereafter until 15 October 1943, when he was discharged to accept a temporary commission; that, as an enlisted man, his highest rating was that of staff sergeant; that he was in the Signal Corps doing cryptography and message center work, until he went overseas, from which time he served in interior Alaska and the Aleutian Islands. He was in the Assistant Chief of Staff's Office, A-2, Headquarters 11th Air Force, where he had charge of six enlisted men. He then did stenographic duties and charts to keep up with the Japanese movements. He then assisted the Operations and Intelligence Officer. His duties also required him to do some flying over the Aleutians, Attu and Kiska, and after approximately fifteen of these flights he was given a Combat Service Rating, which he still holds (R. 18). After he was commissioned on 16 October 1943, he attended the Air Forces Communications School at Chanute Field, Illinois, for four weeks, then returned home on an emergency furlough because of the death of his father, after which he was stationed at Smyrna, Tennessee, from 7 December 1943 until February 1944, undergoing processing for an overseas assignment. The accused graduated from high school in Spokane, Washington.

On cross-examination, the accused admitted being absent without leave from midnight 4 March until approximately 1900 5 March 1944 (R. 20).

5. The accused was charged with, and tried for, an absence without leave of approximately 19 hours and 45 minutes on 5 March 1944, another absence without leave of 2 hours and 30 minutes on 24 March 1944, in violation of Article of War 61, larceny of $100.00 from a fellow officer on 14 March 1944, in violation of Article of War 93, officially reporting that he had had $50.00 stolen from him, officially stating that he had borrowed $50.00 from a fellow officer, and wrongfully requesting a fellow officer to officially state that the accused had borrowed some money from him, knowing that each of such statements was false, in violation of Article of War 96. He pleaded guilty to each of the Specifications of the Charges and of the Charges, and was found guilty, as charged.

Each of the findings of guilty, and the sentence, are legally supported by the pleas of guilty of the accused, and by the evidence, including the sworn admission on the witness stand by the accused of Specification 1 of Charge I, and the written confession of the accused as to the Specification of Charge II. There are no errors or irregularities which prejudicially affect any of the substantial rights of the accused and the record of trial is legally sufficient to support the sentence.

6. The accused is 27-4/12 years of age. He enlisted in the service 24 September 1940 at Spokane, Washington, where he had finished high school. Before entering the service his main civilian occupation was that of truck driver for a construction company with an average

monthly salary of $125.00. His secondary civilian occupation was that of salesman, in which he had had experience selling insurance, lumber supplies, and men's clothing. He is married. Following his enlistment 24 September 1940 the accused served as an enlisted man until 15 October 1943, when he was commissioned second lieutenant Air Corps. As an enlisted man he was in the Signal Corps, serving as a driver and dispatcher for ten months, in the message center and as cryptography clerk eighteen months, and in combat intelligence for 17 months. He was a staff sergeant when commissioned. He is authorized to wear the Asiatic-Pacific and American theatre ribbons. He is a qualified aerial observer (40 hours-Ref. 16), completed specialized, six weeks' course in intelligence routine loyalty check and was cleared for cryptographic duty by the Fourth Service Command 7 December 1943. Records indicate that as of 13 January 1944 he was qualified for overseas duty. Following graduation from Officers' Candidate School, he attended the Army Air Forces Communication School at Chanute Field and then was stationed at the Smyrna Army Air Field, where he was given five days' restriction under Article of War 104 for having given a bad check.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Articles of War 61, 93 and 96.

William A. Founds, Judge Advocate

Paul Shepherd, Judge Advocate

Herbert B. Frederick, Judge Advocate

1st Ind.

War Department, J.A.G.O., 6 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert G. McCann (0-582848), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of all the Charges and Specifications and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the confinement be reduced to two years, and that the sentence as thus modified be carried into execution. I further recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
1 - Record of trial
2 - Dft. of ltr. for sig.S/W
3 - Form of Executive action

(Sentence confirmed but confinement reduced to two years. G.C.M.O. 354, 15 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGV
CM 254026

24 MAY 1944

UNITED STATES v. Second Lieutenant JAMES E. JOHNSON (0-706191), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Dodge City, Kansas, 3 April 1944. Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant James E. Johnson, Air Corps, was at Dodge City, Kansas, on or about 16 March 1944, drunk and disorderly in a room in the Lora Locke Hotel in the presence of enlisted men and civilians.

Accused stood mute when arraigned which resulted in a plea of not guilty to the Charge and Specification being entered by the court on his behalf. He was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution is substantially as follows:

Accused, on 15 March 1944, at about 2300 hours, registered for a bed in the Lora Locke Hotel, Dodge City, Kansas. There were four cots

in the room assigned to accused of which he was entitled to one. Accused did not go to his room immediately upon registering (R. 7, 8). At about 0200 hours, 16 March, Mr. John W. McJones, the hotel houseman, took another guest to the room of which accused was an occupant and there found accused and a woman on one of the cots. He could see both parties were unclothed at least down to the waist (R. 8). Wilma Gillen was the woman with accused. She took the stand as a prosecution witness, stated that at the time and place above set forth she was with accused and that he had been drinking and was very drunk. She refused to testify further, claiming her privilege against self incrimination (R. 6).

Private First Class George W. Birdsong, an occupant of the same room as accused and Wilma Gillen, stated that he was awakened at about 0200 hours, 16 March and saw a man and a woman in bed, that they were uncovered to the waist and that he saw the woman's breasts (R. 9, 10).

Pearl Manda, a policeman of Dodge City, Kansas, saw the accused and Wilma Gillen in bed in the hotel room on the morning of 16 March. Besides accused and Wilma Gillen there were three other occupants of the room, one of whom was a soldier just going to bed. The accused and Wilma Gillen were removed to the police station and during this process accused said, "it was piss poor when a man couldn't get a piece of ass" (R. 12).

Willard I. Curtis, hotel manager, who was at the hotel room occupied by accused and Wilma Gillen when the policeman took them to the police station, heard accused say "that it was a hell of a note to interrupt a man in the middle of a piece of tail" (R. 14).

4. Accused did not take the stand and no evidence was offered by the defense (R. 16).

5. It appears from the papers accompanying the record of trial that the court, subsequent to the findings, but before the sentence, summoned the trial judge advocate and defense counsel before it and asked to see the confidential letter, War Department, The Adjutant General's Office, Washington, AG 250.4 (2-12-43) OB-S-SPJGJ-M, dated 5 March 1943, Subject: Uniformity of Sentences Adjudged by General Courts-Martial. Thereafter, this letter remained with the court until its findings and sentence were announced. This letter had been read to the members of the court while assembled for that purpose some two

or three weeks prior to this trial by the Base Executive Officer, inasmuch as it was a newly appointed court and had not at that time heard any cases. The letter is not attached to the record.

6. The evidence supports fully the findings that accused was on 16 March 1944 drunk and disorderly in a room at the Lora Locke Hotel in the presence of enlisted men and civilians. The testimony of Wilma Gillen that accused had been drinking and was very drunk, his actions with Wilma Gillen in the presence of others, and his remarks to the hotel representatives and the police that "it was piss poor when a man couldn't get a piece of ass * * * that it was a hell of a note to interrupt a man in the middle of a piece of tail" are ample evidence of drunkenness and disorderedness in violation of the 96th Article of War.

The action of the court in examining the letter of 5 March 1943 on the subject of uniformity of sentences did not injuriously affect the substantial rights of the accused. That letter specifically stated in paragraph 4a that "Sentences are imposed by the secret, written ballot of the members of courts-martial acting under their oath and according to the evidence and the dictates of their conscience." The publication of this letter is therefore not to be construed as a directive but merely as a guide to the members of courts and reviewing authorities in order that they may realize the importance of some uniformity in sentences and understand what, under present conditions, the War Department considers adequate and appropriate sentences. Courts-martial have the right and duty to take into consideration, in arriving at proper sentences, general policies announced by the War Department relative to enforcement of discipline and uniform sentences (CM 250472, Hoffman).

The evidence is compelling as to accused's guilt. His actions show him unfit to be an officer and fully justify the sentence of dismissal adjudged by the court.

7. Accused is about 23 years of age and single. Records of the Office of The Adjutant General show the following: He attended Drury College, Springfield, Missouri, for three years. He served as an aviation cadet from 6 February 1943 until 6 January 1944, when he was commissioned second lieutenant, Air Corps, Army of the United States.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial

rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Tappy, Judge Advocate.

Hurbert M. Kidner, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 254026

1st Ind.

War Department, J.A.G.O., 31 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James E. Johnson (0-706191), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 366, 17 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 254054

20 MAY 1944

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Dale Mabry Field, Tallahassee, Florida, 28 March 1944. Dismissal.
	)	
Second Lieutenant CHARLES S. BUNCH (0-815649), Air Corps.	)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 85th Article of War.

Specification: In that 2nd Lt CHARLES S BUNCH, Dale Mabry Replacement Depot Detachment, Tallahassee, Florida, was in the City of Tallahassee, Florida on or about 19 Feb 1944, found drunk while on duty as a Military Police Officer.

CHARGE II: Violation of the 95th Article of War.

Specification 1: In that 2nd Lt CHARLES S BUNCH, Dale Mabry Replacement Depot Detachment, Tallahassee, Florida, was in the City of Tallahassee, Florida, on or about 19 Feb 1944, drunk and disorderly in uniform in a public place, to wit, the vicinity of the Police Station in the City of Tallahassee, Florida.

Specification 2: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification, Charge I, and of Charge I; guilty of Specification 1, Charge II, except the words "and disorderly"; not guilty of Specification 2, Charge II; and guilty of Charge II. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution may be summarized as follows:

On 19 February 1944 accused was assigned as a military police officer under the direction of Major John E. Gross, Provost Marshal at Dale Mabry Field, Tallahassee, Florida. His duties on that day were to remain in Tallahassee from 1:00 p.m. to about 6:00 p.m. "to aid in straightening out any difficulties that might come up, particularly with officer personnel". At about 3:30 p.m. Sergeant Thomas M. Erwin and Patrolman R. H. Prevatte, of the Tallahassee Police Department, saw the accused accompanied by a civilian walk up the alley from "Adams Street" and enter Military Police Headquarters, located directly across the alley from the Tallahassee Police Station. The accused was dressed in uniform and wore a military police brassard on his arm. He was "staggering" and his "talk was louder than normal". They observed that the "MPs" in the station attempted to get him to sit down and "behave", but he would not listen to them. Private First Class Franklin A. Roby, who was present in Military Police Headquarters, testified that accused "seemed to talk a little loud", was "staggering" and sat down while the civilian with him went to the "toilet". After a few minutes accused left Military Police Headquarters and started walking along the alley toward the street. He stopped by one of the city police cars that was parked about 50 feet from the street entrance, leaned against the car and vomited on the ground. Sergeant Erwin ordered Prevatte to place accused and the civilian under arrest, which was done. Accused was "rambling in his speech", his eyes were not clear, his tie was out of place and he had a very strong odor of alcohol on his breath. The police were of the opinion that accused was drunk. They informed him that they were going to take him to the base and turn him over to the Provost Marshal. On the way to Dale Mabry Field accused "begged" the police to release him and to take him to his barracks. When the accused was taken before Major Gross at about 4:00 p.m. he admitted that he had been drinking and was drunk. Major Gross asked him why he was wearing the "MP" arm band and accused replied, that he "was on duty". Major Gross placed accused in arrest in quarters and drove him to the barracks. Accused had a "little difficulty" getting in the jeep. He "seemed" to Major Gross to be "upset and trying to restrain from saying anything". He was of the opinion that accused was drunk, "at least too drunk to be on duty". Accused had been on duty with Major Gross for about two weeks and during that time had performed his duties in a "soldierly manner" (R. 4-14).

4. For the defense:

The accused testified that when he awakened on the morning of 19 February he was not feeling well and did not eat anything. About noon he went to the "Seminole Cafe" in Tallahassee and drank approximately five or six bottles of beer. After going on duty at 1:00 p.m. he returned to the Seminole Cafe to visit with some friends. When he left the cafe he met a civilian friend. They walked around town for a while and proceeded to the

"MP" station as accused was still feeling ill and wanted to "get out of the way and off the street". After a few minutes he stepped outside the station for some fresh air and "suddenly became sick". He held himself away from the police car and pulled his necktie aside to avoid vomiting on his clothes. On cross-examination accused testified that he did not believe five or six bottles of beer taken on an empty stomach would make a normal person drunk. He was "more sick" than drunk and did not feel the effects of the beer he consumed until about two hours afterward, when he was walking up the alley. When the nauseated feeling came over him he was about half way up the alley and did not have time to get back to military police headquarters before he vomited (R. 14-16).

5. a. Charge I: It is shown by the evidence that on 19 February 1944, the accused, after drinking five or six bottles of beer on an empty stomach, went on duty as a military police officer in Tallahassee, Florida. About two hours later he appeared at Military Police Headquarters in a drunken condition. He staggered, was "rambling" in his speech, had a strong alcoholic odor on his breath and vomited in the alley, a public way, between Military Police Headquarters and the Tallahassee Police Station. The accused, after being placed under arrest by city police and taken before the Provost Marshal at Dale Mabry Field, admitted that he was drunk and that he was on duty. The evidence clearly establishes that accused was sufficiently intoxicated to be unable to exercise full control of his mental and physical faculties and that he was found drunk on duty as alleged.

b. Specification 1, Charge II: The evidence shows that accused was drunk in uniform in a public place. It does not appear that the condition of accused was observed by the public, other than military personnel and two policemen. He was not grossly drunk and the court found him not guilty of being disorderly. Under the circumstances the Board of Review is of the opinion that the conduct of accused, though discreditable, was not of such nature as to constitute a violation of the 95th Article of War, and that the evidence is legally sufficient to support only so much of the finding of guilty of this Specification as involves a finding of guilty in violation of the 96th Article of War.

6. The accused is 21 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation cadet from 4 December 1942; appointed temporary second lieutenant, Army of the United States, and active duty, 3 November 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally

sufficient to support the findings of guilty of the Specification, Charge I, and of Charge I; legally sufficient to support only so much of the findings of guilty of Specification 1, Charge II, and of Charge II as involves a violation of the 96th Article of War; and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation in time of war of the 85th Article of War and authorized upon conviction of a violation of the 96th Article of War.

Samuel M. Driver, Judge Advocate

Walter Gilmore, Judge Advocate

H. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 2 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Charles S. Bunch (0-815649), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Specification, Charge I, and of Charge I; legally sufficient to support only so much of the findings of guilty of Specification 1, Charge II, and of Charge II as involves a violation of the 96th Article of War; and legally sufficient to support the sentence and to warrant confirmation thereof. The accused was found drunk in a public place while on duty as a military police officer (Spec., Chg. I and Spec. 1, Chg. II). He was found not guilty of Specification 2, Charge II. I recommend that the sentence to dismissal be confirmed but, in view of all of the circumstances, that the execution thereof be suspended during good behavior.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 336, 27 Jun 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 254055

28 APR 1944

(167)

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Barksdale Field, Shreveport, Louisiana, 21 March 1944. Dismissal.
Second Lieutenant JAMES A. MADDEN (O-684880), Air Corps.	

OPINION of the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 96th Article of War.

Specification: In that Second Lieutenant James A. Madden, Headquarters and Bombardment Crew Section, 336th Bombardment Group (M), did, on or about 15 February 1944, in the vicinity of Galveston, Texas, knowingly violate Section II, paragraph 16 a (1) (d), Army Air Forces Regulation 60-16, dated 9 September 1942, by flying a military airplane at an altitude of less than 500 feet.

CHARGE II: Violation of the 83rd Article of War (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded guilty to and was found guilty of Charge I and its Specification. He pleaded not guilty to and was found not guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

The prosecution introduced Army Air Forces Regulation 60-16, paragraph 16 a (1) (d) of which forbids flight below a minimum of 500 feet above the ground except during landing or take-off operations (R. 19; Pros. Ex. D). Prosecution's Exhibits A and B, respectively, a copy of the 480th Bombardment Squadron's flying schedule and a copy of Army Air Forces Form 1, show that accused was pilot of B-26 type plane number 41-31751, which took off

at 1330 from Lake Charles, Louisiana, Army Air Field, on 15 February 1944, and landed at 1800 the same day (R. 4,5; Pros. Exs. A,B).

It appears from the testimony of Major Gerald J. Crosson, Air Corps, and of Captain Russell I. Maurer, Air Corps, commanding officer and operations officer, respectively, of the 480th Bombardment Squadron, and of Second Lieutenant J. E. Wiegel, bombardier instructor in accused's plane at the time of the offense, that accused was in charge of a flight of three bombing planes scheduled to fly in formation to a bombing range near Galveston, Texas. It was decided at a "briefing" session prior to the flight that they were to make their bomb runs at 11,000 feet, or 500 feet below the clouds, and upon completion of this mission to rejoin in formation and undertake a dead-reckoning navigation mission to DeRidder, then back to Lake Charles (R. 5,7,8,14-16).

Due to overcast weather conditions the bombing runs were carried out at either 4000 feet (R. 15) or at an altitude slightly in excess of 1000 feet (R. 18). After this they rejoined formation, led by accused. The sky was overcast at about 1500 feet. Near Galveston, but over uninhabited, marshy area, accused's plane "peeled off" and flew over the marsh for an unspecified time and distance at a height of about 20 feet (R. 15-18).

In a sworn statement made to Captain Luther B. Williams, Air Corps, investigating officer in the case, accused corroborated the foregoing testimony. Due to an overcast at 1100 or 1200 feet, the bombing was done from 1000 feet. Thereafter accused descended to an altitude of 500 feet, and later to 150 feet. The overcast was still at its previous altitude (Pros. Ex. C). It appears from the preamble of his statement and the stipulation entered into at the time when the exhibit was offered that accused had been properly warned of his rights (R. 18,19).

Evidence for the defense.

Testimony in behalf of accused was introduced by stipulation. A statement by Lieutenant Colonel H. B. Manson, Jr., Commanding Officer of the 336th Bombardment Group, was to the effect that accused had been a member of that organization for over three months as pilot of a combat crew, that he and his crew were outstandingly efficient, that he was not a foolish or reckless pilot, that his attitude and work were sufficient and his character unimpeachable. Colonel Manson further stated that he would "especially desire" to have accused serve with him, in combat or elsewhere (R. 19,20). Chaplain Joseph M. Hannan, Lake Charles Army Air Field, stated in a stipulation that accused had been an excellent soldier; that his character had been above reproach, that this had been his first difficulty, and that it had been brought about by accused's exuberance at being scheduled for immediate overseas duty (R. 20).

Defense counsel stated that accused had been advised of his rights,

and that he elected to remain silent (R. 20). The effect of accused's plea of guilty had been explained to him at the time of his arraignment (R. 4).

4. The court's findings are sustained by the record of trial and by accused's pleas of guilty.

5. War Department records show that accused is 24 years of age, and a high school graduate. He was inducted into the Army on 20 May 1941, serving as an enlisted man, and subsequently as an aviation cadet, until 25 June 1943, when he was honorably discharged and appointed a second lieutenant, Air Corps, Army of the United States.

6. Attached to the record of trial is a letter from Lieutenant Colonel Hugh B. Manson, Jr., Air Corps, Commanding Officer, 336th Bombardment Group, dated 26 February 1944 and addressed to the Commanding General, III Bomber Command, in which he requests clemency for accused, and states that accused has exhibited exceptional cooperation, ability, and application to duty, has never previously been derelict in the performance of his work, and has been admired and loved by his classmates and crew members. Colonel Manson also points out that accused's offense was committed one day before accused's scheduled departure to a staging area.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

Terry E. Eom, Judge Advocate.

John Tarrington, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 8 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James A. Madden (0-684880), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof.

3. Consideration has been given to a letter from Lieutenant Colonel Hugh B. Manson, Jr., Air Corps, Commanding Officer, 336th Bombardment Group, dated 26 February 1944, addressed to the Commanding General, III Bomber Command, which is attached to the record of trial. In it Colonel Manson states that accused has exhibited exceptional cooperation, ability, and application to duty, has never previously been derelict in the performance of his work, and has been admired by his classmates and crew members. Colonel Manson also points out that accused's offense was committed one day before his scheduled departure to a staging area, and requests that clemency be exercised. Consideration has also been given to a letter dated 27 April 1944, attached hereto, written by General Henry H. Arnold, Commanding General, Army Air Forces, in which he states that accused's offenses are aggravated by the fact that, in spite of his stage of training and experience, he wilfully imperiled lives and aircraft in his charge, and in which letter General Arnold recommends that the sentence be confirmed and ordered executed. Accordingly, I recommend that the sentence be confirmed and ordered executed.

4. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr.CG, AAF.

(Sentence confirmed. G.C.M.O. 243, 30 May 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN
CM 254157

26 APR 1944

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at MacDill Field, Florida, 9-11 March 1944. Dismissal, total forfeitures and confinement for one (1) year.
Second Lieutenant THOMAS N. SEYMOUR (O-1546376), Medical Administrative Corps.	)	

OPINION of the Board of Review
LIPSCOMB, GAMBRELL and GOLDEN, Judge Advocates

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification 1: In that Second Lieutenant Thomas N. Seymour, Medical Administrative Corps, Station Hospital Detachment, MacDill Field, Florida, did, without proper leave, absent himself from his station and duty at MacDill Field, Florida, from about 1300 Eastern War Time, 29 December 1943, to about 1030 Eastern War Time, 4 January 1944.

Specification 2: In that Second Lieutenant Thomas N. Seymour, Medical Administrative Corps, Station Hospital Detachment, MacDill Field, Florida, did, without proper leave, absent himself from his

station at MacDill Field, Florida from about 26 January 1944 to about 28 January 1944.

CHARGE II: Violation of the 69th Article of War. (Finding of not guilty).

Specification 1: (Finding of not guilty).

CHARGE III: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Thomas N. Seymour, Medical Administrative Corps, Station Hospital Detachment, MacDill Field, Florida, did, at Tampa, Florida, on or about 24 December 1943, with intent to deceive, wrongfully and unlawfully make and utter to The Hotel Tampa Terrace, Tampa, Florida for cash, a certain check, in words and figures as follows, to wit:

HOTEL TAMPA TERRACE
Tampa, Florida 12 - 24 1943

Pay to the
Order of HOTEL TAMPA TERRACE $15.00
Fifteen and 00/100 - - - - - DOLLARS
With Exchange, Value Received, and Charge To Account Of

TO First National Bank
Miami, Florida

I hereby represent that the amount drawn for in this draft is on deposit with the drawee to my credit, free from any claim, and acknowledge that this amount has been paid to me upon my representation of such facts.

/s/ T. N. Seymour

and by means thereof did fraudulently obtain from The Hotel Tampa Terrace fifteen dollars ($15.00) in cash, he the said Lieutenant Seymour, then well knowing that he did not have and not intending that he should have any account with the First National Bank, Miami, Florida, for the payment of said check.

Specification 2: Same form as Specification 1, but

alleging check drawn on same bank, dated 24 December 1943, made payable to the order of and made and uttered to the Hotel Tampa Terrace, Tampa, Florida, and fraudulently obtaining thereby $50.

Specification 3: Same form as Specification 1 but alleging check drawn on same bank, dated 27 December 1943, made payable to the order of and made and uttered to the Hotel Tampa Terrace, Tampa, Florida, and fraudulently obtaining thereby $15.

Specification 4: (Finding of not guilty).

Specification 5: (Finding of not guilty).

Specification 6: Same form as Specification 1, but alleging check drawn on same bank, dated 28 December 1943, made payable to the order of and made and uttered to the Hotel Tampa Terrace, Tampa, Florida, and fraudulently obtaining thereby $15.

Specification 7: (Finding of not guilty).

Specification 8: (Finding of not guilty).

Specification 9: (Nolle prosequi).

Specification 10: (Motion for finding of not guilty sustained).

Specification 11: Same form as Specification 1, but alleging check drawn on same bank, dated 29 December 1943, made payable to the order of and made and uttered to the Hotel Tampa Terrace, Tampa, Florida, and fraudulently obtaining thereby $25.

He pleaded guilty to Charge I and its Specifications and Charge III and Specifications 1, 2, 3, 6 and 11 thereunder and not guilty to all other Charges and Specifications upon which he was arraigned. A nolle prosequi was entered as to Specification 9, Charge III, and the defense's motion for a finding of not guilty as to Specification 10, Charge III, was sustained. He was found guilty of all Charges and Specifications to which he had pleaded guilty and not guilty of all other Charges and Specifications. He was sentenced to be dismissed

the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for one (1) year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, upon the Charges and Specifications of which the accused was found guilty, supplements the accused's pleas of guilty thereof and shows that the accused was absent without leave from his station on two occasions as alleged in Specifications 1 and 2, Charge I. This was shown by an agreed stipulation to such effect (R. 10).

Two employees of the Hotel Tampa Terrace who had authorized the disbursement by the hotel of its funds for the checks described in Specifications 1, 2, 3, 6 and 11, Charge III, identified the accused as the person who had made and cashed the described checks. The original of the check described in Specification 11, Charge III, was identified and admitted into evidence. It was shown that the checks described in Specifications 1, 2, 3 and 6, Charge III, had been redeemed for the accused by his mother who had refused to surrender them and that, consequently, the originals thereof were unavailable but photostatic copies of them were identified and admitted into evidence, appropriately under such circumstances. All five of the checks were drawn upon the First National Bank, Miami, Florida, and an officer of such bank by deposition testified that the accused had not had an account with such bank at any time during the month of December 1943 or at any subsequent time up to the date of the deposition, 7 March 1944 (R. 12-14, 14-18, 18-27, 27-31; Ex. B-I).

4. The accused, after explanation of his rights as a witness, elected to remain silent.

5. Specifications 1 and 2, Charge I, allege respectively that the accused absented himself without proper leave from his station at MacDill Field, Florida, from about 29 December 1943 to about 4 January 1944 and from about 26 January 1944 to about 28 January 1944. The elements of the offense of absence without leave and the proof required for conviction thereof, according to applicable authority, are as follows:

> "* * * (a) That the accused absented himself from his command, * * *, station, or camp for a certain period as alleged; and (b) that such absence was without authority from anyone competent to give him leave" (M.C.M., 1928, par 132).

The evidence for the prosecution consisting of stipulations that the accused was absent without leave as alleged conclusively supplements the accused's pleas of guilty of such offenses as alleged and, therefore, beyond a reasonable doubt established his guilt thereof. The evidence, consequently, supports the findings of guilty of Charge I and the Specifications thereunder.

6. Specifications 1, 2, 3, 6 and 11, Charge III, allege that the accused at Tampa, Florida, on specified dates with intent to deceive, wrongfully and unlawfully, made and uttered five checks in the amounts of $15, $50, $15, $15, and $25 respectively, to the Hotel Tampa Terrace and by means thereof fraudulently obtained from the hotel money for the face amounts thereof when he knew that he did not have and not intending that he should have any account with the drawee bank for the payment thereof. The issuance of checks by an officer against a non-existent bank account and securing cash therefor without intending that he should have any account with the drawee bank is certainly conduct of a nature to bring discredit upon the military service and particularly is this so when such checks are cashed by civilians (M.C.M., 1928, par. 152b, CM 202027 (1934) Dig. Ops. JAG, 1912-1940, Sec. 453 (22)).

The evidence for the prosecution supplementing the accused's pleas of guilty establishes the commission of the offenses as alleged. The checks were identified; the accused was shown to have made and uttered them and to have received the cash therefor; and it was shown that he had no account with the bank upon which they were drawn. The inference of fraud under such circumstances is inescapable. The evidence and the accused's pleas of guilty established beyond a reasonable doubt his guilt of the offenses alleged in Specifications 1, 2, 3, 6 and 11, Charge III, and fully supports the court's findings of guilty thereof and of Charge III.

7. The accused is about 28 years old. The War Department records show that he has had enlisted service from 17 April 1942 until 28 April 1943 when he was commissioned a temporary second lieutenant upon completion of Officers' Candidate School and that he has had active duty as an officer since the latter date.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support

the findings of guilty of Charge I and the Specifications thereunder and Charge III and Specifications 1, 2, 3, 6 and 11 thereunder and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of either Article of War 61 or Article of War 96.

Abner E. Lipscomb, Judge Advocate.

William H. Hamblett, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 254157

1st Ind.

War Department, J.A.G.O., 8 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Thomas N. Seymour (0-1546376), Medical Administrative Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and ordered executed and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.

(Sentence confirmed. G.C.M.O. 315, 19 Jun 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGQ
CM 254182

4 MAY 1944

UNITED STATES v. Second Lieutenant GEORGE W. ROESSEL (0-753429), Air Corps.	OGDEN AIR SERVICE COMMAND Trial by G.C.M., convened at Army Air Base, Alliance, Nebraska, 30 March 1944. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL and FREDERICK, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that 2d Lieutenant George W. Roessel, 5th Troop Carrier Squadron, Alliance Army Air Base, Alliance, Nebraska, did, without proper leave, absent himself from his organization at Grenada Army Air Field, Grenada, Mississippi, from about 1630, 2 February 1944 to about 1200, 8 March 1944.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of two (2) years. The reviewing authority approved only so much of the sentence as provides for dismissal and forfeiture of all pay and allowances due or to become due, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

During February and March of 1944 accused was assigned to the 5th Troop Carrier Squadron, 10th Troop Carrier Group, Army Air Forces, and stationed at Grenada Army Air Field, Grenada, Mississippi (R. 4, 7, 9, Ex. A). A duly authenticated extract copy of the morning report

of this organization for 25 February 1944 and 8 March 1944 was introduced into evidence, without objection (R. 5, Ex. A). On the morning report for 25 February 1944, accused was carried as from "Dy to AWOL 1630 2nd"; on the morning report for 8 March 1944, he was carried as "AWOL to Dy 1200".

First Lieutenant Charles J. Forst, Executive officer and former Adjutant of the 5th Troop Carrier Squadron, testified it was his duty to maintain the squadron records (R. 5). A formation of the squadron officers was called on 16 February 1944, which accused did not attend. A search was thereupon instituted for him, and he was not found (R. 5). Lieutenant Forst then checked the mail room and discovered accused had not "picked up" his mail "for a great length of time". He found among accused's uncollected mail a notice to him from the Railway Express Company, dated 2 February 1944, advising him of the arrival of a package. Forst went to the Railway Express Office and discovered a package of clothing addressed to accused. He was informed by those in charge of the office that altho accused had called there during the latter part of January, or around the 1st of February, he had not called for the package since the date of the notice (R. 5, 6). Lieutenant Forst continued his search for accused, but had not located him prior to his departure for Alliance, Nebraska (R. 6). He had no knowledge of accused's absence until 16 February 1944, and did not then record him as officially absent on a morning report until 25 February, for the reason that he wanted to make sure that accused was actually absent (R. 6). Accused surrendered himself at his base at Grenada (R. 7) in time to move to Alliance, Nebraska, with his unit (R. 6). Between 2 February 1944 and 16 February 1944, accused "more or less had no schedule" or duties (R. 7).

Captain James M. Turk testified that about 10 or 11 February 1944 he posted a notice on the squadron bulletin board directing accused to report to the group surgeon for "shots". Accused did not respond. Captain Turk had no actual or personal knowledge of his absence until 16 February 1944, when accused was absent from a formation (R. 9). The last day accused flew, prior to 16 February 1944, was on 1 February 1944. The witness did not recall seeing accused after 2 February 1944. The next time he saw accused was on 8 March 1944. Authority to be absent should have been requested through Captain Turk as he was then Executive officer of the Squadron (R. 8). He knew of no authority granted accused to be absent during any of the period between 2 February 1944 and 8 March 1944 (R. 9, 11, 12). Accused had no duties to perform between 1 and 16 February 1944, other than to be available for "shots" (R. 9, 10). Due to a shortage of instructors and planes, accused flew less than ten hours between December 1943 and February 1944 (R. 10). There was no "sign-in sheet" for the organization (R. 9). All officers were supposed to check the squadron bulletin board at least once daily, but no check was made to see that they complied. After 16 February formations of the squadron were held daily, and accused was absent each day (R. 11).

4. For the defense:

Having had his rights fully explained to him, accused elected to remain silent, and he did not introduce any evidence at the trial (R. 12).

5. Verity is attributed to the entries in the morning reports of an Army organization because these reports are, as their name implies, required to be made daily, and the entries contained in them are assumed to be recitations of current facts, recorded from day to day by a responsible officer, whose legal duty it is to do so and which duty he is presumed to discharge in a proper manner, that is, based on his personal knowledge of the facts constituting such entries. For these reasons morning reports, or duly certified extract copies thereof, are admitted into evidence as exceptions to the hearsay rule and given prima facie probative value by military tribunals. However, the entries recorded in morning reports are only prima facie evidence of the facts they recite. The credence to which they are entitled, and the probative value to be given them, are directly dependent upon the integrity and strictness with which the rules governing their preparation have been complied with by the officer responsible for their preparation. The accuracy of these reports is not immune from attack, and when evidence is introduced from any source tending to show error or lack of authenticity in the entries therein, they must be weighed as any other documentary evidence to determine the extent to which they shall be accepted as competent credible proof of the facts they recite. It is always a matter of pertinent inquiry as to whether or not the person who prepared the morning report had personal knowledge of the facts recited. Many precedent cases hold, that where it is manifest that the entries in a morning report could not have been, or were not, in fact based upon the personal knowledge or observation of the person who made them, such entries are not competent evidence of the facts stated and are mere compounded hearsay. Dig. Op. J.A.G.D., 1912-1940, Sec. 395 (18). Even though the morning report may have been introduced into evidence without objection or even after defense counsel has expressly stated that he has no objection to its introduction, nevertheless it may properly be questioned as to its validity and competence. Bull. J.A.G., September 1942, p. 212.

In the instant case, the entry in the morning report of accused's organization for 25 February 1944, wherein it is recited that he went "AWOL" on 2 February 1944, obviously is not, and does not purport to be, a current entry of a current fact; nor does it purport to be the correction of an error made through inadvertence or oversight in the morning report rendered for 2 February 1944. This circumstance leads to the inquiry why the long delay in reporting accused as "AWOL", and whether or not the entry was finally made upon personal knowledge of the recited facts. The answer to both questions is found in the testimony of Lieutenant Forst. The duty of ascertaining the facts and of actually

preparing the morning reports had been delegated to him by the commanding officer of the squadron. Lieutenant Forst had no personal knowledge prior to 16 February 1944 that accused was absent from his organization, nor was he thoroughly convinced that such absence was a fact until 25 February 1944, when he made the entry in question. There is nothing in the record to indicate that the commanding officer of the squadron had any greater knowledge on the subject than did Lieutenant Forst. The conclusion that accused had been absent without leave since 2 February 1944 was admittedly arrived at by a process of deduction based on the fact that 1 February 1944 was the last day he was definitely known to have been present for duty, which in turn is a conclusion reached from talking with his associates, and from the circumstances that accused had not called for a package which had remained undelivered at the Railway Express office since 2 February 1944, and discovery that accused had failed to call for his mail over a considerable period of time.

Defense counsel, altho expressly accorded the opportunity to object to the introduction of this extract copy of the morning report, stated that he had no objection thereto. It was properly admitted by court, but the Board of Review questions its competency as legal documentary proof. Since the pertinent entry amounts to a mere conclusion of Lieutenant Forst, and the principal facts from which he arrived at that conclusion appear of record, these latter facts and circumstances rather than his conclusion are considered for the purpose of determining whether the evidence is legally sufficient to sustain the finding that accused went "AWOL" on 2 February 1944. In the opinion of the Board the competent legal evidence of record is not sufficient to show beyond reasonable doubt that he was absent from his organization on and after that date. There is competent evidence other than the morning report which is legally sufficient to show that accused was absent without leave between 16 February 1944, and 8 March 1944.

6. War Department records disclose that this officer is 24 years of age and is not married. He is a high school graduate. He was a machinist in a defense plant prior to enlisting as an aviation cadet on 28 October 1942. Having successfully completed his course of training as an aviation cadet, he was appointed and commissioned a second lieutenant in the Army of the United States on 30 August 1943, and entered upon active duty at Yuma Army Air Field, Yuma, Arizona, the same day.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding

of guilty of the Specification of the Charge as finds accused guilty of being absent without leave from 16 February 1944 to 8 March 1944, and to support the Charge, and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of Article of War 61.

William A. Pounds, Judge Advocate

William H. Gamble, Judge Advocate

Herbert R. Frederick, Judge Advocate

1st Ind.

War Department, J.A.G.O., 9 MAY 1944 - To the Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant George W. Roessel (O-753429), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification of the Charge as finds accused guilty of being absent without leave from 16 February 1944 to 8 March 1944, legally sufficient to support the finding on the Charge, and the sentence and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed, that the forfeitures be remitted, and that the execution of the sentence as thus modified be suspended during good behavior.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer
Major General
The Judge Advocate General

3 Incls.
1-Record of trial.
2-Dft. ltr. sig. of S/W.
3-Form of action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence as approved by reviewing authority confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 303, 17 Jun 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ
CM 254202

26 MAY 1944

UNITED STATES	)	HAWAIIAN DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 958, 1 February 1944 to
Lieutenant Colonel STEPHEN	)	4 February 1944. Dismissal.
ROBY (0-247561), Ordnance.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL and FREDERICK, Judge Advocates.

---

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 94th Article of War.

Specification 1: In that Lieutenant Colonel Stephen Roby, Ordnance Department, did, at Hickam Field, Territory of Hawaii, on or about 31 May 1942, make a claim against the United States by presenting to Lieutenant Colonel H. B. Turner, Finance Department, Finance Officer at Hickam Field, Territory of Hawaii, an officer of the United States duly authorized to allow and pay such claims, a voucher, W.D. Form 336, in the amount of $100.00, for rental allowance from 1 May 1942 to 31 May 1942, which claim was false and fraudulent in that said Lieutenant Colonel Roby and his dependent, Mrs. Marion K. Roby, his wife, occupied public quarters from 1 May 1942 to 31 May 1942, and was then known by said Lieutenant Colonel Roby to be false and fraudulent.

Specifications 2 to 15, inclusive:

(Each of these Specifications charges the same type of offense as Specification 1, above, and is identical with it in form. These 14 Specifications each allege as a separate offense each monthly pay and allowance account presented by accused between June 1942 and July 1943, both inclusive, in each of which he made claim against the United States for $120 as commutation of quarters.)

CHARGE II: Violation of the 95th Article of War.

Specification 1: In that Lieutenant Colonel Stephen Roby, Ordnance Department, did, at Hickam Field, Territory of Hawaii, on or about 31 May 1942, with intent to deceive Lieutenant Colonel H. B. Turner, Finance Department, Finance Officer at Hickam Field, Territory of Hawaii, officially state, in a voucher, W.D. Form 336, submitted to said Lieutenant Colonel H. B. Turner, that from 1 May 1942 to 31 May 1942, "I was not assigned adequate quarters at my present station; if without dependents, I was not on field or sea duty; if with dependents, I did not occupy with them any public quarters assigned to me without charge at any station, nor did any of them occupy public quarters assigned to them or to any other officer or his dependents, except for bona fide social visits," which statement was known by said Lieutenant Colonel Roby to be untrue, in that during said period he and his dependent, Mrs. Marion K. Roby, his wife, did occupy public quarters assigned to him without charge, and from 1 May 1942 to 15 May 1942 said Mrs. Marion K. Roby was assigned quarters at Fort Shafter, Territory of Hawaii.

Specifications 2 to 15, inclusive:

(Each of these Specifications charges the same type of offense as Specification 1, above, and is identical with it in form, except in the following particulars: The concluding allegation of Specification 1, "and from 1 May 1942 to 15 May 1942 said Mrs. Marion K. Roby was assigned quarters at Fort Shafter, Territory of Hawaii", is not contained in any subsequent Specification. The allegation, "and that the address of his wife, Mrs. Marion K. Roby, was 'Ocean View Court, Honolulu, T.H.' * * * and that during said period the address of said Mrs. Marion K. Roby was not 'Ocean View Court, Honolulu, T.H.'", is contained in Specification 9 but appears in no other Specification. Specifications 14 and 15 conclude with the allegation, "did occupy public quarters assigned to other officers", rather than the allegation, "did occupy public quarters assigned to him without charge". Each of these 14 Specifications alleges as a separate offense, namely, a false official statement, each pay and allowance account presented by accused to the United States during the period from June 1942 to July 1943, both inclusive.)

ADDITIONAL CHARGE I: Violation of the 94th Article of War.

Specification: In that Lieutenant Colonel Stephen Roby, Ordnance Department, did, at Honolulu, Territory of Hawaii, on or about 31 August 1943, make a claim against the United States by presenting to Colonel L. N. Smith, Finance Department, Finance Officer, United States Army, Honolulu, Territory of Hawaii, an officer of the United States duly authorized to allow and pay such claims, a voucher, W.D. Form 336, in the amount of $120.00, for rental allowance from 1 August 1943 to 31 August 1943, which claim was false and fraudulent in that said Lieutenant Colonel Roby and his dependent, Mrs. Marion K. Roby, his wife, occupied public quarters from 1 August 1943 to 31 August 1943, and was then known by said Lieutenant Colonel Roby to be false and fraudulent.

ADDITIONAL CHARGE II: Violation of the 95th Article of War.

Specification 1: In that Lieutenant Colonel Stephen Roby, Ordnance Department, did, at Honolulu, Territory of Hawaii, on or about 31 August 1943, with intent to deceive Colonel L. N. Smith, Finance Department, Finance Officer, United States Army, Honolulu, Territory of Hawaii, officially state, in a voucher, W.D. Form 336, submitted to said Colonel L. N. Smith, that from 1 August 1943 to 31 August 1943, "I was not assigned adequate quarters at my present station; if without dependents, I was not on field or sea duty; if with dependents, I did not occupy with them any public quarters assigned to me without charge at any station, nor did any of them occupy public quarters assigned to them or to any other officer or his dependents, except for bona fide social visits, or receive a monetary allowance in lieu thereof," which statement was known by said Lieutenant Colonel Roby to be untrue in that during said period, he and his dependent, Mrs. Marion K. Roby, his wife, did occupy public quarters assigned to other officers.

Specification 2: In that Lieutenant Colonel Stephen Roby, Ordnance Department, did, at APO 958, on or about 15 August 1943, with intent to deceive Major William E. Cheatham, Inspector General's Department, AUS, who was then and there conducting an official investigation, officially deliver to said Major William E. Cheatham a writing in words and figures as follows:

> "Received from Mrs. Marion K. Roby--($25.00) twenty-five dollars in currency in payment for lodging.
> For the period beginning Dec. 21, '42 to Feb 1st 1943 (incl.)

Diane A. Sloggett
1938 Mott-Smith Dr.
Honolulu, T.H.
Jan. 5th 1943."

which said writing was false and untrue and known by the said Lieutenant Colonel Stephen Roby to be false and untrue in that the signer thereof, Diane A. Sloggett, had not received twenty-five dollars ($25.00) from the said Mrs. Marion K. Roby in payment for lodging for the period stated in said writing and had not written and signed same on 5 January 1943, and in that the said Mrs. Marion K. Roby had not occupied said premises on a rental basis for the said period.

Defense counsel made a motion to strike Charge II and its Specifications (A.W. 95) and Specification 1 of Additional Charge II (A.W. 95), upon the theory that since the offenses alleged in these Specifications grew out of the same transactions, both are in reality the same and therefore constitute an unreasonable multiplication of Charges. This motion was denied. Motion was thereupon made by defense counsel that accused be accorded a separate trial on Specification 2, Charge II, upon the theory that the offense alleged in this Specification was not a part of the transactions giving rise to the original Charges and Specifications, but arose during an official investigation of those transactions, and the evidence relative to this Specification might present apparent conflicts and inconsistencies calculated to operate to the detriment of accused on the other Charges and Specifications; and for the additional reason that accused had already taken the depositions of three of his witnesses before this Specification was filed, which, since the prosecution had access to these depositions, was tantamount to a partial trial of the case before the Specification was filed. This motion was also denied.

Accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The following pertinent facts, which are clearly established by competent evidence of record, are considered essential to a proper understanding of the matters in issue.

Accused was assigned to duty at Hickam Field, T.H., by Par. 10, Special Order No.130, Headquarters Hawaiian Department, 31 May 1941 (Pros. Exs. B to K). He arrived in the Hawaiian Department on 3 June 1941 and was assigned to duty in the 7th Air Force Ordnance Office (R. 136. Prior to the outbreak of hostilities with Japan on 7 December

1941, he was assigned quarters by proper authority, and he occupied these quarters with his wife, at 203 4th Street, Hickam Field (R. 136). On 7 December 1941, by verbal order of the commanding officer of Hickam Field, he was relieved from these quarters and assigned shelter in the same building which he was occupying, and by a similar order on 17 December 1941 was relieved from shelter and again assigned quarters in the same building. These verbal orders were confirmed in Special Order No. 10, Headquarters Hickam Field, 13 January 1942 (Def. Ex. 3; R. 57, 137). Then, by verbal order of the commanding officer of Hickam Field, embodied in Special Order No. 44, Headquarters Hickam Field, 9 March 1942, accused was again relieved from quarters and assigned shelter in the same building, effective 1 March 1942 (Def. Ex. 2; R. 56, 137). He was not thereafter assigned quarters. Accused was relieved from duty in the Ordnance Office of the 7th Air Force, Hickam Field, T.H., and assigned to duty in the Department Ordnance Office, Honolulu, T.H., by Par. 30, S.O. No. 73, Headquarters Hawaiian Department, 14 March 1943, and reported for duty at his new station the same day (Pros. Ex. L), but continued to live at Hickam Field until the first part of September 1943.

The evidence for the prosecution may be summarized as follows:

For each month during the period from 1 May 1942 to 31 August 1943, inclusive, accused, an officer in the Army of the United States, made, signed, and, on or about the last day of each month, presented for allowance and payment to the Army Finance Officer having authority to allow and pay the same, his individual pay and allowance account voucher (W.D. Form No. 336), in which he made a claim against the United States for a rental allowance as one entitled thereto by virtue of having a dependent wife, who was neither assigned nor occupying public quarters, and for whom he was maintaining private quarters within contemplation of law. These vouchers were presented for allowance and payment to the respective Army Finance officers alleged in the various Specifications, and were by them allowed and paid as presented. Accused claimed, and was paid, as commutation of quarters for the month of May 1942, the amount of $100, and for each succeeding month, the amount of $120. Each monthly pay and allowance voucher so presented by accused during the period in question contained the following statement or representation over the signature of accused:

> "For rental allowance from _____,19___, to _____, 19___, during which period I was not assigned adequate quarters at my permanent station; if without dependents, I was not on field or sea duty; if with dependents, I did not occupy with them any public quarters assigned to me without charge at any station, nor did any of them occupy public quarters assigned to them or to any other officer or his dependents, except for bona fide social visits".

The spaces for the rental allowance period claimed left blank in the foregoing were filled in in each instance with the dates applicable to the month for which the voucher was submitted. In each voucher

presented by accused during the period from 1 May 1942 to 31 January 1943 inclusive, accused represented his wife's, Mrs. Marion K. Roby's, address to be "Ocean View Court, Honolulu, T.H." In each voucher presented by him during the period from 1 February 1943 to 31 August 1943 inclusive, he represented his wife's address to be "c/o Mrs. Gladys Lyman, 2199 Kalia Rd., Honolulu, T.H." (Pros. Ex. R, and B to Q incl.; R. 15, 16).

From on or about 19 January 1942 (R. 17) until 15 May 1942 (R. 19, 22), Mrs. Marion K. Roby, wife of accused, was a member of the Women's Air Raid Defense (W.A.R.D.), and as such drew compensation from the Government and was assigned "shelter" free of cost at Fort Shafter, T.H. (R. 19). This shelter was available at all times, but the nature of Mrs. Roby's work only required that she make use of it about three nights each week (R. 22).

Lieutenant Colonel James A. Wells was assigned shelter in the building situated at 203 4th Street, and occupied it with accused from 23 July 1942 until 9 June 1943 (R. 24). Various other officers also lived there intermittently during that period (R. 25, 32). It became necessary to vacate this house at 203 4th Street on or about 9 June 1943, and Colonel Wells was assigned shelter in a building situated at 14 Julian Street, Hickam Field, where Lieutenant Colonel Jack S. Grubb and Major Walter Wolfe were also assigned shelter (R. 27). Accused was not assigned shelter at this new location, but since the quarters contained more room than the three officers assigned there required, they consented that accused move his furniture into this building and take up shelter there (R. 27, 28, 32, 45). This he promptly did, and thereafter continued to occupy this shelter until ordered to vacate it and remove himself and furniture from Hickam Field on or about 6 September 1943 (R. 53, 54; Def. Ex. 1).

The house at 203 4th Street was fully furnished with furniture owned by accused (R. 25, 27), and the same furniture was used in the house at 14 Julian Street (R. 28, 46). Only one room in either house was used exclusively by accused (R. 25, 39). Mrs. Roby kept her personal clothing in accused's room; whether all or only a part of it, the witnesses did not know (R. 25, 39, 46). She and accused frequently entertained guests in those portions of the houses which were used in common by all who occupied them (R. 27, 39, 40, 46). Colonel Wells testified that Mrs. Roby was present at the house at 203 4th Street the majority of the time. She very frequently spent the night there (R. 25). He estimated that she spent ninety per cent of the nights in accused's room and usually prepared breakfast at the house (R. 26). She spent about the same proportion of time at the house at 14 Julian Street (R. 28). Occasionally she spent nights elsewhere, but upon

those occasions accused was usually also absent from his room (R. 28). Accused and Mrs. Roby maintained a beach house in Ocean View Court (R. 34), in conjunction with some other officers (R. 35), and Colonel Wells occasionally heard them say they were going there (R. 28). Major Wolfe estimated that Mrs. Roby spent approximately twenty-five nights each month at 14 Julian Street after accused moved there (R. 38, 39). Colonel Grubb testified as follows with reference to time spent by Mrs. Roby at 14 Julian Street: "She was there practically every night. I know of one or two cases where Colonel and Mrs. Roby were absent on weekends, but other than those one or two occasions, I can state she was there all the time" (R. 46). She stopped staying there after an investigation was made by the Inspector General's Department sometime early in August 1943 (R. 48).

The telephone number of the house at 203 4th Street, which also became the number at 14 Julian Street, was "Hickam Field 2295" (R. 27, 29).

The signed but undated application for employment which Mrs. Roby filed with the Women's Air Raid Defense, sometime between 25 December 1941 and 1 February 1942, and in which she gave "Hickam Field" (T.H.) as her home address and "Hickam Field 2295" as her home telephone number, was introduced into evidence (Pros. Ex. S; R. 18). A cross-index card which constituted a part of the records kept by the W.A.R.D. organization in connection with the .201 file of Mrs. Roby was also admitted in evidence. This card was prepared by someone in the W.A.R.D. personnel office from data contained in the aforesaid application filed by Mrs. Roby, and also listed her home address as Hickam Field and her home telephone number as "Hickam Field 2295" (Pros. Ex. T; R. 20).

Mrs. Roby was an active member of the Motor Corps Transportation Section of the Red Cross from October 1941 (R. 64) until April 1943 (R. 65). She was subject to call for emergency duty at any time during the day or night, and when Red Cross personnel in charge of assignments to duty had occasion to call her, which was "fairly" frequently, they "habitually" called her on the telephone at "Hickam Field 2295" (R. 65, 66, 67).

During the month of March 1942 Mrs. Roby was, as above set out, a member of the W.A.R.D. and assigned shelter at Fort Shafter, T.H. In his pay and allowance voucher for March 1942, accused listed his wife's address as Fort Shafter, T.H., and claimed, and was paid, commutation of quarters for that month (R. 69). Shortly afterwards, the payment was questioned by the Finance Department, and the amount so paid accused as commutation of quarters for March was, with his consent, withheld from his pay for April 1942 (R. 69, 70, 77). There was a considerable divergence of views and conflict of opinion at the

time, even among officers of the Finance Department, as to whether husbands stationed at Hickam Field with wives in the W.A.R.D. and assigned shelter at Fort Shafter were entitled to draw commutation of quarters (R. 70, 74, 75). Several officers, in addition to accused, made claim for, and were paid, commutation of quarters for March under the same circumstances (R. 75, 76). The precise question was not finally decided by the Comptroller General until 10 December 1942 (R. 75).

Major Valentine A. Rutherford, Finance Department, who testified to the foregoing, also testified as follows: He has been in the Finance Department continuously since 10 December 1927. An officer with dependents may be assigned shelter on a military reservation without losing his right to collect commutation of quarters, provided he maintains an establishment off the reservation and his dependents do not occupy public quarters (R. 71). Rental allowance is not part of the pay of an officer. The theory behind its payment is that it is reimbursement for expenses necessarily incurred by an officer for maintenance of private quarters (R. 73, 76). The Comptroller General has ruled that if such private quarters are not maintained and such expenses are not incurred the rental allowance is not payable (R. 73). The Government is not concerned about the amount of money actually paid out as rental for private quarters (R. 74). An officer is entitled to collect commutation of quarters if he provides his own quarters without expense to the Government, provided the quarters are not on a military reservation (R. 74). If a dependent occupies public quarters as her home, this precludes her husband from collecting rental allowances (R. 78).

A cottage at Ocean View Court was rented by Mrs. Roby in the name of accused during May or June 1942 at an agreed rental of $125 per month, with the understanding on the part of the management that several officers would make use of it from time to time (R. 80). This rental agreement was terminated on 20 December 1942 (R. 81).

Mrs. Gladys G. Lyman testified that she had occupied an apartment containing two single beds at the Halekalani Hotel, 2199 Kalia Road, Honolulu, T.H., since 3 August 1942 (R. 87), paying rental thereon at the rate of $105 per month (R. 94). On or about 15 February 1943, Mrs. Marion K. Roby, wife of accused, told her that she needed an address in town (R. 88); that she had given up her beach house and was in need of a place (R. 91); and offered to pay $20 per month for the privilege of moving in with her until she (Mrs. Roby) could find a house (R. 92). Mrs. Roby was given a key, and the apartment was available for her use at any time (R. 92). Mrs. Roby thereafter paid rent monthly to Mrs. Lyman at the rate of $20 per month, but did not actually occupy the apartment with her (R. 88, 95). She did not sleep there any night when Mrs. Lyman was present, and upon no occasion, upon returning after staying away over night, did Mrs. Lyman detect anything to indicate that Mrs. Roby had spent the night there (R. 89). Mrs. Lyman

did not discover any of Mrs. Roby's clothes in her apartment until after the latter had been interviewed by Major Cheatham (Inspector General's Department) in August 1943 with reference to her place of residence, and she then discovered one dress and one pair of shoes belonging to Mrs. Roby in the clothes closet (R. 89).

Mrs. Eileen Risteen testified that she lived in Mrs. Lyman's apartment at the hotel for two weeks, beginning 26 April 1943, and during that time she did not see Mrs. Roby (R. 85, 86).

Colonel Arthur B. Custis, immediate commanding officer of accused during the latter's tour of duty at Hickam Field (Pros. Ex. X, p.2), spoke to accused at least twice between 1 May 1942 and March 1943, once while he had the beach cottage rented and once afterwards (Pros. Ex. X, p. 5, 8), about drawing commutation of quarters. He cautioned accused to the effect that his wife was living with him in public quarters and that eventually all accounts would be checked and that he (accused) would get into trouble (Pros. Ex. X, p. 4). Accused replied that it was not his, but the Post Commander's responsibility to determine whether or not he was entitled to commutation of quarters, as the latter was the one who certified that he was not furnished adequate quarters (Pros. Ex. X, p. 5). He also testified that accused is a good worker and a brilliant man (Pros. Ex. X, p. 9). Accused's reputation at Hickam Field was good and Colonel Custis would believe him under oath or not under oath (Pros. Ex. X, p. 14). Colonel Custis asked that accused be relieved from his office because of a sequence of events, in which accused persisted in by-passing him in going to higher authority, and because he felt that accused was not loyal to him (Pros. Ex. X, p. 15).

Mrs. Diane A. Sloggett testified that when she arrived at her beach house on 14 August 1943 she found accused and Mrs. Roby there (Pros. Ex. Y, p. 6). Mrs. Roby told her they (Col. and Mrs. Roby) had receipts for rent except for a short period of time and requested that she give them a receipt covering that period (Pros. Ex. Y, p. 5, 12). Mrs. Sloggett stated to accused that she did not want to get into any trouble, and he told her there would not be any trouble, that she would probably never hear of it again (Pros. Ex. Y, p. 6, 16). Mrs. Sloggett thereupon wrote and delivered to accused or Mrs. Roby the following receipt, dictated by either accused or his wife:

> "Received from Mrs. Marion K. Roby—($25.00) twenty-five dollars in currency in payment for lodging. For the period beginning Dec 21, '42 to Feb 1st 1943 (incl.) Diane A. Sloggett, 1938 Mott-Smith Dr., Honolulu, T.H., Jan 5th 1943" (Pros. Ex. A; Ex. Y, p. 5).

Neither Mrs. Roby nor accused paid her $25. Mrs. Roby did insist she accept a dollar to make the receipt legal (Pros. Ex. Y, p. 6, 7). The date, 5 January 1943, on the receipt was not the date it was given, but was placed thereon at the request of either accused or Mrs. Roby (Pros. Ex. Y, p. 7). Accused was personally present when the receipt was

given and during the conversation relating to it (Pros. Ex. Y, p. 8, 13). Mrs. Roby had spent one or two nights with Mrs. Sloggett as a guest between 21 December 1942 and 1 February 1943, but had never lodged with her and had never made any arrangements with her for lodging (Pros. Ex. Y, p. 7).

Major Cheatham, Inspector General's Department, interviewed accused on 13 August 1943 and informed him that he was investigating his collection of commutation of quarters. Accused mentioned having receipts showing payment of rent, and Major Cheatham told him he would be glad to have him produce them if he desired to have them considered in the investigation. On 15 August 1943 accused delivered numerous cancelled checks and the above mentioned receipt from Mrs. Sloggett to Major Cheatham (R. 108, Pros. Ex. A). Major Cheatham had not at the time completed his official investigation, and the receipt was given consideration as a part of the evidence (R. 108, 109). He also questioned Mrs. Lyman on 13 August 1943, and she at that time showed him a check signed by Mrs. Roby and post dated 28 August 1943 for rent from 1 August to 31 August 1943 (R. 184, 185). Mrs. Roby showed him the rent checks on 13 August 1943, but she did not show him the receipt from Mrs. Sloggett (R. 111).

4. For the defense:

Defense counsel made motion for a finding of not guilty of all Charges and Specifications except Additional Charge II and Specification 2 thereof (R. 112), which was denied (R. 114).

On 14 May 1942 (R. 119; Def. Ex. 7), Mrs. Roby personally rented a small cottage at Ocean View Court , with the understanding that she was to have the larger cottage on the beach as soon as it was available (R. 118). She told the manager she wanted it for her home (R. 118). The manager testified that she often saw Mrs. Roby there; saw her carry lots of provisions in, and saw laundry on the lines which she judged to be Mrs. Roby's (R. 120). Mrs. Roby's mail was delivered at Ocean View Court (R. 120).

Colonel William L. Boyd was commanding officer of Hickam Field from about March 1942 to about March 1943, during which time accused was assigned shelter there. Colonel Boyd was aware of Mrs. Roby's visits to her husband's quarters, but considered them merely as such and not grounds to preclude accused from drawing commutation of quarters. He considered accused's reputation to be good and would believe him under oath (Def. Ex. 4, p. 1-6).

Major Austin W. Mathis occupied shelter in the same building as accused from the first part of April to the middle of July and from 3 October to 1 November in 1942, during which time Mrs. Roby visited

her husband about two or three times a week and occasionally cooked dinners there. Major Mathis was one of five officers, including accused, who shared the cottage at Ocean View Court from the latter part of May until the middle of July 1942. To the best of his knowledge Mrs. Roby occupied this cottage as her home. She maintained a wardrobe there, did her laundry, and cooked there. She was always present when Major Mathis went to the cottage, which was once each week (Def. Ex. 5).

Captain John K. Martensen shared the cottage at Ocean View Court with the Robys and others from about 15 July to 1 October 1942, and usually spent two and one-half days there each week. Mrs. Roby was usually there when he and his wife were. She maintained a wardrobe there sufficient for normal living conditions, and cooked as the occasion demanded. In his opinion, Mrs. Roby considered the cottage as her home (Def. Ex. 6).

Colonel Archibald J. Hanley, Deputy Chief of Staff, 7th Air Force (R. 130), shared the cottage at Ocean View Court on a rental basis with the Robys for approximately two months. During that time he was at the cottage five or six times and accused and Mrs. Roby were there each time (R. 125, 126). He made his rental agreement with Colonel Roby (R. 125, 126). He testified to accused's good reputation at Hickam Field.

Colonel Wilfred J. Paul shared the cottage during November or December 1942 upon a rental agreement made with Colonel Roby (R. 131). Mrs. Roby was usually at the cottage when he was there. She maintained a wardrobe and was apparently living there (R. 132). He testified that accused's reputation was excellent and he would believe him on oath (R. 133).

The accused, having been duly advised of his rights, elected to be sworn, and testified substantially as follows: He was commissioned a second lieutenant in the Field Artillery Reserve upon graduating from Princeton in June 1928 (R. 135). He entered his present tour of duty as a captain on 1 May 1941. The quarters assigned to him at 203 4th Street were the kind ordinarily assigned to a captain (R. 136). After 7 December 1941 he was relieved from quarters, assigned shelter in the same building, reassigned quarters, and again relieved of quarters and assigned shelter, as hereinabove set out (R. 137; Ex. 2 and 3). While Mrs. Roby was on 24 hour duty with the W.A.R.D. and living at Fort Shafter, she visited him and spent nights with him as often as she could (R. 137, 138). He refunded commutation of quarters paid him while Mrs. Roby was at Fort Shafter. Numerous officers whose wives were members of the W.A.R.D. were paid rental allowances at the same time, and the Hickam Field Finance officer and the Department Finance Officer had differed in their views as to whether these officers were

entitled to commutation (R. 138). After he was relieved of quarters, numerous officers were assigned shelter in the house which he occupied (R. 139). He only occupied one room, and when Mrs. Roby visited him, she occupied this same room. None of the facilities of the house were set aside for her use (R. 140). He had made no arrangements with any other officers to share the beach house at Ocean View Court at the time Mrs. Roby rented it (R. 141). He discussed in the presence of other officers that he was getting the larger place and that they could make use of it (R. 142). Mrs. Roby spent as much time there as she could, and also tried to keep the place at Hickam Field cleaned up (R. 142), Mrs. Roby did a considerable amount of Volunteer Red Cross work after May 1942, and this work frequently required her presence at Hickam Field (R. 143). Mrs. Roby paid the rent on the cottage and garage at Ocean View Court and the utility bills by checks drawn on their joint account, which checks were introduced into evidence, and aggregate $329.97 (R. 144, 145; Def. Ex. 8-33). Cancelled checks aggregating $140, drawn in favor of Mrs. Lyman were also introduced into evidence (Def. Ex. 34-41; R. 150).

Under orders from the Department commander (Def. Ex. 42), accused made an inspection trip to the South and Southwest Pacific Areas in January 1943 (R. 145, 146). He understood that a trip to both areas was to be authorized by the original order, but it did not authorize a trip to the Southwest Pacific Area. Accused radioed back and procured an amendment of the orders so that they did authorize the trip to the Southwest Pacific Area (R. 146; Def. Ex. 43). Colonel Custis was jealous because he had not himself made the trip and his dissatisfaction with accused dated from that incident (R. 148). When he returned, his wife was not at his quarters and he located her at Mrs. Thomas King's, where she had been visiting for several days (R. 149). Mrs. Roby then obtained quarters with Mrs. Lyman (R. 149).

Before moving from 2034th Street to 14 Julian Street accused talked to Colonel Farnum, base commander at Hickam Field, about it (R. 151). Colonel Farnum told him he could not assign him shelter but that he had no objection to his sharing living accommodations with other officers (R. 152). Accused occupied only one room at 14 Julian Street (R. 152). Mrs. Roby visited him at the Julian Street house and spent nights there (R. 153). It was common practice at Hickam Field for officers to have their wives visit them and stay from one to four days at a time (R. 154). Colonel Boyd, base commander at the time, Colonel Smith, and others had their wives visit them under approximately the same conditions as accused (R. 153, 154).

Following the investigation by the office of the Inspector General's Department, the Commanding General of the Hawaiian Department, under date of 1 September, wrote accused a letter directing that he refund $1780 collected by him as commutation for the period between 1 May 1942 and 31 July 1943, inclusive, (Def. Ex. 44; R. 154). After being informed by the Finance Officer that he would be within his rights in doing so (R. 154, 155), accused returned the letter, and by 1st indorsement requested a review by higher authority. The letter

was finally, after the matter had been reviewed by higher authority, indorsed back to accused with request for a statement of his further intentions with reference to making the refund (R. 154). Accused thereupon, under date of 26 October 1943, refunded the $1780 by cashier's check, receipt of which was acknowledged by letter (Def. Ex. 45; R. 154, 155). By letter dated 17 September 1943, accused was directed to refund the $120 drawn by him as commutation of quarters for August 1943 (Def. Ex. 46; R. 155). By 1st indorsement accused protested refunding this amount, claiming that his wife had only spent three or four nights in his quarters during August, as a bona fide visitor (Def. Ex. 46); but under date of 26 October 1943, accused refunded this $120 to the Government, receipt of which was acknowledged by letter (Def. Ex. 47; R. 156, 157).

Accused denied that he had any knowledge of the circumstances under which the receipt was procured from Mrs. Sloggett. He was not present at any discussion between Mrs. Roby and Mrs. Sloggett relative thereto (R. 157, 169-172). He was at the Sloggett beach house around 1 August 1943, but did not go inside (R. 158). The first time he saw the receipt was the day before he delivered it to Major Cheatham, when he and Mrs. Roby were assembling the receipts and checks (R. 157-8, 168-9). He delivered the checks and receipts to Major Cheatham at the latter's request, to substantiate payments made by Mrs. Roby. He had no intention of deceiving the Inspector General or anyone else (R. 158). It was common knowledge that he was living at Hickam Field after he was relieved from duty there, and he never tried to conceal it from anyone. Neither did he ever try to conceal the fact that Mrs. Roby spent portions of her time with him at Hickam Field (R. 158).

Accused expressed the opinion that he had received poor advice from the Finance Department, because someone had apparently been antagonized by his request for a review of the original directive to refund to the Government the amount drawn as commutation of quarters between May 1942 and July 1943. He had felt that he was justly entitled to the money and there had been nothing secretive or furtive about his conduct. Furthermore, there was ample precedent at Hickam Field, established by other officers, including for a time the base commander, for claiming the rental allowance under the circumstances (R. 159).

During cross-examination by the prosecution, accused testified as follows with reference to the amount of time his wife spent with him (R. 162). "I don't deny she spent a great deal of time at Hickam. I won't deny she was probably more with me than away". He also testified that he signed his voucher for January 1943 in blank before leaving for the South Pacific Area, and left specific instructions not to show Mrs. Roby's address as "Ocean View Court", but merely as Honolulu (R. 165). He presumed it was on 14 August 1943 that he and his wife were at Mrs. Sloggett's place, but he had no knowledge of when his wife procured the receipt (R. 169). Mrs. Roby's address was actually "Ocean View Court, Honolulu, T.H.", at the time he signed his voucher for May and December 1942 (R. 161, 165).

Brigadier General William J. Flood, Chief of Staff, 7th Air Force, has known accused approximately two years. So far as he knew, accused enjoyed a good reputation at Hickam Field, and he considered accused a capable ordnance officer (R. 175).

Colonel Harry O. Welch, Commanding Officer of Ordnance Automotive Depot, testified that he has known accused for a period of two years; that accused is a capable ordnance officer whose work has always been of the highest order; that his services are desired as an ordnance officer and he is well qualified for promotion. Colonel Welch was the investigating officer in this case and testified that nothing occurred during the investigation that in any way altered his opinion of accused (R. 176, 177, 178).

Colonel Stephen MacGregor, Ordnance Officer, CPA, who has 36 years Regular Army service, and is accused's commanding officer, testified that accused is an excellent ordnance officer, has a good reputation for truth and veracity, as well as otherwise, and that he especially desires to have accused serve under him (R. 182).

5. The offenses alleged in the Specifications of Charge I and Additional Charge I are alleged as violations of Article of War 94, while those alleged in the Specifications of Charge II and Additional Charge II are alleged as violations of Article of War 95. No error was committed in denying defense counsel's motion, made before pleading to the general issue, to strike Charge II and its Specifications and Specification 1 of Additional Charge II, predicated upon the theory that they constitute an unwarranted and improper duplication of Charges growing out of the same transactions as the offenses alleged in the Specifications of Charge I and Additional Charge I, for the Manual for Courts-Martial expressly provides that Article of War 95 "includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman", and, by illustration, makes it clear that an accused may properly be convicted, upon identical Specifications, of a violation of both Article of War 95 and any other applicable Article of War, under a proper factual situation (par. 151, M.C.M., 1928). C.M. 244212, McFarlane; C.M. 251162, Diehl. It is, therefore, unnecessary, in order to reach the conclusion that has been reached, to attempt to differentiate between the offenses alleged in the various Specifications in the instant case.

Likewise, defense counsel's motion for a trial on Specification 2 of Additional Charge II separate and apart from his trial upon the remaining Charges and Specifications was properly denied. One reason assigned as a basis of this motion was that the transaction out of which the Charge arose occurred after the transactions giving rise to the other Specifications and while they were being officially investigated. The Manual for Courts-Martial expressly provides that Charges based upon an offense committed after original Charges have been filed may be tried with the original Charges (par. 24, M.C.M. 1928). The other reasons assigned as a basis of the motion are equally untenable.

Each Specification of Charge I and Additional Charge I, charges, as a violation of Article of War 94, that accused made a false and fraudulent claim against the United States, knowing the same to be false and fraudulent at the time it was made, by presenting for allowance and payment (in his monthly pay and allowance voucher, W.D. Form 336), to an Army Finance Officer having authority to allow and pay the same, a claim for rental allowance to which he was not entitled by virtue of the fact that his dependent wife had, with his knowledge, occupied public quarters during the period of time for which commutation of quarters was claimed. Each of the 16 separate pay and allowance vouchers dealt with in the 16 Specifications under Charge I and Additional Charge I contained the following recitation and representation in connection with the claim for rental allowance:

> "I was not assigned adequate quarters at my present station; if without dependents, I was not on field or sea duty; if with dependents, I did not occupy with them any public quarters assigned to me without charge to any station, nor did any of them occupy public quarters assigned to them or to any other officer or his dependents, except for bona fide social visits".

Each Specification of Charge II and Specification 1 of Additional Charge II has reference to the identical pay and allowance voucher dealt with in the corresponding Specification of Charge I and Additional Charge I, and charges, as a violation of Article of War 95, that the above quoted recitation and representation was an official statement; that it was known by accused to be false, in that, during the time for which rental allowance was claimed, he and his wife had occupied public quarters assigned, either to him or other officers, free of cost; and that such statements were made with the intent to deceive the finance officer to whom the voucher was presented for allowance and payment. It is also alleged in connection with the voucher presented for May 1942 (Specification 1, Charge II) that Mrs. Roby, wife of accused, was assigned quarters at Fort Shafter, T.H., from 1 to 15 May 1942; and in connection with the voucher presented for January 1943 (Specification 9, Charge II), that Mrs. Roby's address was given as "Ocean View Court, Honolulu, T.H.," when such was not her address. Disregarding for the moment these added variations in Specifications 1 and 9, Charge II, it is apparent that all of these Specifications are predicated upon the same basic theory and allegation, which is that accused and his wife, contrary to representations made by accused in his pay and allowance vouchers, "occupied public quarters" free of cost during the periods of time covered by the vouchers, a fact of which accused was aware at the time he presented the vouchers for allowance and payment.

Whether or not, during the time in question, his wife was "occupying public quarters free of cost" so as to deprive him of the right to draw commutation of quarters, and whether all of the facts and circumstances in his case would honestly justify his claim for

rental allowance, presented a mixed question of law and fact, which it was the duty of accused to initially determine for himself. The law requires no more than that he shall have made that decision honestly and in good faith, while exercising such intelligence, reason and judgment as the average officer of his rank and station possesses. In order, therefore, to prove that accused knowingly made false claims against the United States, and at the same time knowingly made false official statements with intent to deceive the Finance Officers, the proof of record must go further than to merely show that accused was not entitled to draw rental allowances for the time in question. It must establish beyond a reasonable doubt that in preparing the pay vouchers in question accused had not, in good faith, concluded that his wife was living off the post and further that the time she spent with him in his quarters constituted merely bona fide visits which would not invalidate his claim. Consequently, the fact that it has been administratively determined that he was not entitled to retain the sums paid him as rental allowances, is neither conclusive nor unduly persuasive on the question of whether or not accused is guilty of the criminal offenses alleged. The facts and circumstances which tend to show his intent in the premises must be considered and weighed.

Accused admitted that his wife spent a great deal of time at his Hickam Field quarters, in fact, more there than elsewhere. Colonel Wells, who lived in the same house with accused for more than a year, estimated that Mrs. Roby spent ninety per cent of the nights with accused in his quarters. Major Wolfe estimated that she spent 25 nights each month in accused's quarters while he was living at 14 Julian Street. Colonel Grubb, who also lived at 14 Julian Street, testified that, except for one or two week-ends when she and accused were away together, Mrs. Roby was there all of the time. Those having occasion to call her during the day or night in connection with her work with the Red Cross and the Women's Air Raid Defense habitually called her on the telephone at the Hickam Field address. The quarters on 4th Street and at 14 Julian Street were furnished with furniture belonging to accused and his wife. Mrs. Roby cooked, kept her clothes, frequently entertained guests, and to all intents and purposes, she and accused gave all outward evidence of living the life of a married couple at both places. Notwithstanding the fact that for seven months Mrs. Roby was paying $20 a month rent to Mrs. Lyman, she never made any use of the latter's apartment during that time. The proportion of the total rent on this apartment which she agreed to contribute ($20 of $105) does not indicate that it was ever contemplated by her or Mrs. Lyman that Mrs. Roby would take up a bona fide residence in the apartment. The inference is plain that this arrangement was made to furnish a plausible reason for claiming the rental allowance. There is some conflict in the testimony as to the amount of time and the conditions under which Mrs. Roby stayed at the cottage at Ocean View Court. However, Mrs. Roby was not called as a witness and the weight of the evidence leads to the conclusion that the beach house

was not considered as a real residence but was used only occasionally, and then principally for purposes of temporary recreation.

All of these facts lead to the inescapable conclusion that Mrs. Roby was in truth and in fact living with her husband, the accused, at his Hickam Field Government quarters during all of the period in question, and that accused could not honestly have concluded otherwise. Since he was not assigned adequate quarters for himself and wife, it may be argued that accused believed he was entitled to collect rental allowances, but it is also obvious that he well knew that the mere fact that he was not assigned quarters at Hickam Field or elsewhere did not, of itself, entitle him to draw a rental allowance. He was cognizant of the fact that he had to maintain a private establishment off the military reservation for his dependent before he became legally entitled to rental allowance and he must, therefore, be held accountable for knowing that it was payable only as remuneration in bona fide transactions and not upon a sham or pretence. His guilt or innocence does not depend upon his conception of the justice or injustice of the regulations governing the payment of rental allowances, but upon whether or not he represented that his wife was not occupying public quarters when in fact he could not help but know the contrary to be true.

Accused alone was responsible for the truthfulness of the statements contained over his signature in his pay and allowance vouchers. He could not shift responsibility therefor to another. His reply to Colonel Custis when the latter cautioned him about claiming rental allowances, to the effect that it was not his responsibility but that of the Post Commander, evidenced an irresponsible and evasive attitude toward the matter. Even after being thus cautioned, accused sought no advice from the Finance Department or other responsible authority. Furthermore, by claiming rental allowance for the first 15 days of May 1942, at which time Mrs. Roby was a member of the Women's Air Raid Defense and assigned shelter at Fort Shafter, after he had already been required to repay commutation of quarters collected for March because of that identical fact, accused knowingly presented a false claim and further evidenced a dishonest attitude which cannot be disregarded in weighing the evidence on the remaining Specifications. Considered as a whole, the evidence leaves no reasonable doubt that Mrs. Roby was, in fact, occupying public quarters with accused during the period in question, and that accused had full knowledge of this circumstance when he made and tendered the pay vouchers in question, but sought to meet the letter of the law while evading its spirit through the ruse of paying nominal rent on an unused apartment off the military reservation which it was not contemplated Mrs. Roby should occupy as her bona fide place of residence. The evidence of record is sufficient to support the findings as to these Specifications (Specifications of Charge I and Additional Charge I (A.W. 94) and Charge II, and Specification 1 of Additional Charge II (A.W. 95).

The undisputed evidence shows that the purported receipt obtained from Mrs. Sloggett was not a bona fide receipt and does not speak

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGV
CM 254312

9 JUN 1944

UNITED STATES	MOBILE AIR SERVICE COMMAND
v.	Trial by G.C.M., convened at Mobile, Alabama, 11 April 1944. Dismissal and total forfeitures.
First Lieutenant JAMES B. BUCHANAN (0-559644), Air Corps.	

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant James B. Buchanan, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Mobile, Alabama, but then a Second Lieutenant assigned to Army Air Forces Technical Training Command, Officer Candidate School, Miami Beach, Florida, did, at or near Miami Beach, Florida on or about 9 April 1943, wrongfully borrow $200.00 lawful money of the United States from Officer Candidate Bernard H. Weiss, who at that time was under the direct control and supervision of the said Lieutenant Buchanan for tactical instruction.

Specification 2: In that First Lieutenant James B. Buchanan, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Mobile, Alabama, formerly a Second Lieutenant assigned to Army Air Forces Technical Training Command, Officer Candidate School, Miami Beach, Florida, being indebted to Second Lieutenant Bernard H. Weiss, formerly Officer Candidate Bernard H. Weiss, in the sum of $200.00 for $200.00 lawful money of the United States loaned to the said Lieutenant Buchanan by said Lieutenant Weiss, then an Officer Candidate, which amount

became due and payable on or before 25 July 1943, did, at or near Miami Beach, Florida, from about 25 July 1943 to 20 March 1944, dishonorably fail and neglect to pay said debt in its entirety.

Specification 3: In that First Lieutenant James B. Buchanan, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Mobile, Alabama, but then a Second Lieutenant assigned to Army Air Forces Technical Training Command, Officer Candidate School, Miami Beach, Florida, did, at or near Miami Beach, Florida during April of 1943, wrongfully borrow $200.00 lawful money of the United States from Officer Candidate William J. Spears who at that time was under the direct control and supervision of the said Lieutenant Buchanan for tactical instruction.

Specification 4: In that First Lieutenant James B. Buchanan, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Mobile, Alabama, formerly a Second Lieutenant assigned to Army Air Forces Technical Training Command, Officer Candidate School, Miami Beach, Florida, being indebted to First Lieutenant William J. Spears, formerly Officer Candidate and Second Lieutenant William J. Spears, in the sum of $200.00 for $200.00 lawful money of the United States loaned to the said Lieutenant Buchanan by said Lieutenant Spears, then an Officer Candidate, which amount became due and payable on or before 30 May 1943, did, at or near Miami Beach, Florida, from about 30 May 1943 to 20 March 1944, dishonorably fail and neglect to pay said debt in its entirety.

Specification 5: In that First Lieutenant James B. Buchanan, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Mobile, Alabama, but then assigned to 879th Guard Squadron, Brookley Field, Mobile, Alabama, with intent to defraud O. G. Copeland, did, at or near Mobile, Alabama, on or about 1 September 1943, unlawfully pretend to O. G. Copeland that he had sufficient funds in his account in The Merchants National Bank of Mobile, Alabama to satisfy in full his check drawn on said bank in the sum of $25.00, well knowing that said pretenses were false and by means thereof did fraudulently obtain from the said O. G. Copeland said sum of $25.00 in lawful money of the United States.

Specification 6: In that First Lieutenant James B. Buchanan, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Mobile, Alabama, but then

assigned to 9th Aviation Squadron, New Orleans Army Air Base, New Orleans, Louisiana, with intent to defraud The New Hotel Monteleone, New Orleans, Louisiana, did, at or near New Orleans, Louisiana, on or about 3 January 1944, unlawfully pretend to The New Hotel Monteleone, New Orleans, Louisiana, that he had sufficient funds in his account in The Merchants National Bank of Mobile, Alabama, to satisfy in full his check drawn on said bank in the sum of $10.00, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said The New Hotel Monteleone said sum of $10.00 in lawful money of the United States.

Specification 7: In that First Lieutenant James B. Buchanan, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Mobile, Alabama, but then assigned to 9th Aviation Squadron, New Orleans Army Air Base, New Orleans, Louisiana, with intent to defraud the Army Air Base Branch of The National Bank of Commerce in New Orleans, Louisiana, did, at or near New Orleans, Louisiana, on or about 15 February 1944, unlawfully pretend to the Army Air Base Branch of The National Bank of Commerce in New Orleans, Louisiana, that he had sufficient funds in his account in The Merchants National Bank of Mobile, Alabama to satisfy in full his check drawn on said bank in the sum of $25.00, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said Army Air Base Branch of The National Bank of Commerce in New Orleans, Louisiana, said sum of $25.00 in lawful money of the United States.

Specification 8: In that First Lieutenant James B. Buchanan, Air Corps, 480th Base Headquarters and Air Base Squadron, Army Air Base, Brookley Field, Mobile, Alabama, but then assigned to 9th Aviation Squadron, New Orleans Army Air Base, New Orleans, Louisiana, with intent to defraud the Army Air Base Branch of The National Bank of Commerce in New Orleans, Louisiana, did, at or near New Orleans, Louisiana, on or about 17 February 1944, unlawfully pretend to the Army Air Base Branch of The National Bank of Commerce in New Orleans, Louisiana, that he had sufficient funds in his account in The Merchants National Bank of Mobile, Alabama to satisfy in full his check drawn on said bank in the sum of $15.00, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said Army Air Base Branch of The National Bank of Commerce in New Orleans, Louisiana, said sum of $15.00 in lawful money of the United States.

He pleaded not guilty to and was found guilty of the Charge and all Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The reviewing authority approved only so much of the sentence as did not exceed dismissal the service and total forfeitures, and forwarded the record of trial for action under Article of War 48.

3. In support of Specifications 1 and 2 of the Charge it was stipulated by the prosecution and the defense that on or about 9 April 1943 accused was a second lieutenant assigned as an instructor to the Army Air Forces, Technical Training Command, Officers Candidate School, Miami Beach, Florida. One of the officer candidates at the school who was receiving tactical instruction under the direct supervision and control of the accused was Candidate, now Lieutenant, Bernard H. Weiss. It was further stipulated that, if Lieutenant Weiss were present, he would testify that on 9 April 1943, while an officer candidate in the same squadron in which accused was tactical officer, the latter asked him for a loan of $200. The loan was made with the understanding it was to be repaid not later than 25 June 1943, the day before the candidate's anticipated graduation as a commissioned officer. Accused was transferred from the Officers Candidate School during the latter part of April or the early part of May 1943. Thereafter the candidate wrote to accused at Brookley Field, Mobile, Alabama, and received a reply dated 10 May 1943 (Pros. Ex. 16) promising to make payment on the loan by 1 June 1943 and on that day the lender received a check from accused in the amount of $50. On 1 August 1943, another payment of $50 on account was received from the accused. Subsequent to this date, Lieutenant Weiss wrote the accused on several occasions requesting payment of the balance of $100 but received no reply to his letters and no payments until 28 March 1944 when a letter and a money order for $100 were received from accused (Pros. Ex. 2; R. 11).

In support of Specifications 3 and 4 of the Charge it was stipulated that during April 1943, Candidate, now Lieutenant, William J. Spears was an officer candidate in the 12th Training Squadron, Officers Candidate School, Miami Beach, Florida, under the direct supervision and control of the accused for tactical instruction. It was further stipulated that if Lieutenant Spears were present he would testify that on 1 April 1943, he reported to accused's office with $235 in cash and requested the accused to place it in the organization's strong box for safe keeping. Accused then requested this officer candidate to loan him $200 stating he would repay it by the first of the month and assuring him that it would be repaid in any event prior to the candidate's graduation. The loan was made and thereafter the candidate received his commission on 29 May 1943. Prior to his departure for his new station after

graduation, Lieutenant Spears was unable to locate accused to request payment. On or about 10 July 1943 he wrote accused giving him his address and requesting repayment of the loan. On or about 11 August 1943 he received a letter from accused indicating financial inability to repay the loan but stating that something would be sent on account the following month (Pros. Exs. 2, 18; R. 11, 12). Subsequently Lieutenant Spears wrote several letters to the accused concerning the indebtedness but received no answers. Finally on 3 November 1943 he sent accused a letter by registered mail stating that official action would be initiated if the loan were not repaid. On 13 November 1943 Lieutenant Spears received a payment of $50 on account and a letter from the accused (Pros. Ex. 20) stating that he would pay the balance as soon as possible and that he should be able to do so by the 1st of December if not sooner. Eventually, on 31 March 1944, Lieutenant Spears received payment of the balance due of $150 (Pros. Ex. 2; R. 12).

In support of Specification 5 the prosecution introduced evidence to show that on 1 September 1943, the accused requested Mr. O. G. Copeland, then an employee at the officers' club, Brookley Field, Alabama, to cash a check for him (R. 7). In the presence of Copeland, the accused made and signed a check for $25, dated 1 September 1943, payable to cash and drawn on the Merchants National Bank of Mobile, Alabama (Pros. Ex. 1; R. 7, 9). Copeland cashed it giving accused $25 from his personal funds (R. 7). He thereafter presented it to the drawee bank and received payment on it. However, two or three days later Copeland was called by the bank and asked "to pick the check up and give them the cash for it" (R. 8). He was informed by an official of the bank that accused had insufficient funds for payment of the check. Although Copeland presented the check to the bank four or five times thereafter payment thereon was refused because of insufficient funds. Copeland never made demand on accused for payment and believed that accused left Brookley Field sometime in September 1943 (R. 8, 9). It was stipulated that if Charles F. Henback, chief bookkeeper of the Merchants National Bank of Mobile, Alabama, were present he would testify that the date 9 September 1943 was stamped on this check by a teller of the bank and represents the date the check was presented for payment (R. 20).

On 31 August and 1 September 1943, accused's account with the Merchant National Bank was overdrawn $24.49. On 2 September a deposit of $283.80 was made but by 6 September this was reduced to $46.43 and on 7 September the account was overdrawn. Although a deposit of $100 was made on 14 September, sufficient checks were presented for payment on that same day so that at the close of business on 14 September the account was again overdrawn and so remained for the rest of the month (Pros. Ex. 10).

In support of Specification 6, it was stipulated that on 3 January 1944 the accused made a check for $10, payable to cash and drawn on the Merchants National Bank of Mobile, Alabama, which he

presented to the New Hotel Monteleone, New Orleans, Louisiana, and in exchange therefor received cash of $10 which was eventually repaid to the hotel by the accused on or about 28 March 1944 (Pros. Exs. 2, 8; R. 12). On 1 January 1944 accused had a balance of $159.06 in his account which was reduced to $84.06 on 3 January, $36.28 on 4 January, $11.28 on 11 January and for the first time that month fell below a level of $10 on 17 January. It remained at substantially that figure until a deposit of $147.10 made on 24 January raised the balance to $155.42. It was reduced to $5.42 by 26 January but a deposit of $158.80 made on 31 January raised the balance to $162.72 at the close of the month (Pros. Ex. 14).

In support of Specifications 7 and 8 it was stipulated that on 15 and 17 February 1944, accused made two checks one for $25 and the other for $15, payable to cash and drawn on the Merchants National Bank of Mobile, Alabama, which he presented to the New Orleans Army Air Base Branch of the National Bank of Commerce, New Orleans, Louisiana, and in exchange therefor received cash of $25 and $15 respectively which was eventually repaid to the branch bank by the accused on or about 28 March 1944 (Pros. Exs. 2, 6, 7; R. 21, 12). It was also stipulated that if Alvin R. Childress were present he would testify that on 15 and 17 February 1944 he was manager of the above mentioned branch bank, that accused presented to him these checks and that before cashing them he inquired of accused if they were good, and accused replied affirmatively. The checks were put through banking channels for collection and were eventually returned marked "insufficient funds" (Pros. Ex. 2; R. 12, 13). On 1 February 1944 the accused had a balance of $162.72 in his account in this bank which was reduced to $7.22 by 5 February 1944 and never rose above that level for the remainder of the month, the account having a balance of $2.60 in it at the close of the month (Pros. Ex. 15).

A statement made on 24 March 1944 by the accused to the investigating officer in this case after accused's rights had been fully explained to him was admitted in evidence without objection by the defense. The accused, completely cooperative, admitted that in April 1943 he borrowed $200 from Lieutenant Weiss and a like sum from Lieutenant Spears while they were officer candidates and accused was in charge of their squadron; that the former loan was to be repaid during "the next month" and the latter loan by the time the lender graduated from officers candidate school; that the loans had not been paid in full. He admitted cashing the various checks set forth in the Specifications but stated that at no time did he know definitely that he did not have sufficient funds in the bank to cover them. He never kept account of his running bank balance by stub entries or otherwise. He would draw counter checks without making any record thereof and just "estimated" the amount of his running bank balance knowing only that his monthly pay check was being deposited in the bank (Pros. Ex. 3; R. 13, 14).

4. After the accused had been fully advised of his rights he elected to take the stand and testify under oath (R. 19). The accused admitted borrowing $200 from Lieutenant, then Candidate, Weiss as alleged, stating that he needed the money to discharge "immediate indebtedness to commercial firms" (R. 21). Matrimonial difficulties resulted in a separation between the accused and his wife from December 1942 until September 1943 when they resumed their relations. In November 1943 accused's wife left for California and the parting was "in a sense on a friendly basis" (R. 22).

He admitted cashing the four checks alleged in the Specification (R. 22-24). However, he did not know that the $25 check cashed by Copeland was dishonored until Captain Shenk, the investigating officer in this case, so informed him. He thought it had been honored because his pay check was supposed to have been deposited the last of August or the first of September. He believed it actually had been deposited on 2 September which was correct (Pros. Ex. 10; R. 22, 27). He thought he had sufficient funds on deposit to cover the $10 check cashed for him by the New Hotel Monteleone on 3 January 1944 and did not know it had been dishonored until March 1944. Two previous checks cashed for him by this hotel had been dishonored and he had made prompt reimbursement (R. 22, 23). About 9 March accused was informed the two February checks had been dishonored and thereafter he made them good (R. 23, 24).

Accused admitted he kept no personal record of the status of his bank account by stub entries or otherwise. His monthly statements were the only record he had as to its condition and he never knew definitely, but merely estimated, what his running bank balance was at any time. He had the finance office deposit his pay checks to his account and used counter checks for all withdrawals. He believed that the checks he issued would be honored. (R. 24-26). After perusing his bank statement for the month of February accused stated it appeared he had a bank balance of not more than $7.72 from 5 February until the end of the month and that eight checks were presented for payment and dishonored during that time (R. 25). He borrowed on an insurance policy to pay his defaulted loans and dishonored checks (R. 26).

It was stipulated that if two former commanding officers of accused were present they would testify that his character and efficiency were excellent and that they would be pleased to have him in their commands (R. 20; Def. Ex. 1).

5. It is an offense under Article of War 96 for an officer to borrow money from an enlisted man of his organization inasmuch as such conduct tends to weaken authority, to impair the integrity of required relationship and can become the cause of improper favor (Dig. Op. JAG, 1912-40, sec. 453 (5); 1 Bull JAG 106; 2 Bull JAG 144).

The same objections are, if anything, more applicable when the relation of instructor and officer candidate exists. The evidence sustains the findings of guilty of Specifications 1 and 3.

The failure of an officer to respect his promise to pay a debt is dishonorable if the promise was made with a false or deceitful intent or if the failure to pay is characterized by a fraudulent design to evade payment (1 Bull. JAG 22, 23). An inexcusable failure of an officer to repay an obligation to an enlisted man at the time agreed upon is likewise dishonorable (Dig. Op. JAG, 1912-40, sec. 453 (5)). The accused had promised that the two loans made to him by the two officer candidates would be repaid prior to their graduation. No valid excuse existed for his failure so to do. His conduct was a violation of Article of War 96 and the evidence supports the findings of guilty of Specifications 2 and 4. Furthermore, these findings of guilty are also sustained by the evidence as to accused's subsequent conduct. Between August 1943 when the indebtedness to Lieutenant Weiss had been reduced to $100 and 28 March 1944, the lieutenant wrote the accused several letters requesting payment of the balance but received no reply. Similarly, between August and November 1943, Lieutenant Spears wrote the accused several letters requesting payment of his loan and finally on 13 November 1943 received a payment of $50 on account only after threatening to initiate official action. The balances due on these two loans were not paid until after these proceedings had been instituted. From such facts the court was justified in concluding that accused's failure to reply to these communications or to repay these loans was prompted by an intent or design to evade payment.

Specifications 5, 6, 7 and 8 allege that accused obtained certain sums of money under false pretenses. More specifically, it is alleged that accused, with intent to defraud, unlawfully pretended on particular days that he had sufficient funds in his bank account to satisfy checks drawn on such days knowing that the pretenses were false and by means thereof did obtain certain sums of money. The evidence offered in support of Specification 5 shows that on 1 September when the accused made and cashed a check for $25 his account was overdrawn. However, a deposit of $283.80 was made to his account the following day, presumably being deposit of his pay check. Until 7 September the account had sufficient funds to satisfy payment of the $25 check but the check was not presented to the bank for payment until 9 September. This evidence does not establish beyond a reasonable doubt that the accused intended to defraud. Issuance of a check carries with it the implied representation that there are sufficient funds on deposit to cover it. Although this representation may here have been untrue, nevertheless the substantial deposit made the day following issuance of the check reputes any inference of an intent to defraud. With such intent lacking the accused's offense is rather that of wrongfully failing to maintain a sufficient bank balance in violation of Article of War 96. Findings of guilty of this latter offense can only be made in these proceedings if it is a lesser included offense of the one charged. A lesser included offense is one "necessarily included" in the offense charged

(MCM, 1928, par. 78c). It "must always be lesser than, and necessarily included in, the offense originally charged - i.e. an offense the elements of which necessarily are proved in proving the offense originally charged" (underlining added) (JAGS Text No. 1, par. 33b). The elements of the offense of failing to maintain a sufficient bank balance are that a bank account existed, that certain checks were drawn against it, and that the balance in the account was insufficient to satisfy the checks when presented for payment. None of these elements necessarily are proved in proving the offense of obtaining money under false pretenses. Money may be so obtained in a multitude of ways other than by uttering a check on an account where there are insufficient funds. Since the elements of the offense of failing to maintain a sufficient bank balance are not necessarily proved in proving the offense of obtaining money under false pretenses, the former is not always a lesser included offense of the latter. Accordingly, the accused cannot be found guilty in these proceedings of the offense of failing to maintain a sufficient bank balance. Thus the finding of guilty under Specification 5 cannot be sustained.

Under Specification 6 the evidence shows that on 3 January when the $10 check was cashed for accused by New Hotel Monteleone he had a balance of $84.06 on deposit. His balance fell below $10 for the first time that month on 17 January. Thus, on the day the check was issued and for some fourteen days thereafter the implied representation that accused had sufficient funds on deposit to satisfy the check was true. The false pretenses alleged are not proven nor is the intent to defraud (see 3 Bull. JAG 101). Again, the offense committed is that of failing to maintain a sufficient bank balance in violation of Article of War 96. It is not a lesser included offense of the offense charged. The finding of guilty under Specification 6 is not sustained by the evidence.

Under Specifications 7 and 8 the evidence shows that accused cashed two checks at a branch bank of the National Bank of Commerce, one on 15 February for $25 and the other on 17 February for $15. On 5 February accused's account had a balance of $7.72 in it and it never rose above that level for the remainder of the month. The representation as to the sufficiency of accused's bank balance, implicit in the issuance of these checks, was false. Intent to defraud is established if a person cashes checks on a bank where he knows or reasonably should know there are insufficient funds on deposit to satisfy them (MCM, 1928, par. 151; CM 248065, McCraney). There is no proof that any person other than accused had authority to or did in fact draw on this account. The accused kept no personal record of his bank balance and made no effort to determine it. He was content to estimate his balance and issue checks upon such an extremely hazardous basis. The intent to defraud could reasonably be found by the court from the issuance of these checks under such circumstances upon an account utterly insufficient to satisfy them. Accordingly, the evidence sustains the findings of guilty of these two Specifications.

6. The accused is 26 years of age. War Department records show that accused enlisted in the service on 13 September 1939. On 24 June 1942 he was commissioned a second lieutenant. He was promoted to first lieutenant on 25 March 1943. On 6 April 1943 he was awarded the Silver Star for gallantry in action over Bougainville Island on 21 November 1942.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Specifications 1, 2, 3, 4, 7, 8, legally insufficient to support the findings of guilty of Specifications 5 and 6, and legally sufficient to support the findings of guilty of the Charge, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Thomas N. Tappy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert E. Duvetham, Judge Advocate.

SPJGV
CM 254312

1st Ind.

War Department, J.A.G.O., 20 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant James B. Buchanan (0-559644), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specifications 1, 2, 3, 4, 7 and 8 of the Charge and the Charge, legally insufficient to support the findings of guilty of Specifications 5 and 6 of the Charge, legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed but in view of accused's excellent record as an officer and his fine war record, I further recommend that the forfeitures be remitted and that the execution of the sentence as thus modified be suspended during good behavior.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft ltr for sig S/W.
Incl.3-Form of action.

(Findings of guilty of Specifications 5 and 6 of Charge disapproved. Sentence as approved by reviewing authority confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 373, 18 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 254313

13 JUN 1944

UNITED STATES	)	FAIRFIELD AIR SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Rosecrans Field, Missouri, 3 April 1944. Dismissal, total forfeitures and confinement for one (1) year. Disciplinary Barracks.
First Lieutenant HERBERT J. DROZD (0-503310), Air Corps.	)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Herbert J. Drozd, Headquarters and Headquarters Squadron, First Operational Training Unit, Ferrying Division, Air Transport Command, was at St. Joseph, Missouri, on or about 4 March 1944, in a public place, to wit, Robidoux Hotel, drunk and disorderly while in uniform.

Specification 2: In that First Lieutenant Herbert J. Drozd, Headquarters and Headquarters Squadron, First Operational Training Unit, Ferrying Division, Air Transport Command, did, at the Robidoux Hotel, in St. Joseph, Missouri, on or about 4 March 1944, use insulting and defamatory language in the presence of Second Lieutenant Christine B. Boggs and Second Lieutenant Jane E. Smith, Officers of the Army Nurse Corps, as follows: "The only thing wrong with you is you need a piece of ass. It would fix you up fine. Don't get mad at me. You have a nice chest" and "He and I are good friends. We screwed the same horse together for years", or words to that effect.

CHARGE II: Violation of the 69th Article of War.

better leave before "Captain Thompson" came in. The accused had another drink and said "he had to take a piss". He would not stop "bothering" Miss Myers and when they requested him to leave her alone he "acted" like he did not know what they were talking about. When the accused refused to leave after their repeated requests, Lieutenant Hoban and the ladies left him sitting at the table. Accused had two drinks in their presence and according to Miss Stahl he was "pretty tight". She heard him use profane language but could not remember what he said. Miss Myers did not overhear the profane remarks but was offended by the actions of accused (R. 8-15).

At about 5:15 that afternoon the accused sat down at a table occupied by Second Lieutenants Christine V. Boggs and Jane E. Smith of the Army Nurse Corps. They had not invited him and asked him to leave. The accused reached over, "pulled off" Lieutenant Smith's hat and "pulled" the hem of her coat. Lieutenant Boggs again requested the accused to leave and he said to her: "All that is wrong with you is that you need a piece of ass. That would fix you up fine". He left the table but returned in a few minutes and said to Lieutenant Boggs: "Please don't get mad at me. I like you. You have a nice chest". She "slapped his face" and told him they would call for "Captain Thompson" if he did not leave. The accused replied: "That's fine. Go right ahead. We are good friends. We screwed the same horse together for years". Lieutenant Smith obtained the aid of Captain Henry V. Lewis, who persuaded accused to leave the table and told him he should go to bed. The accused was "definitely" under the influence of liquor. His hat was "pulled down over his head". He was not standing straight, but was "sort of bending over". His uniform was "not very military". The lower button of his coat was unbuttoned. The nurses returned to Rosecrans Field at about 6:15 p.m. and reported the incident to "Captain Thompson" by telephone (R. 15-20, 28-30).

Mr. Robert Lee Miller, assistant manager of the Hotel Robidoux, called the accused away from a table in the "Pony Bar" where he had been sitting with two ladies who "didn't want him". He asked accused to leave the girls alone and accused said he "wouldn't bother them any more". Mr. Miller observed that accused "had enough to drink", his face "showed that he was drinking quite a bit", and gave orders at the bar not to serve him any more liquor. He saw the accused go "right back" to the table where the ladies were sitting and called for "Captain Thompson", who lived at the hotel, to talk to accused (R. 20-23).

Captain George L. Thompson, provost marshal at Rosecrans Field, found accused sitting at a table with the two ladies and called him aside. He informed accused that "they" did not want to be annoyed and to leave them alone. The accused "went right back in". Captain Thompson followed him to the table and the women asked him to take the accused away. The accused said that he "didn't propose to be thrown out", so the women

left the table. Captain Thompson "could tell" that accused had enough to drink but did not know whether he was drunk. "He seemed to be kind of dazed. He was kind of slumped over. He wasn't straight". His breath "smelled like liquor". Captain Thompson told accused to go to bed or to get something to eat. Accused entered the hotel elevator to go to his room and the girl operator stepped out of the elevator, refusing to take him to his floor. Accused left the hotel. Shortly afterward Captain Thompson received a telephone call from Lieutenant Boggs and went in search of accused. He found him in a cafe and had the "town patrol" take him to the hospital at Rosecrans Field to see if the nurses could identify him. Captain Thompson did not observe any "ungentlemanly actions" on the part of accused that evening other than his refusal to leave the table (R. 23-25).

At about 7:30 that evening the accused was examined by Captain Harry E. Fridrich in the hospital at Rosecrans Field. The accused was "wobbling" when he walked to the examination room. He "didn't seem to understand" the questions asked him by Captain Fridrich. When accused was asked to sign his name he "jokingly" marked a cross on the place for his signature. Accused had a "slight tremor" of his tongue and when his arms were outstretched there was a "slight tremor" of both extremities. There was an odor of alcohol from his mouth. He said he had been drinking. Captain Fridrich was of the opinion that accused was drunk (R. 25-28).

b. Charge II; On 8 March 1944 Captain Thompson met accused in the lobby of the Robidoux Hotel. He asked accused if he was not restricted to the post and the accused said he was not. After his conversation with accused Captain Thompson telephoned "Captain Smithson" at Rosecrans Field and received instructions to return accused to the field. He arrived at the field with accused at about 6:30 p.m. and received orders from Lieutenant Colonel William B. Hooton, commanding officer of Rosecrans Field, to place accused in arrest in quarters. Colonel Hooton also instructed First Lieutenant Evan J. Rees, the officer of the day, to see that his orders were carried out. Captain Thompson informed accused that he was in arrest in quarters under order of Colonel Hooton, that he could not go to the officers' club and that he would be permitted to leave his barracks to go to the mess hall only. Lieutenant Rees told accused he was "confined" to his quarters and the mess hall. The accused complained of losing a billfold containing his "AGO" pass and Captain Thompson returned to St. Joseph to search for it. The accused was not in his quarters when Lieutenant Rees made his rounds between 9:30 and 10:00 o'clock that night. At about 9:45 p.m. one of the military policemen who drove accused to Rosecrans Field earlier in the evening recognized accused standing on a street corner in St. Joseph. The accused was "apparently drunk" and the military police took him to the Robidoux Hotel, where Captain Thompson met them. Captain Thompson asked accused why he left the field. The accused had been drinking and did not "seem to understand" why he was under arrest. He "argued about it" all the way back to Rosecrans

Field. Captain Thompson took accused to the guardhouse and placed him in the custody of the officer of the guard. The accused was searched and his "AGO" pass was found on his person but his billfold was still missing. On cross-examination Captain Thompson testified that on 5 March 1944 the accused telephoned him and asked if he could go to St. Joseph to keep a dinner engagement. He informed accused that as far as he was concerned the accused was not restricted but should report to Captain Smithson the following morning. At that time Captain Thompson had not received orders that accused had been restricted (R. 30, 38, 41-43).

4. For the defense:

First Lieutenant Hinton C. Daniel testified that he had been acquainted with accused for six weeks. He had observed accused drinking on one occasion at which time the accused consumed eight or ten drinks. The accused "held his liquor well" and did not display any "ungentlemanly actions". Second Lieutenant William H. Polley, Jr., had observed accused drinking on "at least two" occasions during the twenty-one months he had known him. On these occasions the conduct of accused was "very gentlemanly" (R. 43-45).

Second Lieutenant James E. Teres testified that he was "Town Patrol Officer" in St. Joseph, Missouri on 8 March 1944. At about 9:30 that evening he accompanied Captain Thompson and accused on the trip to Rosecrans Field. The accused "seemed insistent" in asking Captain Thompson "a couple of questions", trying to find the reason for his restriction to the post. At one time during the trip Captain Thompson told accused to "shut up", that he did not want to talk to him, and asked Lieutenant Teres to make accused "shut up". Lieutenant Teres stated that he told accused he had been given an order to keep quiet and it would be "a good idea" for him to do so. The accused continued to ask questions and Captain Thompson told him he was finished with him and wanted no more to do with him (R. 45-47).

Captain Robert A. Smithson testified that he sent accused a notice (Def. Ex. A) dated 6 March 1944 to the effect that accused was restricted to the post until further notice. He stated that the purpose of the notice was to get the accused into his office to punish him for missing "link" training. Because of the difficulty in contacting the officers due to their absence on flights Captain Smithson would send a notice of restriction and the officers would "take it upon themselves" to see him immediately. "It was a temporary arrangement". The notice of restriction was opened by accused on the night of 8 March 1944 in the presence of Second Lieutenant Edwin L. Holland, officer of the guard, after accused had been placed in the guardhouse by Captain Thompson (R. 47-51).

The accused testified that he had been in the Army for about three years. He served as an enlisted man and was commissioned an officer on 8 November 1942. Before his arrival at Rosecrans Field on 10 February 1944 he served with the 93rd Ferrying Squadron and the 346th Air Base

Squadron, stationed at Memphis, Tennessee. He had been supply officer and chemical warfare officer of the latter organization (R. 52).

With reference to his conduct on 4 March 1944 (Specs. 1 and 2, Chg. I), the accused stated that he went to St. Joseph, Missouri, that afternoon. After renting a room at the Robidoux Hotel he telephoned "Lieutenant Daniel" at the airport and was informed that he would not fly that day. He then left the hotel, went to a bar, where he ordered a bottle of beer, and joined some people in a booth at their invitation and drank one or two more bottles of beer. At about 3:00 p.m. he returned to the Robidoux Hotel and entered the "Pony Bar". He "felt all right" at that time and ordered some drinks. The only people he recognized in the bar were the girl employees and he did not see anyone from Rosecrans Field. The accused stated that he could not remember having more than three bottles of beer and three or four drinks during the afternoon. After consuming the drinks at the Pony Bar he did not recall any of the events that happened that day until he was "picked up" by Captain Thompson. Captain Thompson informed him that he was restricted until Monday morning and sent him out to Rosecrans Field (R. 52-54, 63).

Regarding his breach of arrest (Spec., Chg. II) the accused stated that on Sunday morning (5 March) Captain Smithson told him to continue with his training schedule. He was given his "AGO" pass, which had been taken from him and was instructed to return it on the completion of his training "period", which ended about 1:30 p.m. That afternoon he telephoned Captain Thompson and told him that he was under the impression that he was restricted until the following morning but would like permission to keep a dinner engagement that evening. Captain Thompson said "You are not restricted any more, forget it". He kept his engagement that evening and also went to St. Joseph on the evenings of 6, 7 and 8 March. On the evening of 8 March 1944 when Captain Thompson asked if he was not restricted, he replied that if he was he "didn't know it". He reminded Captain Thompson of their telephone conversation on 5 March when Captain Thompson told him he was not restricted. Captain Thompson told him to get something to eat and to go to bed. According to accused Captain Thompson returned within an hour and said "Well, I thought you said said you were not restricted. Come on, we are going to take you to the field". Accused stated that he was concerned over the loss of his billfold containing between $100 and $125 and told Captain Thompson of his loss. He "kept trying" to find the reason why he was taken into custody and was under the impression that he was "picked up" for drunkenness. He had "a couple three drinks" but was not drunk. Captain Thompson left him at the Rosecrans Field guardhouse and he was taken from there to the bachelor officers' quarters. The accused stated that he did not recall anyone telling him that he was under arrest but was

"under the impression" that he was restricted to the post. He left Rosecrans Field that evening and went back to St. Joseph to look for his billfold. The "MPs" arrested him and brought him before Captain Thompson. On the way back to Rosecrans Field he "kept trying" to ask Captain Thompson a question and was told to "shut up". He finally asked why he was being taken back to the field and Captain Thompson told him "I will come back there and knock your head off". He was taken to the guardhouse and the following day was placed in arrest in quarters under guard. He stated that he received only one meal on the first day of his arrest in quarters and in the evening he "finally persuaded" the officer of the day to get him some sandwiches from the post exchange. On another day he was in arrest he did not receive anything to eat (R. 54-58).

The accused further testified that he first learned of his alleged conversation on 4 March with Lieutenant Boggs and Smith, while he was in the guardhouse but was not informed "what it was". He did not think it was "very serious" at the time. When he later was informed of the remarks he was supposed to have made to them he apologized and his apologies were accepted (R. 54, 63).

On cross-examination the accused testified that on 4 March Captain Thompson did not give him any reason for restricting him to the post except to state that accused had enough to drink. He did not remember any of the incidents that occurred in the "Pony Bar" that afternoon but did recall that he was taken from the bar to Rosecrans Field and examined at the hospital. The accused did not see Lieutenant Boggs or Lieutenant Smith in the hospital and to the best of his knowledge they did not appear to identify him. After the examination he was taken to the guardhouse and released the following morning, Sunday, 5 March, to continue his flight training. He stated that he did not return his pass after the training period because Captain Thompson informed him that he was no longer under restriction. He performed his regular duties on 6, 7 and 8 March. He further testified that after Captain Thompson had brought him to Rosecrans Field on 8 March he left and went back to St. Joseph as he wanted to find his billfold and "felt like" he was restricted for some "minor thing". He did not receive permission to leave and was not asked to show his pass when he left the post. He first discovered that his pass was not lost with his billfold when he was searched at the guardhouse the second time he was returned to the field and the pass was found with some papers in his pocket (R. 58-62).

5. Colonel Hooton testified on rebuttal that he did not authorize the accused to leave the post after he had ordered him in arrest nor did he direct any officer to permit his release (R. 64).

6. a. Specification 1 and 2, Charge I: It is shown by the evidence that on the afternoon of 4 March 1944, the accused was drinking at the "Pony Bar" in the Hotel Robidoux, St. Joseph, Missouri. During a period of about two hours he made himself obnoxious to employees and customers

in the establishment. He "kicked up" the skirt of a waitress and forced his company on guests at three different tables annoying and angering them. At one table he said to a lieutenant in the presence of two young ladies "You think you are pretty fucking hot, don't you?" and made the remark that he "had to take a piss". He "pinched" one of the girls, pulled her hair and tried to put his arms around her. One of the girls testified that accused was "pretty tight". The lieutenant observed that accused was intoxicated. His "speech was thick and his eyes were unsteady". The lieutenant and the two ladies left the table because accused refused to do so. The accused sat down without an invitation at another table occupied by Second Lieutenants Christine V. Boggs and Jane E. Smith, Army Nurse Corps, pulled at the coat of one nurse and pulled her hat off. To the other nurse he said: "The only thing wrong with you is you need a piece of ass. That would fix you up fine". He also said to her: "don't get mad at me. I like you. You have a nice chest". The nurse slapped his face. The accused would not leave the table after their repeated requests and when they threatened to call the provost marshal for assistance he said: "That's fine. Go right ahead. We are good friends. We screwed the same horse together for years". The nurses testified that accused was under the influence of liquor. The evidence further shows that after the assistant manager of the bar told accused to stay away from another table where he was annoying two women, the accused immediately went back to the table. The assistant manager observed that accused had been drinking "quite a bit" and gave orders not to serve him any more liquor. The provost marshal was called, took accused aside, and asked him to stay away from the table, but accused immediately returned. The accused was then taken to the hospital at Rosecrans Field for an examination. The examining medical officer observed that accused was "wobbling" when he walked, "didn't seem to understand" the questions asked him, gave the odor of alcohol from his mouth and had a "slight tremor" of his extremities when his arms were outstretched. He was of the opinion that accused was drunk. The accused testified that after drinking about three bottles of beer and three or four mixed drinks he did not remember any of the happenings of that afternoon until he was taken to the hospital at Rosecrans Field.

It is clearly established by the evidence that on 4 March 1944 the accused was drunk and disorderly in a public place, as alleged in Specification 1, Charge I, and at the same time and place used improper language in the presence of two lieutenants of the Army Nurse Corps, as alleged in Specification 2, Charge I.

b. Charge II: The evidence shows that on 8 March 1944, the provost marshal at Rosecrans Field received information that accused was wanted at the field for breaking restriction. At about 6:30 p.m. he brought accused from St. Joseph, Missouri to Rosecrans Field, and acting under orders from the commanding officer of the field placed accused in arrest in quarters. He informed accused that he was in arrest in quarters under the orders of Lieutenant Colonel William B. Hooton, the commanding officer. The officer of the day told accused he was to be confined to

his quarters and the mess hall. At about 9:45 o'clock the same evening the accused was arrested by the military police in St. Joseph and returned to Rosecrans Field where he was placed in the guardhouse.

The accused stated that the restriction under which he had been placed on 4 March had been lifted the following day, that he could not understand the reason for his arrest on 8 March, that the provost marshal would not give him any reason, and that he was under the impression that he was taken into custody for drunkenness. He did not remember anyone telling him that he was placed in arrest in quarters but was "under the impression" that he was restricted to the post. He further testified that he considered himself restricted for a minor offense and went back to St. Joseph that evening to look for his billfold containing between $100 and $125 which he had lost.

The record of trial contains evidence indicating that accused had not received notice of his restriction to the limits of Rosecrans Field at the time he was apprehended in St. Joseph by the provost marshal on 8 March, and it appears that the restriction in effect when accused first went to town on 8 March was probably illegal. However, the subsequent order issued by the commanding officer placing accused in arrest in quarters was legal and the fact that accused may have been innocent of the offense with respect to which the arrest was imposed is not a defense to his breaking the arrest (MCM, 1928, par. 139a).

7. The accused is 28 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted Air Reserve 1934 to 1937; enlisted service from 16 April 1941; appointed temporary second lieutenant, Army of the United States, 2 November 1942, accepted 3 November 1942, and active duty, 8 November 1942; temporarily promoted to first lieutenant, Army of the United States, 20 August 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th or the 69th Article of War.

Samuel M. Drucker, Judge Advocate.

Edwin Glamon, Judge Advocate.

F. J. Lotterhos, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 16 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Herbert J. Drozd (0-503310), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused was drunk and disorderly in uniform in a hotel bar (Spec. 1, Chg. I), insulted and offended two officers of the Army Nurse Corps by his obscene remarks there (Spec. 2, Chg. I), and a few days later broke arrest (Spec., Chg. II).

A recommendation for clemency was made by three of the seven members of the court, one of the three members specifically recommending that the sentence be reduced to dismissal. I recommend that the sentence as approved by the reviewing authority to dismissal, total forfeitures and confinement at hard labor for one year be confirmed, but in view of all the circumstances that the forfeitures and the confinement be remitted, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 388, 18 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 254348

31 MAY 1944

UNITED STATES	)	ARMY GROUND FORCES AIRBORNE CENTER
v.	)	
Second Lieutenant GORDON H. HARPER (O-1054614), Infantry.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 27 March 1944. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
LYON, ANDREWS and SONENFIELD, Judge Advocates.

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Gordon H. Harper, C.A.C., Company "T", First Parachute Training Regiment, Fort Benning, Georgia, did, without proper leave, absent himself from his organization at Fort Benning, Georgia, from about 17 December 1943, to about 30 December 1943.

CHARGE II: Violation of the 96th Article of War.

Specifications 1 and 2: (Finding of guilty disapproved by the reviewing authority).

Specification 3: (Finding of not guilty).

Specifications 4,5,6,7,8,9 and 10: (Findings of guilty disapproved by the reviewing authority).

He pleaded guilty to and was found guilty of Charge I and its Specification, and pleaded not guilty to Charge II and all of its Specifications. He was found not guilty of Specification 3 and guilty of Specifications 1,2,4,5,6,7, 8,9 and 10 of Charge II and of Charge II. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for one year. The reviewing authority disapproved

the findings of guilty of all the Specifications of Charge II except that on Specification 3 (of which the court had found accused not guilty), approved only so much of the sentence as provided for dismissal and total forfeitures, recommended that the execution of the sentence be suspended, and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

Accused's absence without leave from 17 December 1943 to 30 December 1943 was proved by a duly authenticated extract copy of the morning report of his organization. It was stipulated that he was apprehended at the nearby town of Columbus, Georgia. Accused stated that he thoroughly understood his plea of guilty (R. 6,8; Pros. Ex. 1).

Evidence for the defense.

Accused testified under oath that he absented himself without leave becaus of his disappointment over having been rejected because of physical reasons for Air Corps and parachute jumping training; because of worry about the condition of a close friend who had been badly injured in an automobile accident; and because of the pain he himself had suffered for two weeks from two infected wisdom teeth. He was under the influence of liquor when he left his post (R. 23-26).

4. The court's findings are sustained by accused's plea, the evidence, and his own testimony.

5. The reviewing authority disapproved the court's findings on all of the Specifications of Charge II, but apparently by inadvertence neglected to disapprove the finding on Charge II. Since there is no longer a finding of guilty on any of its Specifications, there can obviously exist no such finding as to the Charge.

6. War Department records show that accused is 25 years of age and single. He graduated from high school and spent two years at "Louisiana Tech". He was employed as a laboratory technician by the United States Bureau of Animal Industry from August 1936 to December of 1940, at which time he entered the Army. He had previously been a private in the Louisiana National Guard from 10 June 1934 to 10 June 1937. He attended the Antiaircraft Artillery School, Camp Davis, North Carolina, and upon graduation therefrom on 14 April 1943 he was commissioned a second lieutenant, Coast Artillery Corps, Army of the United States, on 15 April. He subsequently entered the Parachute School, Fort Benning, Georgia, but was relieved therefrom on 9 November 1943.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial

rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 61.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 5 - JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Gordon H. Harper (0-1054614), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed, but in view of the recommendation of the reviewing authority to that effect, of accused's previous good record, and all the circumstances of the case, I recommend that the forfeitures be remitted and that the execution of the sentence as thus modified be suspended during good conduct.

3. Consideration has been given to a letter from the Honorable Allen J. Ellender, United States Senate, addressed to The Judge Advocate General, inclosing requests for clemency from Mr. H. T. Richardson, Mayor of the City of Ruston, Louisiana, and from Mrs. Roy Fraser, accused's sister; to a letter from the Honorable John H. Overton, United States Senate, addressed to The Judge Advocate General, inclosing a letter from accused's sister; and to a letter from the Honorable Charles E. McKenzie, Member of Congress, to Colonel R. E. Kunkel, J.A.G.D.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer,
Major General,
The Judge Advocate General.

6 Incls.
Incl.1-Record of trial.
Incl.2-Op. Bd. of Rev. w/ind. by JAG.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. Senator Ellender, w/incls.
Incl.5-Ltr. fr. Senator Overton, w/incl.
Incl.6-Ltr. fr. Congressman McKenzie.

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 386, 18 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN
CM 254349

4 MAY 1944

UNITED STATES	)	ELEVENTH AIR FORCE
v.	)	Trial by G.C.M., convened at Fort Richardson, Alaska, 23 March 1944. Dismissal.
First Lieutenant RICHARD J. WILLETTS (0-1574180), Quartermaster Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD and GOLDEN, Judge Advocates

---

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Richard J. Willetts, Eleven Hundred Twenty Eighth Quartermaster Company, Service Group (Aviation), did, in the City of Anchorage, Territory of Alaska, on or about 17 November 1943, wrongfully and unlawfully occupy a hotel room in a scantily clad condition with Mr. Floyd Evans, a civilian, Mrs. Ted Brown, a married woman and the then wife of Ted Brown, a civilian, and Mrs. Alfred Huffman, a married woman and the then wife of Private Alfred Huffman, Two Hundred Thirty Second Military Police Company, the said civilian and women being also in a scantily clad condition.

Specification 2: In that First Lieutenant Richard J. Willetts, Eleven Hundred Twenty Eighth Quartermaster Company, Service Group (Aviation), did, in the City of Anchorage, Territory of Alaska, on or about 24 October 1943, with intent to deceive, wrongfully and unlawfully make and utter to Lido Gardens, Anchorage, Alaska, a certain check, in words and figures as follows, to wit:

NAME OF BANK Bank of Alaska
City and State Anchorage, Alaska

Anchorage, Alaska October 24, 1943

Pay to the
Order of * * * LIDO GARDENS * * * $75.00

Seventy five and no/100---------- Dollars

Serial No. 0-1574180
Rank 1st Lt.
Organization Serv. Co.

For value received I declare that I have on deposit in said bank in my name the above amount subject to this check and is hereby payable to the Lido Gardens.

Account Closed

/s/ R. J WILLETTS
1st Lt. 0-1574180

and by means thereof, did fraudulently obtain from the said Lido Gardens cash of the value of Seventy-five ($75.00) dollars, he the said First Lieutenant Richard J. Willetts then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Alaska for the payment of said check.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Richard J. Willetts, Eleven Hundred Twenty Eight Quartermaster Company, Service Group (Aviation), did, in the City of Anchorage, Territory of Alaska, on or about 1 January 1944, with intent to do

him bodily harm, commit an assault upon Private Alfred K. Huffman, Two Hundred Thirty Second Military Police Company, by willfully and feloniously striking the said Private Huffman on and about the head with his fists.

Specification 2: In that First Lieutenant Richard J. Willetts, Eleven Hundred Twenty Eighth Quartermaster Company, Service Group (Aviation), did, at Fort Richardson, Territory of Alaska, on or about 19 January 1944, in a sworn signed statement made before Colonel John M. Hamilton, an Investigating Officer appointed to investigate court-martial charges against Private Alfred K. Huffman, make under oath a statement in substance as follows: that he did not strike the said Private Alfred K. Huffman at the Lido Hotel in the City of Anchorage, Territory of Alaska, on or about 1 January 1944, which statement he did not then believe to be true.

ADDITIONAL CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant Richard J. Willetts, 1128th Quartermaster Company Service Group (Aviation), having been restricted to the limits of his station, did, at Fort Richardson, Alaska, on or about 7 March 1944, break said restriction by going to Anchorage, Alaska.

The accused pleaded not guilty to Charges I and II and to the Specifications thereunder and guilty to the Additional Charge and its Specification. He was found guilty of all Specifications and Charges "except for the word 'cash'" in Specification 2 of Charge I, "substituting therefor the words, 'good and valuable consideration'. Of the excepted words: Not guilty. Of the substituted words: Guilty." He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that in November of 1943 the accused, a First Lieutenant serving with the Air Corps Quartermaster, was stationed at Fort Richardson in the Territory of Alaska. Although a married man, he often visited Mrs. Ruth Huffman, a woman of divers occupations, including that of prostitution. Her principal place of business, which she shared with a Mrs. Ann Brown, was located in Room

37 of the Lido Hotel of Anchorage. Both women had husbands. Mrs. Brown's was a civilian; Mrs. Huffman's was Private Alfred Kinney Huffman who was attached to the 232nd Military Police, Fort Richardson. Two other spouses had preceded the private in the lawful enjoyment of Mrs. Huffman's affection. Their respective names had been Mitchell and St. Peter. In addition to the practice of her nefarious, though ancient, profession Mrs. Huffman had another blot upon her record. She had served a sentence at the State Penitentiary at Walla Walla, Washington, for "selling whiskey". Her newest husband was no paragon either. He was a devotee of Bacchus and habitually poured generous libations into himself (R. 8, 11-14, 17-18, 23, 26, 37, 49).

Room 37 was on the first floor. Its window faced "the front of the hotel" and was about three and a half feet above the street. Privacy was preserved by silk curtains, a pair of chenille drapes, and a cream-colored window shade. These did not perform their function perfectly, for at the side there was a two or three inch space through which the interior of the room could be viewed (R. 20, 28, 55-56).

During the evening of 17 November 1943 Private Huffman had been visiting a friend who lived "in the alley around from the Lido Hotel". About one o'clock in the morning, after having imbibed "a few drinks", he parted company and set out for the bus stop. On the way, he passed by the hotel. He paused by his wife's window and "looked in deliberately" through the two or three inch gap between the drape and the window frame. He saw his wife in a nightgown and the accused, Mrs. Brown, and a civilian named Floyd Evans stark naked. The conversation of this uninhibited social group could be plainly heard on the outside. Mr. Evans, who held a pistol, remarked that "Al Huffman had better not show up around there, or he'd get 'this'". The lights were shortly thereafter turned off and Mrs. Huffman got into one bed with Mr. Evans and the accused proceeded to share another bed with Mrs. Brown. Being desirous of obtaining evidence to be used in a divorce action against his wife, Private Huffman called the Anchorage police. When "Patrolman" Brewer and "Officer" Kincaid arrived, they

> "* * * knocked at the door [of room 37] then waited a minute until the door was opened, then they went in. It took at least a half a minute before the door was opened. There was a shuffling around in the room before the door was opened."

Mrs. Huffman greeted them dressed in a negligee and a nightgown. Evans, who was still in one of the beds, was wearing shorts and an undershirt.

The accused was sitting "on the edge of the [same] bed" and had his trousers "about half on". He was nude above the waist. The other bed was occupied by Mrs. Brown, who "had put on a negligee". All four occupants of the room were removed to the police station. Divorce proceedings were instituted by Mrs. Huffman the following day. She obtained a decree terminating her marriage on 15 December 1943 and resumed her maiden name of Ruth Robinson (R. 8, 20-23, 26-32, 53-57).

Some weeks before, on 24 October 1943, the accused had executed a check in the sum of $75 payable to the order of the Lido Gardens, a cabaret, and drawn against the Bank of Alaska of Anchorage. He received "good and present and valuable consideration" for it from Mr. Keith Capper, the owner and manager of the payee. The instrument was returned in due course marked "acct closed". Upon being asked to "make [it] good", the accused "promised that he would". At the trial Mr. Capper "still waited for payment". The accused had previously had a checking account with the Bank of Alaska. As of 6 October 1943 he had only $5.56 on deposit. On that day having represented to the Bank that "he was in a spot and needed $200", a loan in that sum was agreed upon and consummated by a credit entry to his account. Within the next few days he wrote the following checks: "October 7th, two for $25 each and one for $40; October 9th, $25 and $35; October 11th, $20 and $25; October 12th, $10". No other deposits having in the meantime been made, a balance of only thirty one cents remained. This was absorbed by service charges on 14 October 1943, and the account was then closed. When the accused wrote his check dated 24 October 1943, he had exactly nothing on deposit. His account had originally been opened on 30 November 1942. Between that date and 24 October 1943 he had executed only one other check which had not been honored. Its disposition is not explained in the record. The loan of $200 which became due 6 December 1943 had not yet been repaid (R. 38-48; Pros. Ex. 1).

Late in the evening of 1 January 1944 Private Huffman was sitting on a bed "alongside" of his former wife in Room 37 of the Lido Hotel. She had just returned from a visit to a bar and "might have been drunk". Private Huffman had had a few drinks also but was "fairly sober". Shortly after 11:00 p.m. the accused entered the room. He apparently had been drinking, but had full control of his limbs and faculties. He forthwith requested Private Huffman to leave the room. The private asked his former wife "what was the idea of his ordering me out of her room, and she didn't seem to know". At that moment Private Huffman was struck behind the ear by the accused. The blow which was delivered with the fist was so hard that the private was "knocked back on the bed and dazed". The accused followed up

with three or four more punches all of which landed about the head. After receiving the second blow, the private swung at his assailant once but missed. The accused left the room and went to room 35 which was adjacent and, upon seeing Private Harold M. Dobrzyn, requested him "to come next door * * * because * * * there was going to be some trouble * * *". Dobrzyn followed the accused back into room 37. Private Huffman was still sitting on the bed. He did not resist when again asked to leave, this time by Dobrzyn. With the latter's help he walked to the "Alaska Cab stand". Blood was flowing from his nose and left ear and stained Dobrzyn's jacket. At the trial Private Huffman exhibited a scar on his ear which he claimed to be the result of one of the blows inflicted upon him. He had not used any indecent, obscene, or insulting language in the presence of, or offered any violence to, the accused. Both Private Huffman and the accused were in their respective uniforms at the time the assault occurred (R. 8-11, 15-20, 23-24, 33-35).

Private Huffman did not consider the matter closed. After the lapse of several days, he, on 7 January 1944, assaulted the accused. Court-martial charges were immediately preferred. The private was tried and sentenced to restriction for four months and a forfeiture of pay of $35 per month for six months. The principal witness against him was the accused. Before the trial Colonel John M. Hamilton, who was appointed the Investigating Officer, had attempted to ascertain the "background" of the offense. He testified that:

> "* * * I went back to an argument I had heard of on the night of January 1st. At that time, the time of the investigation, I asked [the accused] if he had had an argument with Private Huffman on the night of the 1st. He said he did. I asked him who was present. He told me Mrs. Huffman, Huffman, and himself were in the room, and he called in a soldier by the name of Harry Lobrzyn, I believe. I asked [the accused] if he had struck Private Huffman. He told me he had not. I placed the question to him a couple of times, and he told me still he had not struck Huffman. I asked why he called the soldier into the room, and he said he wanted a witness to his ordering of Huffman from the room."

The statements of the accused were accepted as true, reduced to writing, and subscribed and sworn to by him (R. 25, 31, 49-51).

On 7 March 1944, the accused was restricted to the limits of Fort Richardson, Alaska, "by competent authority". About 10:00 p.m. Major Maher, Captain Edgar V. Hays, and Lieutenant Brooks entered Uncle Bert's Bar in Anchorage on a tour of inspection. They saw the accused in the "back room with an enlisted man and some others, playing cards at a card table" (R. 36-37).

4. The accused, after his rights as a witness were fully explained to him, elected to remain silent. No evidence was presented on his behalf.

5. Specification 1 of Charge I alleges that the accused did "on or about 17 November 1943 wrongfully and unlawfully occupy a hotel room in a scantily clad condition with Mr. Floyd Evans, a civilian", and two married women, "the said civilian and women being also in a scantily clad condition". This offense is laid under Article of War 95.

The accused's course of conduct reveals him to be completely lacking in moral discernment and responsibility and openly contemptuous of military discipline. His bedroom camaraderie in the nude with a married woman not his wife was indecent and undecorous. Although it in itself constituted a serious offense, it was materially aggravated by its public nature. Had the accused had any respect either for himself or for his uniform, he would have painstakingly sought to conceal his guilty relations from the world. Instead he flaunted his debauchery in plain view of another married woman with whom it appears he had also been familiar and in the presence of a male civilian. This licentious behavior was not consonant with the standards required of an officer and a gentleman.

6. Specification 2 of Charge I alleges that the accused did on or about 24 October 1943, with intent to deceive, wrongfully and unlawfully make and utter to Lido Gardens, Anchorage, Alaska, a certain check "in the sum of $75.00" and by means thereof, "did fraudulently obtain from the said Lido Gardens cash of the value of Seventy-five ($75.00) dollars, he the said [accused] then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Alaska for the payment of said check". This offense is also charged under Article of War 95.

One of the violations of Article of War 95 enumerated in paragraph 151 of the Manual for Court-Martial, 1928, is "giving a check on a bank where he knows or reasonably should know there are no funds to meet it, and without intending that there should be."

In the absence of any extenuating evidence, the conclusion is inescapable that the accused's execution of the check dated 23 October 1943 was a deliberate and willful attempt to defraud the Lido Gardens, the payee. He knew or should have known that his account was depleted and closed, for its status resulted from his own acts: CM 202601; CM 236070; CM 243908. As was said in CM 240347 (1943), II Bull. Jag. Jan. 1944,

> "At the time when he drew and uttered the checks, there was not sufficient money in his account to pay them, and he had no basis for a genuine belief that there would be. The evidence clearly warrants the conclusion that in each instance accused knew that the check would not be paid on presentation at the bank and that he intended to deceive and defraud the persons to whom the checks were delivered."

This holding is clearly applicable in this case.

While Specification 2 of Charge I alleges that the accused received "cash" for the check dated 24 October 1943 and the evidence shows only "good and present and valuable consideration", the material elements of the offense charged were proved. The court in its findings properly made certain exceptions and substitutions to conform with the facts. This action did not place the accused at any disadvantage or in any way prejudice his rights.

7. Specification 1 of Charge II alleges that the accused did "on or about 1 January 1944, with intent to do him bodily harm, commit an assault upon Private Alfred K. Huffman * * * by willfully and feloniously striking the said Private Huffman on and about the head with his fists". This act was set forth as a violation of Article of War 96.

The Articles of War specifically penalize the striking of a superior officer. While they do not expressly prohibit assaults by superior officers upon subordinates, that offense is only slightly less heinous, particularly when the object of the attack is an enlisted man. The power and authority vested in an officer are a sacred trust and must be coupled with commensurate self-restraint. Although the officer's assault may be motivated by praiseworthy considerations such as a desire to promote discipline, his action will not be condoned. To quote from Dig. Ops. JAG., 1912-40, sec. 453 (3),

> "An officer has no right to punish, by assault, any offense or dereliction of duty on the part of an enlisted man. Such action constitutes an offense against military law, and charges may be preferred against the officer under either AW 95 or AW 96."

The accused's assault upon Private Huffman was absolutely unprovoked and apparently the product of alcoholic spite. The private was in his ex-wife's room by invitation. While only "fairly sober", he comported himself inoffensively and peacefully. Neither by word nor by act did he then give just cause for the wanton assault upon him. Nor did his summoning of the police on 17 November 1943 warrant the blows which were rained upon him. Prostitute though his wife may have been, he had the right to protest against, and to interfere with, her adultery.

8. Specification 2 of Charge II alleges that the accused did "on or about 19 January 1944, in a sworn statement made before Colonel John M. Hamilton, an Investigating Officer * * *, make under oath a statement * * *, which statement he did not then believe to be true". This was stated as an offense under Article of War 96.

The accused's denial under oath that he had struck Private Huffman was a false official statement. Since "it was made in the course of an investigation" before Colonel John M. Hamilton, an Investigating Officer, "it was patently made with intent to deceive": II Bull JAG, Dec. 1943, Sec. 454 (49), p. 467. The offense is one which could also have been properly charged under either Articles of War 95 or 96.

9. The Specification of the Additional Charge alleges that the accused "having been restricted to the limits of his station, did * * * on or about 7 March 1944, break said restriction by going to Anchorage, Alaska". This was also represented to be in contravention of Article of War 96.

That the accused broke restriction is evident from the testimony adduced and is admitted by his plea of guilty. Willful or wrongful intent is not an essential element in this offense": CM 234815 (1943), II Bull. JAG, Sept. 1943, sec. 454 (21), p. 342. It is sufficient that the accused was outside the limits of his station without authority. His presence at Uncle Bert's Bar will, in the absence of an explanation, sustain the conviction.

10. The accused is about 28 years of age. The records of the War Department show that he had enlisted service from 2 April 1936 to 3 July 1942 when he was commissioned a second lieutenant; that he was promoted to first lieutenant on 19 November 1942; and that since 3 July 1942 he has been on active duty as an officer.

11. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Walter Shepherd, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 9 - MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Richard J. Willetts (0-1574180), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and ordered executed.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl. 1 - Record of trial.
Incl. 2 - Lft. ltr. for sig. S.W.
Incl. 3 - Form of action.

(Sentence confirmed. G.C.M.O. 399, 18 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

(243)

SPJGH
CM 254423

3 JUL 1944

UNITED STATES v. Private First Class ISRAEL GONZALEZ (10405310), Company I, 3rd Provisional Battalion, Infantry Regiment, Force Aruba.	)))))))))	ANTILLES DEPARTMENT Trial by G.C.M., convened at Camp Savaneta, Aruba, N.W.I., 23 March 1944. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Pfc Israel (NMI) Gonzalez, Company I, 3rd Provisional Battalion Infantry Regiment, Force Aruba, did, at Camp Savaneta, Aruba, N.W.I., on or about 12 February 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Cpl. Roy E. Sinclair, 127th Military Police Company, Force Aruba, a human being by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution may be summarized as follows: At about 12:30 a.m. on 12 February 1944 three military policemen, Corporal Roy E. Sinclair, Private First Class Edgar W. Eggers, and Private Alexander S. Fontana, who had been on duty in a nearby town, returned to camp in a truck. They stopped at Company "K" barracks to let out the members of a band which had been playing at the "USO" and proceeded on toward the military police orderly room. Fontana was driving and Eggers and Sinclair were riding in the rear of the truck. As they were passing Company "I" barracks someone at the end of the building

opened fire. Eggers drew his pistol after two or three shots had been fired. Corporal Sinclair "got hit" on the fourth or fifth shot. After he had heard five or six shots Eggers returned the fire but his pistol "jammed" after one or two shots and he picked up Sinclair's pistol and continued to shoot. He fired twenty-three times in all. Eggers had previously fired both a pistol and a rifle and in his opinion the first shot which he heard was fired from a rifle. Upon hearing the shots from the barracks Fontana had stopped the truck. He did not take part in the firing and did not "notice" whether anyone else in the truck fired. He was trying to get the truck out but as "there were too many bullets flying" he waited until the firing ceased and then "made a dash for the company barracks to call for help". Before he returned Eggers drove the truck away and took Sinclair to the hospital (R. 6-6g).

Recalled by the court Private Eggers testified that the military police truck was about fifteen or twenty yards from the barracks from which the shots came and that they were fired from the side and "kind of the rear". His pistol did not go off accidentally and it was not possible that he might have shot Sinclair. The truck was open at the back and had two seats running lengthwise. Eggers was sitting on the seat on the side nearer the barracks and Sinclair was on the same seat a foot or two away and toward the front end of the truck. When the shooting started Sinclair drew his pistol but dropped it without firing when he was hit. The truck stopped twice, once in the middle of the road between the barracks and again after the shooting continued. Sinclair remarked that he had been hit when the truck started to move after the first stop. The lights on the truck were burning when it stopped the first time and they were still turned on when Eggers drove it away from the scene of the shooting (R. 6tt-6ww).

Private First Class Fernando Perez, who lived in the same barracks with accused, saw him come in and go to bed on the night of 11 February 1944. Their beds were only about six feet apart. Accused told Perez "that unusual things were happening to him" but did not say what they were. Some time later Perez was awakened and heard some shots. He could see through a screen by his bed that a truck was parked at the corner of the adjacent barracks and flashes were coming from the truck. He did not hear any shots fired inside the barracks (R. 6g-6i).

Staff Sergeant Jorge Debien, who was sleeping in the same barracks as accused, on the night of 11 February, upon being awakened by gunfire, saw accused firing through the window. It was dark in the room. After firing three or four shots accused moved to the door, stepped just outside and fired two or three times. There were also some pistol shots from outside of the barracks. Sergeant Debien approached accused, said "What are you doing" and took the gun, an M1 rifle, away from him. The accused remarked "Sgt., be careful with this arm, it is loaded and you can kill yourself". Accused "was acting normal". "Pvt. Flores" then held accused and Sergeant Debien called to the "MP's" to cease firing. He heard a number of pistol shots after accused gave up the rifle (R. 6m-6s).

Private First Class Benjamin Flores Cardenas, who also lived in the same barracks as accused, was awakened during the night of 11-12 February. He

heard about fifteen or twenty shots outside and three or four shots inside of the barracks. He had fired both pistol and rifle and was "sure" that the firing outside was from a pistol and the firing on the inside from a rifle. He did not see who was firing but saw Sergeant Debien take a rifle away from accused. He then heard about fifteen pistol shots. Accused said "They are going to kill all of us" and tried to take up another rifle "located near the Sgt.'s bed". Cardenas "jumped on" accused and "hit him to the floor". Cardenas saw no person other than accused in the barracks with a rifle (R. 6i-6m).

At 12:30 a.m. First Lieutenant Enrique Frontera, officer of the day, in response to a telephone call, went to the barracks of Company "I", where he found the accused and standing near him a sergeant with a rifle in his hands. He asked "what the trouble was", and the sergeant replied that the accused had fired the rifle. Lieutenant Frontera unloaded the rifle, removing "two tracers, two balls and one AP", asked accused if the rifle belonged to him and upon receiving an affirmative reply asked if accused had fired it, to which the latter again answered "yes". Accused also stated that he was the only one firing in the barracks. Lieutenant Frontera detailed men to police the barracks and one of them gave him 11 empty caliber .30 cartridges. The next day the first sergeant gave him six more and four ".45's". While accused was on his way to the guardhouse he stated in response to a question by Lieutenant Frontera as to why he had "done that", that he had fired because he had some trouble to settle with the military police and "wanted to make them pay for what they did to him on the 1st of January". When he was asked whether the "explanation" of accused was given "voluntarily" and whether accused was "warned as to his rights" Lieutenant Frontera's answer was not responsive to either query. His interrogation proceeded as follows:

"Q. You did not understand my question with regard to the statement of the accused. Was it voluntary?
A. It was voluntary.
Q. How do you know?
A. Because I only asked him what the trouble was. It was fully voluntary and he was not forced.
Q. You used no force?
A. No, sir.
Q. No rank?
A. No, sir.
Q. No promises and no duress?
A. No, sir." (R. 6s-u).

When Corporal Sinclair was taken to the hospital he was in a moribund condition from an abdominal gunshot wound. He died at about 1:15 a.m. on 12 February. Captain Harold J. Greer assisted by Captain Albert C. Baird, both of the Medical Corps, performed a post mortem examination which disclosed that death was caused by shock and hemorrhage resulting from the wound. Both

officers considered it impossible to determine what type of weapon caused the wound but Captain Greer thought that it must have been a bullet of great destructive power (R. 6v-6y).

Captain Greer was recalled by the court and testified that the bullet entered Corporal Sinclair's body on the left side of the abdomen, ranged upward injuring the small bowel, stomach and liver, broke the seventh, sixth and fifth ribs "in several pieces" and went out at about the fifth rib. It had evidently hit the lower ribs and been deflected upward by them. There were no "powder marks", and Captain Greer stated that the bullet was fired at a greater distance from Corporal Sinclair than 1 to 6 feet. Captain Baird, also recalled by the court, testified that he did not recall whether there were any powder marks on the body (R. 6qq-6ss).

4. For the defense Sergeant Jesus Ramos-Maldonado testified that on the night of 11-12 February 1944 he was in bed in barracks "beside" the building in which accused lived when he was awakened by some shots at the "right side" of his barracks. At the "same moment" a truck drove up and stopped and Sergeant Maldonado heard shots from the truck "on the other side" of his barracks. The shots continued "from one side to the other" but in greater volume from the truck. After he had heard shots from the truck he heard a scream from someone in the truck (R. 6y-6aa).

At about midnight on 11-12 February after being awakened by "some noise" Corporal Fernando Sanchez saw accused in Company "I" barracks and had a talk with him. Accused said that he had had "good fun" in town, was very happy but had been thinking that he wanted to have "some experience in life" and wanted to fire some shots into the air so that he could go to the guardhouse "to have that experience". He specifically stated that the shots were to be fired "at random into the air". Corporal Sanchez tried to dissuade accused, the latter went to bed and Sanchez went "to the toilet". When he returned accused was outside and had a rifle. Later Sanchez awakened, went to the bed of accused, urged him to go to sleep and not let anything happen to him, and then went to bed. At about 12:30 a.m. Sanchez was again awakened and heard shots. He immediately went to the entrance of the barracks. Between the second and third shots he saw the "MP" truck coming. The truck was clearly visible as its lights were on and he could see its silhouette. The first three shots were from outside of the barracks and not from the truck. When he heard firing of "the pistol and the rifle" Sanchez notified the first sergeant. The military police trucks usually came past the barracks at about 12:30 a.m. (R. 6bb-6hh).

The accused testified that on the night of 11 February 1944, after going to town and drinking for "a while" with a friend, he had returned to camp at 11:15 or 11:20 p.m. and had gone directly to his barracks. As his friend was "completely drunk" accused helped "get him to bed", and then engaged in a conversation with Corporal Sanchez. When the latter went to bed accused lay on his bed for a while. He was thinking of firing some shots in the air and "without thinking about anything else" grabbed his rifle and started

shooting through the door. He continued to discharge his rifle "to the front of the place" where he was firing. After shooting four times he went from the door to the window and continued to fire from there. "The Sgt." woke up, shouted "What are you doing", came up and took the rifle away (accused "gave it to him") and went with the rifle to the door and shouted something in English. Private Flores who was "up and ready" grabbed accused and made him lie down on the floor. Lieutenant Frontera then came in and took accused to the guardhouse. He asked accused some questions, one of which was "Why did you do that" and accused answered that he had fired without "any premeditation or any idea in mind but the one of just going to the guardhouse". Accused did not aim the gun at nor intend to kill anyone. He did not see the truck outside when he started to fire. He heard pistol shots after he had fired about four times (R. 6kk-6ll).

On cross-examination accused admitted that he had had "some trouble" with the "MP's" on "the night of the first of January" but stated that "all that thing" had been forgotten as he went to town every night and after the incident sometimes rode back to camp "in their own truck". The idea of firing into the air came to him "all of a sudden". He had been happy enough when he left town but when he went to bed the idea came suddenly. When asked how many shots he fired into the air accused replied, "All the shots I fired were fired to the front". He did not fire any shots directly at the truck because "in those moments" he did not see anything at the front. He had loaded his rifle while he was talking with Sanchez. As a few rounds had fallen to the floor he had only four cartridges in the clip. After he had fired four times from the door he "went over" to re-load the rifle and then went on to the window. He fired from fifteen to eighteen shots in all and loaded the rifle about three times. He first heard shots coming from outside of the barracks after he had fired two shots through the window. In answer to the question why he kept shooting from inside the barracks accused answered "That is something I cannot explain to myself. I had fired a couple already and I just went ahead firing". There was another barracks in front of the window but accused was not firing at it. He could not see the truck while he was firing and did not know where the shots which he heard "came from" (R. 6ll-6nn, 6pp-6qq).

On redirect examination accused testified that he "drank a lot" on the night of the shooting and was feeling happy but was not "completely drunk". He was sitting by the side of his bed when the "Platoon Sgt." took his rifle away. He had often ridden out from town in the "MP" truck but on those occasions the trip had been made between 10:30 and 11:00 p.m. He looked out the window while he was firing but saw no light. He aimed "at nothing" when he fired through the window (R. 6nn-6pp).

Sergeant Ramon Donis, the first sergeant of the company of accused, testified that he had known accused for about eight months, that he had a

good reputation, his character was good, he had been working hard, and that there had been "no trouble with him". Captain A. A. Armstrong, who had been the company commander of accused for about a year, also testified that accused was a very hard worker, did not cause any trouble in the organization and had a very good character. He would have been promoted to corporal except for the fact that he had only an eighth grade education (R. 6hh-6jj).

5. The statements in the nature of a confession of guilt made by accused to Lieutenant Frontera were not shown to have been voluntary. Accused, an enlisted man, had been arrested by Lieutenant Frontera, the officer of the day, and the statements were made in response to questions propounded by the officer. The accused had not been informed of his rights under the 24th Article of War and he had not been advised that he need not make a statement if he did not wish to do so. In the absence of such advice it may reasonably be assumed that accused would feel under compulsion to answer the questions asked of him by the officer who had him in custody, and the absence of threats, promises, or duress was not sufficient to establish the voluntary character of the statements. Under the circumstances the confession was incompetent and should not have been received in evidence (MCM, 1928, par. 114a; CM 222148, Griggs, Bull. JAG I, p. 158, 13 BR 269, 277; CM 237225, Chesson, Bull. JAG II, p. 306, 23 BR 317, 319).

The erroneous admission of the confession did not however injuriously affect the substantial rights of the accused since his guilt is established by other compellingly convincing evidence properly in the record. Such evidence shows that as Corporal Sinclair and two other military policemen riding in a truck were passing the barracks of accused they were fired upon by someone standing at the back of the building and Sinclair suffered a mortal gunshot wound. It is not disputed that accused, who had had trouble with the military police, fired numerous shots from an M1 rifle from the barracks and ceased firing only when a sergeant took the gun away from him. The only other person who could have shot Sinclair was Private Eggers, one of the military policemen in the truck, who drew his pistol and returned the fire of the accused. He testified that he did not fire his pistol until after Sinclair had been wounded. He was sitting beside Sinclair on a seat that ran lengthwise of the truck. One of the Medical Corps officers who performed a post mortem examination of the body of Sinclair testified that because of the absence of powder marks or burns, in his opinion the fatal shot must have been fired from a distance greater than six feet. Moreover, the bullet which caused Sinclair's death entered the left side of his abdomen and ranged upward. The course of the bullet indicates that the shot did not come from someone sitting beside Sinclair. The evidence clearly shows that Sinclair was wounded by a bullet fired from the rifle of the accused.

The accused testified that he fired the rifle into the air at random because of some strange and sudden impulse which impelled him to do so in order that he might be incarcerated in the guardhouse and thus have a new and interesting experience. This testimony, despite some degree of corroboration by another soldier in his barracks, is so inherently improbable and so

inconsistent with human experience as to be utterly unworthy of belief. Accused himself was at a loss to explain why he continued firing after he learned that his fire was being returned. According to his own admissions he loaded his rifle three times and fired about 18 shots. He admits that he looked through the window and that he fired to the front and not up into the air. The lights on the truck were burning and he saw or should have seen that it was in his line of fire. It convincingly appears that accused intentionally fired his rifle in the direction of a truck in which he knew some person or persons were riding.

Murder is the unlawful killing of a human being with malice aforethought. Unlawful means without legal justification or excuse. Malice does not necessarily mean hatred or personal ill-will toward the person killed, or an actual intent to take his life, or even to take anyone's life. It may mean an intention to cause the death of, or grievous bodily harm to any person (except when death is inflicted in the heat of sudden passion caused by adequate provocation), or knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to any person. The use of the word, aforethought, does not mean that the malice must exist for any particular length of time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (MCM, 1928, par. 148a).

6. The charge sheet shows that accused is 21 years of age and that he enlisted at Fort Buchanan, Puerto Rico on 16 May 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of either death or imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized under the 42nd Article of War for the offense of murder, by section 22-2404, District of Columbia Code.

Samuel W. Driver, Judge Advocate.

(On Leave), Judge Advocate.

F. J. Lotthiser, Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGQ
CM 254429

19 MAY 1944

UNITED STATES	)	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
Major HENRY P. EHRLINGER (0-212332), Corps of Engineers.	)	Trial by G.C.M., convened at Headquarters Eighth Service Command, ASF, Dallas, Texas, 3, 4 and 5 April 1944. Dismissal, total forfeitures, fine of $1,000 and confinement until fine is paid but for not longer than one (1) year.

OPINION of the BOARD OF REVIEW
ROUNDS, GAMBRELL and FREDERICK, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 94th Article of War.

Specification: In that Major Henry P. Ehrlinger, 1852nd Unit, Eighth Service Command, Fort Bliss, Texas, did, at Fort Bliss, Texas, between about April 1 1941 and about July 1 1942, knowingly, wilfully, and wrongfully misappropriate United States postage stamps of the value of about $3,985.25, property of the United States intended for the military service thereof.

CHARGE II: Violation of the 96th Article of War.

Specification: In that Major Henry P. Ehrlinger, 1852nd Unit, Eighth Service Command, Fort Bliss, Texas, did, at Headquarters, Cardiff District, APO No. 516, on or about June 24, 1943, with intent to deceive Lt. Col. Marion D. Woodworth, FA, Inspector General, WBS, SOS, APO No. 515, U.S. Army, officially state to the said Lt. Col. Marion D. Woodworth that, while at Fort Bliss, his, Major Ehrlinger's, average investment in postage stamps was about $10.00 per month, or words to that effect, which statement was known by the said Major Ehrlinger to be untrue in that his average investment in postage stamps was about $225.00 per month during said period of time.

The accused pleaded not guilty to all Charges and Specifications, and he was found guilty of all Charges and Specifications, substituting, in the case of the Specification of Charge I, the words "over $50.00" for the words "about $3,985.25". No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay to the United States a fine of one thousand dollars and to be confined at hard labor, at such place as the reviewing authority might direct, until said fine should be so paid, but for not more than one year. The reviewing authority approved the findings and the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

The accused, a reserve officer, went on active duty 17 October 1940 at Fort Bliss, Texas. He was made Assistant Constructing Quartermaster and, on 2 December 1940, was assigned the additional duty of serving as Property Officer for the Constructing Quartermaster. He continued the same duties until 23 February 1942 when he was relieved and ordered to Fort Belvoir, Virginia. On 20 March 1942 he was transferred back to Fort Bliss, where he resumed his former duties as Property Officer and was assigned the additional duty of Area Engineer for the Fort Bliss proper projects, which function he performed under the supervision of the Fort Bliss Regional Engineer, who supervised the work of several area engineers under the Fort Bliss Regional Office and, in turn, reported to the District Engineer at Albuquerque, New Mexico. The accused continued such duties until 24 June 1942 when he was transferred. The accused was, at the time of his trial, and has been at all times since 17 October 1940, in the military service of the United States (R. 6, 101; Pros. Ex. A).

The accused, as Property Officer and Area Engineer, received between 28 October 1940 and 30 May 1942, United States postage stamps in the aggregate face amount of $8,605.90, as evidenced by receiving reports personally signed by him, except for one receiving report, in the amount of $127, which was signed by Second Lieutenant Ira W. Overland. The accused was both accountable and responsible for these stamps (R. 6, 165; Pros. Ex. B). Expenditures of stamps were reported by the accused on shipping tickets, which were in the nature of expendable property vouchers and represented credits against the stock of stamps with which the accused was charged. By means of these shipping tickets, the accused reported that he had expended, between 31 October 1940 and 12 June 1942, in the performance of his official duties, stamps in the aggregate face amount of $8,622.76. Each of such shipping tickets was personally signed by the accused, except one, in the amount of $55.80, which was signed by Second Lieutenant Overland (R. 7; Pros. Ex.C).

Throughout the period the accused was Property Officer at Fort Bliss, it was the practice of employees in the office of the Constructing Quartermaster and area engineer, when needing postage, to apply to

the accused for it, informing him of the nature of the package to be mailed and the amount of the postage needed. The accused would then issue the stamps and record the transaction in a "little black book" which he kept for that purpose. Such transactions were not always recorded promptly in the "little black book". Sometimes the accused would note them on separate slips of paper, and at some later date consolidate the entries so made on the loose slips. On occasions when the accused was not in his office, various of his clerical assistants would issue requested stamps and make notations thereof in the "little black book". The shipping tickets (or expendable vouchers) were not prepared concurrently with the disbursement of stamps; they were prepared from time to time only, and often they would represent consolidations of a number of separate transactions. The shipping tickets were usually prepared by one of the accused's assistants, a property clerk. They were prepared from entries made in the "little black book", from fly-sheets and, sometimes, from separate sheets of paper "worked up" personally by the accused for that purpose. The accused instructed his assistants that each shipping ticket must be signed by the Mail and Records Clerk. Willard L. Magee, a civilian, was Mail and Records Clerk from 20 February 1942 until March 15, 1944. The assistant who prepared most of the shipping tickets during this period (Mrs. Jewel H. Murphy) testified that Magee objected a number of times to signing shipping tickets presented to him on the ground that he had not used or seen the stamps listed thereon (R. 10-13).

Two employees of the Constructing Quartermaster and area engineer, at Fort Bliss (Mrs. Willa May Sears and Harold P. Arnold, Jr.), testified, by depositions, that their duties required them to obtain and use postage on Government mail matter, that they obtained such postage from the accused, who made notations thereof on a black memorandum book, that they kept no record of the amounts of postage so obtained from the accused, and that, subsequently, they were presented with, and signed, shipping tickets therefor without the aid of any means of checking the accuracy of such tickets. Each of these two witnesses identified the particular shipping tickets signed by him or her (R. 19, 20; Pros. Exs. F and G). These tickets had previously been admitted in evidence as Prosecution's Exhibits C-1 to C-128.

Willard L. Magee testified that he was Mail and Records Clerk in the office of the Constructing Quartermaster and area engineer, at Fort Bliss, from 20 February 1942 until 15 March 1944. He handled approximately 90% of the mail that went out of the office of the accused during April, May and June, 1942, and he estimated that the amount of postage which he used during this period totalled approximately $40 per month. He testified categorically that the shipping tickets which were submitted to him for his signature did not represent the true amount of postage which he was using, and that the difference between the true amount of

postage he was using and the amounts shown on such shipping tickets was "rather large". He objected to signing these vouchers "almost every" time they were presented to him. He further testified that during the month of June, 1942, he signed for the accused three shipping tickets, in the amounts of $623.99, $510.54 and $100.37, respectively, making a total of $1234.90 for the month, and that he had not received that amount of postage during that month. He identified such tickets as being Vouchers Nos. 772, 776 and 777, respectively (R. 21-24; Pros. Exs. C-126, C-127, C-128). Magee further testified that for the month of July, 1942, the total amount of postage used by him ran from $30 to $35 (R. 27). Mrs. Jewel H. Murphy had previously testified that there was no appreciable drop in the letters and packages sent out during the month of July, 1942, as compared with the month of June, 1942 (R. 16). The Administrative Chief in the office of the District Engineer, at Albuquerque, when asked whether he knew of any reason for a decrease in postage expenditures at Fort Bliss for the month of July, 1942, testified that "There wasn't any decrease in work, and our records indicate that the same number of projects were under way in July as there were in June" (R. 99).

Three witnesses (two of whom were employees in the accused's office, at Fort Bliss, and the other of whom was an officer on duty in the same office) testified, by depositions, that, after the accused's departure from Fort Bliss, they made a thorough search for any records covering the disbursement of stamps by the accused from 17 October 1940 to July, 1942, and that they were unable to find any such records. The "little black book" was not seen after the accused left Fort Bliss in June, 1942 (R. 14, 19, 35, 36, 37; Pros. Exs. F, H, I, J).

The accused had a stamp collection of his own (Pros. Exs. E and J) and between October, 1940, and July, 1942, he had dealings for his own account aggregating more than $4,000, distributed among several different philatelists. Rupert D. Davis, a stamp collector of Silver Lake, Indiana, testified that, during the period stated, he had between twelve and twenty transactions with the accused; that such transactions aggregated from $500 to $600; that a majority of the remittances made by the accused were in unused United States postage stamps; that all of such stamps were in good condition; and that a majority of the stamps so remitted were of current issue (R. 38-40). Gordon Harland Davison, a stamp collector of Wollaston, Massachusetts, testified that between 20 February 1941 and 14 June 1942 he had transactions with the accused aggregating $951; that remittances made by the accused were "mostly" in stamps; that such stamps were in good condition; that it is "unusual" for customers to remit in stamps when the purchases are as large as those of the accused; that a majority of the stamps so remitted were of current issue; that 10% was added to the sale price of all items for which the accused remitted in stamps; and that the accused was a "good customer" (R. 42-44, 46; Pros. Ex. K). Neil Gronberg, a stamp collector of Sheridan Hill, Pennsylvania, testified that between 24 February 1941 and 1 June 1942 his transactions with the accused amounted to $676.61, of which $477.95 was remitted in stamps, all in good condition; that few, if any, of such stamps were of current

issue; that accused was charged 10% extra on all items remitted for in stamps; and that ordinarily in witness' business purchasers remit about 30% of the purchase price in stamps (R. 48-54; Pros. Ex. L). William B. Kessel, a stamp collector of Tucson, Arizona, testified that between 28 February 1941 and 29 May 1942 his sales to accused amounted to $1839.94, of which sum "at least half" was remitted in stamps, all in good condition; that probably half of such stamps were of current issue; and that 10% was added to the purchase price of some, but not all, of the items for which the accused remitted in stamps (R. 55-58; Pros. Ex. M). Whiton Payne, a stamp dealer of Norwalk, Connecticut, testified that between 8 October 1941 and 27 May 1942 the total money value of remittances received by him from the accused amounted to $1250.95; that such remittances were made "mostly" in postage "although there were one or two checks"; that all of such postage was in good condition and "at least 80 or 85 per cent" of it was of current issue; that accused was charged 10% extra on all items remitted for in stamps; and that the accused was "an excellent customer" (R. 63-65; Pros. Ex. N).

A representative of the Audit Division, Fiscal Director's Office, Headquarters Eighth Service Command (Captain Walter F. Reece), prepared an analysis of Prosecution's Exhibits B-1 to B-65 (receiving reports) and C-1 to C-128 (shipping tickets), setting out the voucher number of each instrument, the amount of stamps represented thereby, the name of the person from whom they were received, or to whom they were delivered, and the name of the person who signed for them. Such analysis was introduced as Prosecution's Exhibit O. From these records, Captain Reece further prepared an abstract, by denominations, of the stamps received and disbursed by the accused as reflected by such receiving reports and shipping tickets, respectively. Such abstract was introduced as Prosecution's Exhibit P (R. 71). It shows that, as to each denomination of stamps received by the accused during the period 28 October 1940 to 30 May 1942 there occurred, according to the shipping tickets, either an over expenditure or an under expenditure. In the case of the $5 denomination, for instance, there was an over expenditure of $535. In the case of the $1 denomination there was an under expenditure of $82. These discrepancies indicated to the witness either that errors had been made in the computations, or that the shipping tickets had been prepared from inaccurate data, or that there was no memoranda at all from which to prepare them (R. 71-72). The witness identified a list prepared by himself, showing, month by month from October, 1940, through June, 1942, the amounts of stamps the accused received and the amounts he disbursed, all as reflected by the dates and amounts shown on Prosecution's Exhibits B-1 to B-65 and C-1 to C-128. Such list was introduced as Prosecution's Exhibit R (R. 74).

Captain Reece further testified that he made a search of the office of the area engineer, at Fort Bliss, for any records of the expenditure of stamps by the accused from October, 1940, to July, 1942, but that he found no daily records of stamps, other than for the three months'

period, April, May and June, 1942. The records for those three months, he said, showed expenditures of stamps of "something like" $200 (R. 75). He ascertained from page 1 of the stock record account maintained in the office of the Constructing Quartermaster, at Fort Bliss (a copy of which page was introduced as Pros. Ex. S), that the opening balance of stamps on hand on 28 October 1940 was 80 cents (R. 87). The stock record account of stamps on hand as of the latter part of June, 1942, "showed a zero balance" (R. 82).

The construction projects that were in progress in the Albuquerque District under the Quartermaster were transferred to the Corps of Engineers as of 1 January 1942. Both before and after this transfer, Major Joseph R. O'Bryan was Chief of the Administrative Division, which included the Cost Section, the Finance Section, Mail and Records, Property and Transportation. At the time of the transfer he was serving in a civilian capacity. After the transfer three Regional Offices were set up under the District Office at Albuquerque. Each Regional Office was supervised by a Regional Engineer who reported to the District Engineer. The accused became area engineer for one of the areas under the supervision of the Fort Bliss Regional Engineer. The work being carried on under the three Regional Offices was "very similar". There were approximately 24 projects in progress in the District in the Spring of 1942, and 6 or 8 of these - an estimated "one-third" of the work - were under the supervision of the Fort Bliss Regional Office. As Chief of the Administrative Division in the office of the District Engineer, Major O'Bryan had responsibilities extending throughout the District (R. 89, 90, 98, 101).

Major O'Bryan testified that under date of 20 February 1942 a memorandum was issued by the Albuquerque District Office to the subordinate offices in the District to the effect that a record of all postage stamps should be kept up to date. The memorandum outlined approved procedure for procuring necessary postage and set forth a requirement that monthly detailed reports of stamp expenditures be made to the Albuquerque office. A sample form of appropriate report was attached to the memorandum. It was the intention of the memorandum that all subordinate offices in the District should thereafter obtain their postage from the District Office. The accused's office at Fort Bliss drew from the Albuquerque office during the months of April, May and June 1942, a total of $283 in stamps, and filed with the Albuquerque office reports of expenditures of stamps, on the prescribed detailed form, for the same months, as follows: April, $58; May, $68.37; and June, $41 (total $167.37) (R. 91-96; Pros. Exs. V, W and X). A similar report of stamp expenditures filed by the Fort Bliss office for the month of July, 1942 (after the accused had departed), showed expenditures of stamps during that month of $13.63 (R. 97; Pros. Ex. Y). Major O'Bryan further testified that total stamp expenditures during the months of April, May and June, 1942, by the Albuquerque office amounted to $3200, and

that on that basis the $283 of stamps drawn by the Fort Bliss office during the same period "was not out of line". The witness' attention was then called to Prosecution's Exhibit R, from which it appears that the accused claimed credit for stamp expenditures during the same three months, as follows: April, $553.94; May, $859.18; and June, $1234.90 - a total of over $2600 for the three months' period (R. 93-94, 98). It was developed by the testimony of Mrs. Murphy that, notwithstanding the intention of the memorandum of 20 February 1942 that all postage should thereafter be obtained from the Albuquerque office (and be accounted for on the prescribed detailed monthly reports of expenditures), as testified to by Major O'Bryan, the accused continued to draw postage from the Finance Officer at Fort Bliss and to account for the same according to "the same system we had used prior to that time" (i.e., shipping tickets based upon entries made in the "little black book" and on loose sheets of paper) (R. 12). Major O'Bryan testified that the bulk of the mail pertaining to the work being carried on under the supervision of the three Regional Offices during April, May and June, 1942, was handled by the District Office. The mailing of plans and specifications involved the heaviest outlay of postage. This mailing was done by the District Office (R. 93, 103). While it was the intention of the memorandum of 20 February 1942 that thereafter all necessary postage for use throughout the District would be obtained from the District Office at Albuquerque, it developed that the authority which certain officers in the Fort Bliss Office had had, under the Constructing Quartermaster, to requisition postage from the Finance Officer at Fort Bliss "had never been rescinded by any memorandum" (R. 105). A search under the direction of Major O'Bryan failed to produce any stamp records at the Fort Bliss Office (R. 99).

Without objection, the prosecution introduced into evidence true and correct copies of official records of Headquarters of the Eighth Service Command, which set out a report of an official investigation conducted by Lieutenant Colonel Marion D. Woodworth, Field Artillery, Inspector General, WBS, SOS, APO No. 515, U. S. Army, on 24 June 1943, at Headquarters, Cardiff District, APO No. 516. These records reveal, among other things, that the accused stated, in the course of such official investigation, that while the accused was at Fort Bliss his average investment in postage stamps was about $10 per month. Such records also reveal that the accused stated, in the course of such official investigation, among other things, that he did not recall having had any transactions with a stamp collector in the vicinity of Westport, Connecticut, or elsewhere in the State of Connecticut; that his transactions with people in the East were "altogether not over ten or fifteen dollars"; and that his total remittances for all time in uncanceled postage stamps would not exceed three hundred dollars (R. 105-106; Pros. Ex. Z).

4. Evidence for the defense:

Five witnesses testified for the defense by depositions. The gist of their testimony, in so far as material, was as follows:

Galen Williams was employed as a clerk in the Fort Bliss Office from 27 December 1940 until 15 February 1943. He took numerous packages to the post office after working hours during the months January through June, 1942. Postage would run between $25 and $50 "most" of the time. The mail was "heavier" during April, May and June, 1942, because of the large number of projects in progress at that time (R. 107; Def. Ex. No. 1).

Miss Ethel Gano was employed in a clerical or secretarial capacity in the Fort Bliss Office from August, 1941, until 1 March 1944. When the property clerks were out she occasionally issued stamps; and upon doing so she made a notation thereof in the "little black book". She could not recall seeing this book after the accused departed from Fort Bliss (R. 107; Def. Ex. No. 2).

Charles E. Waterhouse is an associate engineer under the District Engineer, at Albuquerque. He has known the accused since November, 1941. The printing machine in the draughting room of the Fort Bliss Office was working on two shifts at times during the period January to June, 1942. Contracts, plans and specifications were sent out air mail, some of the packages weighing fifteen or twenty pounds. Also reports were mailed "once or twice a week" by the Fort Bliss Office to Washington and San Antonio (R. 107; Def. Ex. No. 3).

Richard Redmond was employed in the Fort Bliss Office from 30 April 1941 until June, 1942, principally in the draughting and printing room. He wrapped many packages of contracts, plans, specifications and reports, which "in most cases" were forwarded by air mail. The volume of mail was particularly heavy just prior to accused's departure (R. 107; Def. Ex. No. 4).

Mrs. Berwyn D. Ball was employed in the Fort Bliss Office from 14 May 1941 until 15 January 1944. After October, 1941, she was Fiscal Clerk. Prior to 30 June 1942 the fixed fee contract records in the Fort Bliss Office were mailed to some point in Virginia. The postage thereon amounted to between $400 and $500. Weekly reports were mailed to Washington and San Antonio. These were heavy, and the postage required for them was estimated at $100 per week (R. 107; Def. Ex. No. 5).

By stipulation between the prosecution and the defense it was agreed that James R. Frazer of University City, Missouri, if personally present, would testify for the defense substantially as stated in his affidavit which was admitted in evidence as Defense's Exhibit No. 6. In such affidavit Mr. Frazer stated, among other things, that for several years, commencing in 1934, he lived in Chevy Chase, Maryland, and that during this period he often received remittances from the accused for the purchase of United States postage stamps, "sometimes

in rather large denominations and amounts", which postage he purchased and forwarded to the accused "uncancelled" (R. 108; Def. Ex. No. 6).

The accused, after having his rights as a witness explained to him, elected to testify. He briefly reviewed his military history, stating that he has held a commission in the Officers' Reserve Corps since 21 June 1925 and that he went on active duty at Fort Bliss, Texas, 17 October 1940. By way of explanation of his statement to the Inspector General that his average investment in stamps while he was on duty at Fort Bliss was about $10 per month, he testified that he had always tried to budget his stamp investments to between $10 and $20 per month and that he estimated that during this period his "monthly investment was around $10.00" (R. 112). With respect to the discrepancies in the denominations of stamps appearing in the receiving reports (Pros. Exs. B-1 to B-65) and the shipping tickets (Pros. Exs. C-1 to C-128), the accused testified that "on several occasions" the post office did not have in stock the denominations called for by the receiving reports (it having been necessary to prepare and sign the receiving reports before the accused could obtain from the Finance Officer the monies required for the purchase of the stamps) and that on such occasions the accused would accept stamps of other denominations and, sometimes, cash. He did not correct the receiving reports in these cases because he "didn't believe it proper" to "falsify records in any way" (R. 114). The accused received from his predecessor a "little note book" in which a record of stamp expenditures had been kept. The accused continued the same system of recording stamp expenditures, at first making the entries in the book himself and later, "as the work got heavier and I had more jobs to do", delegating this clerical work to assistants (R. 114, 117). The accused was questioned specifically about shipping tickets Nos. 772, 776 and 777 (Pros. Exs. C-126, C-127 and C-128), dated, respectively, 1 June 1942, 12 June 1942 and 12 June 1942. He testified that shipping ticket No. 776, in the amount of $510.54 covered postage used in making shipments of old Constructing Quartermaster records to the Office of The Quartermaster General and the General Accounting Office in Washington, D. C. (R. 115). He did not recollect what the postage represented by shipping tickets Nos. 772 and 777, aggregating $724.36, was used for (R. 135). The accused testified that the use of postage was abnormally heavy during April, May and June, 1942, due to the necessity of closing out a number of Quartermaster contracts before the appropriations in respect thereof expired 30 June 1942 (R. 116). He denied that his authority to requisition stamps from the Finance Officer, at Fort Bliss, had been rescinded prior to his departure from Fort Bliss (R. 116). He asserted that when he left Fort Bliss on 25 June 1942 all of the property records, including the "little black book", were in the property office (R. 118, 138). The accused further testified that he had a stamp collection of his own prior to November, 1940, having been a philatelist since 1910, and that the present value of his collection is between $10,000 and $15,000.

His five albums of stamps were introduced in evidence (R. 120, 121; Def. Exs. Nos. 7, 8, 9, 10 and 11). He had engaged in stamp trading while he was stationed at Fort Bliss and had used uncanceled postage as the medium of payment for some items purchased, but he denied categorically that he misappropriated, embezzled or converted to his own use any postage stamps furnished by the Government for the military service (R. 123, 124). Prior to starting to work at Fort Bliss he owned approximately $4,000 worth of uncanceled United States postage stamps (R. 123).

On cross-examination the accused admitted that he had, by trading, disposed of $4,000 in postage stamps while on duty at Fort Bliss (R. 126), and that he had lost the normal discounts thereon of $100.00 (R. 156-157). He denied that he had intended to deceive or mislead the Inspector General when he failed to mention in the official investigation that he had traded off $4,000 of stamps while on duty at Fort Bliss (R. 127). He admitted, however, that in the affidavit, which he executed five weeks after the date of the investigation (Pros. Ex. Z), he inserted nothing to clear up his original statement that he had invested only about $10 per month in stamps while on duty at Fort Bliss (R. 128).

Lieutenant Colonel Elmer S. Armstrong, Corps of Engineers, Real Estate and Utilities Branch, Headquarters, Eighth Service Command, a witness for the defense, testified that he was Assistant Constructing Quartermaster at Fort Bliss prior to the transfer of construction activities to the Corps of Engineers; he continued in the Fort Bliss Office, after the transfer, until November, 1942; he had known the accused since 8 January 1941; a considerable number of old vouchers and records of the Constructing Quartermaster had been shipped to Alexandria, Virginia, for storage, about 20 May 1942; during the months of April, May and June, 1942, postage requirements were heavy, but that on the new jobs the District Office did the mailing; and he was well acquainted with the accused, who had a "good" reputation and was a "very efficient" officer (R. 174, 177, 179, 182).

Lieutenant Colonel John T. Morgan, Inspector General's Department, Headquarters, Eighth Service Command, a witness for the defense, testified that he has known the accused since September, 1937. His first acquaintance with him was in connection with CCC work, near Silver City, New Mexico, on which they were both engaged. He has had sufficient acquaintanceship and knowledge of the accused, both in his official and unofficial capacities, to form an opinion of his general character and reputation. Witness further testified with respect to the accused, as follows:

> "My opinion of his character and his performance of duty was and is superior. He has been never the subject of a reprimand or admonition of any kind, and I have never known him to be in financial difficulty of any kind" (R. 187, 188).

5. With reference to the offense alleged in the Specification of Charge I, the evidence of the guilt of the accused, adduced by the prosecution, while circumstantial in nature, is such as to exclude any fair and rational hypothesis except that of guilt. Controlling authority provides that "what is required" in such cases is "not an absolute or mathematical but a moral certainty" (MCM, 1928, par. 78a). The following uncontradicted evidence forms a circumstantial web which is sharply inconsistent with the innocence of the accused and which compels, overwhelmingly, the conclusion that the accused is guilty of the offense alleged beyond a reasonable doubt.

(1) The testimony of the mail clerk, Willard L. Magee, that he was repeatedly called upon by accused to sign, and did sign, shipping tickets (i.e., expenditure vouchers) covering the expenditure of amounts of stamps far in excess of the amounts actually expended. Comparison of the records of accused's receipts and expenditures clearly discloses that it was solely by the use of these inflated vouchers that the accused's stamp account with the government carried any semblance of balancing. Giving recognition to the inflated condition of only such of accused's expenditure vouchers as were signed by Magee, and conservatively estimating the extent of the inflation in them, it is evident that the accused's stamp account with the government was, in reality, short several hundred dollars, or more.

(2) The sharp drop in the use of postage by accused's Fort Bliss Office, from an average of $850 per month as reported by accused for the months of April, May and June, 1942, down to $30 to $35 for the month of July, 1942 (being the first month after the accused's departure from Fort Bliss). Major O'Bryan and Mrs. Murphy knew of no reason for such a decrease, and no adequate explanation was given by accused as a witness in his own behalf.

(3) The expenditure by the Fort Bliss Office of more than $2600 of stamps during the months of April, May and June, 1942 (according to the vouchers on which the accused claimed credit), while the Albuquerque District Office, handling, for each of the subordinate offices in the District, the mail matter requiring the heaviest expenditure of stamps, expended during the same three months' period only $3200 of stamps. This marked discrepancy was wholly unexplained by accused when he testified on his own behalf.

(4) The loose practice followed by the accused in the making of records of the disbursement of stamps and in the practical forcing of subordinate employees to execute shipping tickets which they had no adequate means of checking and which,

in some cases, they believed to be false and so stated at the time they signed the shipping tickets.

(5) The various misrepresentations made by the accused during the Inspector General's official investigation, as above enumerated, with particular emphasis on the statement of the accused to the inspector that during his tour of duty at Fort Bliss he had invested only about $10 per month in stamps. Accused's acknowledged course of action in tolerating and condoning a system of accounting which did not honestly reflect in his receiving reports the truth of his transactions in acquiring stamps from the post office for official use when compared with his explanation that he did not believe it proper to "falsify records in any way", discloses a deliberate intent to do the very thing which he professes to abhor.

(6) The fact that, during his stay at Fort Bliss, the accused traded to stamp dealers uncanceled U.S. stamps worth $4000 face value in a manner described by professional stamp dealers and philatelists as "unusual". Moreover, these transactions were conducted by accused on a basis which involved him in an acknowledged loss of $400 because of forfeited discounts resulting from using stamps as means of payment for his purchases.

(7) The strange disappearance of the "little black book" asserted by accused to contain an accurate record of his stamp expenditures for the government. Numerous witnesses who had often seen it testified that they did not see it after the accused's departure in June, 1942; no one testified that he had seen it after that date. Accused himself contended that it was in the office when he left. The circumstances lead to the conclusion he either removed it or destroyed it.

(8) The tabulation prepared by Captain Reece showing a discrepancy in each denomination of stamps appearing on the receiving reports and the shipping tickets. The "in" and "out" transactions do not match. Either an over expenditure or an under expenditure appears in each denomination.

The test for the sufficiency of circumstantial evidence has been stated as follows;

"Where the only competent evidence is circumstantial, it must, in order to be sufficient to support conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt" (Dig. Op. JAG 1912-1940, sec. 395 (9)).

The Board of Review is of the opinion that the evidence in the instant case is clearly sufficient to meet that test. The web of circumstances pointing to the guilt of the accused is too strong to permit of any reasonable doubt that he feloniously misappropriated large amounts of postage stamps entrusted to him for use in the military service. The trial court disbelieved the accused's protestations of his innocence, and the soundness of its decision in this regard is fully supported by the record. The credibility of the accused was badly impeached by the established fact that he told a number of palpable falsehoods, relating to material issues of fact, during the official investigation conducted by the Inspector General. These are revealed in the transcript of the accused's examination contained in Prosecution's Exhibit Z.

Every element of the offense alleged is fully established by the evidence:

(a) There can be no reasonable doubt that there was a misappropriation of postage stamps in the Fort Bliss Office during the period 1 April 1941 to 1 July 1942, if the prosecution's witnesses are to be believed. The testimony is abundant that scores of shipping tickets issued during this period were false because inflated. Without such inflated vouchers the accused's stamp account would have been short, as may be observed from a comparison of the receiving reports (totaling $8605.90) and the shipping tickets (totaling $8622.76) introduced in evidence, and relied upon by the accused himself, as a record of the stamp transactions handled by him as Property Officer. The evidence shows that there was an opening balance of 80 cents of stamps on hand on 28 October 1940, and that the balance stood at "zero" when the accused departed from Fort Bliss near the end of June, 1942. The tabulation of receipts and disbursements of stamps, month by month (Pros. Ex. R), prepared by Captain Reece, shows that on 1 April 1941 (the date of the commencement of the period mentioned in the Specification), receipts and disbursements were nearly even (receipts exceeding disbursements by the sum of $69). It is evident, therefore, that the inflated shipping tickets issued during the period following 1 April 1941 (and it is to be remembered that all of those signed by the witness Magee were issued during this period) indicate a large misappropriation during the period alleged in the Specification. That the accused himself effected the misappropriation is plainly to be inferred. Not only is he inextricably caught in the mesh of incriminating, circumstantial evidence adduced by the prosecution, but it is to be remembered that as Property Officer he was, as he conceded himself, both accountable and responsible for the postage issued to him; and there was a shortage for which he failed to account. In such circumstances, if there is no adequate explanation, a presumption arises that the officer himself made away with the property (CM 123492; Dig. Op. JAG, 1912-1940, sec. 451 (17)).

(b) That the stamps in question belonged to the United States and were intended for use in the military service is fully shown by the evidence, and is uncontroverted.

(c) Ample facts and circumstances are shown indicating that the misappropriation was willfully and knowingly done.

(d) While the exact value of the stamps misappropriated is not shown, the evidence is overwhelmingly to the effect that such value exceeded by many hundred dollars the amount of "over $50.00" contained in the finding.

The Board of Review is of the opinion, therefore, that the evidence amply supports the findings of the court and that, beyond a reasonable doubt, the accused is guilty of the Specification of Charge I and of Charge I.

6. As to the Specification of Charge II the evidence (Pros. Ex. Z) fully establishes that the accused did, at the place and time alleged, in the course of an official investigation, make the statement which he is alleged to have made. Further, the accused not only did not deny that he made it, but, during both his direct and cross-examination, admitted that he made it (R. 112, 126, 127). The falsity of the statement is patent from the evidence adduced. Also, there can be no reasonable doubt from the evidence that the accused knew the statement to be false at the time that he uttered it; and, while the accused vigorously denies that he made the statement with any intention to deceive, the evidence compels the conclusion that it was made with an intent to deceive the officer who was conducting the official investigation. That the making of a false official statement, with intent to deceive, is an offense under Article of War 96 is too clear to require discussion. The Board of Review is of the opinion, therefore, that the evidence fully supports the findings of the court that, beyond a reasonable doubt, the accused is guilty of the Specification of Charge II and of Charge II.

7. The records of the War Department show that the accused is 41 years of age. He was born at Chicago, Illinois, of American born parents, and graduated from high school at Desplaines, Illinois, in 1921. He attended the University of Wisconsin, majoring in geology and mining, and graduated from that University with the B.S. degree in 1925. While in college, he completed the R.O.T.C. course, and was commissioned a second lieutenant, Inf. Res., 22 June 1925. He was promoted to first lieutenant, Eng-Res., 23 January 1936, to Captain, Eng-Res., 4 April 1940, and to Major, A.U.S., 3 April 1943. He was called to active duty in the Army of the United States 17 October 1940, and has been on active duty since that date. In civil life the accused was a professional engineer. He was on duty with the Civilian Conservation Corps, at Fort Bliss, Texas, from 6 August 1936 until 5 August 1939, in which work he was given an efficiency rating of "Superior".

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The sentence imposed by the court is authorized upon conviction of either a violation of Article of War 94 or a violation of Article of War 96.

William A. Pounds, Judge Advocate

William H. Dambrell, Judge Advocate

Herbert B. Frederick, Judge Advocate

(266)

1st Ind.

War Department, J.A.G.O., 31 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Major Henry P. Ehrlinger (O-212332), Corps of Engineers.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and ordered executed, and that in event this officer defaults in the payment of the fine imposed by the sentence, the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action designed to carry into effect the above recommendation, should such recommendation meet with your approval.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.

(Sentence confirmed. G.C.M.O. 411, 27 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGV
CM 254498

25 May 1944

U N I T E D S T A T E S	)	III CORPS
v.	)	Trial by G.C.M., convened at Hunter-Liggett Military Reservation, California, 6 April 1944. Dismissal and total forfeitures.
Second Lieutenant EDWARD MILLER (0-2047749), Medical Administrative Corps.	)	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Second Lieutenant Edward Miller, 596th Ambulance Company (Motor) Separate, did, at Hunter-Liggett Military Reservation, California, on or about 17 March 1944, feloniously take, steal, and carry away ten gallons of gasoline of the value of about $.80, property of the United States furnished and intended for the military service thereof.

Specification 2: (Disapproved by the reviewing authority).

He pleaded not guilty to and was found guilty of the Charge and its two Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the finding of guilty of Specification 2 of the Charge, approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The finding of guilty of Specification 2 of the Charge having been disapproved by the reviewing authority, only that evidence which

relates to Specification 1 will be summarized and is substantially as follows:

At about 8:45 o'clock the night of 17 March 1944, on the Hunter-Liggett Military Reservation near Jolon Junction, California, a member of the military police on duty, observed a civilian automobile and an Army vehicle pull off the highway and stop. As it was his duty to prevent civilians from parking in this area he notified the military police patrol of what he had seen. The military police patrol, consisting of Private First Class James P. Ellena and Private Vallis W. Keller, traveling in a jeep, turned out the car lights and proceeded toward the parked vehicles. As they approached, they saw an enlisted man put a five-gallon gasoline can in the civilian car. They got out and walked over to this car, in which they observed two five-gallon cans of gasoline. The accused was sitting under the steering wheel on the driver's side, and said something about motor trouble. Accused and the two gasoline cans were taken to the stockade where the cans were marked by Private Keller as shown by Prosecution's Exhibit A. Private Keller testified that the two five-gallon cans of gasoline introduced in evidence were the same cans as those taken from accused's car (R. 8; Certificate of Correction).

Prior to this incident (time not stated) accused left word with Private John E. Siwula for Corporal Wilbur E. Lawrence to meet accused at the motor pool. Corporal Lawrence and Private Siwula, who were hauling water in a Government vehicle, drove to the motor pool, arriving ahead of accused. When accused arrived he ordered these two soldiers to pick up two five-gallon cans at a gasoline dump near the motor pool of accused's organization, and place them in the Government vehicle. He then ordered them to proceed to Jolon Junction and wait for him. On arrival at Jolon Junction Corporal Lawrence drove the Government vehicle to the front of accused's car and transferred the two five-gallon cans to accused's car.

Sergeant Harold E. Lewis, who was in charge of the gasoline supply dump, testified that only Government gasoline was stored there. He had not counted the cans of gasoline on hand the night of 17 March nor the night before. Without such a count a loss could not be detected. In response to the question, "There is no possibility of there being anything but gasoline in those cans, now is there?", his answer was, "No sir, there is not" (R. 12).

4. Following an explanation of his rights as a witness, accused elected to remain silent.

Captain John E. Thompson, Jr., M.C., and Captain William H. Arnberg, M.A.C., each testified that he had known accused about six months and would rate accused's character and efficiency as excellent. His honesty had never been questioned, and accused had never caused either of them any trouble.

5. It does not affirmatively appear that there was any shortage of Government gasoline from the supply dump at the motor pool, but it is clear that only Government gasoline was stored there; that two five-gallon cans of gasoline were placed in a Government vehicle at the direction of accused and transported to the vicinity of Jolon Junction where it was, again at accused's direction, transferred to accused's private car. The cans were marked for identification by one member of the military police patrol within a few minutes after this incident took place, and this same soldier identified the cans from these markings when they were received in evidence at the trial. The court was thoroughly justified in concluding that the contents of the cans was Government gasoline, furnished and intended for the military service as alleged. The value of the gasoline was not proven. The cans containing the gas being before the court, the members thereof from their own experience could infer that it was of some substantial value (MCM, 1928, p. 173).

6. Accused is 27 years of age. He was inducted 19 January 1943 and served as an enlisted man to 18 August 1943, when upon graduation from Medical Administrative Corps Officer Candidate School he was appointed second lieutenant, Medical Administrative Corps, Army of the United States.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 94.

Thomas N. Tappy, Judge Advocate.

Charles McKinney, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 254498

1st Ind.

War Department, J.A.G.O., 12 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Edward Miller (0-2047749), Medical Administrative Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority, to support the sentence and to warrant confirmation of the sentence. In view of the small value of the gasoline taken and the previous excellent record of this officer, I recommend that the sentence be confirmed but commuted to a reprimand and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig. S/W.
Incl.3-Form of action.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 329, 27 Jun 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 254517

9 JUN 1944

UNITED STATES	)	OGDEN AIR SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Hill Field, Ogden, Utah, 6 April 1944. Dismissal.
First Lieutenant DAVID M. BRYANT (O-672319), Air Corps.	)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 1st Lieutenant David M. Bryant, AC, 5th AAF, Proving Ground Detachment, Dugway Proving Ground, Tooele, Utah, did at Delta, Utah, on the 22nd of February, 1944, wrongfully pilot an army airplane, A-30A, 43-8788, in that he flew outside the designated local flying area without proper clearance in violation of AAF Regulation 15-23.

Specification 2: In that 1st Lt. David M. Bryant, AC, 5th AAF Proving Ground Detachment, Dugway Proving Ground, Tooele, Utah, did at Delta, Utah, on 22 February 1944, wrongfully pilot an army airplane, A-30A, 43-8788, in that he flew over the town of Delta at an extremely low altitude violating AAF Regulation 60-16, Par. 16, to wit: "Minimum altitudes of flight. (a) Except during take-off and landing, aircraft will not be operated (1) below the following altitudes: (a) 1000 feet above any building, house, boat, vehicle or other obstructions to flight.** (d) 500 feet above the ground elsewhere than as specified above."

Specification 3: In that 1st Lt. David M. Bryant, AC, 5th AAF Proving Ground Detachment, Dugway Proving Ground, Tooele, Utah, did at a point approximately eleven (11) miles from Delta, Utah, on the highway between Delta and Lynndyl, Utah, on 22 February 1944, wrongfully pilot an army airplane, A-30A, 43-8788, in that he flew so low over a truck hauling cattle that he hit said truck, damaging the truck, killing one cow and endangering the lives of the

occupants of the truck, thus violating AAF Regulation 60-16, Par 16, to wit: "Minimum altitudes of flight (a) Except during take-off and landing, aircraft will not be operated (1) below the following altitudes; (a) 1000 feet above any building, house, boat, vehicle or other obstructions to flight."

Specification 4: In that 1st Lt. David M. Bryant, AC, 5th AAF Proving Ground Detachment, Dugway Proving Ground, Tooele, Utah, did at Delta, Utah, on 22 February 1944, wrongfully pilot an army airplane, A-30A, 43-8788, in that he flew over the Delta Municipal Airport at an extremely low altitude violating AAF Regulation 60-16, paragraph 16, to wit: "Minimum altitudes of flight. (a) Except during take-off and landing, Aircraft will not be operated (1) below the following altitudes: (a) 1000 feet above any building, house, boat, vehicle or other obstructions to flight.*** (d) 500 feet above the ground elsewhere then as specified above. (2) Within 500 feet of any obstruction to flight."

Specification 5: In that 1st Lt. David M. Bryant, AC, 5th AAF Proving Ground Detachment, Dugway Proving Ground, Tooele, Utah, did at Delta, Utah, on 22 February 1944, wrongfully pilot and operate an aircraft to wit: Army airplane, A-30A, 43-8788, in a reckless and careless manner so as to endanger persons and property on the ground and particularly that he flew so low over a truck hauling cattle that he hit said truck damaging the truck and killing one cow in violation of AAF Regulation 60-16, paragraph 1.

He pleaded not guilty to all Specifications and guilty to the Charge. He was found guilty of all Specifications and of the Charge, and was sentenced to dismissal. The reviewing authority approved the sentence. The record of trial has been forwarded for action under the 48th Article of War.

3. The evidence for the prosecution shows that at about 1:45 p.m. on 22 February 1944 accused, a pilot stationed at Dugway Proving Ground, Tooele, Utah, began a regularly scheduled local training flight, accompanied by First Lieutenant Dana F. Peck, bombardier, and Staff Sergeant Ransom H. Robbins, radio operator. They made the flight in the only A-30-A plane at the field, which bore the serial number 43-8788, and is described as a twin motored medium bomber, built for British use, with British insignia and painted with greenish or blue and tan colors for camouflage. The plane was in an undamaged condition when it left the field. It cleared the field under a "local clearance" (Ex. M) signed by accused, which under existing regulations limited the flight to the local flying area as shown on a map (Ex. E) posted in the operations room. The plane returned at about 3:30 p.m., and at that time was damaged in that two of the propeller blades were bent, another had "quite a chunk" taken out of it, there was a slight dent in the wing, and a "slight hole" in the leading edge of the wing. Photographs (Ex. C) showing

the damage were placed in evidence (R. 8-14, 40-57; Exs. H, K, L).

Lieutenant Peck testified that after the plane took off, they flew their mission and released their bombs over the target, which was in the local flying area. They then flew over the mountains toward Delta, which is outside the local flying area, at an altitude of about 2,000 feet. In about 20 minutes, they approached Delta "heading due south" and "let down and buzzed it". Lieutenant Peck estimated their altitude over the town at about 200 feet. They made two "passes" over Delta. They then flew east from Delta and along a highway from Delta to Lynndyl; accused "let down there" and they were flying "very low". The plane was not more than 50 feet above the highway, and Lieutenant Peck could not say whether it was more than 10 feet above. They passed over a truck, he "felt a jar", and thought they hit the truck. Lieutenant Peck stated that he did not see the Delta Municipal Airport, which is northeast of the town, and they did not fly over it. He stated that there was an overcast, with a ceiling between 6,000 and 10,000 feet, and the visibility was about 10 miles (R. 55-63).

At about 2:50 p.m. on 22 February, Mr. Nathan E. Ward, chief aircraft communicator at Delta Municipal Airport, located about four and a half miles northeast of the town, observed a plane similar to the one accused was operating. It was camouflaged and bore "RAF or RCAF" insignia. The plane passed about 600 feet northwest of the building from which Mr. Ward was watching, came within 35 feet of the ground, flew over the field about 350 to 400 feet inside the fence, "zoomed" up to 300 or 400 feet, and turned toward Delta (R. 15-17, 19-23).

At about 3:00 p.m. Mr. Orville G. Bennett, who was in front of a drug store at about the center of Delta, Utah, a town with a population of about 1,200 or more, observed a two motored, camouflaged plane flying over. He "figured" that it came down to about 60 feet from the ground. It was travelling "north and east" (R. 23-25, 28-28b).

Mr. John C. Henderson and Mr. James L. Skinner left Lynndyl, about 17 miles northeast of Delta, at about 2:45 p.m., on the way to Delta. They were in a truck loaded with a cow and three calves. At about 3:00 p.m. when they were approximately nine miles from Delta, they saw a two motored, camouflaged plane about a half mile or more down the road, approaching from the south. The plane appeared to be "right on the ground". It passed over the truck at about 11 feet above the ground, "swiped" the truck, and killed the cow by cutting off her head. Part of the wooden sides or stakes of the truck were damaged, as shown by pictures (Ex. D) placed in evidence (R. 18, 25-27, 28b-39).

4. Accused testified that he had had 518 hours of flying experience and his training was that of a pilot (R. 72-73).

On 22 February 1944, after completing a bombing mission assigned, he decided to "ride around for a while to get some time in". He went south, saw the town of Delta, had an "impulse to buzz" and so "buzzed" the town twice at about 200 or 300 feet. When returning to the field he saw a long stretch of road and "went down on the road". He saw a truck two or three miles in front "so I had bad judgment" and "felt a slight jar" as they went over the truck. He climbed to about 9,000 feet, returned "home" and inspected the damage. Accused thought he was about 100 feet above ground when he first saw the truck. He denied doing any diving on the trip and denied flying over the airport, but stated that on "our first run" they "headed" into Delta from the northeast and "circled" the airport. This was his first flying accident, he liked being a pilot "Very well", and desired to remain a military pilot if possible (R. 73-74).

On cross-examination and examination by the court accused stated that on approaching Delta he may have flown near the municipal airport, but not over it, that he had never flown near it before, and thought he would recognize it if he flew over it. As he approached the truck on the highway, he came within 10 or 12 feet of the ground. He stated that he was not trying to see how close he could come to the truck, but could not state why he did not "come up higher". Accused admitted that he knew he was flying outside the designated flying area, knew he was breaking regulations in so doing, and knew he flew below permissible altitudes. When he hit the truck he "felt very foolish", knew he was in trouble, and knew he was reckless (R. 74-77).

First Lieutenant Joseph W. Green, who had known accused for about 10 months and flown with him for about seven, considered accused a very good pilot, that his reputation was very good, and his standing as an officer and a gentleman excellent. Major Jack Wilson, commanding officer of accused for four or five months, considered him "on a par with any of the rest of the pilots", and stated that if taking a squadron into combat he would "be glad" to have accused in the squadron. Accused was well liked by officers and men, and respected as an officer and a gentleman. Lieutenant Peck and Sergeant Robbins, who were with accused on 22 February, would not hesitate to fly with him again and considered him a good pilot. Lieutenant Peck stated that the standing of accused as an officer and a gentleman was "of the highest degree". On 22 February during the flight that day, Sergeant Robbins was not where he could look out (R. 64-70).

5. a. Specification 1: At about 1:45 p.m. on 22 February 1944, accused, a pilot stationed at Dugway Proving Ground, Tooele, Utah, left the field on a regularly scheduled local training flight in a two motored camouflaged A-30-A plane, number 43-8788, with a bombardier and a radio operator. Army Air Forces Regulation No. 15-23, 15 October 1943 (Ex. K) provides a form of aircraft clearance (Form 23) to be used to clear pilots on all flights except in certain instances, of which the only one applicable

here is that of flights within local training areas. Accused signed a "local clearance", which under applicable regulations limited the flight to a designated local flying area. After completing his mission within the local area, accused flew the plane to Delta, Utah, outside of the designated local area. He knew that he was flying outside of the local area, and that this was a violation of regulations. His action in going outside of the local flying area without a proper clearance, contrary to the regulation, was a violation of the 96th Article of War.

b. Specification 4: On approaching Delta accused flew over the Delta Municipal Airport, located about four and a half miles northeast of the town, at an altitude of approximately 35 feet. Although accused denied that he flew over the airport, he admitted that he flew near it and "circled" it. The chief aircraft communicator at the municipal airport testified positively that he saw the plane fly across the field about 350 to 400 feet inside the fence. The Board of Review is of the opinion that the evidence shows beyond reasonable doubt that accused flew over the field, and there was no conflict in the proof as to the altitude. Paragraph 16, Army Air Forces Regulation No. 60-16, 9 September 1942 (Ex. J) prohibits the operation of aircraft at altitudes less than 500 feet, except in certain instances not applicable here. In flying the plane over the airport at 35 feet accused violated this regulation.

This Specification charged accused with flying over the airport "at an extremely low altitude" in violation of the regulation. Properly it should have alleged the altitude definitely, rather than by such vague language. However, the regulation was in part copied into the Specification, so that it was clear that accused was charged with operating the plane at an altitude less than 500 feet. Accordingly, accused was sufficiently advised of the offense with which he was charged.

c. Specification 2: Accused then flew over the town of Delta at an altitude of about 60 feet. By his own admission, he "buzzed" the town twice at about 200 or 300 feet. This action was a direct violation of that part of the regulation referred to above (par. 5b) which prohibits operation of aircraft below an altitude of 1,000 feet when above any building, house or other obstruction. The comments made above (par. 5b) with respect to the wording of the Specification are applicable here also.

d. Specifications 3 and 5: After leaving Delta, accused flew in a northeasterly direction along a highway from Delta to Lynndyl. At a point about nine miles from Delta he flew over a truck travelling on the highway, came within about 11 feet of the ground, struck the truck, and killed a cow in the truck. In so doing, he violated paragraph 16 of the regulation referred to by operating the plane below 1,000 feet in passing over a vehicle (Spec. 3), and also violated paragraph 1 of the same regulation by operating

the plane in a reckless and careless manner and so as to endanger friendly persons and property on the ground. Although both of these Specifications involved the same act, they charged separate offenses in that one (Spec. 3) alleged low flying and the other (Spec. 5) alleged reckless and dangerous flying. In the opinion of the Board, both Specifications are sustained.

6. a. The court declined to permit accused to plead guilty to Specifications 2 and 4 except the allegations of "extremely low altitude", substituting other words. Thereupon, accused pleaded not guilty to these Specifications and all other Specifications, but guilty to the Charge. It was irregular for accused to plead guilty to the Charge when there was no Specification to which he had pleaded guilty, and the court should have directed that a plea of not guilty be entered to the Charge also. However, this irregularity did not prejudice the substantial rights of accused.

b. Upon cross-examination of one of the witnesses for the defense who had testified regarding the reputation of accused and his skill and standing as a pilot, the court permitted and asked numerous argumentative questions directed to the opinion of the witness as to when flying regulations may be properly disregarded, whether a pilot who violates regulations is a good pilot, and upon similar matters (R. 70-72). In the opinion of the Board this cross-examination was improper. However, it does not appear that the rights of accused were prejudiced thereby.

7. The reviewing authority in his action approved the sentence, ordered it executed, but withheld the order directing the execution of the sentence. Since this is a case requiring confirmation by the President under the 48th Article of War, it was improper for the reviewing authority to order the sentence executed. However, the rights of accused are not prejudicially affected thereby, as the only legal effect of the action is to approve the sentence.

8. The accused is 23 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation cadet from 3 June 1942; appointed second lieutenant, Air Corps Reserve, Army of the United States, and active duty, 16 February 1943; temporarily promoted to first lieutenant, Army of the United States, 22 October 1943.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Samuel M. Driver, Judge Advocate

Robert Solomon, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 12 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant David M. Bryant (0-672319), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused wrongfully operated an Army airplane outside the designated local flying area (Spec. 1), below authorized altitudes over a municipal airport (Spec. 4) and a town (Spec. 2), and over a highway below the authorized altitude (Spec. 3) and in a reckless and careless manner (Spec. 5) so that the plane struck a truck and killed a cow being transported therein, all contrary to applicable regulations.

Attached to the record of trial are a recommendation of clemency by Major Jack R. Wilson, Air Corps, commanding officer of accused, and a first indorsement by Colonel J. R. Burns, Chemical Warfare Service, commanding officer of Dugway Proving Ground, in which he concurs in the recommendation.

In a memorandum to me, dated 9 May 1944, the Commanding General, Army Air Forces, states that he has reviewed the evidence in the case and recommends that the sentence be confirmed and ordered executed. I recommend that the sentence to dismissal be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Memo. fr. CG, AAF, 9 May 1944.

(Sentence confirmed. G.C.M.O. 415, 27 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 254548

19 MAY 1944

UNITED STATES	)	ARMY AIR FORCES
	)	
v.	)	EASTERN FLYING TRAINING COMMAND
	)	
Second Lieutenant CHARLES L. HARMON (0-1305579), Infantry.	)	Trial by G.C.M., convened at Maxwell Field, Alabama, 18 March 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused was tried on the following Charges and Specifications:

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Charles L. Harmon, Infantry, AUS, attached to Headquarters & Headquarters Squadron, Army Air Forces Pre-Flight School (Pilot), Maxwell Field, Alabama, did, at Prattville, Alabama, on or about 3 December 1943, commit the crime of bigamy by unlawfully and wrongfully contracting marriage with Dorothy Juanita Tuggle, he, the said Second Lieutenant Charles L. Harmon, having a legal wife, viz: Helen L. Harmon, then living.

ADDITIONAL CHARGE I: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Charles L. Harmon, * * *, was, at Maxwell Field, Alabama, on or about 1 March 1944, drunk in station, Maxwell Field, Alabama, while in uniform.

He pleaded not guilty to all Charges and Specifications and was found guilty of Charge I and its Specification, guilty of the Specification of Additional Charge I, not guilty of Additional Charge I, but guilty of a violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to dismissal and total forfeitures.

The reviewing authority approved the sentence, but remitted the forfeitures, and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

a. Charge I and Specification.

A certified true copy of the Record of Marriages of the town of Hempstead, New York, was offered to show the marriage, on 3 July 1941, of accused to one Helen Lillian Lang (R. 7; Pros. Ex. 1). Accused's War Department AGO Form 66-1, signed by him on 24 December 1942, listed his wife as Helen L. Harmon, of Freeport, New York (R. 8; Pros. Ex. 2).

Accused's bigamous marriage was proved by the testimony of Herman B. Graham and Charles Vickery, civilians, of Montgomery, Alabama, who were witnesses, of F. L. Gaddis, of Prattville, Alabama, the Probate Judge who performed the ceremony, and of Miss Dorothy Juanita Tuggle of Grantville, Alabama, whom he married. Accused met Miss Tuggle at her home in Montgomery about 2030 on 3 December. They went "down town to the Blue Room" and started drinking. She had known accused for about a year, and "broached" the subject of marriage during the evening. They left the Blue Room about 2230, and were standing on a street corner waiting for a cab to take them home when Graham, Vickery and Graham's girl friend, all of whom they knew, drove up in Graham's car (R. 9,10,14,15,23,24,26, 28). Graham and Vickery asked where accused and Miss Tuggle were going. One or both of them replied that they were going to get married, and asked where this could be done (R. 10,14,24,27). The others asked if they were serious, and upon being assured that they were, picked up accused and Miss Tuggle in the car. They drove to a hotel, where accused obtained "a bottle", and then to the nearby town of Prattville, which they reached about 2400 or 0030 of the 4th of December. After some search they found the home of Judge Gaddis, whom they roused from bed (R. 11,15,17,18,24,25). Accused left for a short time to obtain a necessary doctor's certificate, returned, and the license was issued. Judge Gaddis performed the ceremony, to which Vickery and Graham were the official witnesses (R. 11,15,16,18,25,26). The prosecution introduced as its Exhibit 3 a certified copy of the record of the marriage (R. 20). Judge Gaddis testified that as Probate Judge he was empowered to perform marriage ceremonies (R. 18).

After the ceremony they returned to Montgomery. Miss Tuggle said that she and accused had never lived as man and wife, but in response to a question whether on the morning of 4 December she had gone to her home and accused to his, she answered that they had not (R. 27). She, Vickery, and Graham all testified that accused was drunk at the time. He was helped by Vickery as he walked from the car to the judge's house (R. 12,16,26). His responses to the judge's questions "were not quick by any means" (R. 16). Vickery "had to tell him what to say"(R. 13). Judge Gaddis, however, testified that accused was not drunk. He observed accused for "about 15 or

20 minutes". Accused did not stagger, and witness did not notice any odor of alcohol on his breath. His answers to the judge's questions were "normal as far as I know" (R.20-22). Witness stated that "if he [accused] was drunk I would not have issued the license" (R. 21).

The marriage was annulled on 22 January 1944 at Montgomery, Alabama (R. 27,28).

b. Additional Charge I and Specification.

On 1 March 1944, accused was taken to the office of Second Lieutenant Johnie G. Robinson, Air Corps, the Adjutant of the Student Officers' Detachment at Maxwell Field, by "Lieutenant Elliott". Accused staggered, "spoke with a thick tongue", and in Lieutenant Robinson's opinion, was drunk (R. 29). Some time later that day he was taken to the station hospital. Lieutenant Colonel Walter O. Klingman, Medical Corps, who examined him immediately upon admission, found him unsteady on his feet, his coordination poor, his face florid, and his reflexes "depressed". He was incoherent at that time and three hours later. In witness' opinion he "was definitely under the influence of alcohol". Both witnesses testified that accused was not loud or boisterous, and caused no disturbance (R. 30,31).

The defense counsel stated that accused's rights as a witness had been fully explained to him and that he desired to remain silent (R. 32).

4. Little comment is necessary. The evidence is undisputed, and convincing with respect to both Specifications. While it is probable that accused's act of marrying Miss Tuggle was an impetuous one, spurred on by the influence of liquor, it is clear that he was not so drunk as to be incapable of entertaining the intent to go through the marriage ceremony and of understanding what he was doing. He was sober enough to go alone to obtain a doctor's certificate and to return to the judge's home. The witnesses who testified that he was drunk were his friends and the woman he married. The judge, more likely to be impartial, testified that accused was sober. The court had all the witnesses before it, and was in a position to assay their credibility. That a bigamous marriage constitutes a violation of Article of War 96 was held by this office in CM 250233, Moore.

5. While it was not shown affirmatively that accused's first wife was still living and still married to him at the time of the performance of the second marriage, it may be presumed that both statuses continued, especially since she was shown by accused's own admission to be both alive and his wife as recently as 24 December 1942. (M.C.M., 1928, par. 112, p. 110; Wharton, Criminal Evidence, 12th ed. Vol. I, p. 161.) The judge's authority to perform a valid marriage ceremony was evidenced by his testimony and by the marriage certificate.

6. In its original findings the court failed to make a specific finding as to the Specification of Additional Charge I, although it did find him guilty of the Charge in violation of the 96th Article of War. Twenty days later the court met in revision in pursuance of the command of the appointing authority, and made a specific finding of guilty of the Specification. Neither accused nor his counsel was present. It is specifically stated in paragraph 83 of the 1928 Manual for Courts-Martial that they need not be unless required by the court. No new evidence was received, and it is clear that the court's only act was to perform a function obviously intended by them at the previous sitting, but inadvertently omitted. No error occurred.

7. War Department records show that accused is 25 years of age. He graduated from Auxier, Kentucky, High School in 1938, and enlisted in Company M, 28th Infantry, Fort Ontario, New York, on 26 September of the same year. He was honorably discharged 11 June 1939, and reenlisted 12 June 1939. At the time he made application for attendance at Officer Candidate School in February 1942, he was a mess sergeant with the grade of Staff Sergeant. He attended The Infantry School, Fort Benning, Georgia, and upon graduation therefrom was commissioned a second lieutenant, Infantry, Army of the United States, on 24 December 1942. He later underwent pre-flight training at the Army Air Forces Pre-Flight School, Maxwell Field, Alabama, but was relieved there on 29 December 1943, for academic deficiencies.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

Irving G. Eson, Judge Advocate.

John Vanneffel, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 25 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Charles L. Harmon (0-1305579), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority and to warrant confirmation thereof. In view of the nature of the offenses, and particularly in view of accused's repetition of his drinking at a time when he was already awaiting trial for the first offense, I believe that he is unfit to remain a commissioned officer. I therefore recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to two letters to the President requesting clemency for accused, one from Miss Dorothy Juanita Tuggle, with whom accused contracted the bigamous marriage, and one from his wife, Mrs. C. L. Harmon.

4. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

5 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. Miss D.J. Tuggle, 20 Jan. 1944.
Incl.5-Ltr. fr. Mrs. C.L. Harmon 3 May 1944.

(Sentence confirmed. G.C.M.O. 435, 11 Aug 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 254601

5 MAY 1944

UNITED STATES	96TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp White, Oregon, 12 April 1944. Dismissal.
Second Lieutenant JOSEPH P. THIBAULT (0-492403), Corps of Military Police.	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD and GOLDEN, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 85th Article of War.

Specification: In that Second Lieutenant Joseph P. Thibault, Military Police Platoon, 96th Infantry Division, was, at Camp White, Oregon, on or about 26 March 1944, drunk while on duty as a Military Police Officer.

He pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but remitted the forfeitures imposed and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused was duty officer of the military police platoon of the 96th Infantry Division for the weekend of 25-26 March 1944, having assumed such duties for the latter day, Sunday, by mutual agreement between himself and the regularly appointed officer for such day with the full knowledge of the commanding officer of the platoon who described the agreement between the two officers as permissible. The duty officer was required to be with the platoon in camp during the day and in the evening he would go to the nearby town where he would make routine

inspections of military personnel both as to conduct and propriety of station and be available at the police station. On Sundays such officer also was obligated to inspect the Post Exchanges in the division area between 1500 and 1700 o'clock (R. 4-10).

Between 1300 and 1500 o'clock on Sunday, 26 March 1944, the accused was in the division staff officers' club where he was served an undetermined number of both "whiskey sours and high balls" by the club's bartender who characterized the accused's mood at that time as "He was not intoxicated, he was just feeling good, happy, joking with everyone and talking". Captain Robert B. O'Neill, who observed the accused in the club, was unable to state that the accused was either drunk or sober but that he was talking so loudly to some visiting Canadian Officers that the witness became embarrassed and decided to leave the club. Major Willis M. Ross also saw the accused at the club and characterized his condition as "intoxicated" so that the witness encouraged accused's early departure because he was "talking in a drunken manner" and because he "became concerned as to any probable incident that might arise because of his (accused's) actions". The accused left the club shortly after 1500 o'clock (R. 10-12, 12-14, 14-16).

About 1800 o'clock a sergeant reported to the accused at his barracks to take him and the enlisted military police detail to the nearby town. The accused appeared "not sober". Thereafter the sergeant drove the accused back to the camp about 1930 o'clock where the accused instructed the sergeant to inspect the Post Exchanges which was done and so reported by the sergeant. The accused then decided to personally inspect "PX No. 6" to which he was accompanied by the sergeant. At this exchange the accused terminated the sale of beer, directing that the exchange be cleaned up, which resulted in an argument with some of the enlisted personnel there. At this time a woman employee of the exchange who talked to him felt that "There seemed to be something definitely wrong with the man" because of his actions and speech which were rough and impolite. She called the Regimental Officer of the Day and the accused left with the sergeant to secure additional men to "police" the exchange. When the accused returned he encountered the Regimental Officer of the Day who after conversing with him took charge at the exchange because the accused was "drunk". The sergeant then drove the accused to the "MP station" in the nearby town where he went into a small room and slept until about 0130 o'clock when he returned to his barracks. The sergeant was of the opinion that the accused was intoxicated because of his actions and his alcoholic breath. Such opinion was likewise formed by the military police guard stationed at the door of the exchange (R. 17-20, 20-22, 23-26, 26-28).

4. The evidence for the defense, elicited after the court had denied a motion for findings of not guilty because of insufficiency of evidence, shows that a sergeant, who had volunteered to assist the ac-

cused in policing the exchange at about 2045 o'clock and consequently had observed the accused for a few minutes, found the accused in control of his physical and mental faculties. Two enlisted men who had seen the accused at the MP station in the nearby town had formed a similar opinion and further were of the opinion that the accused's tone of voice was normally loud. A captain who had seen the accused for a few minutes at the club about 1330 o'clock testified that at such time the accused was talking loudly which was not unusual and had control of his physical faculties but such witness was unable to swear that the accused was sober although at about 2000 o'clock when he again saw the accused it appeared that he was sober. A lieutenant and a warrant officer both of whom had observed the accused at the club for a few minutes were of the opinion that he had full control of his physical and mental faculties at that time, attributing no importance to the accused's loud talking as his normal tone of voice was "clear and loud" (R. 29, 30, 31, 32, 33-34).

The accused, after explanation of his rights as a witness, elected to remain silent (R. 34).

5. The Specification alleges that the accused at Camp White, Oregon, on or about 26 March 1944 was drunk while on duty as a Military Police Officer. The elements of the offense in brief are drunkenness while on military duty. Military duty is that duty which is legally required of an officer by superior military authority for the proper execution of which he is answerable to such authority. Drunkenness within the meaning of the offense charged is any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties (MCM, 1928, par. 145).

The uncontroverted evidence shows that the accused on 26 March 1944 had appropriately assumed and entered upon the performance of his duties as the duty officer of the military police platoon of his division which burdened him with certain responsibilities. The evidence for the prosecution shows that on the afternoon in question the accused remained in the division staff officers' club for about two hours where he drank an undetermined number of "whiskey sours and high balls", talked loudly and abusively, and so conducted himself that at least one officer became embarrassed and left and another officer encouraged the accused's departure because he was intoxicated. Thereafter the sergeant who was driving the accused's car detected the odor of alcohol on his breath from which and his actions at the Post Exchange he concluded that the accused was drunk as did the Regimental Officer of the Day and one of the guards at the exchange. The testimony of these witnesses was clear and definite in this connection and is fortified by the testimony of the woman employee at the exchange who described his actions as rough and impolite. The evidence for the defense, elicited from witnesses who had only a limited opportunity to observe the accused, is vague and inconclusive in that it is merely to the effect that the accused appeared to

have control of his physical and mental faculties. The indefinite character of such evidence is indicated by one of the defense witness' refusal to swear that the accused was sober at the club when asked such question directly. The court was entitled to observe the demeanor of the witnesses and to determine what testimony was credible. It elected to believe the evidence presented by the prosecution which abundantly established that the accused was drunk as alleged and to disbelieve the evidence presented by the defense. No reason is perceived why the court's action which was peculiarly and appropriately within is province should be disturbed. By its findings based upon clear, definite, persuasive and abundant evidence the accused stands convicted upon evidence which beyond a reasonable doubt establishes the accused's guilt of the offense alleged and amply supports the court's findings of guilty of the Charge and its Specification.

6. The accused is about 34 years old. The War Department records show that he has had enlisted service from about 1928 to 28 August 1942 when he was honorably discharged and appointed a temporary second lieutenant with date of rank from 16 September 1942 and that he has had active duty as an officer since the latter date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specification and the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction in time of war of a violation of Article of War 85.

Abner E. Lipscomb, Judge Advocate

Walton Shepherd, Judge Advocate

Gabriel H. Golden, Judge Advocate

SPJGN
CM 254601

1st Ind.

War Department, J.A.G.O., 18 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Joseph P. Thibault (0-492403), Corps of Military Police.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and ordered executed.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 346, 11 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ
CM 254639

11 MAY 1944

UNITED STATES v. Second Lieutenant ROLAND M. BENJAMIN (01319896), 3rd Infantry, attached to 13th Company, First Student Training Regiment, The Infantry School.	THE INFANTRY SCHOOL Trial by G.C.M., convened at Fort Benning, Georgia, 6 April 1944. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
ROUNDS, CAMPBELL and FREDERICK, Judge Advocates.

---

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Roland M. Benjamin, Third Infantry, attached to Thirteenth Company, First Student Training Regiment, The Infantry School, Fort Benning, Georgia, being indebted to The Homestead Bank, Columbia, South Carolina, in the sum of Two Hundred Seventy Five Dollars and having promised in writing to said, The Homestead Bank, that he would on or about 2 November 1943 pay on such indebtedness the sum of One Hundred Seventy Five Dollars and that he would on or about 2 December 1943 settle such indebtedness in full, did at Fort Benning, Georgia, dishonorably fail and neglect to pay said debt and did dishonorably fail to keep said promise until about 7 March 1944.

CHARGE II: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Roland M. Benjamin, Third Infantry, attached to Thirteenth Company, First Student Training Regiment, The Infantry School, Fort Benning, Georgia, was at Phenix City, Alabama, on or about 4 March 1944, drunk and disorderly in uniform in a public place, to wit: The Maytag Club.

He pleaded not guilty to, and was found guilty of, all of the Charges and Specifications. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence of record may be summarized as follows:

Charge I

F. Van Benthuysen in his capacity as vice president of The Homestead Bank, of Columbia, South Carolina, made two bank loans to accused; one of $200.00 on 2 October 1943, and a further loan of $75.00 on 11 October 1943, for which accused executed two promissory notes; in the first he promised to pay off the $200.00 loan in two installments of $100.00 each on 2 November 1943 and 2 December 1943, and in the second note he agreed to pay the $75.00 loan in full on 2 November 1943. Because accused did not make any payments on the due dates as promised, Mr. Van Benthuysen wrote him four dunning letters, the first on 17 November 1943, two more on 6 and 15 December 1943, and finally on 7 January 1944. A copy of Mr. Van Benthuysen's letter of 15 December 1943 was sent to accused's commanding officer, the Commanding General of the 100th Division. On 4 January 1944 the bank received a telegram and a letter from accused (Pros. Ex. 2; R. 6). This letter, dated 4 January 1944, reads as follows:

> "It is requested that I be granted an extension on my loan. Due to unforeseen events I have not been able to make the payments as I at first thought possible.
>
> "At present I am waiting for my monthly check to arrive from Camp Butner, N. C. where I am now stationed, and will start payment on the loan as soon as it arrives.
>
> "Thank you again for your kind help, and I wish to express my regret that I have not been able to keep my part of the contract." (Def. Ex. D; R. 31)

The bank approved arrangements made by a Major Jack A. Goodman of Fort Benning, Georgia, allowing accused to make payments on his indebtedness in another manner than that called for by the original agreements. The time or terms of this new contract are not in evidence. Final payments thereon were made as follows: on 13 January 1944 he paid $75.00; on 4 February 1944, $125.00, and on 9 March 1944, $88.25,

a total of $288.25 which includes interest (Pros. Ex. 2, R. 6). Mr. Van Benthuysen cannot furnish the promissory notes in question because they were returned to the maker (the accused), after payment thereon was finally completed on 9 March 1944.

Charge II

About 11:40 p.m. on the night of 3 March 1944 Corporal Harry J. Eibel, a military policeman (R. 6), acting on the personal report of a civilian, went to the Maytag Club in Phenix City, Alabama, located at 14th Street and 3rd Avenue (R. 9), where he saw accused in full uniform standing right in the doorway (R. 14), or in front of the club, and observed"his condition was not normal" (R. 7); "he was in a drunken condition, too drunk to be in the street" (R. 12); he was boisterous and loud (R. 12.) Eibel approached and asked if he would like Eibel to call a cab for him. Accused inquired the time and Eibel told him it was 12:45 a.m. (4 March). Accused then said it wasn't curfew time and he didn't have to leave (R. 7). Eibel said he was referring to his condition and not to curfew time, to which accused replied "you can go to hell" (R. 8), and turning, staggered back into the club (R. 11). Eibel followed, told him he was under arrest and directed accused to accompany him to Military Police Headquarters. Accused refused (R. 8). Accused was dressed in full uniform including blouse but minus a hat (R. 8) and was wearing the 3rd Infantry insignia (R. 7). He was then attached to the First Student Training Regiment (R. 7). Eibel phoned Military Police Headquarters for a car. While waiting for its arrival, accused kept wandering in and out (R. 13) of the club and bumping into people leaving the club (R. 9, 13, 14). He could not stand erect, he staggered, his voice was thick and he was drunk (R. 9). When a Corporal King and a captain from the 4th Infantry, who was on M.P. duty that night, arrived with a carryall, the captain advised accused to get in. He attempted to do so but as he was about to step in he stumbled, and Eibel had to catch him to keep him from falling (R. 8, 15). They then drove to the office of the Assistant Provost Marshal in Columbus, Georgia, and turned the accused over to Captain Lynch (R. 8). Corporal King, also an M.P., corroborates Corporal Eibel's statement that on this occasion accused was drunk (R. 15) and staggering (R. 16). Corporal King states that when accused had his foot on the running board of the carryall he fell against the seat. This running board is higher than that on an ordinary automobile (R. 17). It was about 12:45 or 1:00 a.m. when accused arrived at police headquarters in Columbus. Captain Lynch asked him what the trouble was at the Maytag Club. Accused told him to wait a while, that he would talk to him later. Captain Lynch repeated the question about a minute later but accused refused to answer (R. 19). At that time accused staggered, his breath smelled of whiskey and Captain Lynch testifies that he was drunk (R. 20). His voice was normal and his clothes were not disarranged, nor was he unruly or disrespectful (R. 20, 21), but his intoxication had resulted in impairing his physical faculties. (R. 22).

Mr. Orie Stewart, employed as the floor man at the Maytag Club, who knew accused just by his face and not by name, observed him for three or four hours (R. 27) in the club on the night of 3 March 1944 (R. 23) and, in his opinion, accused was drinking "pretty heavy" (R. 25) and was "slightly intoxicated" (R. 26); more so than the average person coming out of the club. He spoke in a thick tone. He had seen accused once or twice in the club during the three weeks prior to 4 March (R. 23).

Mrs. Dorothy Stewart, the check room girl at the Maytag Club, who has known accused for about two months, states he had been coming in the club once or twice a month. She checked his cap on the night of 2 March. She saw him when he left at curfew time, and later when he came back in with the M.P. "He wasn't loud or bothering to anybody" (R. 29, 30).

Second Lieutenant Robert J. Eade, 103rd Infantry Division, Camp Howze, Texas, testified by deposition that he was in the company of accused on the night of 3 March 1944 at the Maytag Club from about 8:00 p.m. until 1:00 a.m. on 4 March. He saw accused drink about one half a pint of an intoxicant during that time which made him slightly intoxicated and he became boisterous but was not disorderly. He was not drunk when the military police took him into custody but only boisterous.

It was stipulated by the defense and accepted by the court that,

> "item 15, Record of Service, From 66-1 pertaining to the accused reads as follows: Student Officer, OPS, Camp Croft, S.C., 28 May 1943 to 3 July 1943, Very Satisfactory; Mortar Platoon Leader, Company 'H', 388th Infantry, 5 July 1943 to 21 September 1943, Excellent; Heavy Weapons Platoon Leader, Company 'H', 399th Infantry, 22 September 1943 to 7 November 1943, Excellent; Heavy Weapons Platoon Officer, Company 'M', 3rd Infantry, 11 November 1943 to 13 December 1943, Excellent. On 13 December 1943 he was placed on detached service as a student officer at The Infantry School."

It was further stipulated that Colonel Philip H. Kron, Secretary of the Academic Department of The Infantry School, would testify as to the record of accused as an Officer Candidate and as a student in the Officers Communication Course of that School as shown in Defense Exhibits B and C. It was further stipulated that Mr. Van Benthuysen would identify Defense Exhibit D, accused's letter to The Homestead Bank, Columbia, South Carolina, dated 4 January 1944 (R. 31).

Having been informed of his rights as a witness in his own behalf by the law member in open court, accused elected to remain silent (R. 32).

5. Comment - Charge I

Accused executed in favor of the Homestead Bank of Columbia, South Carolina, two promissory notes, the first in the sum of $200, dated 2 October 1943, payable in two equal installments on 2 November and 2 December 1943 respectively; the second in the sum of $75.00, dated 11 October 1943, payable in full on 2 November 1943. Accused defaulted on both notes, made no attempt to renew them and ignored four letters concerning payment of these notes addressed to him by the bank during the period between 17 November 1943 and 7 January 1944. A copy of one of these letters, dated 15 December 1943, was sent by the bank to accused's Division Commander through military channels, thus bringing his delinquency officially to the latter's attention. If accused had intended to meet his written obligations in good faith he should have paid, either partly or in full, or in some honorable manner arranged for a postponement of payment, this note of 11 October for $75.00 on 2 November and also paid $100, as he agreed, on account of his note of $200 dated 2 October. Although accused drew his Army pay of $157.50 per month for the next three months, October, November and December 1943, after making the notes in question, he made no payment on either of them until 13 January 1944, on which date he sent the bank $75.00. Both notes were then over two months past due. The vice president of the bank who handled these loans testified by deposition that he approved "subsequent arrangements" allowing accused to make payments on this indebtedness "in another manner than was called for by the original agreement", which arrangements were made by a Major Goodman of Fort Benning, Georgia. It was not until 9 March 1944, or three and four months respectively after the original dates, that these notes were paid in full. The record is silent as to the time or terms of the new arrangements but the official investigation papers with the record, which were in the trial judge advocate's possession at the time of the trial but not offered in evidence, disclose that to Mr. Van Benthuysen's letter of 12 January 1944 addressed to Major Goodman of The Infantry School at Fort Benning, there is attached a postscript which reads as follows:

> "P.S. Since writing the above letter, I have just received your letter together with money order for $75.00, for which we wish to thank you. After crediting the above remittance, this leaves a balance of $213.25 and if Lt. Benjamin whishes he may pay this $113.25 the first week in February and the balance of $100.00 the first week in March 1944."

This explanation off the record makes intelligible the vague reference to the "new arrangement" cited in the record of trial.

The mere failure by an officer to keep his promise to pay a debt is not a dishonorable act in violation of Article of War 95 unless the promise to pay is made with a false or fraudulent purpose or unless the failure to pay is characterized by a fraudulent design to evade payment (pp. 22 and 106 Jan.-June 1942 and July 1942 Bul. JAG). It is evident that the accused was financially able to make at least a substantial partial payment on account of the notes in question. Failure to meet his obligations to the extent his income permitted was dishonorable (C.M. 228894 (1943)). This officer's conduct in this respect does violence to Army standards of honor; it would affect the credit standing of other officers who might attempt to secure a loan at the same bank, and is characterized by a clear purpose to evade payment of a financial obligation when it is obvious that accused had the potential means available to do so. Accused's conduct evidenced a dishonest purpose and intent to evade payment of these debts. The evidence is legally sufficient to support the finding as to Charge I.

The staff judge advocate in his review advises the reviewing authority that since "the original agreement to pay as alleged in the Specification was changed by a subsequent agreement and that the indebtedness was paid in full in accordance with such subsequent agreement" the evidence is, therefore, insufficient to sustain the findings as to Charge I. The reviewing authority evidently did not agree with this view, as he did not disapprove the finding as to Charge I and approved the sentence. The Board of Review concurs with the reviewing authority for the reasons set forth above.

Comment - Charge II

The testimony of two enlisted members of the Military Police Department, Corporals Eibel and King, plus the testimony of the Assistant Provost Marshal of Columbus, Georgia, clearly establish beyond a reasonable doubt that accused was, while dressed in full uniform, drunk both in and at the entrance to the Maytag Club in Phenix City, Alabama, on the night of 3 March 1944. He staggered, his voice was thick, he told Corporal Eibel, who tried to get him off the public street, to go to hell and he stumbled when loaded into a vehicle by the military police who were sending him to the police headquarters. When he arrived at the police station he refused to give the Provost Marshal any explanation of his conduct. That official, Captain Lynch, smelled whiskey on his breath and was of the opinion he was then drunk to a degree which impaired his physical faculties. He had been, in the opinion of the floor manager of the Maytag Club, drinking heavily while in the club on that night and became "slightly intoxicated" as evidenced by the fact that he spoke in a thick tone. The cumulative

effect of this evidence compels the conclusion that he was grossly drunk at the time and place alleged.

The allegation that he was disorderly in uniform in a public place is supported by uncontradicted testimony that, as he kept wandering in and out of the Maytag Club, he bumped into various individuals who were on their way out and that on the outside of the club in the public street he was objectionably boisterous and loud. He refused to accompany the M.P. and told him to go to hell. His conduct attracted the attention of patrons of the club. The evidence as to this Charge is legally sufficient to sustain the findings.

6. War Department records disclose that this officer is now 25 years of age and was born at Berlin, Vermont. He finished grammar school and graduated from high school in 1936 at Montpelier, Vermont. He has worked as a clerk for a grocery store and a florist shop, and has been a bell hop and clerk in a hotel. He has been married and is divorced and has no children. He enlisted in 1939 and, having reached the grade of technical sergeant, was sent to Officers Candidate School at Fort Benning, Georgia, in 1942, from which he was commissioned a second lieutenant, Army of the United States, in May 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification and of Charge II and its Specification, and legally sufficient to support the sentence and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95, and is authorized upon conviction of a violation of Article of War 96.

William A. Hounde, Judge Advocate.

William H. Bamberger, Judge Advocate.

Herbert B. Fredman, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 22 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Roland M. Benjamin (01319896), 3rd Infantry, attached to 13th Company, First Student Training Regiment, The Infantry School.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of all of the Charges and Specifications and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be suspended during good behavior.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
1 - Record of trial.
2 - Dft. ltr. sig. of S/W
3 - Op. Bd. of Rev.
w/JAG Ind.

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 316, 19 Jun 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGV
CM 254692

26 MAY 1944

UNITED STATES v. Technicians Fifth Grade ROBERT LAMAR (34535132) and EDKER RILEY (34519028), Privates First Class BRITT BALLARD, JR. (33224399), MARION J. GOLDEN, JR. (34541565), and WINCE GREEN (34619593), Privates JOHN T. BROOKS (32205868), NORMAN BROUGHTON (34569541), WILLIAM BUCKINGHAM (33519644), EDWARD CURRIE, JR. (34468136), JAMES EVANS (33390494), WILLIE L. HAGGARD (34619786), NATCHEL HARPER (34555332), OZZIE HILL (34534260), HARRY L. JAMES (33644698), FRANK NEWBORN (38505862), NATHANIEL PATE (34014020), BEN WILSON (36394643), and LEE R. WRIGHT (32804272), all of 447th Quartermaster Troop Transport Company, and Privates BELEVA P. BAILEY (32085439), JAMES A. BARBER (34251020), JAMES H. PHIFER (34252027), ALBERT SHUMAKER (34100443), and ALONZO WRIGHT (34006067), all of 448th Quartermaster Troop Transport Company.	CALIFORNIA-ARIZONA MANEUVER AREA Trial by G.C.M., convened at Yuma, Arizona, 20 and 21 March 1944. Ballard, Brooks, James and Newborn: Acquittal; Haggard: Disapproved; Lamar and Currie: To be shot to death with musketry; Shumaker, Evans and Broughton: Dishonorable discharge and confinement for fifteen (15) years; Alonzo Wright and Pate: Dishonorable discharge and confinement for ten (10) years; Green: Dishonorable discharge and confinement for eight (8) years - Disciplinary Barracks. Harper and Bailey: Dishonorable discharge (suspended) and confinement for fifteen (15) years; Golden and Lee R. Wright: Dishonorable discharge (suspended) and confinement for ten (10) years; Phifer, Hill, Barber and Buckingham: Dishonorable discharge (suspended) and confinement for eight (8) years. Wilson and Riley: Dishonorable discharge (suspended) and confinement for five (5) years - Ninth Service Command Rehabilitation Center, Turlock, California.

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the soldiers named above and submits this, its opinion, to The

Judge Advocate General.

2. The accused were tried upon the following Charges and Specifications:

CHARGE I: Violation of the 66th Article of War.

Specification: In that Technician Grade 5 Robert Lamar, Technician Grade 5 Edker Riley, Private First Class Britt Ballard Jr., Private First Class Marion J. Golden Jr., Private First Class Wince Green, Private John T. Brooks, Private Norman Broughton, Private William Buckingham, Private Edward Currie Jr., Private James Evans, Private Willie L. Haggard, Private Natchel Harper, Private Ozzie Hill, Private Harry L. James, Private Frank Newborn, Private Nathaniel Pate, Private Ben Wilson, and Private Lee R. Wright, all of the 447th Quartermaster Troop Transport Company, and Private Beleva P. Bailey, Private James A. Barber, Private James H. Phifer, Private Albert Shumaker and Private Alonzo Wright, all of the 448th Quartermaster Troop Transport Company did, at 4th Quartermaster Battalion (Mobile) Area, Pilot Knob, California on or about 10 March 1944, voluntarily join in a mutiny which had been begun in the 4th Quartermaster Battalion (Mobile) Area, Pilot Knob, California, against the lawful military authority of First Lieutenant Robert B. Gilbert, the Commanding Officer of 448th Quartermaster Troop Transport Company and First Lieutenant E. John Butler, the Commanding Officer of 447th Quartermaster Troop Transport Company and Major Burton K. Philips, Major Harry T. Thelen, both of 4th Headquarters and Headquarters Detachment Special Troops, California-Arizona Maneuver Area, and did, with intent to override for the time being, in congert with sundry other members of the said 447th Quartermaster Troop Transport Company and 448th Quartermaster Troop Transport Company of the 4th Quartermaster Battalion (Mobile) assembled on the Battalion Area, refuse to disperse and heed any lawful order to that effect.

CHARGE II: Violation of the 89th Article of War.

Specification: In that Technician Grade 5 Robert Lamar, Technician Grade 5 Edker Riley, Private First Class Britt Ballard Jr., Private First Class Marion J. Golden Jr.,

Private First Class Wince Green, Private John T. Brooks, Private Norman Broughton, Private William Buckingham, Private Edward Currie Jr., Private James Evans, Private Willie L. Haggard, Private Natchel Harper, Private Ozzie Hill, Private Harry L. James, Private Frank Newborn, Private Nathaniel Pate, Private Ben Wilson, and Private Lee R. Wright, all of the 447th Quartermaster Troop Transport Company and Private Beleva P. Bailey, Private James A. Barber, Private James H. Phifer, Private Albert Shumaker and Private Alonzo Wright, all of the 448th Quartermaster Troop Transport Company, 4th Quartermaster Battalion (Mobile), being with 447th Quartermaster Troop Transport Company and 448th Quartermaster Troop Transport Company, both of the 4th Quartermaster Battalion (Mobile), Pilot Knob, California, did, at 4th Quartermaster Battalion (Mobile) Area, Pilot Knob, California, on or about 10 March 1944, commit a riot in that they, together with certain other soldiers to a number of about seventy-five (75), whose names are unknown, did, unlawfully and riotously, and in a violent and tumultous manner, assemble to disturb the peace of the 4th Quartermaster Battalion (Mobile), Pilot Knob, California, and having so assembled, did, in the area of the 4th Quartermaster Battalion (Mobile), unlawfully and riotously assault First Lieutenant Robert B. Gilbert and Staff Sergeant Charles H. Graham, both of the 448th Quartermaster Troop Transport Company, both being then and there present in the execution of their duties, by pushing and knocking to the ground the said First Lieutenant Gilbert and striking, beating and knocking to the ground and kicking said Staff Sergeant Graham, to the terror and disturbance of the members of the 4th Quartermaster Battalion (Mobile) and certain other members present of the 4th Headquarters and Headquarters Detachment Special Troops, California-Arizona Maneuver Area, all at Pilot Knob, California.

Each accused pleaded not guilty to each Charge and Specification. Accused Ballard, Brooks, James and Newborn were found not guilty of all Charges and Specifications and accused Lamar, Currie, Alonzo Wright, Shumaker, Harper, Evans, Bailey, Broughton, Golden, Riley, Pate, Lee R. Wright, Phifer, Hill, Barber, Buckingham, Green, Wilson and Haggard were found guilty of all Specifications and Charges. Evidence was introduced of one prior conviction of accused Alonzo Wright and one prior conviction of accused Hill. The following sentences were imposed upon the accused, viz:

Lamar and Currie - Each to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be shot to death with musketry.

Alonzo Wright, Shumaker, Harper, Evans, Bailey and Broughton - Each to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life.

Golden, Riley, Pate and Lee R. Wright - Each to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for twenty-five years.

Phifer, Hill, Barber, Buckingham and Green - Each to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for twenty years.

Wilson - To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for ten years.

Haggard - To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for five years.

The reviewing authority took the following action with respect to the sentences:

Lamar and Currie - Approved the sentences but recommended each be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years, and forwarded the record of trial for action under Article of War 48.

Alonzo Wright - Approved the sentence but reduced the period of confinement to ten years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

Shumaker, Evans and Broughton - Approved the sentences but reduced the periods of confinement of each to fifteen years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under

Article of War 50½.

Harper and Bailey - Approved the sentences but reduced the period of confinement of each to fifteen years, ordered the sentences as thus modified duly executed, but suspended execution of each dishonorable discharge and designated as to each the Ninth Service Command Rehabilitation Center, Turlock, California, as the place of confinement.

Golden and Lee R. Wright - Approved the sentences but reduced the period of confinement of each to ten years, ordered the sentences as thus modified duly executed, but suspended execution of each dishonorable discharge and designated as to each the Ninth Service Command Rehabilitation Center, Turlock, California, as the place of confinement.

Riley - Approved the sentence but reduced the period of confinement to five years, ordered the sentence as thus modified duly executed, but suspended execution of the dishonorable discharge and designated the Ninth Service Command Rehabilitation Center, Turlock, California, as the place of confinement.

Pate - Approved the sentence but reduced the period of confinement to ten years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

Phifer, Hill, Barber and Buckingham - Approved the sentences but reduced the period of confinement of each to eight years, ordered the sentences as thus modified duly executed, but suspended execution of each dishonorable discharge and designated as to each the Ninth Service Command Rehabilitation Center, Turlock, California, as the place of confinement.

Green - Approved the sentence but reduced the period of confinement to eight years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

Wilson- Approved the sentence but reduced the period of confinement to five years, ordered the sentence as thus modified duly executed, but suspended execution of the dishonorable discharge and designated the Ninth Service Command Rehabilitation Center, Turlock, California, as the place of confinement.

Haggard - Disapproved the sentence.

3. Competent evidence introduced by the prosecution shows that at approximately 1630 hours on 10 March 1944, a shot was fired in the

vicinity of the orderly room of the 448th Quartermaster Troop Transport Company, Camp Pilot Knob, California, and that very soon thereafter a crowd of soldiers from the 448th and 447th Quartermaster Troop Transport Companies (both apparently negro companies), variously estimated as composed of from 30 to 150 men (R. 16, 32, 63, 84), gathered at the head of the company street of the 448th Company (R. 45, 50, 88, 95, 101). The shot had been fired by Staff Sergeant Charles H. Graham, colored, acting first sergeant of the 448th Company, and had struck a colored soldier apparently resisting arrest who was thereupon removed in a truck (R. 44, 56, 80, 88).

After the shooting, Sergeant Graham made his way from the orderly room to battalion headquarters tent, also identified as the command post, a distance of some 150 to 200 feet, followed by First Lieutenant Robert B. Gilbert, company commander of the 448th Company, and then by the crowd of men (R. 16, 32, 50, 56, 63, 81, 85, 88, 101; Pros. Ex. A). Lieutenant Gilbert held up his hands "trying to stop the men and telling them to get back" (R. 101). Apparently he had them halted momentarily but they again surged forward toward battalion headquarters, contrary to his directions, when their ranks were swelled by the addition of newcomers from the 447th Company (R. 101). Accused Riley, Green, Pate, Evans, Shumaker, Lee R. Wright, Golden, Currie, Buckingham, Hill, Lamar, Phifer, Harper, Broughton and Wilson were in the crowd as it rolled on to battalion headquarters (R. 102). One member of the crowd had an axe or hatchet and another had a saw (R. 40, 65).

Second Lieutenant Ernest A. Hampton, executive officer of the 447th Company, approached the crowd of men and issued orders that all men of his company return immediately to the company area. He also had the first sergeant blow a whistle from the company area in order to recall the men (R. 107). All of the accused who belonged to the 447th Company, except for accused Haggard, were identified by the lieutenant as members of the crowd and none of them so identified obeyed his order to return to the company area (R. 107, 108).

At battalion headquarters tent there was an inspection team from 4th Headquarters Special Troops, checking service records (R. 49, 80). It was composed of several white officers, including Major Burton K. Philips, Major Harry T. Thelen, Second Lieutenant Arthur J. Richards, Second Lieutenant Don D. Fowler, a Lieutenant Stein and some five or six white enlisted men (R. 16, 17, 33, 51). As Sergeant Graham entered the battalion tent the above-named officers, joined by Lieutenant Gilbert and eventually by Lieutenant E. John Butler, company commander of the 447th Company, lined up in front of the entrance facing the approaching crowd (R. 17, 33, 53, 63, 64, 81, 82). Major Thelen, Major Philips,

Lieutenant Gilbert and Lieutenant Butler all issued various orders to the men to go back, "to break it up", to return to their company areas (R. 33, 34, 53, 54, 57, 65, 70, 96, 100). A few did so but the majority of them refused (R. 46, 54, 61, 62, 96, 100). The crowd of men pushed and surged about the entrance to the tent muttering, cursing, shouting at Sergeant Graham and creating a considerable disturbance (R. 23, 34, 51, 57, 61, 84, 86). Accused Currie, Shumaker, Barber, Phifer, Lamar, Golden, Lee Wright, Buckingham, Wilson, Hill, Riley, Green, Harper, Broughton, Pate and Evans were in this milling, noisy crowd (R. 26, 34, 52, 53, 59, 69, 75, 86, 95, 97, 98, 99, 102, 105, 106). Accused Currie and Lamar were at the front of the crowd and passed remarks to the effect that they should "get" Sergeant Graham; that a man who shoots his own color ought to be killed (R. 51, 52, 54, 75, 97, 99, 103). Both of them were angry and upset and were urging and encouraging the crowd (R. 99). Accused Lamar, shouting and noisy, stepped inside the tent and asked why the soldier had been shot (R. 64, 69). He was heard to cry out, "that mother fucking son of a bitch from Mississippi should be hung. Let's get him" (R. 64, 69, 95). Accused Lee Wright was heard to remark, "Let's get that Mississippi sucker" or words to that effect (R. 87). Accused Hill, Riley and Golden were observed in the forepart of the crowd (R. 95, 98, 105). Accused Pate angrily shouted, "Them God damned lieutenants were up there defending the sergeant" (R. 103). Accused Bailey went to the rear of the tent and called to Sergeant Graham to come out, stating, "we are going to take care of you" (R. 17, 69, 72, 73). He entered and reached to grasp the sergeant's arm as the latter sought protection behind Corporal Harry W. Stanley, one of the members of the inspection team (R. 17, 18, 81). About this same time someone in the crowd shouted "let's get him" and the crowd began to sift into the tent through the line of officers (R. 34, 35, 53, 57, 61, 64).

Sergeant Graham then slipped under one side of the tent and commenced running toward several autos parked near the officers' tents, a distance of approximately 300 feet, with the crowd of men in hot pursuit (R. 19, 34, 35, 58, 59, 64, 65, 68, 81, 96, 104). Sticks and stones were thrown at the sergeant as the crowd gave chase (R. 19, 58, 59). Among the pursuers were accused Bailey (R. 19); accused Shumaker who, when stopped in progress by Lieutenant Gilbert and told to go back, picked up a rock and hurled it at the fleeing sergeant (R. 35); accused Wilson who was trailing the pack and was not observed doing or saying anything (R. 87); accused Lee Wright who was in the middle of the pursuing crowd (R. 87); and accused Hill, Harper and Pate, the first mentioned accused being well forward among the pursuers (R. 105, 106). Lieutenant Gilbert tried unsuccessfully by word and action to stop the chase and halt the mob (R. 35).

The sergeant was finally overtaken among the parked automobiles by the crowd which now numbered somewhere between 50 and 75 men (R. 19, 20, 96, 97). Cornered and screaming the sergeant was pelted with rocks by the angry crowd. Lieutenant Gilbert arrived at the scene almost immediately and the sergeant made his way to him. Together they tried to stem the mob but the sergeant was promptly beaten to the ground. He crawled between the lieutenant's legs and wrapped his arms about the lieutenant's ankles seeking protection from the onslaught. Lieutenant Gilbert astride him attempted to ward off the blows and kicks that were directed at the outstretched sergeant, shouting at the men, pushing them away and flailing his arms. He was forced down upon the sergeant at least twice either from blows or the pressure of the mob (R. 20, 27, 28, 35, 36, 59, 62, 89, 96). Among the members of this mob were accused Bailey, Barber, Phifer, Alonzo Wright, Shumaker, Currie, Lee Wright, Buckingham, Pate, Golden, Green, Wilson, Riley, Evans, Broughton and Hill (R. 19, 36, 37, 46, 77, 90, 106). Accused Alonzo Wright and Currie were taking a most active part, the latter shouting loudly in the forepart of the mob (R. 42, 43, 46). Accused Harper dealt the sergeant a kick in the stomach (R. 20, 43). Accused Barber and Phifer were observed shouting at the south end of the crowd (R. 48). Accused Lamar was creating considerable disturbance, although he did not physically assault the sergeant, exciting the crowd by his comments and stating that it "was bad enough having to fight this war without having to put up with this stuff too" until docile and sobbing he was conducted from the scene by Major Thelen (R. 59-61). Accused Broughton struck Sergeant Graham on the back of the head and then darted back into the crowd (R. 76, 90). Accused Evans also kicked the sergeant (R. 96, 97). Accused Golden, Wilson and Currie were heard to pass remarks to the effect that the sergeant ought to be killed (R. 90).

Lieutenant Helbig of the 446th Company, Major Thelen, Lieutenant Nathan Newman, company commander of the 445th Company, and Lieutenant Butler hastened to the scene and attempted to quell the disorder (R. 38, 39). Lieutenant Ben Babcock, who was officer of the day, had seen the crowd gather at battalion headquarters and had hurried after it down to the officers' tent (R. 89). He forced his way through the mob to Lieutenant Gilbert and the sergeant and, drawing his .45 caliber automatic, he brandished it before the crowd and forced them to fall back (R. 39, 89, 93). While Lieutenant Babcock confronted the crowd with his drawn pistol, Sergeant Graham was put in Lieutenant Butler's auto and driven away (R. 20, 39, 71, 89).

The men then gathered around Lieutenant Gilbert and the other officers, demanding an explanation as to why Sergeant Graham had been

armed. The officers sought to reason with the men (R. 39, 76, 77). Accused Currie, shouting in a loud voice, stated that it was a poor officer who would arm a man like Graham (R. 40). Lieutenant Helbig ordered the men to clear the area and return to their companies which they did (R. 40).

Sworn statements made by certain of the accused before the investigating officer, after their rights had been fully explained to them, were admitted in evidence without objection by the defense (R. 109-113, 115, 116, 119). Accused Bailey stated he heard the shot while he was playing cards, that

> "the boys began to gather behind the sergeant and I goes to the Battalion Headquarters tent and the last I see of the sergeant he came out from the side of the tent and was running away. When he broke out I was coming out from in front of the tent. I wanted to make myself conspicuous in front of the officers so that they could say that I had nothing to do with it. The last I saw of the sergeant was when he ran towards the officers tents."

He further stated that he broke up a later gathering around Lieutenant Gilbert at the lister bag and was thanked by the lieutenant therefor (Pros. Ex. B).

Accused Broughton stated he was taking a bath when he heard the shot fired. He put on his pants and undershirt, proceeded to the orderly room, learned what had happened, and

> "Then I goes to Battalion Headquarters. When I got up there the place was full of people and I see a grey Chevrolet leave out with my own eyes. After I seen the Chevrolet leave, the crowd came back to the company area" (Pros. Ex. D).

Accused Barber stated that he was present when Sergeant Graham fired the shot which struck an enlisted man, Patterson, and that after the crowd gathered at battalion headquarters he

> "walked towards the crowd and saw the sergeant emerge from the side of the tent. He ran towards some civilian automobiles, which was behind the officers tents. I walked towards the crowd and the Officer of the Day

> came by with his gun, a .45 automatic, which was still in the holster. I immediately stopped because I did not want to see any more tragedy" (Pros. Ex. E).

Accused Lee Wright stated that he heard the shot and when he

> "got up to the front of my area I noticed a big crowd around Battalion Headquarters and when I got there I saw a man break out of Battalion Headquarters and run towards the officers tents. The crowd was following him * * *. I started to go to my area but walked over towards the officers tents and met the crowd coming back" (Pros. Ex. F).

Accused Shumaker stated

> "I was in the back of headquarters when they were beating up Sgt Graham * * *. It looked like everyone in the company was up there. When they took Sgt. Graham away, I was standing by the two officers tents out towards the cars and was crying. As far as hitting was concerned, I did not put a scratch on him. I was trying to keep the others from hitting him" (Pros. Ex. G).

Accused Evans saw a soldier placed in a truck and he

> "caught up to the back of the truck and looked in and before I got off, the truck was on its way and was at the guard house. I jumped off and walked back to where the crowd was gathering at the officers tents. When I got there I saw the officer of the day and another officer putting a sergeant in an automobile" (Pros. Ex. H).

In view of the numerous accused, a more satisfactory picture of the complicity of each accused in the offenses can be obtained from the following resume of the prosecution's evidence as it pertains to each accused:

Robert Lamar. This accused was a noisy participant in the crowd at battalion headquarters, remarking with accused Currie that a man who shoots his own color needs killing (R. 52, 53, 69, 75). He stepped inside headquarters tent to ask why someone had been shot, stating, "that mother fucking son of a bitch from Mississippi should be hung. Let's

get him" (R. 64). Angry and upset, "trying to urge the rest of the fellows along with him", he was heard to state at battalion headquarters that they should "get" Sergeant Graham and kill him (R. 95, 99, 102, 103). He was a noisy participant exciting the crowd at the officers' tents where he was heard to proclaim that it was "bad enough having to fight this war without having to put up with this stuff too", until docile and sobbing he was conducted from the scene by Major Thelen (R. 59-61).

Edker Riley. This accused was in the crowd moving to battalion headquarters which refused to obey Lieutenant Gilbert's orders to stop and turn back (R. 102). He was in the van of the crowd milling around the entrance to battalion headquarters (R. 95, 98) and was also a participant in the crowd which assaulted the sergeant at the officers' tents (R. 90).

Marion J. Golden, Jr. This accused was also in the crowd which moved on to battalion headquarters in violation of Lieutenant Gilbert's orders to stop (R. 102) and was in the van of the crowd at headquarters tent (R. 52, 53, 95, 98). He was one of the group at the officers' tents held back by Lieutenant Babcock's drawn pistol (R. 90). He was heard to state that the sergeant ought to be killed (R. 90).

Wince Green. This accused was in the crowd which proceeded to battalion headquarters, was in the crowd milling around battalion headquarters and was identified in the crowd at the officers' tents (R. 90, 102).

Norman Broughton. This accused was in the crowd which proceeded to battalion headquarters and was in the crowd at the officers' tents where he was seen to strike Sergeant Graham a blow on the head and then duck back into the mob (R. 76, 90, 102).

William Buckingham. This accused was in the crowd which proceeded to battalion headquarters, was in the crowd milling around battalion headquarters and was in the crowd at the officers' tents (R. 75, 77, 102).

Edward Currie, Jr. This accused was in the crowd which proceeded to battalion headquarters (R. 26, 52, 53, 75, 102). He was angry and upset and was encouraging the crowd at battalion headquarters (R. 99). He took an active part in the proceedings and was one of the men who kept the crowd at a high pitch (R. 42, 43, 46). He was heard to state at battalion headquarters that a man who shoots his own color needs killing and that the crowd should "get" Sergeant Graham (R. 75, 97, 99, 103). In the crowd at the officers' tents he was heard to remark that

the sergeant ought to be killed (R. 36, 37, 90). After the sergeant had been taken away Currie continued to shout in a loud voice and stated that it was a poor officer who would arm a man like Graham (R. 40).

James Evans. This accused was in the group which proceeded to battalion headquarters and was also in the crowd at the officers' tents where he was seen to kick Sergeant Graham (R. 34, 90, 97, 102).

Natchel Harper. This accused was in the group proceeding to battalion headquarters and was also in the crowd around the officers' tents where he was seen to kick Sergeant Graham in the stomach (R. 43, 102, 105, 106).

Ozzie Hill. This accused was in the crowd which proceeded to battalion headquarters and was in the van of the crowd as it milled about it (R. 95, 98, 102, 105). He was also in the crowd around the officers' tents (R. 90).

Nathaniel Pate. This accused was in the crowd which proceeded to battalion headquarters and was also in the crowd at the officers' tents. He was heard to curse the officers, saying, "Them God damned lieutenants were up there defending the sergeant" (R. 102, 103).

Ben Wilson. This accused was in the crowd which proceeded to battalion headquarters and milled about it, and was also in the crowd at the officers' tents (R. 86, 87, 102). He was heard to remark, apparently in reference to Sergeant Graham, that he was "one of those tough sergeants; he needs killing" (R. 90).

Lee R. Wright. This accused was in the crowd which proceeded to battalion headquarters and milled around it (R. 75, 86, 102). He was heard to remark, "Let's get that Mississippi sucker" or words to that effect (R. 87). He was in the middle of the crowd which pursued the sergeant to the officers' tents and participated in that melee until driven back by Lieutenant Babcock (R. 87, 90).

Beleva P. Bailey. This accused went to the rear of battalion headquarters tent, told Sergeant Graham to come out, stating, "we are going to take care of you", and reached to grasp the sergeant's arm who then sought protection behind one of the white enlisted men (R. 17, 18, 69, 72, 73). He was also in the crowd which chased the sergeant to the officers' tents (R. 19).

James A. Barber. This accused was in the crowd milling around battalion headquarters and was also in the crowd which pursued the sergeant

to the officers' tents where he was observed shouting with accused Phifer (R. 34, 36, 37, 46, 48).

James H. Phifer. This accused was in the crowd at battalion headquarters and joined the pursuit of the sergeant to the officers' tents where he was observed shouting (R. 34, 36, 37, 46, 48, 102).

Albert Shumaker. This accused also was in the crowd which moved on to battalion headquarters and there milled around (R. 34, 102). He also was in the crowd which pursued the sergeant to the officers' tents until Lieutenant Gilbert stopped him and ordered him to go back whereupon he picked up a rock and hurled it at the sergeant (R. 35). He was in the crowd at the officers' tents (R. 46).

Alonzo Wright. This accused was seen in the crowd at the officers' quarters where he was taking a most active part in the melee along with accused Currie (R. 36, 37, 42, 43).

4. The defense offered evidence with respect to the activities of certain of the accused during the above course of events. Such evidence is hereinafter summarized as to each respective accused. Unless otherwise noted, the testimony of the accused was given under oath after a full explanation of the accused's rights.

Robert Lamar. He testified he was taking a bath prior to going on guard duty when he heard the shot fired. Although he saw the crowd gather near the orderly room and in the battalion area he did not at any time join it. He denied that he was led from the crowd by an officer and conducted back to his company street (R. 130-133).

Edker Riley. He testified he heard the shot fired, saw the crowd gather at battalion headquarters but he remained in his company area and did not at any time join the crowd (R. 141). It was stipulated that if Sergeant James Hughes were present he would testify that this accused went on guard at battalion headquarters at 6 p.m. (R. 126).

Marion J. Golden, Jr. He testified he was playing cards with accused Haggard, Green and Buckingham, and one James Deal when the shot was fired (R. 147). He went to the end of the 447th Company street and was ordered by Lieutenant Hampton to stand guard over the arms tent. He did not leave the arms tent and did not join the crowd at battalion headquarters (R. 148). Inferentially he denied that he had made any remark that the sergeant ought to be killed (R. 150). It was stipulated that if Private James Deal were present he would testify that this accused was playing cards with accused Haggard, Buckingham and Green and deponent at the end of the 447th Company street at the time the shot was fired (R. 126).

Wince Green. He testified he was playing cards as set forth in the next preceding paragraph at the time the shot was fired and that he did not go to see why the crowd formed or to join it (R. 151, 152).

Norman Broughton. He testified that he was taking a bath preparatory to guard duty when he heard the shot fired. Putting on his O.D. trousers and his undershirt he proceeded to his company area and heard that somebody had been shot. He saw the crowd at battalion headquarters and, although he started over to it, he heeded the advice of a sergeant, refrained from so doing and returned to his company area (R. 144). He never did join the crowd (R. 145). It was stipulated that if Sergeant James Hughes were present he would state that this accused was taking a bath at the time the crowd gathered (R. 127).

William Buckingham. He testified he was playing cards with accused Haggard, Green and Golden and Private James Deal when the shot was fired. Running up his company street to the supply tent he saw a soldier placed in a truck which was then driven off. He noticed a crowd of men go toward battalion headquarters. He was approximately 20 yards from it and was never a part of it at any time (R. 164). He saw Lieutenant Babcock over by the officers' tents with a drawn pistol ordering the men to fall back (R. 165).

Edward Currie, Jr. He testified that, after the crowd had dispersed, he met Lieutenant Gilbert in the vicinity of the orderly room of the 448th Company and asked him "if he gave this fellow a right to shoot that fellow, and he said no" (R. 202, 203). He was not with the crowd at battalion headquarters or at the officers' tents (R. 204).

James Evans. He testified that he heard the shot fired, saw a soldier carried to a truck, climbed on the truck to look at him and before he could dismount the truck commenced to move. He finally dismounted at the guardhouse about 50 or 75 yards from the orderly room, walked past battalion headquarters, saw a crowd at the officers' tents, proceeded there to see what was happening and arrived as Lieutenant Babcock ordered the crowd back (R. 210). At first he was close to the lieutenant but fell back some 20 yards "and stopped and was looking" (R. 211). He took no part in the crowd "no more than I was in the crowd, but I didn't say anything because I went out in the crowd. I didn't know what was happening and I wanted to see what was going on" (R. 211). He denied that he kicked Sergeant Graham (R. 211, 212).

Natchel Harper. He testified he was taking a bath preparatory to guard duty when he heard a shot fired. He did not go near the gathering crowd, was not with it at battalion headquarters and in fact never left

the company area (R. 137). He denied that he kicked Sergeant Graham in the stomach in the melee at the officers' tents (R. 138, 139). It was stipulated that if Sergeant Hughes were present he would testify that this accused at the time of the shooting was in the lower end of the company area away from the crowd, putting on his uniform (R. 127).

Ozzie Hill. He testified he heard the shot fired and saw a soldier placed in a truck. He then went to the mess hall where he was on K.P. duty. Observing the crowd gather at battalion headquarters he went over to see what was transpiring. As the crowd had gone on to the officers' tents he walked there, arriving as Lieutenant Babcock was ordering the crowd back. He looked around, saw the sergeant on the ground with the lieutenant standing over him, talked to two soldiers, Privates James Carter and Ernest Sands, and then walked back to his company area. He did not get closer than 20 feet to the crowd, did not strike, kick or throw rocks at the sergeant and made no threatening remarks (R. 183-185). It was stipulated that if Privates James Carter and Ernest Sands were present they would testify that this accused did not get closer than 20 feet to the auto which took Sergeant Graham away and that, when the crowd was at battalion headquarters, this accused was on K.P. at the mess hall of the 447th Company (R. 125).

Nathaniel Pate. He testified he heard the shot fired and saw the crowd gather in front of battalion headquarters. He was sewing chevrons on accused Lamar's shirt when the shot was fired (R. 167, 171) but was stenciling boxes at the orderly room when the crowd gathered in front of battalion headquarters (R. 167). He continued to work at stenciling, stopping only to go to the mess hall to get two G.I. cans (R. 168, 170, 171). He did not leave his work to join the crowd (R. 168, 169). It was stipulated that if Private William H. Holliday were present he would testify that this accused was crating boxes at the time the crowd gathered (R. 123, 124).

Ben Wilson. He testified he was loading cots on a truck near the 447th Company's supply room when the shot was fired. Thereafter the soldier who was shot was placed on the truck (R. 178). He saw the crowd gather at battalion headquarters, proceeded there but when he arrived the crowd had gone to the officers' tents. He did not go any further than battalion headquarters and did not join the crowd at the officers' tents (R. 179). It was stipulated that if Corporal Jubilee Phillips were present he would testify that this accused was loading cots on the same truck in which the stricken soldier was placed and was around this truck when the crowd gathered (R. 127, 128).

Lee R. Wright. He elected to remain silent and no testimony was introduced relative to his activities.

Beleva P. Bailey. He testified he was playing cards when the shot was fired and that he

> "looked up and he [presumably Sergeant Graham] was headed for the C P tent and all the boys began to gather quick, because in any case like that a mob or congregation will gather awful fast. If a fellow was late he couldn't get in. I sat there and took my time and I couldn't even get near the crowd, so I looks in the back and the sergeant makes a dive for the bottom of the tent and he broke his way out and come out and I come on around the front. When I come around the crowd had dispersed that quick. I didn't pay any mind. I come around the front to make myself conspicuous because I knew that wouldn't be the last of it, because I knew we would hear more from them, so I said 'I will get around here so they can see me and identify me.' I wasn't in the crowd" (R. 189, 190).

After Sergeant Graham had been taken away in the auto, Lieutenant Gilbert walked to the lister bag, in front of the mess hall, some distance from the officers' tents, and another crowd began to gather around him. This accused directed the crowd to disperse and was thanked by Lieutenant Gilbert for his efforts in so doing (R. 190-193). It was stipulated that if Private Morgan Allen were present he would testify that when the shot was fired he was playing cards with the accused (R. 128).

James A. Barber. He testified that he was on K.P. duty on the day of these events, going to his company area about 3:30 or 4 o'clock to shave (R. 154). After the shot was fired he saw a crowd of some 150 to 200 men gather at battalion headquarters. He started to walk toward the crowd which then pursued the sergeant to the officers' tents and, as he got between battalion headquarters and the parked automobiles, the officer of the day came past. This accused then stopped, saw the sergeant carried off in an auto, and returned to his company area (R. 155, 156). He denied being an agitator in the crowd (R. 156).

James H. Phifer. He testified he heard the shot fired and saw the stricken soldier removed in a truck (R. 134). He observed the crowd gather and move over to battalion headquarters. As he started over to it, the crowd broke and ran to the officers' tents. He started to follow the crowd but stopped when the officer of the day came running past him. He did not get any closer to the crowd than 35 or 40 yards, was

never at any time in the crowd, and did not throw any rocks or sticks at Sergeant Graham (R. 135).

Albert Shumaker. He testified he was in the 448th Company area when he heard a shot fired and trailed the crowd to battalion headquarters (R. 173, 174). Individuals in the crowd were shouting and there was a great deal of noise. He did not know whether he was in the crowd or not (R. 175). He was somewhere between battalion headquarters and the officers' tents when Sergeant Graham was removed in an auto. He was scared, excited and was sobbing when Lieutenant Gilbert came along and led him back to his company area (R. 176). In explanation of his conduct in trailing the crowd he stated, "I was scared, but when a bunch of them gets to running, you run too. It excites you" (R. 177). It was stipulated that if Staff Sergeant Paul T. Haggard, Sr., were present he would testify that this accused was on K.P. duty on the day in question, and that if Sergeant Evans were present he would testify that this accused had left the company supply room to return to K.P. duty just prior to the firing of the shot (R. 121, 122).

Alonzo Wright. He testified he was in the latrine about 50 yards from his company area when he heard noise and commotion. Eventually he went to his orderly room and saw a crowd standing around Lieutenant Gilbert at the lister bag. He was in the latrine for about 20 minutes while the events at battalion headquarters and the officers' tents were taking place (R. 195, 196). He did not kick or slap Sergeant Graham and did not join the crowd at battalion headquarters or at the officers' tents (R. 196, 197). It was stipulated that if Private Thomas J. Sowell were present he would testify that this accused was at the latrine when the shot was fired and that he "got to the Battalion Headquarters tent after the crowd had gathered" (R. 128, 129).

5. In rebuttal of the testimony offered by the defense, the prosecution introduced evidence to show that 10 or 15 minutes after the disturbance at battalion headquarters and the officers' tents, another crowd gathered around Lieutenant Gilbert at the lister bag, one member of it stating that he had no respect for an officer who would defend such a man as Graham and that he ought "to take a poke at him" (R. 215, 216). Accused Bailey was of verbal assistance in dispersing this group and was thanked by Lieutenant Gilbert for his efforts (R. 215). On the afternoon in question accused Golden had not been told by Lieutenant Hampton to remain in the supply tent where the arms were stored (R. 218). There was no arms tent in the company, all of the arms being stored in the supply tent (R. 217, 218).

6. Under the Specification of Charge I the accused were charged with joining in a mutiny, in violation of Article of War 66. Mutiny

imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. The act of insubordination need not be active or violent but may consist simply in a persistent and concerted refusal or omission to obey orders with an insubordinate intent (MCM, 1928, par. 136a). A person is not guilty of joining in a mutiny unless he is present at the scene of the mutiny and joins in some overt act of collective insubordination (MCM, 1928, par. 136b). An examination of the summarized evidence of the prosecution as to each accused in paragraph 3 hereof except Alonzo Wright, demonstrates that accused Lamar, Riley, Golden, Green, Broughton, Buckingham, Currie, Evans, Harper, Hill, Pate, Wilson, Lee R. Wright, Bailey, Barber, Phifer and Shumaker, acting in concert, proceeded to battalion headquarters in violation of Lieutenant Gilbert's orders to withdraw. They refused to obey the orders of several officers to disperse as they thronged about the headquarters and pursued Sergeant Graham to the officers' tents where they resisted Lieutenant Gilbert's authority, certain of them proceeding to strike and kick the sergeant. As to accused Alonzo Wright, the prosecution's evidence shows that this accused was in the crowd at the officers' quarters where, according to the opinion expressed by Lieutenant Gilbert, he took a "most active part" in the melee. It is a general rule that a witness must state facts and not his opinions and conclusions. However, on matters within the common observation and experience of mankind, a witness may express an opinion (MCM, 1928, par. 112b). It is clear that an opinion tending to show the emotion, conduct, or demeanor of another is readily receivable in evidence (Wharton's Criminal Evidence, 11th ed., Vol. 2, p. 1706). Accordingly, the opinion of the lieutenant as to the conduct of accused Alonzo Wright was properly received in evidence and demonstrates that this accused in concert with the others resisted the lawful military authority of Lieutenant Gilbert. The evidence sustains the findings of guilty of Charge I and its Specification as approved by the reviewing authority.

Under the Specification of Charge II the accused were charged with committing a riot, in violation of Article of War 89. A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful (MCM, 1928, par. 147c). This offense differs from that of mutiny and accused may be found guilty of both offenses without being placed in double jeopardy for the same offense (3 Bull. JAG 143-144). The evidence conclusively establishes

that the accused did assemble together of their own authority with intent to assist each other against any opposition and did tumultuously disturb the peace of the battalion area in execution of their enterprise to assault Sergeant Graham. The evidence sustains the findings of guilty of Charge II and its Specification as approved by the reviewing authority.

7. The ages and dates of induction of the accused whose sentences were approved by the reviewing authority are as follows:

	Age	Date of Induction
Robert Lamar	31	10 Dec. 1942
Edker Riley	25	26 Dec. 1942
Marion J. Golden, Jr.	20	28 Jan. 1943
Wince Green	20	28 Jan. 1943
Norman Broughton	20	3 Feb. 1943
William Buckingham	23	17 Dec. 1942
Edward Currie, Jr.	23	19 Dec. 1942
James Evans	22	19 Dec. 1942
Natchel Harper	24	14 Nov. 1942
Ozzie Hill	25	5 Dec. 1942
Nathaniel Pate	24	28 Jan. 1941
Ben Wilson	38	18 Sep. 1942
Lee R. Wright	22	13 Feb. 1943
Beleva P. Bailey	29	11 Apr. 1941
James A. Barber	25	19 Feb. 1942
James H. Phifer	22	25 Feb. 1942
Albert Shumaker	24	4 Apr. 1941
Alonzo Wright	22	21 Jan. 1941

8. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, legally sufficient to support the sentences as approved by the reviewing authority, and to warrant confirmation of the sentences. Death or such other punishment as a court-martial may direct is authorized upon conviction of a violation of the 66th Article of War. Any punishment that a court-martial may direct except death is authorized upon conviction of a violation of the 89th Article of War.

Thomas H. Tappy, Judge Advocate.

Herbert M. Kelleher, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 254692

1st Ind.

War Department, J.A.G.O., 22 JUL 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Technician Fifth Grade Robert Lamar (34535132) and Private Edward Currie, Jr. (34468136), both of the 447th Quartermaster Troop Transport Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentences and to warrant confirmation of the sentences. I recommend that the sentences be confirmed but that each be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty years, and that the sentences as thus commuted be carried into execution. I also recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft ltr for sig S/W.
Incl.3-Form of action.

(Sentences confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for twenty years. G.C.M.O. 485, 7 Sep 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGV
CM 254692

26 MAY 1944

UNITED STATES v. Technicians Fifth Grade ROBERT LAMAR (34535132) and EDKER RILEY (34519028), Privates First Class BRITT BALLARD, JR. (33224399), MARION J. GOLDEN, JR. (34541565), and WINCE GREEN (34619593), Privates JOHN T. BROOKS (32205868), NORMAN BROUGHTON (34569541), WILLIAM BUCKINGHAM (33519644), EDWARD CURRIE, JR. (34468136), JAMES EVANS (33390494), WILLIE L. HAGGARD (34619786), NATCHEL HARPER (34555332), OZZIE HILL (34534260), HARRY L. JAMES (33644698), FRANK NEWBORN (38505862), NATHANIEL PATE (34014020), BEN WILSON (36394643), and LEE R. WRIGHT (32804272), all of 447th Quartermaster Troop Transport Company, and Privates BELEVA P. BAILEY (32085439), JAMES A. BARBER (34251020), JAMES H. PHIFER (34252027), ALBERT SHUMAKER (34100443), and ALONZO WRIGHT (34006067), all of 448th Quartermaster Troop Transport Company.	CALIFORNIA-ARIZONA MANEUVER AREA Trial by G.C.M., convened at Yuma, Arizona, 20 and 21 March 1944. Ballard, Brooks, James and Newborn: Acquittal; Haggard: Disapproved; Lamar and Currie: To be shot to death with musketry; Shumaker, Evans and Broughton: Dishonorable discharge and confinement for fifteen (15) years; Alonzo Wright and Pate: Dishonorable discharge and confinement for ten (10) years; Green: Dishonorable discharge and confinement for eight (8) years - Disciplinary Barracks. Harper and Bailey: Dishonorable discharge (suspended) and confinement for fifteen (15) years; Golden and Lee R. Wright: Dishonorable discharge (suspended) and confinement for ten (10) years; Phifer, Hill, Barber and Buckingham: Dishonorable discharge (suspended) and confinement for eight (8) years. Wilson and Riley: Dishonorable discharge (suspended) and confinement for five (5) years - Ninth Service Command Rehabilitation Center, Turlock, California.

HOLDING by the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

The record of trial in the case of the soldiers named above has been examined and is held by the Board of Review to be legally sufficient to

support the sentences as to the sixteen accused named as follows: Riley, Golden, Green, Broughton, Buckingham, Evans, Harper, Hill, Pate, Wilson, Lee R. Wright, Bailey, Barber, Phifer, Shumaker and Alonzo Wright.

Thomas N. Jeffery, Judge Advocate.

Hartwig in Kleiner, Judge Advocate.

Robert B. Hanford, Judge Advocate.

1st Indorsement.

War Department, J.A.G.O., - To the Commanding General, Camp Haan, Riverside County, California.

1. In the case of Technician Fifth Grade Edker Riley (34519028), Privates First Class Marion J. Golden, Jr. (34541565), and Wince Green (34619593), Privates Norman Broughton (34569541), William Buckingham (33519644), James Evans (33390494), Natchel Harper (34555332), Ozzie Hill (34534260), Nathaniel Pate (34014020), Ben Wilson (36394643), and Lee R. Wright (32804272), all of 447th Quartermaster Troop Transport Company, and Privates Beleva P. Bailey (32085439), James A. Barber (34251020), James H. Phifer (34252027), Albert Shumaker (34100443) and Alonzo Wright (34006067), all of 448th Quartermaster Troop Transport Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sixteen sentences, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order the execution of the sentences imposed upon the sixteen accused named herein.

2. Attention is particularly invited to the sentences to death imposed upon Technician Fifth Grade Robert Lamar and Private Edward Currie, Jr., which the reviewing authority approved but recommended that each be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. The record of trial in each of these cases has been examined and held by the Board of Review to be legally sufficient to support the sentences However, final action by the President is required under the provisions of Article of War 48. In due course you will receive notice of the final action taken by the confirming authority.

3. A teletype is being sent advising you of the foregoing holding and my approval thereof. Please return the said holding and this indorsement and, if you have not already done so, forward therewith five copies of the published order in this case.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

SPJGJ CM 254692 7th Ind. LHC - 77535
Hq, ASF, J.A.G.O.,

4 - OCT 1944

To: The Adjutant General.

1. Attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence as to Technician Fifth Grade Edker Riley, 34519028, Privates First Class Marion J. Golden, Jr., 34541565, and Wince Green, 34619593, Privates Norman Broughton, 34569541, William Buckingham, 33519644, James Evans, 33390494, Natchel Harper, 34555332, Ozzie Hill, 34534260, Nathaniel Pate, 34014020, Ben Wilson, 36394643, and Lee R. Wright, 32804272, all of 447th Quartermaster Troop Transport Company, and Privates Beleva P. Bailey, 32085439, James A. Barber, 34251020, James H. Phifer, 34252027, Albert Shumaker, 34100443, and Alonzo Wright, 34006067, all of 448th Quartermaster Troop Transport Company, which holding was approved by the 1st Indorsement thereto. Under the provisions of Article of War 50½ the sentences may now be executed.

2. In view of the fact that the California-Arizona Maneuver Area, which exercised general court-martial jurisdiction in this case, has been inactivated, it is recommended that War Department general court-martial orders be published and distributed directing execution of the sentences. A draft of such general court-martial order is inclosed.

3. The prisoners are now in confinement at the Ninth Service Command Rehabilitation Center, and it is requested that a copy of the general court-martial order be distributed to the Commanding General, Ninth Service Command, Fort Douglas, Utah.

4. The return to this office of the holding of the Board of Review, together with twenty-one copies of the published War Department general court-martial orders is requested.

For The Judge Advocate General:

R. E. Kunkel,
Colonel, J.A.G.D.,
Chief. Military Justice Division.

1 Incl.
Dft of GCMO.

(Sentence as to each accused as approved and modified by the reviewing authority ordered executed by order of the Secretary of War. G.C.M.O. 542, 4 Oct 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGV
CM 254703

2 JUN 1944

UNITED STATES	71ST LIGHT DIVISION
v.	Trial by G.C.M., convened at Hunter Liggett Military Reservation, California, 30 March 1944. Dismissal.
Second Lieutenant JAMES W. ROBERTSON (0-1174124), Field Artillery.	

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of guilty disapproved by the reviewing authority).

Specification 2: In that Second Lieutenant JAMES W. ROBERTSON, 609th Field Artillery Battalion (Pack), did, at Hunter Liggett Military Reservation, California, on or about 15 February 1944, with intent to deceive Colonel MARLIN C. MARTIN, Hq 71st Light Division, Hunter Liggett Military Reservation, California, officially state to the said Colonel MARLIN C. MARTIN, that his name and organization was Second Lieutenant J. W. JENKINS, 608th Field Artillery Battalion (Pack), which statement was known by said Second Lieutenant JAMES W. ROBERTSON, to be untrue.

Specification 3: In that Second Lieutenant JAMES W. ROBERTSON, 609th Field Artillery Battalion (Pack), did, at Hunter Liggett Military Reservation, California, on or about 16 February 1944, with intent to deceive Major GEORGE E. DOOLEY, 607th Field Artillery Battalion (Pack), officially state to the said Major GEORGE E. DOOLEY, that he did not know Second Lieutenant RAYMOND M. STEINMETZ, 607th Field Artillery Battalion (Pack), that he had never used the alias of Second Lieutenant J. W. JENKINS, and that he was not present at the junction of the King City and Hunter Liggett Military Reservation Highway on or about 15 February 1944, which statements were known by said Second Lieutenant JAMES W. ROBERTSON to be untrue.

He pleaded not guilty and was found guilty of the Charge and all Specifications. No evidence of prior convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 1, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution is substantially as follows:

Colonel Marlin C. Martin, Chief of Staff of 71st Light Division testified that about 0900 on 15 or 16 of February he was riding on the back seat of a Government sedan when he passed within two or three feet of two officers (accused and Second Lieutenant Raymond M. Steinmetz) standing by the road near the information booth at Hunter Liggett Military Reservation, California. Neither officer saluted so Colonel Martin had his sedan backed to where they stood. He asked them why they did not salute and they answered they had not recognized him. He then asked if they knew of the order requiring all official cars to be saluted and "they seemed to know of such an order". Colonel Martin asked each their name and one gave his name correctly as Lieutenant Steinmetz, and accused identified himself as Lieutenant Jenkins of the 608th Field Artillery Battalion. Colonel Martin then looked at them and "told them that was all and they just stood there. I asked them what did they do when they were dismissed with such a statement. I was looking right at the accused. He said, 'salute', or something to that effect, and saluted. However, he did not hold the salute until it was recognized. I looked at Lieutenant Steinmetz. He saluted and I purposely waited before recognizing his salute to see if he knew what to do. He held the salute until I recognized it. I then asked Lieutenant Steinmetz, 'What did you do correctly that this other Officer did not do?' Lieutenant Steinmetz told me that the other officer did not hold the salute untilit was recognized. I then looked at the accused and asked him how much service he had had. He told me he had had five year's service. I remarked, 'You do not show a semblance of even knowing your recruit training.' I took down the names as given to me and, upon arrival in camp, I turned this memorandum to the Division Artillery Commander for his information and necessary action." (R 7).

Colonel George R. Scithers, 71st Light Division, after receiving the report from the Chief of Staff directed Major George E. Dooley to try and find the officer who had given a wrong name to Colonel Martin as above set forth (R. 17).

On the evening of 17 February 1944 Major Dooley interviewed accused who stated he had not been off the post on the previous day, and had not ridden any officers in his car the previous day. Major Dooley then summoned Lieutenant Steinmetz. Upon entering the tent Lieutenant Steinmetz, seeing accused, remarked "You certainly have us in a hell of a jam". Steinmetz identified accused as the officer in whose car he had ridden to

to camp the previous day. Accused still denied he knew Lieutenant Steinmetz and that he had given Lieutenant Steinmetz a ride from King City the previous day. After Steinmetz had been examined Major Dooley talked to accused concerning the seriousness of a false official statement by an officer, told him to think it over, and to call him later if he were guilty. Accused never called Major Dooley (R. 9-11).

The day after receiving Major Dooley's report Colonel Scithers talked to accused in the presence of Lieutenant Steinmetz, and accused at this time admitted he was the officer who had told Colonel Martin that his name was Jenkins. Accused said he had wanted to keep his outfit out of trouble, and had made the statement to Colonel Martin on an impulse (R. 17).

Accused was also interviewed by Major Robert H. Deason, 609th Field Artillery Battalion, 71st Light Division, on 16 February, and admitted he was the officer with Lieutenant Steinmetz on the 15th of February. When asked "how the name of Jenkins came into the picture" accused replied he had given Colonel Martin his correct name and organization but he saw the Colonel write the name Jenkins and 608th. When asked why he did not correct Colonel Martin accused did not reply (R. 18, 19).

Lieutenant Raymond M. Steinmetz, 607th Field Artillery Battalion, 71st Light Division, testified that on 15 February 1944 accused picked him up in his car as he was waiting for a bus and rode him to Jolon, where all civilian cars are stopped. Then they got out and waited on the side of the road trying to catch a ride into camp. At this time Colonel Martin's car came by. This witness corroborates fully Colonel Martin's testimony as to the occurrences at this time, and also Major Dooley's account of the interview between the major, accused and this witness (R. 11-14).

4. No evidence was offered by the prosecution and accused, after having his rights as a witness explained, elected to remain silent.

5. The evidence conclusively shows that on 15 February 1944 accused had ridden to the gate of the Hunter Liggett Military Reservation, California, in his car, and was accompanied by Lieutenant Raymond M. Steinmetz. Both officers left accused's car at this point. While he and Steinmetz were waiting to catch a ride into the Reservation they failed to salute Colonel Marlin C. Martin as he drove by in a Government sedan. After being questioned by Colonel Martin concerning this delinquency accused was asked to give his name and he falsely identified himself to Colonel Martin as Lieutenant Jenkins of the 608th Field Artillery Battalion. The next day, when interviewed by Major Dooley who was investigating the matter, accused denied knowing Lieutenant Steinmetz and that he had given him a ride in his auto the previous day from King City.

The evidence sustains the finding of guilty of Specification 2 and so much of the finding of guilty of Specification 3 as involves the making of the

false official statement by accused that he did not know Lieutenant Steinmetz.

6. War Department records show that accused is 26 years of age. He graduated from Olden High School, Olden, Texas. He entered the Army 25 November 1940, and after completing Field Artillery Officer Candidate School, Fort Sill, Oklahoma, was apointed second lieutenant, Army of the United States, 25 November 1942.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Charge and Specification 2 thereunder and so much of the finding of guilty of Specification 3 thereunder as involves the making of a false official statement by accused that he did not know Lieutenant Steinmetz; legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Thomas H. Tapley, Judge Advocate

Robert B. Harwood, Judge Advocate

Robert E. Trevethan, Judge Advocate

SPJGV
CM 254703

1st Ind.

War Department, J.A.G.O., 12 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James W. Robertson (O-1174124), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specification 2 thereunder, and only so much of the finding of guilty of Specification 3 thereunder as involves the making of a false official statement by the accused that he did not know Second Lieutenant Raymond M. Steinmetz, legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but in view of accused's length of service and previous good record, I recommend that the execution thereof be suspended during accused's good behavior.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig. S/W.
Incl.3-Form of action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 327, 27 Jun 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

22 JUL 1944

SPJGH
CM 254704

UNITED STATES	)	92ND INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, 30 December 1943 and 19 June 1944. Dismissal, total forfeitures and confinement for one (1) year.
	)	
First Lieutenant JAMES L. THOMPSON (O-341678), Infantry.	)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates

---

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 95th Article of War.

Specification: In that First Lieutenant James L. Thompson, Service Company, Three Hundred Seventieth Infantry, being indebted to The First National Bank of Ayer, Massachusetts, in the sum of One-Hundred and Fifty Dollars ($150.00), for a loan secured by promissory note, which amount became due and payable on or about 3 April 1943, did from 3 April 1943 to 30 August 1943 dishonorably fail and neglect to pay said debt.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant James L. Thompson, Service Company, Three Hundred Seventieth Infantry, did, at Fort Huachuca, Arizona, on or about 10 August 1943 with intent to deceive Colonel Raymond G. Sherman, Three Hundred Seventieth Infantry, his Commanding Officer, officially state to the said Colonel Sherman that he had sent a Fifty Dollar ($50.00) check to The First National Bank of Ayer, Massachusetts, which statement was known by the said First Lieutenant Thompson to be untrue in that he had in fact sent no such check.

Specification 2: In that First Leiutenant James L. Thompson, Service Company, Three Hundred Seventieth Infantry, did, at Fort Huachuca, Arizona, on or about 10 August 1943, with intent to deceive Colonel Raymond G. Sherman, Three Hundred Seventieth Infantry, officially state to the said Colonel Sherman, that he had sent a One-Hundred Dollar ($100.00) money order to the First National Bank of Ayer, Massachusetts, which statement was known by the said First Lieutenant Thompson to be untrue in that he had in fact sent no such money order.

Specification 3: In that First Lieutenant James L. Thompson, Service Company, Three Hundred Seventieth Infantry, did, at Fort Huachuca, Arizona, on or about 3 September 1943, with the intent to deceive Colonel Raymond G. Sherman, Three Hundred Seventieth Infantry, officially state to the said Colonel Sherman that he had not sent the One-Hundred Dollar ($100.00) money order to the First National Bank of Ayer, Massachusetts because he had been careless, which statement was known to the said First Lieutenant Thompson to be untrue in that he had cashed the money order on 16 August 1943.

ADDITIONAL CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant James L. Thompson, Service Company, 370th Infantry, was at Fort Huachuca, Arizona, on or about 5 September 1943 in the Service Company, 370th Infantry Orderly Room drunk and asleep in uniform while on duty.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for one (1) year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

a. Specification, Charge I; Specifications 1 to 3, Charge II: Following receipt of a communication from the War Department, Colonel R. G. Sherman, Commanding Officer of the 370th Infantry, of which the accused was a member, summoned the accused sometime between 6 and 10 August 1943, and discussed with him payment of the note of the latter to the First National Bank of Ayer, Massachusetts, in the sum of $150. The accused stated that he had sent $50 by personal check to the bank and intended

to pay the balance from his August pay. Colonel Sherman instructed him to remit the balance by money order without delay. The accused returned the following morning and displayed a receipt, the "stub" of a money order blank, for the sum of $100, payable to the bank, and stated he had sent the $100. Colonel Sherman did not see the money order. After waiting two weeks Colonel Sherman wrote the bank and "just after the 1st of September" received a reply (Ex. A) dated 30 August 1943, that nothing had been received on the note, a duplicate copy (Ex. A) of which was inclosed with the reply. The copy of the note, dated at Ayer, Massachusetts, March 8, 1943, shows a promise by the accused to pay the First National Bank of Ayer the sum of $150 on 3 April 1943. About 3 September Colonel Sherman again questioned the accused who stated that he had sent the $50 and that it must have been lost in the mails. Colonel Sherman did not remember the accused saying that his wife was to have sent the $50 check to the bank. The accused also stated he had sent the money order but after some further discussion said he had not sent it "yet" because "I must have been careless, I guess". Colonel Sherman requested that the accused procure the money order and bring it to him. As the accused did not comply with the request Colonel Sherman made inquiry at the post office concerning the money order and the following day again talked to the accused. He told the accused that he had learned that the money order had been cashed on 16 August and the accused admitted this was true stating that he had gotten "in a strain" and had to cash it (R. 6-14).

It was stipulated that employees of the post office, Fort Huachuca, Arizona, would testify that on 7 August 1943, the accused purchased a money order in the sum of $100, payable to the First National Bank of Ayer, Massachusetts, which he cashed on 16 August 1943 (R. 15).

b. Specification, Additional Charge: About 11 a.m. on 5 September 1943, Captain Frederick H. McGrath, Commanding Officer of the Service Company, 370th Infantry, of which company the accused was a member, saw the accused in the company orderly room. The accused, was "rather sleepy and showed evidence of having been drinking" and Captain McGrath reprimanded him. About 3:30 p.m. Captain McGrath found accused asleep at his (Captain McGrath's) desk. There was a noncommissioned officer in the room at the time typing. Captain McGrath left, made an inspection and when he returned the accused was gone. He sat down, "read the afternoon distribution," and then went to the officers' latrine where he found the accused asleep on the floor. The accused was in uniform. Captain McGrath "wouldn't say" the accused was drunk; "it was probably after-affects". Under the definition in the Manual for Courts-Martial that "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness" within the meaning of the 85th Article of War, Captain McGrath "would say" the accused was drunk (R. 15-17, 23).

On cross and recross-examination, Captain McGrath testified that he did not think the accused was drunk at the time he found him asleep, it was probably the result of drinking and lack of sleep. He would not

say that the accused was drunk on duty. The accused "had a duty as regimental disposal officer", dispatched trucks and checked to see whether they picked up "stuff" in the areas; usually the accused was out when Captain McGrath was at company headquarters. During the afternoon the only times he saw the accused were when he was asleep in the chair and twenty minutes later when he was asleep in the latrine. The accused, however, was drunk interpreting drunkenness as unfitness for duty. He was not in condition to perform his duty due to drink. Under examination by the court Captain McGrath testified that the accused was "on duty" when he saw him asleep in the orderly room. The phone was ringing but accused did not awaken. Four hours earlier when he reprimanded him, the accused "had the smell of liquor on him". He would "judge" that the accused was able to perform military duty at that time but he did not know if accused did perform any duty. The duties of accused were administrative and he could have handled them "up to falling asleep". The accused was supposed to be on duty at 3:30 p.m. when Captain McGrath found him sleeping. Captain McGrath "judged" that the accused was not in condition to remain awake at that time as a result of intemperance, possibly the night before or that morning. The accused was not then in condition to do military duty, not while sleeping. Comparing the accused with other men he had seen drunk, Captain McGrath "would say" he was drunk. When he found accused asleep on the floor he opened his eyes and Captain McGrath left to report him. Captain McGrath would not have assigned him to any clerical work or to guard duty because of his physical condition. What he meant was that a man who has been drunk, for example, for two days and becomes sober, is not physically fit for duty, but he could not say he is drunk (R. 17-25).

4. Evidence for the defense: The accused testified that he made a loan from the Ayer bank in March and gave a note payable a month later. The first notification concerning his failure to pay came in July by indorsement from regimental headquarters. The bank may have written him but he did not receive it due to his change of station from Fort Devens to Fort Dix and then to Fort Huachuca. He replied by indorsement stating he would pay $50 a month beginning in August until it was liquidated and took the indorsement to the regimental adjutant who said he felt this arrangement would be satisfactory. About 3 September (August?) he gave his wife a sum of money to take care of their obligations and "since she had never failed to meet any obligation before, I said nothing more to her about it". The adjutant told him about 5 or 6 September (August?), that Colonel Sherman wanted to see him because the indorsement had been lost. Colonel Sherman asked him what arrangements had been made and he replied that he had sent the money or a check. He believed that his wife had sent the money and therefore felt he could make this statement. Colonel Sherman asked if he could get the balance and accused said he could. The following morning he showed Colonel Sherman a completed money order, with attached receipt,

but he did not say he had mailed it. He carried the money order around in his pocket until 16 September (August?) when he cashed it. When Colonel Sherman later called him in and told him he had a letter from the bank dated 30 August stating nothing had been received on the obligation, accused again told him he had mailed the bank a check for $50. Colonel Sherman asked if he had mailed the money order and accused replied that he had not, adding, "It was partially carelessness". Accused was instructed to produce a receipt for the $50 but not finding it among his wife's cancelled checks or money order slips, he asked her about it and learned she had not sent it. He went to Colonel Sherman the following day, told him the circumstances about the $50, and also that he had cashed the $100 check. Colonel Sherman then questioned whether accused had ever purchased a $100 money order and said he would go to the post office and make inquiry. Accused sent the bank a check for $150 about 2 or 3 September and received his note showing it was paid on 7 September. This was six months from the date it was signed and five months from the due date (R. 40-42).

Concerning the Specification of the Additional Charge, accused testified that about 11 p.m. on 4 September, he and his wife, who lived in an apartment house, were asked to go to an adjacent apartment, to take care of a woman who was sick. They did so and he remained there until 4 or 5 a.m. when he returned to his apartment, dressed and laid down until it was time to report. He reported at 7:30 a.m. and proceeded to post Army regulations and file the distributions received. He sat down at Captain McGrath's desk to answer the phone and after completing the conversation leaned forward on the desk. A staff sergeant came in and sat at the desk of accused using the typewriter. Accused remained in that position for about five minutes when Captain McGrath came in and reprimanded him. A little later accused went to have his helmet painted and from there to mess. During the afternoon he became more and more drowsy every minute and felt that it would help if he could get five or ten minutes sleep. He went into the latrine, he thought he locked the door, and sat there with his head down on his knees when Captain McGrath came in and opened the door. The accused looked up and Captain McGrath walked out of the room (R. 38-40).

On cross-examination and examination by the court accused testified that when he purchased the $100 money order he intended to send it to the bank but put it in his pocket and forgot it. Later he needed some money, remembered the money order and cashed it. Due to the fact that he supported his mother and also had two permanent changes of stations involving expenses in "closing out" apartments in Boston and Philadelphia, he was not able to pay the note prior to August 1943, without a financial strain. Although he had not received any demand from the bank for payment he felt it was his obligation to pay it. He made no effort to pay until Colonel Sherman called him in. He did not have a car. His wife commenced working about 1 June but for the first two

or three months her earnings were sent to her mother or used to buy clothes. Accused further testified that the woman they were with on the night of 4 September was dangerously ill. She was pregnant and had a sprained ankle as the result of a fall from the steps of the Officers' Club a few days before. She was admitted to the hospital on the morning of 5 September and had a miscarriage. About three or four o'clock that morning, accused had one "drink", about a quarter of a small water glass or cheese glass. When he was at Captain McGrath's desk he had his head down on his arms. He did not think he "was what you would call asleep", and was aware of sounds although they did not enter his consciousness completely. If he had been addressed directly he thought it would have "penetrated" and he would have gotten up. Captain McGrath reprimanded him for sleeping at the desk but accused could not recall whether he said anything about the sobriety of accused (R. 43-49).

Mrs. Alice Thompson, wife of the accused, testified that in the first part of August the accused told her to send a check to the bank at Ayer. The matter "slipped" her mind and she did not send it. She told him nothing about her failure to send it until he asked about it (R. 34-36).

Technician Fourth Grade Alvin L. Moon, acting supply sergeant of the Service Company, saw the accused in the company orderly room on the morning of 5 September. He remembered the day because it was "on or about" the time the officers got their helmets painted and also because the accused said he had been up with a sick lady the night before and was sleepy. Accused was performing his normal duties and at the request of Sergeant Moon signed a requisition for him. He smelled no liquor on accused at that time or at any other time since he had known him. Sergeant Moon saw accused at his desk that morning working on some papers. He did not see the accused asleep at any time. He also saw accused about 3 p.m. when he came through the supply room and the accused was the "same as he always was". Second Lieutenant Charles Ellis picked up the accused in his jeep sometime during the morning of 5 September, "about 8 or 8:30" and took him to the motor pool to have his insignia painted on his helmet. He talked to the accused about 10 or 15 minutes, smelled no liquor on him and saw nothing "peculiar" about him. In his "estimation" the accused was not drunk. Technician Fourth Grade Henry White saw the accused in the motor pool between "10 and 11 o'clock" on the morning of 5 September. At the request of the accused Sergeant White painted his helmet. He noticed nothing unusual about the accused, did not notice whether he was drinking but accused stood close to him and "it didn't seem like he was drunk" (R. 26-34).

Major William E. Allen, Medical Corps, had known the accused since 4 March 1941, was in the same battalion and lived in the same quarters with him while they were stationed at Fort Devens, Massachusetts. During this time he had no reason to believe that the accused had "any

bad character of any type". First Lieutenant Edward T. Mayfield, a member of the same company as accused, knew the accused since 1941, worked under him, and knew him socially. He had no reason to believe that the character of accused was other than "very high", had never seen him drunk on duty, or under the influence of liquor, or smelled liquor on his breath during duty hours (R. 25-26, 36-37).

5. a. Specification, Charge I; Specifications 1 to 3, Charge II: The evidence for the prosecution shows that about 8 March 1943, the accused borrowed $150 from the First National Bank of Ayer, Massachusetts, giving his note payable 3 April 1943. A communication was received by Colonel R. G. Sherman, regimental commander of the accused, from the War Department concerning the failure of the accused to discharge the obligation. Colonel Sherman questioned the accused concerning the matter about 6 August 1943 and the accused stated that he had sent $50 by personal check to the bank and that he intended to discharge the balance from his August pay. Colonel Sherman instructed him to pay the balance by money order, without delay. On 7 August the accused purchased a $100 money order payable to the First National Bank of Ayer, Massachusetts, showed the "stub" or receipt to Colonel Sherman and told him that he had sent the bank the $100. However, on 16 August the accused returned the money order to the post office and cashed it. Colonel Sherman wrote the bank to ascertain if the obligation had been discharged and received a reply, dated 30 August, that nothing had been paid on the note. He showed this reply to the accused about 3 September and the accused reiterated that he had sent the bank a check for $50 adding that it must have been lost in the mails. He also stated that he had sent the money order but after some further discussion with Colonel Sherman said he had not sent it "yet" because "I must have been careless, I guess". Colonel Sherman told him to get the money order and bring it to him. The next day Colonel Sherman made inquiry at the post office and found out that the money order had been cashed.

The accused testified that a letter concerning his failure to pay the note was indorsed to him by regimental headquarters in July. He replied by indorsement stating he would pay $50 a month beginning in August, and took the indorsement to the regimental adjutant who stated he thought the proposed arrangement was satisfactory. This was the earliest he could pay anything on the note due to the expenses connected with two changes of station and the fact that he was supporting his mother. His wife had commenced working in June but her earnings for two or three months went to buy clothes or to help her mother. About 3 September (August?) he gave his wife the money to pay their obligations and "since she had never failed to meet any obligation before, I said nothing more to her about it". (The wife of accused testified that in early August he told her to send a check to the bank but the matter "slipped" her mind and she said nothing to him about it until he inquired about it.) The indorsement which he had given the adjutant was lost and Colonel Sherman called him in personally about 5 or 6 September (August?) to find out what he was doing regarding the note. The accused, believing

that his wife had sent the money, told Colonel Sherman that he had sent the bank a $50 check. Colonel Sherman asked him to pay the balance so he secured a money order with attached receipt which he showed in its entirety to Colonel Sherman. He did not tell him that he had sent it. He placed the money order in his pocket and forgot about it but later needing money, he remembered it and cashed it. When Colonel Sherman called him in about 3 September he told him he had mailed the bank a check for $50 but had not mailed the money order adding, "It was partially carelessness". He was instructed to produce a receipt for the $50 payment and thereupon talked to his wife who said she had not sent it. The accused then went to Colonel Sherman and explained the circumstances to him. The note was paid on 7 September.

With reference to the failure of the accused to pay his note to the bank (Spec., Chg. I), the evidence discloses little more than the fact that he did not discharge the obligation until it was five months past due. The accused testified that he was unable to pay the note earlier due to the fact that he was supporting his mother and that he had been put to considerable expense by reason of two permanent changes of station. The Board is not convinced that the failure of the accused to meet his obligations promptly is proven attributable to an evasive or dishonorable motive, or to any indifference to his legal obligations. It was held in CM 121207 (Dig. Ops. JAG 1912-40 Sec. 453 (14)):

> "Dishonorable neglect to pay debts is a violation of Article of War 95. Neglect on the part of an officer to pay his debts promptly is not of itself sufficient grounds for charges against him. Where the nonpayment amounts to dishonorable conduct, because accompanied by such circumstances as fraud, deceit or specific promises of payment, it may properly be deemed to constitute an offense. Where the specification alleged that accused, as an officer, failed and neglected to pay debts, and the proof does not show such conduct with reference to the debts as would constitute an offense, although some of the debts had been due for more than seven months, a finding of guilty cannot be sustained."

Although the evidence here shows that the accused made false statements to his commanding officer concerning payments allegedly made on the obligation there is no showing that these statements were communicated to the bank. No fraud or deceit was practiced on the bank nor any specific promise of payment (other than the note) made to the bank. Under the circumstances the Board is of the opinion that the failure of the accused to meet this obligation is not proven to be dishonorable within the meaning of the 95th Article of War or discreditable within the meaning of the 96th Article of War (cf. CM 207712, Thompson, 8 B.R. 319; CM 217636 Nichols, 11 B.R. 285).

It is shown that about 6 August 1943 accused told Colonel Sherman his regimental commander, that he had sent the bank a check for $50 and that the statement was false (Spec. 1, Chg. II). Although in effect admitting the falsity of the statement the accused insisted that it was made in good faith inasmuch as a few days before he had given his wife the money, had instructed her to send it to the bank and assumed she had mailed it. His wife testified that she had been so instructed but that the matter "slipped" her mind. It is further shown that about 7 August 1943 the accused purchased a $100 money order payable to the bank, brought the receipt to Colonel Sherman and stated to him that he had sent the money to the bank, which statement was false (Spec. 2, Chg. II). Accused contended that he showed the whole money order to Colonel Sherman and not the receipt alone, and did not tell Colonel Sherman that he had sent the money to the bank. The court by its findings of guilty of these two Specifications avowed its disbelief in the testimony of the defense, a conclusion with which the Board is in full accord. The testimony of the accused concerning the $50 check is more ingenious than credible while his testimony concerning the money order is neither.

The evidence also sustains the Specification alleging that accused falsely stated to Colonel Sherman on 3 September that the reason he had not sent the money order to the bank was because he had been careless (Spec. 3, Chg. II). Accused purchased the money order on 7 August when directed by Colonel Sherman to send the balance due on the note to the bank by money order, showed Colonel Sherman the money order receipt on that date and stated that he had made the remittance. Instead accused kept the money order and cashed it on 16 August. Then, when questioned by Colonel Sherman on 3 September, he stated that he had not sent the money order "yet" because "I must have been careless, I guess". Such a statement was false and deceitful. Its purpose was to lead Colonel Sherman to believe that the money order was still in the possession of accused when in fact he had cashed it more than two weeks previously. Not only was this statement false by reason of its false implication and incomplete character but taken literally it was without any factual basis. There is nothing to show that his failure to send the money order resulted from carelessness. His testimony that he placed the $100 money order in his pocket and forgot about it is manifestly incredible considering his straitened financial condition at the time. Whether accused purchased the money order solely to deceive Colonel Sherman, intending to cash it after it had served this purpose, or whether he actually intended to mail it at the time of purchase but later changed his mind, in either event his failure to send the money order was the result of deliberate action on his part and not the result of any carelessness. The finding of guilty of the Specification is sustained.

b. Specification, Additional Charge: The evidence shows that the accused was on duty 5 September 1943 and that at about 11 a.m. on that date was in the company orderly room. He looked "rather sleepy", "showed

evidence of having been drinking", and had the "smell of liquor on him". A noncommissioned officer was working in the room. Captain Frederick H. McGrath, the company commander, reprimanded him for his appearance. At 3:30 p.m. Captain McGrath returned to the company orderly room and found the accused asleep at the desk. The phone was ringing but the accused did not awaken. Captain McGrath walked outside and when he returned shortly the accused was gone. About 3:50 p.m. Captain McGrath went into the officers' latrine and found the accused asleep on the floor. The accused immediately opened his eyes. The accused testified that he and his wife had sat up with a neighbor lady who was ill most of the preceding night. The only time he laid down was from 4 or 5 a.m. to 7:30 a.m. He had one "drink" about 3 or 4 a.m., about a quarter of a cheese glass. He reported for duty at 7:30 a.m., performed his usual duties, and was leaning forward on the desk when Captain McGrath came in and reprimanded him. Shortly afterwards he went to have his helmet painted and from there he proceeded to mess. In the afternoon he became very drowsy and decided to get five or ten minutes sleep. He went into the latrine, he thought he locked the door, and sat there with his head down on his knees when Captain McGrath entered. Three defense witnesses who saw the accused at various times in the morning of 5 September and at 3 p.m. that date testified that accused performed his normal duties, did not have the odor of liquor on him, and was not drunk. Captain McGrath further testified that the accused was able to perform his military duties at the time he saw him in the morning. He did not think that the accused was drunk. It was probably the result of previous drinking and lack of sleep. However, Captain McGrath believed that the accused was drunk under the definition in the Manual for Courts-Martial that "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness" within the meaning of the 85th Article of War, because the accused was unable to perform his duties. The accused was able to perform his duties "up to falling asleep"; while he was asleep he could not perform his duties.

The accused is charged with being "drunk and asleep in uniform while on duty" in violation of Article of War 95. Although there can be no doubt that during the time the accused was on duty on 5 September "the rational and full exercise of the mental and physical faculties" of the accused were sensibly impaired there exists grave doubt in the minds of the members of the Board that it is proven that such impairment was the immediate result of intoxication. The Board does not doubt that such impairment resulted from an alcoholic escapade the preceding night attended by loss of sleep and is not inclined to place much credence in the testimony of the accused as to preceding events. Nevertheless the question remains whether the fact that an officer who has the odor of liquor about him, shows signs of having been drinking, and falls asleep on duty is proven to be intoxicated when it is shown that he is otherwise able to perform his duties, otherwise acts in a normal manner, and in the opinion of all the witnesses is not "drunk". After careful

consideration of all the evidence the Board concludes that it is not proven beyond a reasonable doubt that the accused was drunk on duty (cf CM 220672, Erickson, 13 B.R. 35). The Specification alleges that accused was "drunk and asleep in uniform while on duty" at a particular time and place. The language remaining, if the word "drunk" be excepted from the Specification, is in the opinion of the Board insufficient to state an offense under the rule that where an act charged is not per se an offense, words such as "wrongful", "unlawful" or the like must be used in the Specification to make it an offense (CM 113535 and 130811, Dig. Ops. JAG 1912-40, sec. 451 (8); CM 218409, 1 Bull. JAG 18; CM 226512, 2 Bull. JAG 17). The finding of guilty of this Specification is, therefore, not sustained.

6. The accused is 30 years of age. The records of The Adjutant General's Office show his service as follows: Appointed second lieutenant, Infantry Reserve, Army of the United States, and accepted 5 June 1936; active duty from 16 July 1936 to 29 July 1936, and from 14 July 1939 to 27 July 1939; promoted to first lieutenant, Infantry Reserve, Army of the United States, 20 September 1939; active duty from 3 March 1941.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the Specification, Charge I, and Charge I, and of the Specification, Additional Charge, and the Additional Charge; legally sufficient to support the findings of guilty of Specifications 1, 2 and 3, Charge II and Charge II; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Samuel M. Drier, Judge Advocate.

Robert J. Plumer, Judge Advocate.

(On Leave), Judge Advocate.

(340)

1st Ind.

War Department, J.A.G.O., 11 AUG 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant James L. Thompson (0-341678), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of the Specification, Charge I, and of Charge I, and of the Specification, Additional Charge, and of the Additional Charge, but legally sufficient to support the findings of guilty of Specifications 1, 2 and 3, Charge II, and of Charge II; and legally sufficient to support the sentence and to warrant confirmation thereof. The accused, on three different occasions, made false statements to his regimental commander when questioned concerning payment of his past-due note to a bank in the sum of $150. About 6 August 1943, the first occasion, he falsely stated that he had sent the bank a check for $50 (Spec. 1, Chg. II). The following day the accused showed him a money order receipt for $100 and falsely stated that he had sent the bank that amount (Spec. 2, Chg. II). He had in fact on 7 August purchased a money order but did not send it and cashed it himself on 16 August. On 3 September, when questioned again he repeated his previous false statement that he had sent the bank a check for $50 and also falsely stated that he had not sent the money order "yet" because he had been "careless" (Spec. 3, Chg. II). The note was paid about 7 September. It appears from papers attached to the record that accused procured a loan of $150 from the Red Cross on 10 August 1943 for the declared purpose of discharging this note. Payments on the loan of $50 each were due the Red Cross on 2 September and 2 October but as of 18 October 1943 only $25 had been paid. The dishonesty shown by accused in his dealings with his commanding officer and his indifference to his financial obligations indicates a fundamental lack of character and renders undesirable his continuance in the service as an officer. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for one (1) year be confirmed but that the confinement and forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

3 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 502, 13 Sep 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 254722

30 MAY 1944

UNITED STATES	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	
Second Lieutenant TARJE M. GRIMSTAD (0-731570), Air Corps.	)	Trial By G.C.M., convened at Randolph Field, Texas, 3 April 1944. Dismissal, total forfeitures, and confinement for three (3) years.

OPINION of the BOARD OF REVIEW
LYON, ANDREWS and SONENFIELD, Judge Advocates.

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Tarje M. Grimstad, Air Corps, did, without proper leave, absent himself from his station at Randolph Field, Texas, from about 16 November, 1943, to about 23 November, 1943.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Tarje M. Grimstad, Air Corps, did, in San Antonio, Texas, on or about 21 November 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Gunter Hotel Corporation, a certain check in words and figures as follows, to wit:

San Antonio, Texas, November 21, 1943.
Pay to the order of - Gunter Hotel $50.00
Fifty and No/100 Dollars.
To: Security Trust and Savings Bank (s) Tarje M. Grimstad, 2nd Lt.
Billings, Montana TARJE M. GRIMSTAD. 0-73157

and by means thereof did fraudulently obtain from the Gunter Hotel Corporation the sum of $50.00, he the said Second Lieutenant Tarje M. Grimstad, then well knowing that he did not have and not intending that he should have an account with the Security Trust and Savings Bank of Billings, Montana, for the payment of said check.

Note: and two additional specifications, Specification 2 being identical in form with Specification 1, and Specification 3 being identical in form with the exception of the date of the check, which is 20 November 1943.

ADDITIONAL CHARGE I: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant Tarje M. Grimstad, Air Corps, did, at the St. Anthony Hotel, San Antonio, Texas, from between on or about 3 December 1943 to on or about 28 December 1943, wrongfully and illegally cohabit with a female, other than his wife.

Specification 3: (Nolle prosequi by direction of appointing authority).

Specification 4: In that Second Lieutenant Tarje M. Grimstad, Air Corps, did, in San Antonio, Texas, on or about 28 December 1943, with intent to defraud, wrongfully, and unlawfully, make and utter to the St. Anthony Hotel, a certain check in words and figures as follows, to wit:

THE ST. ANTHONY HOTEL
San Antonio, Texas.
December 28, 1943.

Pay to the order of THE ST. ANTHONY HOTEL $75.00
Seventy-five and No/100 . . . . . Dollars
(s) Tarje M. Grimstad, 2nd Lt., AC,
Randolph Field, CIS 0-731570.

TO: Security Trust & Savings Bank
Billings, Montana.

and by means thereof did fraudulently obtain from The St. Anthony Hotel satisfaction of his account with such hotel in the amount of $63.16, and lawful money of the United States in the amount of $11.84, and he the said Second Lieutenant Tarje M. Grimstad, then well knowing that he did not have and not intending that he should have an account with the Security Trust and Savings Bank of Billings, Montana, for the payment of said check.

Specification 5: In that Second Lieutenant Tarje M. Grimstad, Air Corps, did, in Omaha, Nebraska, on or about 12 November 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Eppley Hotels Company, a certain check in words and figures as follows, to wit:

November 12 1943

Pay to the order of EPPLEY HOTELS COMPANY $50.00
Fifty and no/100 Dollars.

National Bank of Ft. Sam Houston, San Antonio, Texas.
Room #437

(s) Tarje M. Grimstad, 2nd Lt.,AC,
Randolph Field, Texas.
Serial Number O-731570

and by means thereof did fraudulently obtain from the Eppley Hotels Company the sum of $50.00, he the said Second Lieutenant Tarje M. Grimstad, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said check.

Note: and three additional specifications, all identical in form with Specification 5 with the exception of the dates of the checks, which are as follows:

Specification 6: Check dated November 13, 1943.
Specification 7: Check dated November 14, 1943.
Specification 8: Check dated November 14, 1943.

Specifications 9, 10, 11: (Nolle prosequi by direction of appointing authority).

Specification 12: In that Second Lieutenant Tarje M. Grimstad, Air Corps, having been restricted to the limits of Randolph Field, Texas, did, at Randolph Field, Texas, on or about 15 January 1944, break said restriction by going to the St. Anthony Hotel at San Antonio, Texas.

ADDITIONAL CHARGE II: (Nolle prosequi by direction of appointing authority).

Specification: (Nolle prosequi by direction of appointing authority).

ADDITIONAL CHARGE III: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Tarje M. Trimstad, Air Corps, being indebted to the Park Hotel, Great Falls, Montana, in the sum of $106.58, for lodging and services furnished between 1 July 1943 and 30 September 1943, which amount became due and payable on or about 30 September 1943, did, at Great Falls, Montana, from 30 September 1943, to 31 January 1944, dishonorably fail and neglect to pay said debt.

The appointing authority directed that a nolle prosequi be entered as to Specifications 3,9,10, and 11 of Additional Charge I, and as to Additional Charge II and its Specification. Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1, Additional Charge I and guilty of the Specification of Additional Charge III except the figures and words "$106.58" and "dishonorably", substituting therefor respectively the figures and words "$105.78" and "wrongfully", of the excepted words not guilty, of the substituted words, guilty, not guilty of the Charge, but guilty of a violation of the 96th Article of War, and guilty of all other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for three years. The reviewing authority approved the sentence, stating that, "If I had the power I should order the sentence executed as approved", and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

Insofar as is possible, the offenses will be set forth in the order in which they occurred, rather than as set forth in the Charge Sheets. Evidence for the defense will be set forth by specific offenses. Accused made an unsworn statement through his counsel after a thorough explanation by the law member of his rights as a witness (R. 73).

a. Charge I and Specification (Absence without leave from 14 November 1943 to 23 November 1943).

Lieutenant Colonel George M. Frame, Air Corps, 1053rd Basic Flying Training Squadron, Randolph Field, Texas, testified that he was accused's commanding officer. The morning reports of the squadron, prepared for witness' signature, showed accused from "duty to AWOL, 1100, 16 Nov. 43" and from "AWOL, 1100, 16 Nov. 43, to sk in hosp, 0020, 23 Nov. 43" (R. 9, 10; Pros. Exs. 2,3). To witness' recollection, accused reported back to the squadron from the hospital the day after his return to the hospital from his unauthorized absence (R. 10).

b. Evidence for defense, Charge I and Specification.

In his unsworn statement accused said in part, concerning this offense:

"Arriving at Randolph Field on November 15th, I reported and discovered for the first time that I was to be trained as an instructor. Until then I had believed that I was being assigned to a combat unit where my experience would stand me in good stead. I was quite disappointed and a little bitter. I went to San Antonio the evening of the 15th of November and imbibed much too freely with the result I didn't come out of the fog until two or three days later, at which time I became deathly ill. I was extremely weak and unable to eat a thing. However, thinking it would pass away soon, I decided to remain where I was until I could re-

turn to duty without going to the hospital. I finally became so ill that the hospital was the only place for me, so I returned to Randolph Field and entered the * * * post hospital where I remained for nine days before being released * * *" (R. 74).

c. Specifications 5,6,7 and 8, Additional Charge I (Wrongfully making and uttering four worthless $50 checks, in violation of Article of War 96).

The prosecution introduced the testimony of Mr. E. Lloyd Bumpas, Assistant Manager of the Hotel Fontenelle, Omaha, Nebraska, in the form of two depositions (R. 46,47; Pros. Exs. 13,14). Attached to the depositions were the checks issued by accused (Exs. A,B,C,D). On 12 November accused tendered to the cashier of the hotel, a unit of the Eppley Hotels Company, a check for $50. The records of the hotel show that it was cashed and that accused received $50 for it (Pros. Ex. 13, Ex.D). On 13 November the hotelcashed another $50 check of that date for accused, and on 14 November two more checks, each for $50. All were drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, and all bore accused's signature, serial number, and rank. The only check cashed personally by witness was that of 13 November (Pros. Ex. 14, Exs. A,B,C). All four checks were deposited to the hotel's checking account, and all were subsequently returned to it, bearing attached a form slip of the drawee bank, with the annotation, "Not Sufficient Funds", checked in pencil (Exs. A,B,C,D).

Mr. W. L. Bailey, the assistant cashier of the National Bank of Fort Sam Houston, testified that the signatures on the checks were the same as that upon accused's specimen signature card (Pros. Ex. 15; R. 53). Defense counsel, while refusing to enter into a stipulation concerning the signatures, subsequently admitted that accused gave the checks (R. 50,57).

There was introduced into evidence the bank's ledger sheets covering accused's account during the period from 21 July 1943 to 21 March 1944. Mr. Bailey stated that this was a record of all transactions, including checks drawn on, deposits made to, and service charges against, accused's account in that period (R. 53,58; Pros. Ex. 16). Summarizing the condition of accused's account between 1 October 1943 and 20 November 1943 (the date shown by the indorsement on Exhibits C and D to be that by which all four checks had passed through the hands of the San Antonio branch of the Federal Reserve Bank of Dallas (R. 55)), it appears that on 30 September, accused's account was overdrawn $1.79. Accused made two deposits (on 7 October and 9 October) totaling $346.35, and during the month drew nine checks, in amounts from $15 to $125, and totaling $344. There also appear eight debit items of 50¢ each and one debit item of $1, during the month. The account was overdrawn 94¢ on 20 October and $4.44 by 29 October, as a result of successive 50¢ debits (Pros. Ex.16).

During the period from 1 November through 20 November, accused made two deposits (on 2 November and 8 November) totaling $272.75. Eight separate checks were debited, in amounts from $15 to $75, and totaling $265. Twelve debit items of 50¢ each are found. The balance in the account on 8 November, after a $140 deposit, was $142.81, but five checks presented on 10 November reduced the balance to $2.81. A 50¢ debit item on 13 November, five such items on 17 November, and five more on 19 and 20 November resulted in an overdrawn status of $2.69 (Pros. Ex. 16).

A further examination of the record of accused's account back as far as 31 July discloses that on such date he had a balance of $206.62. During the month of August he drew 23 checks, in amounts ranging from $10 to $65, and totaling $553.94. There were also seventeen 50¢ items and one $1 item. During August there were two deposits, on the 5th and 10th, totaling $247.75. By 14 August the account was overdrawn by 7¢, and by 30 August, as a result only of the 50¢ and $1 items, by $9.07. In September accused drew 9 checks, in amounts ranging from $15 to $100, and totaling $391.97. There were also three 50¢ items and one $1 item. During September there were two deposits, on the 7th and 8th, totaling $247.75. By 11 September the balance was 21¢, and by 30 September, as a result only of the 50¢ and $1 items, it was overdrawn by the $1.79.

Mr. Bailey testified that it was the policy of the bank to make a 50¢ service charge the first time a check was returned through regular clearing house channels for lack of sufficient funds in the account upon which it was drawn (R. 54,57). Between 21 July and 28 December 1943, there were 43 such debits to accused's account, including those set forth above (R. 59). They could also have been a series of 50¢ checks (R. 60).

Testifying from a "return check sheet" for 16 November and 19 November, which sheet he stated was a permanent record of the bank, prepared and maintained in the ordinary course of business by "any number of bookkeepers" (none of whom he could identify), witness stated that on 16 November they returned accused's 12 November check and on 19 November they returned the 13 and 14 November checks (R. 54-56,58).

d. Evidence for defense, Specifications 5,6,7 and 8, Additional Charge I.

In his unsworn statement accused said, in part, concerning these Specifications:

> "The matter of the Fontennelle Hotel checks is an entirely different situation. Here, I was careless and neglectful in that I had only a vague idea as to the * * * status of my checking account at Fort Sam Houston Bank. This was due to the fact that in April of 1943 all my cancelled checks, statements, and so forth, began to be sent to my mother instead of to me. This was instituted primarily because of the fact that not only

was I out of the State a great deal on ferrying missions, but also because I expected a transfer to foreign service at any moment. My pay check was always sent directly to the bank by the Finance Office, and I would issue checks against it. * * * [These] checks were written in good faith and with the belief that they would be honored. As soon as I discovered that they were not honored, I sent the Fontenelle back a check to cover. Said check was honored and my account and debt paid in full.* * * It was never my intention to write the above mentioned checks with any thought that they would not be honored" (R. 74-75).

e. Specifications 1,2, and 3, Charge II (Wrongfully making and uttering three worthless $50 checks, in violation of Article of War 96).

Mr. William M. Corrin, Executive Assistant Manager of the Gunter Hotel, San Antonio, Texas, testified that the hotel records in his custody showed that accused registered at the hotel at 1828 on 15 November and checked out at 1435 on 22 November. On 20 November the hotel cashed a $50 check, signed by accused, dated that date, and payable to the hotel (R. 12; Pros. Ex. 7). On 21 November the hotel cashed two more $50 checks, otherwise similar to the first except for the date (R. 12; Pros. Ex. 5, 6). All three were drawn on the Security Trust and Savings Bank of Billings, Montana. The checks were deposited by the hotel to its checking account, and it was given credit for them, but the account was charged back when the checks were returned from the drawee bank bearing the notations, "No account". The checks were returned on either 3 or 4 December (R. 12-14).

Mr. Hayden Lonney White, Cashier of the Security Trust and Savings Bank, of Billings, Montana, testified by deposition that he had known accused since childhood, and that the records of the bank showed that accused had never had a checking account there. Prosecution's Exhibits 5,6 and 7 were presented to the bank in the usual course of business on 27 and 30 November, and returned unpaid to the last indorser for this reason. Accused's mother, Mrs. Carmen G. Thuerer, had had an account with the bank for a number of years, and in the past the bank had notified her of checks drawn on it by accused. She had instructed the bank to charge her account with checks thus drawn by accused, but after this practice had continued for some time she refused to honor checks drawn in this manner (R. 10,11, 16; Pros. Ex. 4).

Letters were written by Mr. Corrin on 4 December and 9 December, directly to accused, concerning the three checks. Corrin's secretary also talked to accused twice over the telephone. "Right after the 1st of January" accused gave the hotel his check for $150, which was paid. At the time of the trial accused owed the hotel nothing (R. 12,15).

f. Evidence for defense, Specifications 1, 2 and 3, Charge II.

In his unsworn statement accused said in part, concerning these Specifications:

"In August, 1943, I received permission from my mother to write personal checks on her account in the Security Trust and Savings Bank of Billings, Montana. I did this several times during August and they were all honored. In September my mother and I had a business talk at which time it was decided that I would borrow money from the bank for which I would sign a personal note. Before this was consummated I was sent to Randolph Field. Again I utilized her checking account by issuing checks drawn against it, to the Gunter Hotel and to the St. Anthony Hotel. I issued these checks in good faith, believing at the time they would be honored, as in the past. However, my mother had not informed me of her desire to stop this practice. As a result, said checks were returned. I immediately made all these checks, drawn on her account, good. I did not at any time issue any checks on her account with the knowledge that it (sic) would not be honored. I wrote these checks in good faith fully believing that they would be honored * * *" (R. 74).

Defense introduced in evidence a check for $150, drawn on the National Bank of Fort Sam Houston, payable to the Gunter Hotel, dated 31 December 1943, and signed by accused. Mr. Bailey testified that this was paid by the bank on 18 January (R. 61; Def. Ex. C). This appears to be the check with which accused made good the three checks of 20 and 21 November.

g. Evidence in rebuttal, Specifications 1,2, and 3, Charge II.

The prosecution introduced in rebuttal of accused's unsworn statement above a deposition of Mrs. Carmen G. Thuerer, originally taken by defense, but not used by them. Corroborating Mr. White's testimony, she stated that she had an account in the Security Trust and Savings Bank, and that in August of 1943 she had issued instructions to the bank to honor checks drawn by accused and to charge them to her account. These instructions were withdrawn by her between 15 and 20 September 1943, and the bank told not to honor any more checks drawn by accused. She visited accused in Great Falls, Montana, in September and again in October of 1943, and at one or both of these times she told accused of her last instructions to the bank (R. 78; Pros. Ex. 18).

h. Specification 2, Additional Charge I. (Wrongful cohabitation with a female other than his wife from 3 December to 28 December 1943.)

Testimony concerning this Specification was offered by witnesses Richard R. Riestenberg and A. J. Wiest, and by the deposition of Mrs. Jeanne Turner of St. Joseph, Missouri, the woman with whom the unlawful cohabitation took place. Mrs. Turner had known accused for 5 years. She was married to him in Longview, Texas, in April 1939, and divorced from him in May 1940, no children being born of the marriage. She married one James W. Turner in

Louisiana in October 1941, and was still married to him as of 7 March 1944. Turner is now overseas with the armed forces, which, she stated, prevents her obtaining a divorce from him, and which, in turn, prevents her and accused's contemplated remarriage (R. 37; Pros. Ex. 10).

Mrs. Turner also stated that she arrived in San Antonio on "approximately December 7th, 1943 and remained approximately three weeks". During this time she stayed with accused at the St. Anthony Hotel, the expenses being paid by accused. She found upon her arrival that a room had been reserved for her, and a baby bed placed in it for Judith Ann Turner, her 2-year old daughter, who accompanied her (R. 37; Pros. Ex. 10).

Mr. Wiest, the assistant manager of the hotel, testified that the night accused registered at the hotel desk, he heard accused "remark that his family wouldn't be in that night * * * but would be in the next day" (R. 34). Wiest, who identified accused at the trial, testified that he talked to accused on several occasions between 3 December and 28 December. The first of these was "some time after December 3rd", in regard to a $75 check (to be discussed later). A day or two after accused registered at the hotel, an officer from the Provost Marshal's office inquired of witness whether accused was registered there, and was escorted by witness to accused's room. Accused and another lieutenant came to the door. Witness thought that he had heard a woman's and a small girl's voice emanating from inside the room (R. 31,32,35,36).

Mr. Riestenberg, the executive assistant manager of the hotel, testified that the original registration card signed by accused had been lost, but remembered having seen it and having recognized accused's signature, with which he was familiar (R. 28). The hotel's ledger sheets, or "guest folio", were introduced as Prosecution's Exhibit 9. They were the hotel's permanent record of charges upon the guest's account, made up from the charges and vouchers of various departments of the hotel (R. 24,25). Prosecution's Exhibit 9 shows occupancy by accused "and family" of a room from 3 December to 28 December, inclusive. The price of the room was $6 per day, and such a charge appears for each day of occupancy. Riestenberg and Wiest both testified that this is the rate for occupancy by two persons, no charge being made for a baby's bed (R. 28,36). Accused once informed Mr. Riestenberg during a conversation that "his wife and baby were here", and made a similar statement to witness at a Christmas party given by the hotel for its guests (R. 26,29). When accused checked out of the hotel and paid his bill, he told Mr. Wiest "that he was sending his family home, [and] that he was returning to Randolph Field" (R. 32). Neither Riestenberg nor Wiest could testify of his own knowledge that accused spent any one night at the hotel (R. 27,34).

i. Evidence for defense, Specification 2, Additional Charge I.

Accused's unsworn statement contained no reference to this offense, nor

did he introduce any evidence concerning it.

j. Specification 4, Additional Charge I. (Wrongfully making and uttering a worthless check for $75, in violation of Article of War 96.)

At the time when accused checked out of the St. Anthony Hotel on 28 December, the balance of his unpaid account there totaled $63.16 (R. 39; Pros. Ex. 9). Despite the fact that a previous check given by accused had not been paid (R. 32), accused tendered and Mr. Wiest accepted accused's check for $75. This satisfied the bill, and accused received the balance of $11.84 in cash. The check was dated that date, signed by accused, and drawn on the Security Trust and Savings Bank of Billings, Montana (R. 39; Pros. Ex. 11). It was deposited to the hotel's bank account, but was subsequently returned from the drawee bank, bearing attached a form marked "no account" (R. 40; Pros. Ex. 11).

Mr. White, the cashier of the Security Trust and Savings Bank, testified in another deposition that accused did not have an account with the bank at this time. His testimony was in all respects similar to that given in the deposition concerning the checks of 20 and 21 November, except that he fixed the dates of accused's mother's original signed authorization as 26 August 1943, and of her verbal withdrawal of such authorization as approximately 15 September 1943 (Pros. Ex. 12; R. 46).

Mr. Wiest testified that the check was made good "about the middle of January" by another check drawn on the National Bank of Fort Sam Houston and paid by that bank (R. 42-44).

k. Evidence for defense, Specification 4, Additional Charge I.

The defense introduced as its Exhibit A the check for $75, drawn on the National Bank of Fort Sam Houston, and dated 14 January. It was received by the hotel on 16 January and paid the next day (R. 44,62,70,71; Def. Ex. A). Accused's unsworn statement concerning the three checks discussed under (e), (f), and (g) above, is also applicable to this Specification.

l. Specification 12, Additional Charge I. (Breach of restriction at San Antonio, Texas.)

It appears from the testimony of Colonel Walter C. White, Air Corps, the commanding officer at Randolph Field, that accused had been under a restriction at the time Mrs. Turner came to San Antonio to visit him, and that she had visited Colonel White in a successful effort to have the restriction removed in order that a cused might visit her in town (R. 65, 66; Pros. Ex. 10).

Upon learning that Mrs. Turner was not accused's wife, as she had

stated to him, Colonel White summoned accused to his office on 12 January. The pertinent part of the conversation between them at that time, testified to by Colonel White from transcribed shorthand notes taken by a reporter, is as follows:

> "Colonel White: All right, You understand what I have told you about how you are to conduct yourself. You are restricted to the limits of this post.
> "Accused: Yes, sir. I understand that, sir" (R. 64).

Colonel White never subsequently authorized accused to leave the post, and did not authorize anyone else to release him (R. 64,65).

Mr. Wiest testified that accused called him on the telephone at about 1700 on 15 January, asking if Wiest had been looking for him. Wiest said that he had, and they discussed a check which witness had cashed and which had been returned. (It is probable, from the testimony concerning the $75 check of 28 December, that it was that alleged in Specification 4, Additional Charge I, although witness speaks of it as a $50 check (R. 68)). Accused told witness that there was another check in the mail to take it up. About 30 minutes later accused appeared at the St. Anthony Hotel, explained the matter again, and asked witness to cash another check. Witness refused (R. 67,68).

m. Evidence for defense, Specification 12, Additional Charge I.

In his unsworn statement, accused said, concerning this Specification:

> "I went to the St. Anthony Hotel on the evening of January 15th to assure myself that my debt to them was paid in full and to secure the check and receipt, if possible. I left Randolph Field about 7 o'clock and returned at 10 o'clock. Colonel White had told me to consult with no one except through my defense counsel, Captain James Malone. I discovered, by accident, that this check had been returned, and I wanted to get it straightened out as soon as possible lest it be reported to headquarters here. I believed I was in enough trouble as it was, without anything additional being added" (R. 76).

n. Additional Charge III and Specification. (Failure and neglect to pay hotel bill from 30 September 1943 to 31 January 1944.)

The prosecution introduced by deposition the testimony of Mr. Fred J. Perra, manager of the Park Hotel, Great Falls, Montana (R. 72; Pros. Ex. 17). Accused stayed at the hotel from 1 July to 14 July 1943. He checked out on the latter date, owing $34.35, and leaving no forwarding address. He checked in again on 5 September 1943, at which time the unpaid account appears to

have been brought to his attention. He left again on 19 September, taking all of his belongings, and telling Perra that he was going on a flight, but would return on 15 November and would pay all of the amount due at that time. The total amount due was now $105.78, which was incorrectly itemized as $106.58, but which the court corrected in its findings. The records of the hotel indicate that only on the night of 5 November (September?) did accused share a room with any other officer. A "personal request" appears to have been made thereafter that accused pay his bill, and on 1 November he again promised to pay on 15 November. The account was unpaid as of 9 March, the date of the deposition (Pros. Ex. 17).

o. Evidence for defense, Additional Charge III and Specification.

In his unsworn statement accused said, in part, concerning this Specification:

> "In the matter of the alleged debt of the Park Hotel in Great Falls, Montana, I believe there is a discrepancy somewhere. However, if I'm wrong, the bill will be paid in full * * * Until September, 1943, the BOQ at Great Falls was inadequate. The results being that a great number of pilots would stay in town at a hotel when they were back from trips. Several of us had a large room together which would be under one or two names. This room was kept monthly, month in and month out, as there were usually one or two of us in when the others were out. The bill would be paid or there'd be a payment on it ever (sic) two weeks and in this way there was always a running account on this room. How much of the bill is mine, if any, is being ascertained and if it is found that I owe a bill, it will be paid. It is my contention that part, if not all of the bill, is not mine. When I left Great Falls I talked with Mr. Perra and told him to check on it again and let me know the result. This is the first knowledge I have had since then on this matter".

p. Other evidence for accused.

In his unsworn statement accused said that he had served as an enlisted man in the Air Corps from April 1937 until June 1939, when he received an honorable discharge with character "excellent"; that he had volunteered as an aviation cadet in January 1942, and upon being honorably discharged from that status and commissioned a second lieutenant, Air Corps Reserve. He has been engaged in ferrying aircraft to Alaska, the Aleutians, and other places, for over a year, and is a qualified pilot in types of aircraft ranging from small liaison ships to four-motored bombers. He has never been tried by court-martial before.

4. Comment.

a. Charge I and Specification.

Accused's absence without leave during the period alleged was proved by the squadron morning reports and by his own admission in his unsworn statement. That he was disappointed over his assignment, and that he got drunk, and subsequently became ill, are, if true, neither defenses nor even mitigating factors. He was neither too drunk nor too ill to write three worthless checks totaling $150 on 20 and 21 November, on which days he claimed to have been particularly ill. Nor was he so ill that he could not return from hospital to duty a day or so after his return from the absence. The drunkenness was voluntary, and the consequences which resulted therefrom must be accepted by accused. The court's finding is clearly sustained by the evidence.

b. Specifications 5,6,7, and 8, Additional Charge I.

Any failure of certain proof that the four checks given by accused to the Hotel Fontenelle were returned by the drawee bank for lack of sufficient funds in accused's account, was cured by his admission that they were not honored, and that he "sent the Fontenelle back a check to cover". This admission, together with the undisputed testimony as to the state of his account immediately prior to 10 November is sufficient to show that the refusal of the bank to pay was based on the actual lack of funds, and not any error on the part of the bank. It is painfully apparent to this Board, from an examination of accused's bank account back as far as 31 July, that accused was careless of its status to the point of willfully closing his eyes to its frequent condition of insolvency. He claimed in his unsworn statement that he knew nothing of its condition because after April all his statements and cancelled checks were sent to his mother. The court had a right to disbelieve him, and it must be said that in the face of the evidence little credence should be given to his version. The court was warranted in inferring from the testimony of Mr. Bailey that the 50¢ items did represent checks returned for lack of sufficient funds. How much money they represented nowhere appears in evidence. But it is clear that between 31 July and 8 November accused wrote a total of 49 checks, totaling $1554.91. His total deposits, including the 31 July balance of $206.62, were $1321.22. He wrote 40 checks which were returned for "not sufficient funds", and, if the three $1 items are taken to represent each two checks returned, 46 such checks. On top of that, he wrote the four checks here discussed, totaling $200. The whole picture is one which calls for an explanation better than the one accused chose to give. The Board of Review is unable to say that there is error in the court's finding on these Specifications, which allege that he knew he had not sufficient funds and did not intend that he should have.

c. Specifications 1,2, and 3, Charge II.

That accused issued the three checks to the Gunter Hotel, that they were returned because he had no account in the drawee bank, and that he

knew this, are all clearly proved by the evidence and by his own admissions. His only defense is that for a time he had his mother's permission to draw checks upon her account in the bank in Billings, Montana, and that he did not know that this privilege had been withdrawn. A consideration of the events leading up to the issuance of these three particular checks shows that his practice of drawing checks on the bank had started out wholly without authority, that his mother had subsequently told the bank officials that such checks might be charged to her account, and that for reasons not disclosed she revoked those instructions within one month. He stated that he did not know of the revocation, but Mr. White testified that none of accused's checks was charged to her account after the revocation, while accused's own mother testified that she had personally informed him of her last instructions to the bank. Accused is thus shown to have known that he had no account and that he could not expect the checks to be honored. He could not reasonably expect the court to believe his version of the transaction, nor does this Board believe it.

d. Specification 2, Additional Charge I.

While there is no specific evidence that accused spent any night with Mrs. Turner at the hotel room in San Antonio, there was ample evidence from which the court could infer that he did. It is clear that he paid a bill for a room at a rate for occupancy by two persons for every day of her stay there. It is clear that he spoke of Mrs. Turner and her daughter as his family to two or more of the employees of the hotel. It is clear that when they left San Antonio he told one witness that he was "returning" to Randolph Field. The use of this word implies more than a mere daily leaving of the hotel room for the night. And finally, Mrs. Turner's testimony that she "stayed with" accused is hardly susceptible of misinterpretation.

It must be remembered that proof was needed here, not of a marriage, but merely of cohabitation. Speaking of the word, we find, at 11 Corpus Juris, 952:

> "The term is of a large signification. Cohabitation may be lawful or it may be illicit. * * * Although it has been held that the term implies sexual intercourse, it seems that, according to the weight of authority, sexual intercourse is not necessarily implied, as the word does not even include necessarily the occupying the same bed."

In United States v. Musser, a criminal prosecution in the Territory of Utah under a Federal statute aimed at the practice of polygamy, the Supreme Court of Utah said:

> "As defined by lexicographers, 'cohabit' means to dwell with or to reside together. It may mean residing * * * in the same family, or the dwelling together in lawful wedlock. This

would be lawful cohabitation. Or it may mean the dwelling of a man and woman together ostensibly and apparently in wedlock, when, in fact or in law, no marriage exists; and, without proof of adultery or fornication, this would be unlawful cohabitation" (7 Pac. 389, 390; underscoring supplied).

That matrimonial intercourse is not necessarily implied by the term "matrimonial cohabitation" is held in Forster v. Forster (4 Eng. Ecc.R., 359) and in Orme v. Orme (2 ibid, 354). See also Calef v. Calef (54 Me., 365), Yardley's Estate (75 Pa. St. 207), Sharon v. Sharon (79 Cal., 670, 22 Pac., 26, 22 Pac. 131).

The Board of Review is satisfied that accused lived from 3 December to 28 December 1943 openly and publicly with a woman not his wife in a manner such that the discovery later that he had done so was calculated to bring the military into discredit and disrepute, and that his acts constituted a violation of Article of War 96.

e. Specification 4, Additional Charge I.

The same conclusions which support the findings of the court upon Specifications 1,2, and 3 of Charge II support its findings upon this Specification. There is in evidence the additional fact that accused was twice notified by letter on 4 December and 9 December that the first three checks had not been honored. He had that much less reason to expect that this would be.

f. Specification 12, Additional Charge I.

Accused's breach of restriction on 15 January is proved by Colonel White's testimony that he placed accused under restriction, by Mr. Wiest's testimony that he talked to accused about the $75 check in the hotel, and by accused's admission that he left the post. His reason therefor is no defense.

g. Additional Charge III and Specification.

The Board of Review is compelled by established precedent to hold the record of trial legally insufficient to support the court's findings with respect to this Charge and its Specification. Accused was charged with dishonorably failing to pay a hotel bill, in violation of Article of War 95. The court found him guilty, by means of exceptions and substitutions, of wrongfully failing to pay the debt, in violation of Article of War 96. It is the opinion of the Board of Review that the evidence was sufficient to have justified a finding of guilty as charged, in that accused's conduct was characterized by deceit and protracted evasion, and that while in receipt of ample funds, he preferred to satisfy his own desires rather than to discharge a standing obligation. It has repeatedly been held, however, that

mere failure to pay a debt is not an offense under either Article of War 95 or 96. In CM 221833, Turner (13 B.R.,p.239), the court made a finding of guilty with exceptions and substitutions, identical in all respects to that made in this case. It was held by the Board of Review, the holding being concurred in by The Judge Advocate General, to be legally insufficient. See also CM 220760, Fanning (13 B.R.,p.61), and CM 207212, Thompson (8B.R., p. 319).

5. The ledger of the St. Anthony Hotel, admitted in evidence to show, by reason of the accumulated charges for room, meals, and other miscellaneous items, the occupancy by accused over the alleged period of time, was properly identified by Mr. Riestenberg. Defense objected on the ground that witness had not himself made the entries. Witness' position, however, was such that under the modern rule concerning the admissibility of entries made in the regular course of business, the introduction of such evidence in this way was not only proper but actually desirable, in that this evidence was more likely to be accurate than the testimony of the innumerable witnesses who had first made the entries. See 5 Wigmore, Evidence, 3rd ed., pp. 379 et seq., Massachusetts Bonding & Insurance Company v. Norwich Pharmacal Company (2d C.C.A., 18 Fed. 2nd 934, (Learned Hand, J.)); 2 Wharton, Criminal Evidence, 7th ed., pp. 1395 et seq. The other documentary evidence was clearly admissible under the same rule.

6. Attached to the record of trial is an affidavit signed by Carmen G. Thuerer, accused's mother, which the defense sought to introduce in evidence upon trial but which was not admitted when the prosecution refused to consent thereto (R. 79, 80). In it she partially repudiates the testimony given by her in her deposition concerning her refusal to honor checks drawn by accused on the Security Trust and Savings Bank of Billings, Montana. This affidavit is not part of the record of trial, and is not entitled to consideration as such in determining the legal sufficiency of the record. Even if it were, there appears in it nothing which would require or even suggest to this Board any different conclusions of fact or law. The relationship between affiant and accused is such that the repudiation of unfavorable testimony after conviction and sentence is to be expected.

Also attached to the record is a Clemency Petition, dated 14 April 1944, signed by Major Thomas A. Rouse, Air Corps, and Captain Charles E. Heidingsfelder, Jr., Air Corps, Defense Counsel and Assistant Defense Counsel, respectively, which calls attention to the above-mentioned affidavit, and briefly discusses the law involved in this case, and which requests clemency for accused "because of his honorable service record of four years as an enlisted man, cadet and officer in the Army Air Forces, and because of his future use to the service".

7. War Department records show that accused is 29 years of age. They show him to be married to Elinor Bryant Grimstad of Ann Arbor, Michigan, but

her affidavit, which accompanies the record of trial, states that while he has lived with her as her husband for more than three years and has a child by her, he had never married her and has refused to do so. Accused attended Carleton (Minnesota) College for 2 years, the University of Wisconsin for one-half year, and Centenary College at Shreveport, Louisiana, for one-half year, but graduated from none of them. He attended the American Academy of Dramatic Arts in New York City for one year. He enlisted in the Army Air Corps on 3 April 1937 and was honorably discharged therefrom by purchase on 21 June 1939. He again entered the Army as an aviation cadet on 23 February 1942, was honorably discharged therefrom on 29 October 1942 and commissioned a second lieutenant, Air Corps Reserve, on 30 October 1942. It also appears that accused was admitted to the Michigan State Hospital, Ypsilanti, Michigan, as insane, on 20 April 1936 and released therefrom on 17 June 1936 as recovered.

8. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Additional Charge III and its Specification, legally sufficient to support the findings of guilty of all other Charges and Specifications, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Articles of War 61 and 96.

Percy G. Zon, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.
Samuel Bonnifant, Judge Advocate.

(358)

1st Ind.

War Department, J.A.G.O., 8 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Tarje M. Grimstad (0-731570), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Additional Charge III and its Specification, legally sufficient to support the findings of guilty of all other Charges and Specifications, and legally sufficient to support the sentence and to warrant confirmation thereof. It appears from an affidavit of Elinor Bryant Grimstad of Ann Arbor, Michigan, who has lived with accused as his wife for over three years, that accused has indulged in a long course of shameless neglect and mistreatment of this young woman, and is guilty of complete disregard of his obligations to his creditors, and of an almost unparalleled selfishness and indulgence in his own inclinations. This affidavit accompanies the record of trial. Although the sentence is legal, it is believed that two years' confinement will be adequate. Accordingly, I recommend that the sentence be confirmed, but that the forfeitures be remitted; that the period of confinement be reduced to two years; that as thus modified the sentence be carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Findings of guilty of Additional Charge III and its Specification disapproved. Sentence confirmed but forfeitures remitted and confinement reduced to two years. G.C.M.O. 360, 17 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 254783

12 MAY 1944

UNITED STATES	)	13TH ARMORED DIVISION
	)	
v.	)	Trial by C.C.M., convened at
	)	Camp Bowie, Texas, 10-11
Second Lieutenant FRED M.	)	April 1944. Dismissal, total
HALL, JR. (0-1032712),	)	forfeitures and confinement
13th Armored Division.	)	for ten (10) years.

OPINION of the BOARD OF REVIEW
LIPSCOMB, SHEPHERD and GOLDEN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer above-named and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Fred M. Hall, Junior, Headquarters, 13th Armored Division, Camp Bowie, Texas, did, without proper leave, absent himself from his organization and station at Camp Bowie, Texas, from about 13 February 1944, until he was apprehended at Killeen, Texas, on or about 19 March 1944.

ADDITIONAL CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Fred M. Hall, Junior, Headquarters, 13th Armored Division, Camp Bowie, Texas, did, at Killeen, Texas, on or about 19 March 1944, without authority, appear in civilian clothing.

He pleaded guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for ten (10) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, supplementing the accused's pleas of guilty, shows that on 12 February 1944 the accused was relieved from duty with the 106th Mechanized Cavalry, Camp Hood, Texas, and was assigned to the 13th Armored Division, Camp Bowie, Texas, to whose Commanding General he was directed to report. By Special Orders dated 14 March 1944 the verbal order of the Commanding General of the latter division assigning the accused to the Headquarters of the division effective on 13 February 1944 was confirmed and made of record. The accused, however, according to the testimony of Captain Leo Kleiman, Headquarters, 13th Armored Division, failed to report and an extract copy of the organization's morning report, which was admitted into evidence without objection, shows the following entry : "For period ending 2400, 21 March 1944, 01032712, Hall, Fred M., Cavalry, 2nd Lieutenant, from AWOL to hands of civil authorities, Killeen, Texas, 0400, to confinement, Camp Hood, Texas, to arrest as of 19 March 1944" (R. 15-16, 17-19, Pros. Exs. "D" - "G").

The Assistant Provost Marshal, Camp Hood, Texas, in response to a telephone call by a Military Policeman went to nearby Killeen, Texas, on the morning of 19 March 1944 where he saw the accused who was then attired in the civilian raiment of a cowboy and who, upon questioning, at first denied his identity although he had his regular "AGO" officers identification card, claiming that he had received a medical discharge. A civilian policeman arrested him for detention pending verification of his claim and the accused then by voluntary admission disclosed to both the Assistant Provost Marshal and the civilian policeman that he was still a second lieutenant who had been absent without leave for about a month, stating that on a pass from the 106th Cavalry he had gone to Austin, Texas, that upon returning to Killeen, Texas, he had learned from an officer friend of his transfer to Camp Bowie, that he had been wanting to attend a rodeo at Ft. Worth, Texas, and so decided to go "AWOL", and that, although he had not reported to his organization, he had returned and secured his military clothing and foot locker which he had taken to the town of Youngsport, Texas, some 16 miles south of Killeen. The accused at the time of his apprehension was not under the influence of either liquor or narcotics and, although he was not advised of his right to speak or remain silent, he spoke freely and voluntarily without compulsion of any kind. The stipulated testimony of the civilian policeman in substance corroborates that of the Assistant Provost Marshal as does the stipulated testimony of the investigating officer with the addition that the accused stated to the latter that when he (the accused) was apprehended "he was on his way to pick up his uniform and report to Camp Bowie, Texas". It was further stipulated that the accused "was apprehended in Killeen, Texas, on or about 19 March 1944, at approximately 0300 hours" and that at such time he was in the civilian clothes of a cowboy (R. 7-11, 15, Pros. Exs. "A" - "C").

The accused was brought from Camp Hood, Texas, to Camp Bowie, Texas, in his civilian attire on 20 March 1944 by an officer dispatched for such purpose (R. 12-14).

4. The accused, after explanation of his rights as a witness, elected to remain silent (R. 19).

5. The Specification of the original Charge alleges that the accused without proper leave absented himself from his organization and station at Camp Bowie, Texas, from about 13 February 1944 until he was apprehended at Killeen, Texas, on or about 19 March 1944. The elements of the offense thereby alleged and the proof required for conviction thereof, according to applicable authority, are as follows:

> "(a) That the accused absented himself from his command, * * *, station, or camp for a certain period, as alleged; and (b) that such absence was without authority from anyone competent to give him leave" (MCM, 1928, par. 132.)

The evidence for the prosecution abundantly supplements the accused's plea of guilty and his commission of the offense as alleged is, therefore, established beyond a reasonable doubt. The prosecution's evidence and the accused's plea of guilty fully support and warrant the court's findings of guilty of the original Charge and its Specification.

6. The Specification of the Additional Charge alleges that the accused at Killeen, Texas, on or about 19 March 1944 appeared in civilian clothing without authority. The appearance by an officer in time of war in civilian clothing as alleged and shown is certainly both a neglect to the prejudice of good order and military discipline and conduct of a nature to bring discredit upon the military service and therefore violative of Article of War 96.

The evidence for the prosecution conclusively establishes that the accused when apprehended at Killeen, Texas, on 19 March 1944 was publicly wearing civilian clothes and thereby supplements the accused's plea of guilty to the alleged offense which plea implicitly admits that such action was without authority. Consequently the evidence and the accused's plea of guilty amply warrant and support the findings of guilty of the Additional Charge and its Specification.

7. The accused is about 23 years old. The War Department records show that he has had enlisted service from 18 July 1942 until 12 August 1943 when he was commissioned a temporary second Lieutenant upon completion of Officers Candidate School and that he has had active duty as an officer since the latter date.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support

the findings of guilty of all Charges and Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of either Article of War 61 or Article of War 96.

Abner E. Lipscomb, Judge Advocate

William Shepherd, Judge Advocate

Gabriel H. Goldberg, Judge Advocate

SPJGN
CM 254783

1st Ind.

War Department, J.A.G.O., 22 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Fred M. Hall, Jr. (0-1032712), 13th Armored Division.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the period of confinement be reduced to one year, that as thus modified the sentence be ordered executed, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.

(Sentence confirmed but confinement reduced to one year. G.C.M.O. 385, 18 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ
CM 254809

12 MAY 1944

UNITED STATES v. First Lieutenant STEPHEN F. PAVLUS (0-1044643), 577th Antiaircraft Artillery Automatic Weapons Battalion, Fort Bliss, Texas.	ANTIAIRCRAFT ARTILLERY TRAINING CENTER Trial by G.C.M., convened at Fort Bliss, Texas, 13 April 1944. Dismissal.

OPINION of the BOARD OF REVIEW
ROUNDS, GAMERELL and FREDERICK, Judge Advocates.

---

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant STEPHEN F. PAVLUS, 577th Antiaircraft Artillery Automatic Weapons Battalion, having been restricted to the limits of his post, did, at Fort Bliss, Texas, on or about 6 April 1944, break said restriction by going to El Paso, Texas.

Specification 2: In that First Lieutenant STEPHEN F. PAVLUS, 577th Antiaircraft Artillery Automatic Weapons Battalion, having received a lawful order from Major EVERETT K. HIGGINS to return to his post at Fort Bliss, Texas, the said Major EVERETT K. HIGGINS being in the execution of his office, did, at El Paso, Texas, on or about 6 April 1944, fail to obey the same.

He pleaded not guilty to and was found guilty of the Charge and its Specifications. Evidence of one previous conviction by general court-martial of absence without leave for four days, in violation of Article of War 61, was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for one year. The reviewing authority approved the sentence but remitted the confinement and forwarded the record of trial for action under Article of War 48.

3. The competent legal evidence of record discloses the following proof.

The prosecution offered, and the court admitted into the evidence, with a specific statement of no objection by the defense, a certified copy of GCMO No. 21 of Headquarters Antiaircraft Artillery Training Center, Fort Bliss, Texas, dated 29 March 1944 (R. 6), which discloses that accused, while stationed at Fort Bliss, Texas, was tried for, and convicted of, a violation of Article of War 61 at Fort Bliss, Texas and, on 21 March 1944, sentenced to forfeiture of $75.00 per month of his pay for six months "and to be restricted to the limits of his post for three months". (Pros. Ex. A.) The sentence imposed by the court was approved without modification and ordered executed by the Commanding General of the Antiaircraft Artillery Training Center as reviewing authority on 29 March 1944.

Lieutenant Colonel Philip I. Baker of the 577th Antiaircraft Artillery Automatic Weapons Battalion, Fort Bliss, Texas, testified that accused is now and was on 6 April 1944 a member of this same organization. About 1 April he saw the general court-martial order concerning Lieutenant Pavlus, who is the accused in the instant case, and about the same date held a conversation with him about it (R. 7) in which accused, in response to an inquiry from this witness, told him that he "had been sentenced to three months' restriction to the post and a fine of seventy-five dollars a month for six months" (R. 8).

Specifications 1 and 2 of the Charge

Major Everett K. Higgins, C.A.C. 53d AAA Group, Fort Bliss, Texas, testified that, because he was a member of the general court-martial convened at Fort Bliss, Texas, which imposed the sentence on accused about 21 March 1944 of restriction "to his organizational area for a period of three months" he has personal knowledge concerning such sentence (R. 9). He does not recall specifically whether the sentence read "restricted to his organizational area" or to "the area of his organization". They are both synonymous (R. 12).

About 10:15 p.m. on 6 April 1944 witness was in the El Paso Officers Club, located in the Blumenthal Building in El Paso, Texas (R. 9), where he saw accused dancing with a young lady. Witness knew that accused saw him because he passed by him while dancing. Around eleven-thirty he walked over to the table where accused was sitting, tapped him on the arm and told him to follow, that he wanted to speak to him. When they reached a little hallway leading to the latrine witness said to him "What are you doing down here? You know that you are under restriction". Accused replied "Well, I am resigning from the Army". Witness said, "The lieutenant knows that he cannot resign from the service while you are under sentence of a court-martial" (R. 10). Looking at his watch witness continued "It is now eleven-thirty p.m. or thereabouts (R. 10-11). I will give you until midnight

to return to your organization, so get moving" (R. 11). Accused was sober (R. 12) and appeared to understand his instructions (R. 13-14). Witness' purpose in giving accused an order to return to his post by midnight was that he felt it was his duty, as a member of the court which had sentenced accused, to see that the sentence of the court was carried out; and further, being a senior officer he still felt it was his duty, knowing the accused had willfully violated a sentence, to enforce it (R. 13). Major Higgins went to the latrine and when he returned accused and his friend had gone. About twelve minutes later Major Higgins left the club and, on his way home, stopped in a restaurant on North Copia Street known as the "Welcome Inn". It was then three minutes past midnight both by the electrical clock in the Welcome Inn and by the clock across the street. Accused and his friend were sitting there eating. Major Higgins "checked" both clocks after he saw accused and as soon as he saw him (R. 12). He sat down at a table but said nothing to accused, who evidently saw him, because about twelve minutes later, that is, about fifteen minutes after midnight, he got up and left (R. 12). Witness does not know whether or not he then returned to his organization (R. 12).

His rights as a witness having been explained, both by the defense counsel out of court and by the law member in open court, accused elected to remain silent (R. 13-14).

4. Comment

Accused's status as an officer in arrest, restricted to the limits of the Fort Bliss Military Reservation, on 6 April 1944 was established by introduction of an authenticated GCMO pertaining to his previous trial by a general court at Fort Bliss, Texas. "Proof of former trial by court-martial * * * may be * * * by the order publishing the case, or by the record of trial if no order was published or the order is not sufficiently explicit" (par. 68, M.C.M., p. 53). This order discloses that the sentence of the court was adjudged on 21 March 1944 and became effective as of that date when the reviewing authority approved the sentence and ordered it executed on 29 March 1944. The sentence was composed of two elements of punishment, a forfeiture and restriction "to the limits of his post for three months". The court could and did take judicial notice, as it lawfully may (par. 125, M.C.M., pp. 134-135), of the existence and location of the post, Fort Bliss, Texas, and the fact that accused belonged to an organization stationed on that post. It is elementary that, unless this sentence to restriction was subsequently mitigated, suspended, remitted or in some manner modified by the reviewing authority, accused could not lawfully go without the confines of Fort Bliss, Texas except by authority of the Commanding General during the period between 21 March and 21 June 1944. Although knowledge of a prior conviction was thus incidentally brought to the notice of the court, the documentary evidence in question was introduced solely for the purpose of establishing the exact terms of the sentence and to prove thereby an existing

status of restriction. As such it did not prejudice any substantial rights of accused and comes within the provisions of Article of War 37.

Accused was seen on the night of 6 April 1944 on two separate occasions, in the city of El Paso, Texas, by Major Higgins, who knew and recognized him - once at the Officers Club in the Blumenthal Building, and again at the Welcome Inn on North Copia Street. Major Higgins conversed with accused on the former occasion. Accused was then obviously, in the absence of some authorization which was not shown, beyond the limits of the post of Fort Bliss, Texas, and therefore breaching the limits of the restriction imposed by the court-martial sentence he was then serving. This evidence is compelling and clearly sustains the finding of guilt as to Specification 1 of the Charge.

Major Higgins, stationed at Fort Bliss, Texas, on 6 April 1944, well knew, because he participated in his trial as a member of the general court which convicted and sentenced him, that accused by being in El Paso, Texas, was breaching the arrest of his sentence by being outside the limits of the post of Fort Bliss, Texas. He ordered accused to return to the post before midnight when he found him dining and dancing in a club in the city of El Paso about 10:15 p.m. on 6 April 1944. Accused was sober and his response to the Major's questions indicated there was no misunderstanding on his part as to what was being said. Major Higgins' direct order given to him in person about 11:30 p.m. was clear - "I will give you until midnight to return to your organization". Accused left the El Paso Officers Club shortly thereafter. About fifteen minutes later Major Higgins found accused in another nearby restaurant on North Copia Street having something to eat. When he saw Major Higgins he finished with his food and left at 12:15 a.m. These circumstances clearly outline a failure to obey the order of Major Higgins which the latter was in duty bound to give under the circumstances. Accused's conduct displayed an intentional and studied indifference to the result of failing to obey a lawful order of his superior officer. The evidence is sufficient to sustain the findings as to Specification 2 of the Charge.

6. War Department records disclose that accused is now 27 years of age. He graduated from high school in 1934 and attended the Illinois Business College for six months. He worked as a chrome plater in a die-casting plant for ten months. He enlisted in the Regular Army in November 1939 and was commissioned a second lieutenant, Army of the United States, upon graduation from an Officer Candidate School on 2 October 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 96.

William H. Rounds, Judge Advocate.

William H. Bamberger, Judge Advocate.

Herbert B. Fredericq, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 22 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Stephen F. Pavlus (O-1044643), 577th Anti-aircraft Artillery Automatic Weapons Battalion, Fort Bliss, Texas.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
1 - Record of trial.
2 - Dft. ltr. sig. of S/W.
3 - Form of action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 345, 11 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

27 JUN 1944

SPJGH
CM 254814

UNITED STATES v. Private First Class WHEELER MULLINS (35122658), Detachment Medical Department, Section I, Service Command Unit 1473, Camp Shelby, Mississippi.	))))))))	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Shelby, Mississippi, 10-11 April 1944. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private First Class Wheeler Mullins, Detachment Medical Department, Section I, Service Command Unit 1473, Camp Shelby, Mississippi, did at Mixon's Tourist Court in the vicinity of Hattiesburg, Mississippi, on or about 23 October 1943 forcibly and feloniously, against her will, have carnal knowledge of Barbara Schoonover, his stepdaughter, an infant of twelve (12) years of age.

Specification 2: (Finding of not guilty).

He pleaded not guilty to the Charge and the Specifications thereunder. He was found not guilty of Specification 2 and guilty of Specification 1 and of the Charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. Evidence was considered of a previous conviction by summary court-martial of absence without leave for ten days, in violation of the 61st Article of War. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution in pertinent part is substantially as follows:

During the month of October, 1943, Imogene Schoonover, age 14, Barbara Schoonover, age 12, and Raymond Schoonover, age 10, were living with their mother in a house trailer at "Nixon's Tourist Camp" near Hattiesburg, Mississippi. The family had formerly lived in Kentucky where the children's father had died seven or eight years previously. Subsequent to his death the accused had boarded with the family and later married the mother. The accused was stationed at Camp Shelby and accordingly the family moved to nearby Hattiesburg. The accused visited the trailer house nearly every evening (R. 6-9, 29, 40-41, 53-54).

On 23 October 1943 the mother was a patient in the hospital and the children were left alone in the house trailer. The accused arrived at the trailer late that afternoon and that evening drank grain alcohol mixed with Coca Cola. On one occasion during the evening Barbara, who was hiding behind a tree, saw accused leave the trailer and "pull out his thing" or "peter". He "spit on it and then rubbed it on a tree". Late that night or early the following morning, the accused, dressed in shorts and an undershirt, went to the bed where the children were sleeping and attempted to pull Imogene from the bed. He awakened Ray, asked him to sleep in the bed of accused and then "tried to crawl in" bed with the girls. Barbara hit his hand and the accused said "You kids crazy" and ordered them out of bed. The accused lit the lamp and said "You all kids hurry and cook me everything in this God damn house". The children cooked "everything" and after accused finished eating "he got out his pistol" and asked Imogene if she wanted to go to the hospital to visit her mother. Imogene replied that she wanted to see her mother but that she did not trust him. He then asked Barbara if she wanted to go and she said "yes". She was already dressed and at about 2:00 o'clock in the morning on 24 October 1943 she left the trailer with accused. Imogene did not want Barbara to go but she was afraid to say anything. After they left Imogene watched for a bus to stop but none stopped. She "thought" she heard Barbara scream and then she "got sleepy" (R. 9-14, 41-45).

Barbara and the accused walked to the main highway running between Camp Shelby and Hattiesburg, Mississippi. Accused suggested that they catch the bus "by the dusty road", so they walked there. An empty bus went by and Barbara did not see him "flag it". He placed his hand over her mouth, she removed it and "hollered" for her sister but she did not answer. The accused took her about a quarter of a mile further, lifted her over a fence and brought her over near a water tower. What happened further is described by the prosecutrix as follows:

> "Well, he taken off my step-ins. * * * I kicked but it did not help none. * * * He throwed me down on the ground and covered up my mouth and put my legs over his shoulder and then he sticked his finger up in - * * * Feel like something was breaking in me and it seemed like it was coming out here. * * * He say him going to get me bigger so he can - * * * (Spelling the word) F - u - c - k. * * * He called me a son-of-bitch and hit me in the head when I

squealed and then some colored people passed. * * * He hold my mouth and said I better keep quiet and threatened to kill me with his pistol. He said I was the only thing 'I am living for'. And then it seemed like a long time we were laying there. * * * I was squirming around and he were sticking his finger up in me and after he got through, after he got me big enough for him, he done that to me what I spelled. * * *

* * * *

"Q. Did you see what you called his peter?
A. Yes, sir.
Q. And did you see what he did with that?
A. Yes, sir.
Q. What did he do?
A. Sticked it up in me.

* * * *

* * * He layed on my stomach and he was going up and down, going up and down. * * * sometimes it slipped out and he hit me and put it back in and I scratched him on his hand and back on his back. * * *"

Barbara further testified that accused had removed his pants and shorts and had her legs spread out when he had "his thing" in her. He placed her arms behind her back and when she attempted to free them he "hauled off and slapped" her. She "hollered" and he hit her on the head with his flashlight. He had his "peter" in her a "long time, about an hour"; it was in her "P-u-s-s-y". After the accused was "through" she put on her step-ins and he pulled them off. "Every time" she stood up she would "stagger and fall back down". She "was dizzy and the ground was going round and round". A truck passed as they were walking back to the trailer and the accused pushed Barbara into a ditch and "got in" himself until the truck passed. They then returned to the trailer (R. 14-19).

The clothes Barbara had worn were bloody, and at about 10:00 o'clock that morning accused told her to burn the clothes because her mother was coming home from the hospital that evening. She burned everything except the coat, which was also bloody and dirty. Accused told her that if her mother or sister saw the coat to tell them that he "got damn drunk" and that she put it under his head. That same day accused sent Barbara out to look for his hat. Imogene went with her and found the hat near the water tower where accused had taken Barbara earlier that morning. Imogene thought it was two or three days later. Barbara thought that before they went to search for the hat she told Imogene "a few things but not all" that accused had done to her and complained to Imogene of having "sharp pains" in her back and stomach. She stated that

she continued to bleed from five to seven days and used some "Kotex" belonging to her mother. She did not tell her mother of the attack because it "might worry her" but did tell her school teachers. On 2 March 1944, Barbara went to Military Police Headquarters at Camp Shelby and told Major Carl Henne the name of accused and "some of what he did" to her. After talking to Major Henne and at his request she told her mother of the incident (R. 20-24, 27-29, 47-48, 62).

On cross-examination Barbara testified that she did not like the accused because he was "mean" to them, would hit them and threatened to kill her brother. He wanted to "get rid" of the children and "tried" to have her mother send them to a reform school. The accused took money from her mother and Barbara stated she "did not like that" because her mother could not buy any clothes for herself or the children. He also threatened to kill her mother if she ran away from him. According to Barbara the accused drank nearly every week-end but knew what he was doing when he was drunk. He scolded her for working at "the little picture stand" and her mother made her quit. Barbara further stated that on the night of 29 February 1944 she became frightened when the accused cut her mother with a knife. She would have told Major Henne what the accused did to her even though accused had not cut her mother because she wanted her mother to leave him so they could go back home. Barbara stated that on a number of occasions she went to a picture show instead of going to school because she "hurt so bad". When her teachers scolded her for being absent from school she told why she was absent and what the accused had done to her. Barbara further testified that on the morning when accused lifted her over the fence and had her on the ground he made her hold her mouth on his chest and held her hands behind her back. He threatened to kill her if she did not keep her mouth against his chest and "sometimes" when she would raise up to scream he would hit her. He "got it in" her "about one and one-half inches" and there was "blood on it" when he took "it" out (R. 29-40).

Imogene Schoonover testified that it was just before daylight when Barbara and the accused returned to the trailer. Imogene observed that Barbara's face was "white", she looked "scared and trembling", her hair was "tore up", she had "marks on her neck and on her jaws", her dress was "wrinkly" and had "unusual looking spots" on it, her coat was dirty and there were "dirty spots" on her face and legs. The accused looked "mean and everything". His pants were "wrinkly and dirty" and had "unusual spots on them". He was wearing a hat when he left but did not have one when he returned. When Imogene asked Barbara some questions the accused "started cussing" and told them to "shut up". He "looked at Barbara mean like he was telling her to keep her mouth closed". Imogene believed that it was two or three days later that Barbara "got sick" and told her "everything". She saw some "unusual spots" on Barbara's underclothes, spots of blood. Barbara was bleeding on "her body

between her legs" and told her that accused "had hurt her that way". Barbara was usually running around and happy but after that night she was sickly and weak and would never run and play like before. On cross-examination Imogene testified that on the night accused took Barbara from the trailer he had threatened to kill all of the children. He acted "pretty wild" but she believed he knew what he was doing. She never liked accused and did not get along with him because he had been "so mean". She was opposed to her mother marrying him. He acted "goofy" to her, "kind of funny". There was "something strange" about him. Imogene further stated that the children would usually stay out until about seven o'clock in the evenings and if they did not come in accused would "cuss and fuss" (R. 41-53).

On 2 March 1944, following her complaint against accused, Barbara was taken to the Camp Shelby Station Hospital for examination. Captain William I. Huesing, who examined her testified that he found no external or internal lacerations or abrasions of the vagina. He found no residual of a hymen present, but stated that the hymen was a variable factor and that its absence did not necessarily indicate that some object had entered the vaginal tract. Barbara was nervous about being examined and complained of some pain in the region of the vagina but Captain Huesing did not find anything to verify the pain. He could not say whether Barbara had ever had sexual intercourse but stated that her vagina would admit a normal male penis, with difficulty. Captain Huesing further testified that Barbara could have been attacked during the month of October 1943 without any indications of injury appearing at the time he made the examination. It would have been possible but not probable that Barbara would have bled for several days as a result of engaging in sexual intercourse (R. 62-69).

Major James B. Craig, psychiatrist at the Camp Shelby Station Hospital, testified that the accused was under his observation for twenty-two days after his arrest. In his opinion the accused was sane, knew the difference between right and wrong and as far as he could ascertain the accused was sane on 23 October 1943. His diagnosis of the condition of accused was "Constitutional Psychopathic State, inadequate personality and alcoholism, chronic. The second condition due to the first". He thought that accused would "probably" be "beyond the pale of reason" when he drank excessively. "Impressionistically" he estimated that accused had low average or borderline intelligence (R. 70-76).

4. For the defense: It was stipulated that if Doctor B. D. Blackwelder, "Director of Forrest County Health Department", were present in court he would testify that on about 3 March 1944, he made a superficial examination of the external genitals of Barbara Schoonover and was of the opinion that a man with a normal size penis had never had complete sexual intercourse with her (R. 76).

Corporal Rudolph H. Bade testified that he lived in the same barracks with accused and slept in the next bed to him for about nine months. He found

accused to be "a regular fellow, straight-forward". Accused had "always praised" his family and exhibited pictures of the children. During the last four months Corporal Bade observed that accused was restless, unable to sleep nights, and became "very moody and morose like". He had a "twitching effect". Private First Class James A. Bannatyne considered accused a good friend, a good worker, trustworthy and considerate of others. He worked with accused and, in so far as he knew, the family life of accused had always seemed normal (R. 92-97).

The accused testified that when he first entered the Army he was with a division at Camp Shelby but was later transferred and placed on limited service because he had been shot in the foot. He had previously served in the Navy from 1924 to 1926 (R. 80).

He stated that he was aware of the nature of the charges for which he was being tried but was unable to aid his defense counsel because he did not know "anything about all of this". He knew he did not commit the offense because he had "never done anything like that" in his life. He guessed that "maybe" he "could have done it" but as far as he knew he did not do it. He went to school with his present wife in childhood and thought a lot of her children, whom he had known most of their lives. He went to board with them in Kentucky some time after he had separated from his first wife. The accused further testified that he had been nervous and troubled with "steady" headaches for over a year. He drank alcohol to relieve the pain, drank every night, either beer, mixed alcohol, "can heat", hair tonic, or "practically anything". He knew what he was doing when drinking if he did not "drink too much of anything". He did not remember the night of 23 October. On 1 March 1944 his wife told him that the previous night when he was drinking he tried to kill her with a knife and hit her in the stomach. He did not believe her until she showed him her dress, and then he cried for three or four hours because of what he had done. The accused further stated that he scolded the children for staying out late at night, and as a result of this staying out he had arguments with his wife, because she did not make them obey. Although he had spanked Barbara on occasions in the past he had not done so for "a long time" (R. 77-85).

On cross-examination and examination by the court the accused testified that for the past fourteen months he had been driving a truck and was also emergency ambulance driver at the station hospital. He had been drinking "pretty heavy" for over a year but was never drunk "on the job". He stated that he always did his best to be a good soldier and had qualified for expert rifleman in 1941. He was awarded the Good Conduct Medal but did not recall the date, except that he received it the same day that he was court-martialed for being "AWOL". He had gone "AWOL" to marry his present wife. He denied attempting to get into bed with the girls, and stated that he did not take Barbara into the woods near the water tower. Accused said he did

not lose his hat and always had it. He remembered that his wife was at the Camp Shelby Station Hospital in October, 1943, but he did not remember asking Barbara to go to the hospital to see her mother. He did not "believe" he told her to burn any clothes. He stated that nothing could have taken place at Mixon's Tourist Court that he would not remember as he was "never so bad drunk" when he lived "down there".

5. The evidence shows that the accused spent the evening of 23 October 1943 with his stepchildren, Imogene, Barbara and Ray Schoonover, in their house trailer at "Mixon's Tourist Camp" near Hattiesburg, Mississippi. After the children had gone to bed the accused, who had been drinking grain alcohol mixed with Coca Cola during the evening, "tried" to get into bed with Imogene, age 14, and Barbara, age 12. When they resisted he made the children get out of bed and ordered them to cook him a meal. After he finished eating he asked if either of the girls wanted to go with him to see their mother, a patient in the Station Hospital at Camp Shelby. Imogene refused because she did not trust him. Barbara wanted to see her mother and agreed to go. At about 2:00 a.m. on 24 October 1944, she left the trailer with accused to catch a bus to Camp Shelby. A bus went by and accused instead of stopping it placed his hand over Barbara's mouth to prevent any outcrys and took her to a place about a quarter of a mile from the trailer, where he removed her step-ins and threw her on the ground. According to Barbara the accused "sticked his finger up in" her and said he was going to get her "bigger" so he could, and she spelled out the word, "F-u-c-k". He called her a "son-of-bitch" and hit her on the head when she "squealed". When some colored people passed nearby he held her mouth and threatened to kill her with his pistol if she did not keep quiet. After a long time, when he got her "big enough for him", she stated that he did that to her which she had "spelled". When asked what he did with his "peter" she said he "sticked it up in me". He was on her stomach "going up and down" and when "it slipped out" he would hit her and "put it back in". He held her arms behind her back and when she attempted to free them he "slapped her". At one time she "hollered" and he hit her on the head with his flashlight. He had "it" in her about one and one-half inches. The accused took her back to the trailer just before daylight. Imogene observed that Barbara "looked scared and trembling", her face was white, her hair was "tore up" and she had marks on her body. Her clothes were "wrinkly", dirty and "bloody".

The accused testified that he knew nothing of the attack on Barbara and did not remember anything that happened on 23 or 24 October 1943, but he knew he did not commit the act because he had never done anything like that in his life. He admitted that he was a heavy drinker.

The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of the Charge and the Specification.

6. The Charge Sheet shows that accused is 37 years of age; and that he was inducted in April, 1941, discharged 6 November 1941 by reason of overage, and recalled to duty 20 January 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of either death or of life imprisonment is mandatory upon conviction of rape, in violation of the 92nd Article of War. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year, by Section 22-2801 of the District of Columbia Code.

Samuel B. Driver, Judge Advocate.

(On Leave), Judge Advocate.

F. J. Lotterhos, Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGV
CM 254870

8 JUN 1944

UNITED STATES	FAIRFIELD AIR SERVICE COMMAND
v.	Trial by G.C.M., convened at Chicago, Illinois, 27 March 1944. Dismissal and total forfeitures.
Captain JAMES E. BAGGETT (0-511062), Air Corps.	

OPINION of the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that Captain James E. Baggett, Air Corps, did, at Oklahoma City, Oklahoma, on or about 9 November 1943, with intent to defraud, willfully, unlawfully, and feloniously make and utter to the Lubritorium a certain OPA Form R-544, in words and figures as follows, to-wit:

Form OPA R-544 (Revised 9-30-42)	United States of America Office of Price Administration	Budget Bureau No. 08-R022-42 Approved until further notice.

ACKNOWLEDGMENT OF DELIVERY
GASOLINE-FUEL OIL-KEROSENE-RESIDUAL OIL-DIESEL OIL
(For use of the Army, Navy, Marine Corps, Coast Guard, Maritime Commission, and War Shipping Administration)

No. _____
NOV 22 1943

Date Nov 9, 1943

This is to certify that Lubritorium 314 W 10
(Name of seller) (Address of seller)
has
delivered Eighteen (18) Gals of Gasoline
(Write quantity in words) (Figures) (Unit of measure) (Specify whether gasoline, fuel oil, etc.) (Grade)
for the
exclusive use of WAR DEPARTMENT 23rd TTTng. DETACHMENT 6 N. HAMLIN, CHICAGO, Ill.
(Specify agency) (Specify activity) (*Address of activity)
Oklahoma City 1505989
(Place of delivery) (Motor vehicle license number**or name of vessel)

James E. Baggett Capt Air Corps
(Signature of person accepting delivery-print name below signature) (Title and office of person accepting delivery)

James E. Baggett

* The local War Price and Rationing Board will cancel this acknowledgment upon submission and will then forward it to the activity specified above.
** If delivery is made into the fuel tanks of more than one motor vehicle, the motor vehicle license numbers need not be given.

THIS ACKNOWLEDGMENT VOID IF ANY ERASURES OR CHANGES APPEAR HEREON

and by means thereof did fraudulently and illegally obtain from the said Lubritorium eighteen (18) gallons of gasoline for the said Captain James E. Baggett's private use.

Specification 2: In that Captain James E. Baggett, Air Corps, did, at Valley Park, Missouri, on or about 7 November 1943, with intent to defraud, willfully, unlawfully, and feloniously make and utter to the Motor Gas Station a certain OPA Form R-544, in words and figures as follows, to-wit:

Form OPA R-544
(Revised 9-30-42)

Budget Bureau No. 08-R022-42
Approved until further notice.

United States of America
Office of Price Administration

No. _____

ACKNOWLEDGMENT OF DELIVERY
GASOLINE-FUEL OIL-KEROSENE-RESIDUAL OIL-DIESEL OIL
(For use of the Army, Navy, Marine Corps, Coast Guard, Maritime Commission, and War Shipping Administration)

Date Nov 7, 194 3

This is to certify that Motor Gas Station
(Name of seller) (Address of seller)

has
delivered 25 Twenty five(25) Gals. of Gasoline
(Write quantity in words) (Figures) (Unit of measure) (Specify whether (Grade) gasoline, fuel oil, etc.)
for the
exclusive use of WAR DEPARTMENT 23rd TTTng. DETACHMENT, 6 N HAMLIN,
(Specify agency) (Specify activity) (*Address of activity)
CHICAGO, Ill.

Valley Park Mo. Plymouth 1542329-Buick 1544512
(Place of delivery) (Motor vehicle license number**or name of vessel)

James E. Baggett Capt A C
(Signature of person accepting delivery-print name below signature) (Title and office of person accepting delivery)

JAMES E. BAGGETT Chicago, Ill.

* The local War Price and Rationing Board will cancel this acknowledgment upon submission and will then forward it to the activity specified above.

** If delivery is made into the fuel tanks of more than one motor vehicle, the motor vehicle license numbers need not be given.

THIS ACKNOWLEDGMENT VOID IF ANY ERASURES OR CHANGES APPEAR HEREON

and by means thereof did fraudulently and illegally obtain from the said Motor Gas Station twenty-five (25) gallons of gasoline for the said Captain James E. Baggett's private use.

CHARGE II: Violation of the 69th Article of War.

Specification: In that Captain James E. Baggett, Air Corps, having been duly placed in arrest in his quarters in the Coolidge Hotel, Chicago, Illinois, on or about 27 January 1944, did, at Chicago, Illinois, on or about 7 February 1944 break his said arrest before he was set at liberty by proper authority.

CHARGE III: Violation of the 61st Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and the two Specifications thereunder and of Charge II and the Specification thereunder, and not guilty of Charge III and its Specification. No evidence of previous convictions

was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution in support of the Charges and Specifications of which the accused was found guilty is substantially as follows:

a. Specifications 1 and 2, Charge I:

On 7 November 1943 at Valley Park, Missouri, the accused while on an authorized leave of absence executed an OPA Form R-544 and thereby procured 25 gallons of gasoline from the Motor Gas Station for use in a Plymouth and a Buick automobile. On the above-mentioned OPA Form the accused certified that the gasoline thus obtained was for the exclusive use of the "War Department 23rd TTTng Detachment 6 N. Hamlin Ave, Chicago, Ill."

Again on 9 November 1943, while still on leave, the accused obtained 18 gallons of gasoline from the Lubritorium in Oklahoma City, Oklahoma, through the use of an OPA Form R-544, again certifying that such gasoline was for the exclusive use of the "War Department 23rd TTTng Detachment 6 N. Hamlin, Chicago, Ill." This gasoline was for use in a Hudson automobile (R. 15-17; Pros. Exs. 2, 3).

First Lieutenant William V. Schroff, Adjutant of the 23rd Transport Transition Training Detachment, of which the accused was the commanding officer at the time of the commission of the offenses, testified that accused was not on any official business for the War Department while on his leave and further that said organization did not have at its disposal any Plymouth, Buick or Hudson automobiles during the period of accused's leave (R. 16).

b. Specification, Charge II:

On 27 January 1944, pursuant to instructions contained in a TWX Message from the Commanding Officer, Domestic Transportation Division Air Transport Command (Pros. Ex. 5), Captain James B. Folsom, 1689th Military Police Detachment, Chicago, Illinois, placed accused in arrest in his quarters, Room 330, Coolidge Hotel, 2950 West Jackson Boulevard, Chicago, Illinois. In the presence of Lieutenant Schroff Captain Folsom read to the accused the TWX Message, and additionally explained to accused

the terms of his arrest which were that accused was not to leave his room except to obtain meals, and in case of an emergency (R. 18, 48, 49). It was shown that there are several restaurants within walking distance of the Coolidge Hotel (R. 21).

Thereafter, on 7 February 1944, Lieutenant Schroff tried for a period of four and one half hours to contact accused by telephone at the Coolidge Hotel. At the end of this time accused called Lieutenant Schroff by telephone, and accounted for his absence by saying he had been out for lunch (R. 18, 19).

It was stipulated that if A. H. Pollack were present he would testify that on 7 February 1944 he was chairman of OPA Local Rationing Board 40-29, located at 3415 West Madison Street, Chicago, Illinois, and that on 7 February 1944 accused personally appeared before him in the Rationing Board's office requesting that he expedite the issuance of a "B" Gasoline Ration Book and a certificate for two tires and tubes (R. 20; Pros. Ex. 6). In the application filed by the accused for the "B" Gasoline Book he stated that the gasoline was to be used in "Driving on duty to and from home" (Pros. Ex. 7). The Ration Board office is about a half mile east and a quarter mile south of the Coolidge Hotel (R. 51).

The accused had not been released from his arrest on 7 February 1944 (R. 21).

4. For the defense:

After having his rights as a witness explained to him the accused elected to testify under oath. He admitted executing the two OPA Forms R-544 on which he obtained the 25 gallons of gasoline at Valley Park, Missouri, on 7 November and the 18 gallons of gasoline at Oklahoma City, Oklahoma, on 9 November 1943. He had obtained these forms for the use of his detachment, but had never received any instructions concerning their use, and knew that organizations had used them for obtaining gasoline for military personnel (R. 55-57). Accused said that the 25 gallons of gasoline obtained on 7 November 1943 was put in a Plymouth and a Buick automobile, driven by himself and his wife respectively, and the 18 gallons of gasoline obtained on 9 November 1943 was put in a Hudson automobile, driven by a Private Harris. He was transferring these three automobiles, none of which belonged to or were being used by the United States Government, to Oklahoma City from Chicago, for the purpose of selling them (R. 68-73).

In regard to his alleged breach of arrest on 7 February 1944, accused said that Captain Folsom, when placing him under arrest, had told

him the hours and places for obtaining meals was left to his discretion (R. 80). Because he must have a heavy vegetable diet he had found it necessary to go to restaurants from 15 to 32 blocks from his hotel to find suitable eating places (R. 79-80), driving to such restaurants in his car (R. 59). Accused stated he did go to the Ration Board on 7 February 1944, arriving there about 11:45 and remaining there from 45 minutes to two hours, when he proceeded to the Howell Restaurant at Cicero and Madison Streets for his midday meal, thereafter returning to his room (R. 60). Accused did not think he had been absent from his room during 7 February for four and one half hours as testified to by Lieutenant Schroff but said he might have been absent for as long as three and three quarters hours. No one told him Lieutenant Schroff had called him while he was away from his room, and he "just called" the lieutenant on his return (R. 75, 76).

5. The evidence conclusively shows that on 7 November and 9 November 1943, accused, while on a leave of absence obtained 25 and 18 gallons of gasoline respectively from gasoline dealers in Valley Park, Missouri and Oklahoma City, Oklahoma respectively, by executing two OPA Forms R-544, falsely certifying on each form that the gasoline was for the exclusive use of the War Department. This gasoline was placed in three privately owned automobiles which the accused was transferring to Oklahoma City, Oklahoma to sell.

On 27 January 1944 accused was placed in arrest in quarters in his room in the Hotel Coolidge in Chicago, Illinois, pursuant to TWX Message from the Commanding Officer, Domestic Transportation Division, Air Transport Command. Under the terms of his arrest accused was permitted to leave his room only to obtain meals, and in case of emergencies. On 7 February 1944 accused breached this arrest by going to a local rationing board office in Chicago, Illinois, to file an application for a gasoline ration book, remaining at the ration board office for from 45 minutes to two hours.

6. War Department records show that accused is 48 years of age. He graduated from Southwestern State Institute of Technology, Weatherford, Oklahoma. He enlisted in the Army 1 November 1917 and after completing the Officers' Training School, Camp MacArthur, Texas, was commissioned second lieutenant, 26 August 1918; honorably discharged 20 December 1918. He was appointed captain, Army of the United States, 16 January 1943.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial

rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 69 or 96.

Thomas H. Tolley, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert E. Turnbull, Judge Advocate.

SPJGV
CM 254870

1st Ind.

War Department, J.A.G.O., 12 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain James E. Baggett (0-511062), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig. S/W.
Incl.3-Form of action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 359, 17 Jul 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

4 AUG 1944

(387)

SPJGH
CM 254879

UNITED STATES v. Second Lieutenant WILLIAM J. KELLY (0-1288564), Air Corps.	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Santa Ana Army Air Base, Santa Ana, California, 4 April and 21 June 1944. Dismissal, total forfeitures and confinement for five (5) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

---

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that William J. Kelly, 2nd Lt., AC, being at the time a duly appointed Class A Agent Officer for J. A. Milton, Lt. Colonel, FD, Disbursing Officer, Santa Ana Army Air Base, Santa Ana, California, did at Santa Ana Army Air Base, Santa Ana, California, on or about 24 November 1943, feloniously embezzle by fraudulently converting to his own use currency of the United States of a value of $86.17, the property of the United States, furnished and intended for the Military Service thereof, entrusted to him, the said William J. Kelly, by the said Disbursing Officer, Santa Ana Army Air Base, Santa Ana, California.

Specification 2: In that William J. Kelly, 2nd Lt., AC, being at the time a duly appointed Class A Agent Officer for J. A. Milton, Lt. Colonel, FD, Disbursing Officer, Santa Ana Army Air Base, Santa Ana, California, did at Santa Ana Army Air Base, Santa Ana, California, on or about 30 November 1943 feloniously embezzle by fraudulently converting to his own use, currency of the United States of a value of $373.62, the property of the United States, furnished and intended for the Military Service thereof, entrusted to him, the said William J. Kelly, by the said Disbursing Officer, Santa Ana Army Air Base, Santa Ana, California.

Accused pleaded not guilty to and was found guilty of the Charge and Specifications. Evidence of a previous conviction by general court-martial of a violation of the 95th Article of War was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of ten (10) years. The reviewing authority approved the sentence but remitted five (5) years of the confinement imposed, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: It was stipulated (Ex. A) that accused was appointed "Class A Agent" to pay the October, 1943, supplemental pay roll of "Squadron 16", which included $86.17 due Leslie R. Peterson; that on 24 November 1943, accused received $584.24, the exact amount of said pay roll, and on the same date he returned the pay roll to the finance office showing all enlisted men, including Peterson, as paid. It was also stipulated that accused was appointed "Class A Agent" to pay the November, 1943, regular and supplemental pay rolls of Squadron 16; that the amount of the regular pay roll was $6,270.98, which included $37.30 due John G. Cieslak, $31.25 due Andrew Humen, $49.30 due Arthur L. McCue, $25.50 due Ralph F. Ridgeway, $31.10 due Ralph B. Pister, Jr., $37.25 due Ray J. Varga and $31.10 due Louis J. Weiss; that the amount of the supplemental pay roll was $2,629.65, which included $21.50 due H. C. Floyd, Jr., $31 due Charles A. Gildersleeve, $28 due Idus F. Hicks, $25.50 due Lester J. Lawrence, $50 due Wesley C. Murphy, Jr., $28 due Willard A. O'Denius and $28 due Norris E. Thompsen; that on 30 November 1943, accused received from the finance officer the amount of the two pay rolls, $8,900.63, and on 1 December 1943 returned the pay rolls showing all enlisted men, except a Corporal Julian L. Klein, as paid, including the men listed above; and that during the dates mentioned Lieutenant Colonel James A. Milton was finance officer (R. 5-7).

It was further stipulated (Ex. B) that Leslie R. Peterson would testify that he was not paid the $86.17 due him on the October supplemental pay roll until after 23 December 1943; that Cieslak, Humen, McCue, Ridgeway, Pister, Varga and Weiss would testify that on 30 November there was paid to the cadet treasurer on behalf of each $6.90 on the November regular pay roll, and Floyd, Gildersleeve, Hicks, Lawrence, Murphy, O'Denius and Thompsen would testify that on 30 November, there was paid to the cadet treasurer on their behalf the sums of $2.52, $5.88, $6.30, $6.90, $3.15, $5.88 and $2.25, respectively, on the November supplemental pay roll, and that the balances due them (totaling $373.62) were not paid until after 23 December 1943. It was also stipulated (Ex. C) that Leslie R. Peterson was confined to the station hospital on 24 November 1943 and returned to his squadron on 30 November; that Cieslak, Lawrence, McCue, Ridgeway, Varga and Weiss were assigned to "squadron 94" on 30 November; and that Floyd, Gildersleeve, Hicks, Humen, Murphy, O'Denius, Pister and Thompsen were confined to the station hospital on 30 November (R. 7).

Second Lieutenant Patrick A. Quigley signed as witnessing officer for Lieutenant Kelly on the pay rolls of 24 and 30 November. He did not in fact see the men paid but signed upon the representation of Lieutenant Kelly that they had been paid (R. 8-10).

Sergeant John H. Marks testified that on 30 November 1943, he was clerk of Squadron 16, 2nd Wing, Classification Center, of which squadron the accused was the commanding officer; that on "four or five" occasions subsequent to that date, including about the 3rd and the 8th of December, he reported to accused that "the men" had been asking for their pay and on one occasion Sergeant Marks took down the names of the men and gave them to the accused. Accused said nothing at the time. The accused left on "furlough" about 11 December and before leaving told Sergeant Marks that the men would be paid by check (R. 10-20).

Aviation Cadet Leslie R. Peterson testified that about the middle of November, 1943, he signed the regular November and the supplemental October pay rolls. On 24 November he was in the hospital and did not receive his back pay. He received his regular November pay on 30 November and immediately "after pay roll" went to the accused and asked about the pay due him on the October supplemental pay roll. Accused told him if he did not receive it "by Monday" to come back then. Peterson did not receive it and returned on Monday at which time accused said he did not have it and that Peterson would receive it by check through his orderly room (R. 20-22).

4. Evidence for the defense: Sergeant Marks, recalled as a witness for the defense, testified that he "made out" the envelopes in which the men were paid on 30 November and after that the accused and three cadets worked on them. Half of the envelopes were placed on Sergeant Marks' desk and half on the desk of the accused. The latter handed over the envelopes personally to the men when they answered the roll. The envelopes of absentees were put to one side on the desk of accused and a notation placed on them as to the reason for the absence. Sergeant Marks did not take any of the envelopes and saw no one else, except the payees, take any of them (R. 23-25).

Captain John E. Burris, Director of Military Training, Classification Center, Santa Ana Air Base, testified that accused worked in "our" wing and was a personal friend. About 30 November accused mentioned that he had received word that his father had an "attack" and was very ill. The accused said several times that he was worried about his father's condition and appeared to be nervous, upset and agitated (R. 25-28).

Accused made an unsworn statement substantially as follows: He enlisted as a private 13 October 1940 and was graduated from Officer Candidate School at Fort Benning, Georgia, and commissioned a second lieutenant on

23 July 1942. During this period he had no contact with pay rolls or financial matters but did subsequently as a squadron commander and as an adjutant. He was married, had no children, and the $250 he received as a second lieutenant was adequate for his needs. He had no debts or obligations. His parents were well to do, his father was an internationally known surgeon, and they did not rely upon him for support. He received word about 30 November that his father was seriously ill and not expected to live. On 10 December he received a telegram that his father was dead (R. 23).

5. Captain Norwood B. Smith, Jr., called as a witness for the court, testified that he and accused were in the Classification Center at the base, he (Captain Smith), in the payroll section and the accused in charge of Squadron 16. Captain Smith prepared the pay rolls of 24 November and 30 November which accused was designated to pay. About 10 December six men came to him from Squadron 94 claiming pay for the period when they were in Squadron 16. The records showed that they had been paid. Accused had left the post on emergency leave and accordingly Captain Smith called him at his home in Detroit. Captain Smith gave accused the names of the men, Varga, Pister, Lawrence, Weiss, Ridgeway and McCue, and accused said they had been paid, that he had sent their money down to Squadron 94 by runner and had a receipt for it which he thought was signed by "Lt. Patty", the commanding officer of Squadron 94. Accused said he would send the receipt out air-mail, but Captain Smith never received it. The day after his telephone conversation with the accused Captain Smith saw a telegram (Ex. D) addressed to "Major Tremper Longman" at the air base and signed "Lt. Wm J Kelly" asking for an extension of leave and reading in part:

> "REALIZING MY OBLIGATIONS IN THE MATTER OF APPARENTLY IMPROPERLY HANDLED PAYROLL AND SINCE FUNDS IN QUESTION HAVE INDUBITABLY BEEN LOST. WOULD IT BE POSSIBLE, DUE TO THE EXTREME EXIGENCIES OF MY SITUATION HERE AND THE URGENT NECESSITY THAT I REMAIN HERE UNTIL AT LEAST THE END OF THE WEEK, * * *".

About 18 December, after the return of accused to camp, Captain Smith talked to him in the office of Colonel Milton, the finance and disbursing officer, at which time the accused told Captain Smith that he had put the receipt in the mail. Captain Smith further testified that on the same date he talked to the accused at Detroit he listened on an extension and overheard another telephone conversation between Lieutenant Quigley and the accused. Lieutenant Quigley asked for further information concerning the matter and accused stated that he had told Captain Smith the men had been paid and further stated that he (accused) had forwarded the receipt by registered mail to Captain Smith (R. 41-54).

6. a. The evidence for the prosecution shows that the accused, commanding Squadron 16 at the Santa Ana Army Air Base, was appointed "Class A Agent" to pay the October supplemental pay roll and the November regular and supplemental pay rolls of the squadron. Lieutenant Colonel James A. Milton

was the disbursing officer at the base. On 24 November 1943 accused received the sum of $584.24, the exact amount of the October supplemental pay roll, and on the same date he returned the pay roll showing all enlisted men paid. Among the names on this pay roll was that of Aviation Cadet Leslie R. Peterson, due the sum of $86.17. Cadet Peterson was in the hospital on 24 November, was not paid on that date, and did not receive the $86.17 until subsequent to 23 December.

On 30 November the accused received the sum of $8,900.63, the exact amount of the November regular and supplemental pay rolls, and on that date he returned the pay rolls showing all enlisted men paid (with one exception not pertinent here). Included in the list of men shown paid in full on the pay rolls were the following enlisted men: Floyd, Gildersleeve, Hicks, Humen, Murphy, O'Denius, Pister and Thompsen, all of whom were confined in the hospital on 30 November, and Cieslak, Lawrence, McCue, Ridgeway, Varga and Weiss, who on that date were assigned to another squadron. In the case of each of these men small amounts had been paid the cadet treasurer on their behalf but the major part of the money due them was not paid until sometime after 23 December. The total balance due them, after deduction of the amounts paid the cadet treasurer, was $373.62. Second Lieutenant Patrick A. Quigley, although not personally present at the time, signed all three pay rolls as witnessing officer upon the representation of the accused that the men were paid.

Several of the enlisted men who did not receive their pay, subsequently went to the squadron clerk and inquired concerning it. The clerk reported this to the accused and gave him their names. Accused departed on emergency leave about 11 December and before leaving told the clerk that the men would be paid by check. Aviation Cadet Peterson went to accused directly about his pay and accused told him if he did not get it "by Monday" to come back. Peterson did not receive it, returned and was also told he would receive it by check.

Captain Norwood B. Smith, of the pay roll section of the Classification Center, to which Squadron 16 was administratively attached, called accused by long distance while he was at his home in Detroit on emergency leave, and told him that Varga, Pister, Lawrence, Weiss, Ridgeway and McCue from Squadron 94 had inquired about their pay. The accused said he had sent their money to their squadron by runner and had a receipt for it which he thought was signed by their commanding officer. He promised to send the receipt to Captain Smith by airmail and on his return to the base claimed he had mailed it. In a conversation with another officer he said he had sent the receipt to Captain Smith by registered mail. No receipt was ever received by Captain Smith.

The foregoing evidence is uncontradicted. The accused made an unsworn statement to the effect that he was married, had no children, and that his pay as a second lieutenant was adequate for his needs. He had no debts

or obligations and his parents did not rely on him for support as they were well to do. His father was an internationally known surgeon. About 30 November he was notified that his father was not expected to live and on 10 December he received word his father was dead. Captain John E. Burris, a friend of accused, testified that accused became very nervous, upset and agitated upon receipt of word of his father's illness.

b. The evidence accordingly shows that on two occasions accused was entrusted with funds to pay his squadron pay rolls and that he returned the pay rolls showing all men paid in full (with one exception not pertinent in this case). In fact several men listed on the pay roll were not paid in full due either to absence in the hospital or recent transfer to another organization. Subsequent to the paydays some of these men came to accused or to his clerk (who in turn took the matter up with accused) and requested payment of what was due them. On one pretext or another accused put them off and left camp on emergency leave without doing anything further in the matter. When a superior officer requested an explanation of the failure to pay the men who had been transferred to a new squadron, accused insisted he had sent their money to their new commanding officer and held the latter's receipt for the money. He promised to mail the receipt to his superior but none was ever received. He offered no explanation whatever as to what had happened to the money allegedly paid those men absent in the hospital on payday.

Embezzlement is defined by the Manual for Courts-Martial (par. 149h) as "the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come". It was held in CM 122562, Dig. Op. JAG 1912-40, sec. 452(3):

> "Money delivered to a company commander for payment of the salaries of his company still remains the property of the United States; and when there is no evidence that any enlisted man had agreed to constitute the accused his agent for the collection or the custody of his pay, and the evidence shows that the money for such pay was delivered to the accused, and that certain enlisted men whose pay accused received, failed to receive their pay, and there is no explanation by the accused as to the disposition of the money, the evidence is sufficient to constitute a prima facie case of embezzlement".

In the opinion of the Board the facts and circumstances of the case, and the legitimate inferences to be drawn therefrom, are sufficient to establish the fraudulent appropriation by the accused of pay roll funds entrusted to him as alleged in the Specifications (cf. CM 231953, Hentz, 18 B.R. 337).

7. The records of the War Department show that this officer is 32 years and 2 months of age. He graduated from Howe Military School in 1930 and attended the University of Michigan for 1 year. After quitting college he

was employed for several years by a brokerage concern as a securities salesman. He enlisted on 15 October 1940, served in an enlisted status for one year and nine months, and after graduating from The Infantry School, Fort Benning, Georgia, was appointed temporary second lieutenant, Army of the United States, on 23 July 1942. He entered upon active duty as an officer on the same day.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 94th Article of War.

Samuel M. Driver, Judge Advocate.

Robert J. Warner, Judge Advocate.

F. J. Lotterhos, Judge Advocate.

(394)

1st Ind.

War Department, J.A.G.O., 23 AUG 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William J. Kelly (0-1288564), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused, on two separate occasions, was entrusted with Federal funds in his capacity as Class A Agent officer, to be used to discharge the pay rolls of the squadron which he commanded, and both times he returned the pay rolls showing all enlisted men paid in full when, in fact, some fifteen members who were absent from the squadron on pay day because sick in hospital or transferred to another organization, had not been paid. The money due these soldiers as pay, totaling $459.79, was embezzled by accused in violation of Article of War 94. The record of trial and the accompanying papers disclose no extenuating circumstances. The accused is presently under a suspended sentence to dismissal arising out of his conviction by general court-martial, on 26 April 1943, of making and uttering, with intent to defraud, seven checks totaling $162, knowing that he did not have, and not intending that he should have, sufficient funds in the bank to pay them, in violation of Article of War 95, and of breach of restriction, in violation of Article of War 96. I recommend that the sentence, as approved by the reviewing authority, to dismissal, total forfeitures and confinement at hard labor for five years be confirmed, that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the above recommendation, should it meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. of ltr. for sig. S/W.
Incl.3-Form of Action.

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 525, 26 Sep 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 254880

1 JUN 1944

UNITED STATES	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	Trial by G.C.M., convened at Victorville Army Air Field, California, 18 April 1944. Dismissal and total forfeitures.
Second Lieutenant ARVIS G. WILLIAMS (0-758498), Air Corps.	

- - - - - - - - - - - - - - - - -

OPINION of the BOARD OF REVIEW
LYON, ANDREWS and SONENFIELD, Judge Advocates.

- - - - - - - - - - - - - - - - -

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused was tried on the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Williams, Arvis G., 2nd Lieutenant, Air Corps, 87th Base Headquarters & Air Base Squadron, did, on or about 29 March 1944, at or over Big Bear Lake, California, wrongfully pilot an AT-11 airplane at an altitude of approximately fifty (50) feet over Big Bear Lake, California, in violation of Paragraph 16, Army Air Forces Regulation 60-16.

Specification 2: In that Williams, Arvis G., 2nd Lieutenant, Air Corps, 87th Base Headquarters & Air Base Squadron, did, at or near Big Bear Lake, California, on or about 29 March 1944, wrongfully pilot an AT-11 airplane in a careless and reckless manner so as to endanger persons in said airplane and property on the ground, in violation of paragraph 1, AAF Regulation 60-16.

He pleaded not guilty to Specification 2 of the Charge, and guilty of Specification 1 of the Charge and of the Charge. He was found guilty of the Charge and both Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal and total

forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

About 1500 or 1530 on 29 March 1944, Privates Keith R. Bean and Lyman B. Clark, members of the Pre-Aviation Student Detachment at Victorville, California, Army Air Field, approached accused and "Lieutenant Harris" on the field and asked to be taken for a ride in an airplane. Clark had never been in an airplane, and Bean had been up once before. The four men got in an AT-11 type plane, with accused at the controls (R. 5,6,8,9,10,12). They flew in a southwesterly direction, passing about 5 or 6 miles east of the city of San Bernardino at an altitude of about 6000 feet above sea level, then flew east to Arrowhead Lake. From here they proceeded further east to Big Bear Lake. Neither Bean nor Clark knew much about reading an altimeter, but they estimated the plane's altitude in flying from Arrowhead to Big Bear to be between 500 and 1000 feet above the terrain (R. 6,8,10,12). Big Bear Lake is higher than Arrowhead, but the plane followed the sharp rise between the two and continued to maintain its comparative altitude above the ground (R. 6,10,12,13).

A standard atlas shows Big Bear Lake to be considerably longer than it is wide, and to have its long axis in a general east-west direction. From the testimony of Captain John L. Albright, Air Corps, 87th Base Headquarters and Air Base Squadron, Victorville Army Air Field, and from photographs introduced by the prosecution as its Exhibits "C" and "D", it appears that somewhere towards the eastern edge of the lake there is a "narrows", perhaps 1000 feet wide. Telephone wires cross the lake in a north-south direction at this point, supported on poles set in pylons in the water. The poles are between 35 and 50 feet "above the ground" (R. 14,15,17,21; Pros. Exs. C,D).

The plane descended in a shallow dive to an altitude of 75 or 80 feet above the ground as it reached the lake, and continued across the water at an altitude of 40 or 50 feet. Bean and Clark were sitting at the feet of Lieutenant Harris, the co-pilot, in the bombardier's glass-enclosed compartment in the plane's nose. The plane struck the wires, the impact shattering the glass, and causing, in turn, cuts on Bean's thumb and legs. He was hospitalized for 13 days, but suffered no permanent injuries. Clark was not hurt (R. 6-9,10,11,13,14). Accused, who had been piloting at all times, kept the plane under control and flew it back to Victorville (R. 7,13).

Other than the low flying immediately prior to reaching the lake and while flying across it, there was no low or reckless flying (R. 8,9,13).

Captain Albright and First Lieutenant Edward Miller, Air Corps, 520th Squadron, the latter the assistant engineering officer in the sub-

depot, in charge of the maintenance shops, testified as to the damage to the plane, which they examined on 29 March and 1 April, respectively. Photographs of the damage were introduced as exhibits. Both wings were damaged, part of the stabilizer on the right wing being torn out. The glass in front of and on top of the bombardier's compartment was shattered. The tail section was damaged, and the "skin on the fuselage" was dented and cut. The hood over the hub of the propeller on one engine was dented (R. 19-21,22,23; Pros. Exs. E,F,G,H,I,J,K,L,M,N, and O).

Captain Albright also testified that he investigated the scene of the accident on 29 March. He found 5 of 8 separate wires across the lake had been severed at a point 200 or 300 feet from one shore. Other wires which had not been cut were sagging about 8 feet above the ice on the lake. Enmeshed in the dangling wires was a piece from the top of the right rudder of an AT-11. Another piece of metal was found on the ice approximately 200 feet east of the wires (R. 15-18,22; Pros. Exs. A, B and C). Three high tension wires parallel to the others were undamaged (R. 15).

Evidence for defense.

Defense counsel explained that accused's rights had been explained. He was sworn and testified in his own behalf (R. 39).

He stated that he had entered the Army as a member of the National Guard, had refused an opportunity to be demobilized, and had spent a total of three years and nine months as an enlisted man and an officer. After fifteen months in Alaska he had made application for and had been appointed as an Aviation Cadet. He was commissioned on 3 November 1943, and had never before been disciplined in any way while in the Army (R. 39-41).

His duty on 29 March was that of flying high-altitude missions on the desert. He had flown three of them during the morning. After some "instrument flying" for his own and Lieutenant Harris' benefit during the afternoon, they took off with Bean and Clark, who had asked for a ride. He obtained no clearance for instrument flying because the plane was already cleared for that purpose. Accused was at the controls at all times (R. 41,42,45,46,49,50). They commenced climbing to the south of the field, in an attempt to experiment with the plane's ability to gain altitude over mountainous terrain. At Arrowhead Lake their altitude above the terrain was between 2800 and 3000 feet (R. 42,46,47,49). From there accused "started climbing on up towards that big peak by Big Bear". He increased his altitude above sea level by about 500 feet, but he did not state how much the terrain rose in that distance. Somewhere before reaching Big Bear Lake, he leveled off. He had not formulated any plans concerning flying over the lake, but remembered "looking down at the lake, and I didn't see anything and I thought it would be a good place to fly lower, so I went on down to about 50 feet or a little lower." This was accomplished by a shallow dive at the rate of about 700 or 800 feet per minute, but accused did not know how much altitude he lost (R. 42,43,47). He leveled off above the surface of the lake, and flew

down its long axis, "way over 500 feet" from any land obstructions, for 20 or 30 seconds (R. 43,48,49). He was watching his altitude above the lake over the nose of the plane and did not see the wires until he looked up and found them directly in front of him. He tried to go beneath them, but was unable to do so. The plane "wanted to go down" after he hit them, but he succeeded in maintaining control. He flew further down the lake, gained altitude, flew out of the valley, and back to Victorville, where he immediately reported the accident (R. 43,44).

Accused stated that he had not flown low at any other time that day, or, in fact, since being stationed at Victorville. He knew that the students were in the nose of the plane, and that he was flying slightly outside of the "local flying area". The act was committed "on the spur of the moment", but accused felt that he had learned the lesson of the necessity to abide by flying rules and that he would henceforth be a better pilot for it. He desired to remain in the Army as a flying officer (R. 44,45,49).

Captain Floyd L. Ratliff, Jr., Air Corps, the commanding officer of Pilot Section II at accused's field, testified that he had examined accused's plane after it landed. He stated that in his opinion accused displayed a high degree of skill and judgment in bringing it in when its damaged condition was considered (R. 38). He also stated that accused had been in his section for about three months, and had been "very satisfactory" as a "mission pilot". He had never been in trouble before, and his attitude had been one of attentiveness, promptness and thoroughness. Witness had never flown with accused or rated his professional efficiency, but if he were doing so would place accused "definitely in the upper bracket". Accused was "definitely of value to the squadron" (R. 26-28).

Chaplain (First Lieutenant) Albert L. Higgins, the Catholic Chaplain at the field, roomed across the hall from accused, and had known him for 5 months. He testified that accused had been a gentleman at all times, and had never exhibited any traits in habit or conduct which could be criticized in any way. Accused's conduct as an officer had been exemplary and his attitude "the very best" (R. 24,25).

First Lieutenant Earl L. Simmons, Air Corps, Second Lieutenant Edward F. Wehrly, Air Corps, and Second Lieutenant Herbert E. Worsham, Air Corps, all of accused's squadron, also testified concerning his excellent character and his ability as a pilot. Lieutenant Simmons had known accused for five months while accused was in his section. He had found accused to be among the most cautious and conservative of flyers, and he described examples of accused's careful conduct (R. 33,34). Lieutenant Wehrly had known accused for seventeen months and Lieutenant Worsham had known him for fourteen. The three had been through all stages of Aviation Cadetship together, and had been associates since that time. Neither witness knew of any infraction of regulations by accused. Both, from their observation of him, considered him a very good pilot of excellent character, who had been and would be an asset to the Air Forces.

In advanced training accused had been among the first five in a squadron of sixty men, in the accuracy of his landings (R. 29,30,31,32). Second Lieutenant Joseph S. Trum, Air Corps, and First Lieutenant Clarence W. Hayne, Air Corps, both of accused's field, gave similar testimony (R. 35,36,37).

4. The court's findings of guilty of Specification 1 and of the Charge are sustained by accused's pleas of guilty, by his own testimony and by the evidence introduced by the prosecution. While the prosecution did not introduce in evidence Paragraph 16 of Army Air Forces Regulation 60-16, or request that the court take judicial notice thereof, it is clear, from accused's plea of guilty, that no prejudice to him resulted therefrom.

After careful consideration of the evidence and of the applicable Army Air Forces Regulations, the Board of Review is convinced that the court's findings of guilty of Specification 2 of the Charge were proper. The Specification alleged a violation of Paragraph 1 of Army Air Forces Regulations 60-16, which was read to the court, and which is as follows:

> "1. Reckless Operation. An air force pilot will not operate aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons or property on the ground."

Accused could properly have been found guilty, under Specification 1 of the Charge, of a violation of Paragraph 16 of Army Air Forces Regulation 60-16, even if he had not struck the telephone wires, damaged the airplane, and caused injury to one of his passengers. The paragraph forbids flying below stated minimum altitudes, and the very act of flying at 50 feet constituted the violation.

In addition to flying at a prohibited altitude, accused also struck the telephone wires. This constituted flying in a manner from which the court could properly infer reckless or careless operation of the aircraft within the meaning of those words as used in Paragraph 1. Paragraph 2b(1)(d)(1) of Section II, Army Air Forces Regulation 62-14, 26 May 1942, defines "carelessness" for accident report purposes as "* * * inattention or lack of mental alertness". It was held in CM 241729, Weld, that "negligence, as defined in Army Air Forces Regulation No. 62-14, is a narrower term than negligence at common law, and seems practically synonymous with the term 'reckless' * * * ", while Paragraph 2b(1)(d)(1), of Part Nine, Section II of Regulation 62-14 gives as an example of "negligence", "diving at a crowd on the ground, or a boat on the water etc., when the least failure of material or the slighest display of poor technique would result in the death or injury to personnel * * * " (underscoring supplied). Accused himself admitted that "I was watching my altitude above the lake over the nose of the plane and I wasn't watching out very far ahead" (R. 44). Clearly, here is an instance in which accused by his action in violating paragraph 16, placed himself in a position where a momentary lapse in mental attention and alertness could

and did cause damage to equipment and personnel. While this accident could not have happened apart from the first violation, it was in itself a separate and distinct violation, and therefore, we hold, properly charged under Specification 2.

The Specification is inartfully drawn, in that it alleges that accused flew "in a careless and reckless manner so as to endanger persons in said plane and property on the ground", instead of following the alternative wording of the paragraph itself. It is obvious that the second part of the paragraph, from its very wording, does not pertain to persons in the plane, but only to those on the ground. The telephone wires, however, were on the ground, and may properly be assumed to be the property of some person or entity, and to have value. Furthermore, as previously set forth, a violation of the first part of the paragraph was adequately shown. It is obvious that accused was not misled in his defense to Specification 2 by the inept wording thereof, and that no error prejudicial to his substantial rights resulted therefrom.

5. War Department records show that accused is 22 years of age, and a high school graduate. He worked on his father's farm in Benton, Arkansas, prior to enlisting in Battery H, 206th Coast Artillery, at Hot Springs, Arkansas on 18 July 1940. He served with this organization in Alaska from July, 1941 to December, 1942, and as an Aviation Cadet from January, 1943 to 3 November 1943, when he was commissioned a second lieutenant, Air Corps, Army of the United States. Accused's W.D.A.G.O. 201 file contains a letter from Roswell L. and Nellie C. Williams, his parents, addressed to the President, requesting clemency for accused.

6. Attached to the record of trial is a recommendation for clemency, signed by five of the six members of the court, and letters of a similar nature signed, respectively, by First Lieutenant Robert B. Powell, Air Corps, Trial Judge Advocate, and Second Lieutenant Louis Katz, Air Corps, Defense Counsel.

7. The court was legally constituted, and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

Irwin G. Esser, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

Samuel Lounsford, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 12 JUN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Arvis G. Williams (0-758498), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof.

3. Consideration has been given to a letter to the Secretary of War from Mrs. R. L. Williams, accused's mother, requesting clemency; to a letter to Brigadier General Wilton B. Persons, Office of the Chief of Staff, from Senator John L. McClellan of Arkansas; and to a letter from the Honorable W. F. Norrell, Member of Congress, which in turn incloses eight letters written in accused's behalf by prominent citizens and public officials of Benton, Arkansas. Consideration has also been given to a communication signed by five of the six members of the court which tried accused, directed to the reviewing authority, and recommending that he consider remitting the sentence of dismissal and imposing "an adequate forfeiture of pay in lieu thereof", and to requests for clemency signed by the trial judge advocate and the defense counsel. Finally, consideration has been given to a letter dated 31 May 1944, attached hereto, written by General Henry H. Arnold, Commanding General, Army Air Forces, in which he states that this is a case of willful and serious violations of the regulations against low and careless flying, and that the ends of justice and the interest of the Army Air Forces require that accused be eliminated as a flying officer. General Arnold recommends that the sentence be confirmed and ordered executed. I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

4. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

7 Incls.
Incl.1-Record of trial.
Incl.2-Drft. of ltr. sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. to Sec. of War.
fr. accused's mother.
Incl.5-Ltr. to Br.Gen.Persons
fr. Sen. McClellan.
Incl.6-Ltr. fr. Hon.W.F.Norrell, w/incls.
Incl.7-Ltr. fr. CG, AAF.

- 7 -

(Sentence confirmed but forfeitures remitted. G.C.M.O. 394, 18 Jul 1944)

vol 35 Army JAG Bd. Rev.

vol 35 Arm y JAG Bd. Rev.

TITLE

DATE	BORROWER'S NAME	EXT.