

IN AND BEFORE THE STATE BOARD OF MEDICAL EXAMINERS

STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,        )  
STATE BOARD OF MEDICAL         )  
EXAMINERS,                         )

Plaintiff,

v.

PAUL B. DEVANESON, M.D.,         )  
Medical License No. 11656

Defendant.

COMPLAINT

COMES NOW John Talbert, Inspector for the Oklahoma Board of Medical Examiners, being first duly sworn upon oath and states:

1. That Paul B. Devaneson, M.D., holding Oklahoma Medical License No. 11656, is in violation of the Oklahoma Medical Practice Act, 59 O.S. 1981, §509, Paragraph 16, to-wit:

"The inability to practice medicine with reasonable skill and safety to patients by reason of age, illness, drunkenness, excessive use of drugs, narcotics, chemicals or any other type of material or as a result of any mental or physical condition."

2. That on or around February 13, 1985, while in the United States Air Force at Sheppard Air Force Base, Texas, the Defendant, an anesthesiologist, was performing medical services on a mastoid operation. That during this time the operating room circulating nurse and medical technician saw the Defendant pour Forane, an anesthetic, onto a surgical sponge, placed under his mask and inhale it. Thereafter the Defendant tried to focus his eyes by opening and closing them and his speech was slurred. The Defendant then fell to the floor and the nurse tried to help and while doing so felt the surgical sponges underneath his mask. The Defendant was removed from the operating room and placed on a stretcher in the hall. As the Defendant regained consciousness he exhibited some of the behavior shown by patients coming out of anesthesia, i.e., combativeness and moving around.

3. That the Defendant's actions were investigated through the Judge Advocate Office. That on or around July 9, 1985, the Staff Judge Advocate recommended that the above-stated offense be tried by General Court Martial. That on or around October 23,

1985, a General Court Martial was convened at Sheppard Air Force Base, Texas, and the Defendant was tried on the offense set forth above, and other unrelated offenses, and found guilty thereon. That the Defendant's conviction was timely appealed to the United States Air Force Court of Military Review and the appeal on the aforesaid charge was affirmed by written decision dated June 25, 1986. Copies of the Advice of the Staff Judge Advocate, the Action of the Court Martial of October 23, 1985, and the Decision from the United States Air Force Court of Military Review are incorporated by reference as if fully set out herein and are attached hereto as Exhibits A, B, and C.

WHEREFORE, Complainant prays this Board to conduct a hearing and upon proof of the allegations contained herein that such disciplinary action be taken by the Board as is authorized by law.

  
JOHN TALBERT, Inspector  
State Board of Medical Examiners

Subscribed and sworn to before me this 10<sup>th</sup> day of December, 1986.

  
Notary Public

My Commission expires:  
10-3-90



Spec 3: Did, at Bowie, TX, o/a 16-17 FEB 85, wrongfully engage in civilian employment.	Dismissal, confinement for 2 years, total forfeitures.
Spec 4: Did, at Bowie, TX, o/a 13-14 MAR 85, wrongfully engage in civilian employment.	Dismissal, confinement for 2 years, total forfeitures.
Charge II: Violation of the UCMJ, Article 121: Spec: Did, at Sheppard AFB, TX, o/a 13 FEB 85, commit larceny of "Forane".	Dismissal, confinement for 6 months, total forfeitures.
Charge III: Violation of the UCMJ, Article 112. Spec: Was at Sheppard AFB, TX, o/a 13 FEB 85, drunk on duty.	Dismissal, conf for 9 months total forfeitures.
Charge IV: Violation of the UCMJ, Article 112. Spec: Did, at Sheppard AFB, TX, o/a 13 FEB 85, wrongfully use "Forane".	Does not state an offense - Recommend dismissal.
Charge V: Violation of the UCMJ, Article 133. Spec: Was, at Sheppard AFB, TX, o/a 13 FEB85, wrongfully incapacitated for proper performance of his duties.	Dismissal, 3 mos conf, 2/3 forf for 3 mos.
Charge VI: Violation of the UCMJ, Article 134: Spec: Did, at Sheppard AFB, TX, o/a 12 FEB 85, maliciously communicate a defamatory statement.	Dismissal, confinement for 5 years, total forfeitures

IV. Summary of Expected Evidence:

The evidence is expected to show that on 13 February 1985, the accused wrongfully appropriated a 100 milliliter bottle of Forane and proceeded to sniff this anesthesia inhalant during a surgical operation at the Sheppard Regional Hospital. Further, the evidence is expected to show that on diverse occasions between January and March of 1985 the accused did in fact,

without proper authority engage in off duty employment at the Bowie Memorial Hospital in Texas. Still further, the evidence is expected to show that the accused communicated to the Honorable Beau Boulter, a defamatory statement concerning his commanding officer, Colonel William Belk. In particular, two witnesses present in the operating room on 13 February 1985, Airman First Class Lisa Pack, and Lieutenant George Godfrey, are expected to testify that they personally observed the accused pour a quantity of Forane onto gauze sponges and proceed to sniff them on various occasions throughout the operation. Further, their testimony will reveal that the accused acted in a drunken manner with slurred speech and glassy eyes. The evidence is further expected to show that on 12 February 1985, the accused communicated the aforementioned defamatory statement concerning his commanding officer to the Honorable Beau Boulter by way of a letter drafted and signed by his attorney, Mr. Arthur P. Swerdlow. At the conclusion of the letter the accused signed and adopted the contents of this letter as his own. With reference to the accused wrongfully engaging in off duty employment, a review of the accused's records kept at the Sheppard Regional Hospital indicates that the accused had not applied for or received permission to engage in civilian off duty employment. While direct and tangible evidence was not readily available from the Bowie Memorial Hospital to indicate that the accused did actually work there, the Officer in Charge of the Office of Special Investigations at Sheppard Air Force Base, Texas, personally reviewed the Emergency Room log at the Bowie Memorial Hospital which indicates the accused indeed worked in a civilian capacity there.

The evidence clearly supports all the charges and specifications, except Charge IV, that being a violation of Article 112a, Uniform Code of Military Justice. The elements of this offense necessitate that the government show that the accused wrongfully used a controlled substance. A review of the evidence failed to reveal that "Forane" is in fact, a controlled substance. Indeed, it does not appear to be listed in Schedules I through V of the Federal Controlled Substance Statute.

V. Legal Conclusions:

A. Each specification with the exception of the specification of Charge IV alleges an offense under the Uniform Code of Military Justice.

B. All specifications except the specification of Charge IV are adequately supported by the evidence.


C. There is courts-martial jurisdiction over the accused and all charged offenses.

VI. Recommendations:

A. Article 32 Investigating Officer: General Courts-Martial.

B. I recommend that all charged offenses, with the exception of Charge IV and the Specification of Charge IV, be tried by General Court-Martial.

C. I recommend that Charge IV and the Specification of Charge IV be dismissed.

  
JAMES R. BARROW, Colonel, USAF  
Staff Judge Advocate

The recommendations of the Staff Judge Advocate are approved.

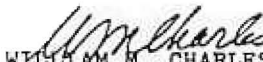
  
WILLIAM M. CHARLES, Jr.  
Major General, USAF  
Commander

EXHIBIT B

DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS SHEPPARD TECHNICAL TRAINING CENTER (ATC)  
SHEPPARD AIR FORCE BASE TEXAS 76311-5000

General Court-Martial Order No. 1, 23 October 1985. Before a general court martial which convened at Sheppard Air Force Base, Texas, pursuant to Special Order AC-16, this headquarters, dated 9 July 1985 as amended by Special Order AC-17, this headquarters, dated 30 July 1985, was arraigned and tried:

MAJOR PAUL P. DEVANESON, 155-62-4192FV, United States Air Force, USAF Regional Hospital Sheppard.

The accused was arraigned on the following offenses and the following findings or other dispositions were reached:

Charge I. Article 92 (Guilty).

Specification 1: Derelict in the performance of duties by willfully failing to remain alert and attentive during a surgical operation on 13 February 1985. (Guilty).

Specification 2: Violated paragraph 9(a), AFR 30-30, as supplemented by Air Training Command Supplement 1, by wrongfully engaging in civilian employment on 12 through 13 January 1985. (Guilty).

Specification 3: Violated paragraph 9(a), AFR 30-30, as supplemented by Air Training Command Supplement 1, by wrongfully engaging in civilian employment on 16 through 17 February 1985. (Guilty).

Specification 4: Violated paragraph 9(a), AFR 30-30, as supplemented by Air Training Command Supplement 1, by wrongfully engaging in civilian employment on 23 through 24 March 1985. (Guilty).

Charge II. Article 121 (Guilty).

OFFICE OF THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE  
This order accurately reflects the result of trial  
and action of the convening authority in this case.  
FOR THE JUDGE ADVOCATE GENERAL

*Elva J. Smith*

ELVA J. SMITH  
Documents Examiner  
Court of Military Review

GCMO No. 1

AC M 25076  
Atch 4

Specification: Larceny of property of a value of \$48.00 on 13 February 1985. (Guilty), except of the words "one one hundred millimeter bottle of Forane, of a value of about forty-eight dollars", substituting therefor the words, "a partial bottle of about sixty-six millimeters of Forane of a value of about thirty two dollars;" of the excepted words, not guilty, of the substituted words, Guilty.) ✓

Charge III. Article 112 (dismissed by Military Judge after arraignment). ✓

Specification: Drunk on duty on 13 February 1985.

Charge IV. Article 112a (withdrawn prior to arraignment). ✓

Specification: Wrongfully use "Forane", an anesthesia inhalant on 13 February 1985.

Charge V. Article 133 (dismissed by Military Judge after arraignment). ✓

Specification: Wrongfully incapacitated for proper performance of duties on 13 February 1985. ✓

Charge VI. Article 134 (renumbered Charge III) (Not guilty). ✓

Specification: Maliciously communicate a defamatory statement on 12 February 1985. (Not guilty) ✓

PLEAS: The accused pleaded not guilty to all charges and specifications.

SENTENCE

✓ The members adjudged the following sentence on 3 August 1985: ✓

To be dismissed from the Service.

ACTION

ACTION OF THE CONVENING AUTHORITY:

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS SHEPPARD TECHNICAL TRAINING CENTER (ATC), Sheppard Air Force Base, Texas 76311-5000, 23 October 1985

In the case of MAJOR PAUL P. DEVANESON, 155-62-4192FV, United States Air Force, United States Air Force Regional Hospital Sheppard, the sentence is approved. The record shall be



✓ forwarded to the Secretary of the Air Force

✓ /s/Richard W. Phillips, JR.  
✓ RICHARD W. PHILLIPS, JR.,  
✓ Major General, USAF  
✓ Commander

FOR THE COMMANDER

*John J. Aldridge III*  
JOHN J. ALDRIDGE III, Capt, USAF  
Assistant Staff Judge Advocate

DISTRIBUTION:

- 1 - Maj Paul P. Devaneson, USAF Rgn Hosp Sheppard, Sheppard AFB TX 76311-5300, ACC
- ✓ 1 - Col George C. Clark, 3750 CES, Sheppard AFB TX 76311-5486, PRES
- ✓ 1 - Lt Col William Karr, HQ USAF Trial Judiciary, Randolph AFB TX 78150-5000, MJ
- ✓ 1 - Maj Larry Kelly, HQ USAF Judiciary, Randolph AFB TX 78150-5000, TC
- ✓ 1 - Capt John J. Aldridge III, HQ STTC, Sheppard AFB TX 76311-5122, ATC
- ✓ 1 - Mr. Arthur P. Swerdlove, Route 1, Box 247, Wichita Falls TX 76301, CIV DC
- ✓ 1 - Capt Chris Clark, HQ USAF Judiciary, Randolph AFB TX 78150-5000, DC
- 1 - HQ STTC/CC, Sheppard AFB TX 76311-5000
- 3 - USAF Rgn Hosp Sheppard/CC, Sheppard AFB TX 76311-5300
- 3 - HQ STTC/AFO, Sheppard AFB TX 76311-5260
- 4 - 3750 ABG/DP, Sheppard AFB TX 76311-5000
- ✓ 10 - HQ USAF/JAJM, Bolling AFB DC 20332-6128
- 1 - AFMPC/MPCAJB, Randolph AFB TX 78150-5000
- 1 - Professor of Law, USAF Academy, Colorado Springs CO 80840
- 1 - Professor of Law, US Military Academy, West Point NY 10996
- 1 - Professor of Law, US Naval Academy, Annapolis MD 21402
- 1 - Professor of Law, US Coast Guard Academy, New London CT 06320
- 1 - Curriculum Area Manager, Professional Knowledge Section, OTS/MTC, Lackland AFB TX 78236
- 1 - AFAFC/MPSSR, Denver CO 80279
- 1 - AFMPC/MPCDOM, Randolph AFB TX 78150-5000
- ✓ 1 - A.F.S.C.O., Wash DC 20330-6440
- 10 - HQ STTC/JA, Sheppard AFB TX 76311-5122

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES

EXHIBIT C

v

Major PAUL P. DEVANESON, 155-62-4192 FV  
UNITED STATES AIR FORCE

ACM 25076

25 JUN 1986

Sentence adjudged 3 August 1985 by GCM  
convened at Sheppard Air Force Base, Texas.  
Military Judge: William H. Karr.

Approved sentence: Dismissal.

Appellate Counsel for the Accused: Colonel  
Leo L. Sergi, Captain Timothy J. Malloy and  
Major Michael Sofocleous, USAFR. Appellate  
Counsel for the United States: Colonel  
Kenneth R. Rengert, Colonel Andrew J. Adams,  
Jr., Captain Joseph S. Kistler and Captain  
Robert L. Marconi, USAFR.

Before

HODGSON, FORAY and MICHALSKI  
Appellate Military Judges

DECISION

HODGSON, Chief Judge:

The appellant is an anesthesiologist assigned to the USAF  
Regional Hospital, Sheppard Air Force Base, Texas. His appeal  
centers on events that took place during a mastoid operation on 13  
February 1985, and in which he participated.

Two operating room personnel, a circulating nurse and a  
medical technician, testified they saw the appellant pour Forane,  
an anesthetic, onto a surgical sponge, place it under his mask and  
inhale it. Forane is packaged in a brown bottle with a color-  
coded purple collar. The nurse stated that after the appellant  
"sniffed" the Forane his vision was unusual and he tried to focus  
by "open[ing] and clos[ing] his eyes." Both the nurse and the

Arch 5

medical technician said his speech was slurred. After the appellant fell to the floor, the nurse tried to help him and while doing so felt the surgical sponges underneath the mask. The appellant was removed from the operation room and placed on a stretcher in the hall. As he regained consciousness he exhibited some of the behavior shown by patients coming out of anesthesia, i.e., combativeness, moving around.

Lieutenant Colonel Annie L. Jackson was a nurse anesthetist during the operation and prepared the anesthesia cart that was used during the procedure. Forane was not used as an anesthetic agent during the operation. She relieved the appellant twice. The last time he seemed tired and had a strong anesthetic vapor odor about him. When he left the room, the odor subsided. She checked the drawer of the anesthetic machine, and found among the anesthetic agents a partially-full bottle of Forane. At approximately 1800 hours, the appellant relieved Jackson and she left the operating room. A few minutes later she returned and saw the appellant holding a bottle of Forane.

The appellant testified that it is his practice to check the anesthetic machine and make sure it is in working order and that a supply of the anesthetic agent being used is available. In doing this he opened the second drawer of the anesthesia cart and found an almost empty bottle of Forane together with two other bottles of anesthetic agents laying on their side. He picked up the Forane bottle, examined it, tightened the cap and kept it on top of the cart. He also keeps a box of gauze sponges available for patient care and personal use.

The appellant indicated he frequently has nasal congestion and when his nose is blocked, he uses spray to clear it and gauze sponges to wipe his nose. He fell off the stool because he was tired, hungry and had a sick feeling in his stomach. He was also concerned over the increasing tension between himself and his superiors and his pending separation from the Air Force in June. He emphatically denied abusing Forane.

Through expert testimony of Doctor Bernard S. Goffin, an anesthesiologist, the defense attempted to establish that anyone who abused Forane in the manner described by the prosecution witnesses would have become "unconscious very quickly" and "might have died from suffocation." Doctor Goffin also stated he was aware of no situation where a physician had been treated for Forane abuse.

This view was challenged by Colonel (Doctor) Robert R. Kirby, Chairman, Department of Anesthesiology, Wilford Hall, Lackland Air Force Base. Doctor Kirby acknowledged that there were no reported cases of Forane abuse, but there were numerous situations where other inhalation anesthetics, i.e., ethrane and halothane were the subject of "recreational" use, and such incidents has reached "almost epidemiologic proportions" among anesthesiologists and nurse anesthetists. Doctor Kirby indicated that Forane evaporates rapidly so that the concentration the individual inhales is quickly diluted by the atmosphere. While Forane has noxious properties, a tolerance for the unpleasant side effects can be achieved. An anesthesiologist would know how much of the anesthetic could be safely self-administered. If Forane had been poured onto a gauze sponge and the sponge placed under a surgical mask the loss of consciousness would be rapid and the regaining thereof would also be rapid.

The surgeon whom the appellant was assisting in the operating room saw nothing unusual in his behavior and heard no slurred speech -- he considered the appellant to be an excellent physician.

During January, February and March 1985, the appellant worked a weekend each month in the emergency room at the Bowie Memorial Hospital, Bowie, Texas, without first obtaining written permission from his commander to do so.

These circumstances resulted in the appellant's conviction for willful dereliction of duty by failing to remain alert and attentive during a surgical operation because of his intentional inhalation of Forane; larceny of a quantity of Forane; and three allegations of wrongfully engaging in civilian employment without first getting permission from his commander. The appellant has assigned five errors for our consideration, one of which has merit and requires remedial action.

I

The appellant argues, the government concedes, and we agree that the findings of guilty as to Specifications 2, 3, and 4 of Charge I cannot stand. The gravamen of the prosecution's case was that the appellant engaged in outside civilian employment without the written permission of his hospital commander in violation of paragraph 9(a), Air Force Regulation 30-30, Standards of Conduct, dated 21 June 1983, as supplemented by Air Training Command

Supplement 1, dated 23 February 1984. The provision the appellant is charged with violating does not require that he get his commander's permission to work off-duty in a civilian hospital. The drafter of these charges apparently confused Air Force Regulation 30-30 and the supplement issued by the subordinate major command with Air Force Regulation 168-4, Administration of Medical Activities, dated 11 July 1980, which sets forth Air Force policy with respect to the off-duty employment of medical service officers. The latter regulation, together with Air Training Command Supplement, sets out the procedures to be followed prior to engaging in off-duty employment. However, the appellant was not charged with violating Air Force Regulation 168-4. Penal regulations must be strictly construed against the drafters. United States v. Smith, 16 M.J. 694 (A.F.C.M.R. 1983). The findings of guilty as the Specifications 2, 3, and 4, of Charge I are set aside and dismissed.

## II

The appellant next challenges the sufficiency of the evidence to prove beyond a reasonable doubt that he stole a quantity of Forane and used it in a manner that resulted in a willful dereliction of duty. While appellate defense counsel admit their client lifted his surgical mask several times during the operation and placed gauze sponges under it, they argue this was not due to Forane abuse, but rather due to a nasal condition. They suggest that their client's unconsciousness came about when he fell accidentally from his stool and hit his head. They further contend the appellant's testimony is believable and corroborated by independent evidence i.e., the surgeon conducting the operation was aware of the appellant's nasal condition and his use of the sponges to wipe his nose. Further, this individual saw nothing amiss in the appellant's behavior while he was assisting in the operation. They also point out that the appellant's nasal spray container was in the operation room.

The members had before them conflicting versions of the incident involving the appellant. The two medical personnel stated they saw him pour Forane onto a gauze sponge, place it under his surgical mask and "sniff" it. They identified the Forane bottle by the color-coded collar around the neck. Earlier the appellant had been seen holding a Forane bottle which he maintained he found unsealed in the anesthesia cart. He denied any Forane abuse and contended the substance he used in the operating room was a nasal decongestant spray. The evidence was

in this posture when it was submitted to the members and the outcome of the trial rested on the credibility and weight they chose to give to the testimony of each witness. United States v. Lipps, M.J. (A.F.C.M.R. 1986). But a challenge to the factual sufficiency of the evidence may also be asserted on appeal as we have the obligation to again review the evidence and in so doing, judge the credibility of witnesses and resolve controverted questions of fact, recognizing that the trial court saw and heard the witnesses. Article 66 (c), U.C.M.J. The guilty finding is, of course, a clear statement that the members accepted the government's version of what happened that day in the hospital.

We have repeatedly held that proof beyond a reasonable doubt does not mean conflict-free evidence. United States v. Lipps, supra; United States v. Steward, 18 M.J. 506 (A.F.C.M.R. 1984). This was a vigorously litigated trial with both parties offering all available evidence to support their theory of the case. We, like the trial court, are convinced of the appellant's guilt beyond a reasonable doubt.

Additionally, appellate defense counsel suggest that the larceny specification cannot stand because the government alleged the appellant stole a "bottle of Forane," and the evidence proved only that he stole the "contents of a bottle of Forane." We see no merit to this claim or error. See generally United States v. Groover, 38 C.M.R. 478 (A.F.B.R. 1967); rev'd on other grnds, 17 U.S.C.M.A. 295, 38 C.M.A. 93 (1967).

### III

The appellant next contends that the trial judge erred by taking no action after he became aware that the president of the court had discussed the case with his daughter who had been a spectator during portions of the trial. This claim of error was brought to our attention in a letter written by the appellant's civilian counsel and addressed TO WHOM IT MAY CONCERN. In this correspondence the attorney who represented the appellant at trial claimed that while the members were deliberating on findings, the daughter of the president of the court, came up to the trial judge and said, "Daddy is so conscientious about this! Why only last night when he was discussing the case with me he said that he wanted to be sure to do the right thing." We determined that the circumstances surrounding the alleged misconduct required additional development and on 21 April 1986, ordered affidavits from the parties involved. These affidavits have been received by the Court.<sup>1</sup>

<sup>1</sup>The Government MOTION TO FILE AFFIDAVITS is GRANTED.

Our reading of these affidavits convinces us that no misconduct by a court member occurred. See generally United States v. Accordino, 20 M.J. 102 (C.M.A. 1985). Assuming, arguendo, there was member misconduct, such misconduct was known by civilian counsel who chose to ignore it. In his affidavit, civilian counsel stated that after he heard the remark now complained of, "[He waited] to see what, if anything, the judge would do or say about it." By waiting until the trial was over before claiming member misconduct, he waived the right to later assert such error. United States v. Martin, 19 C.M.R. 646 (A.F.B.R. 1955); See State v. Pliam, 77 N.W.2d 546 (Minn. 1956). The remaining assigned error is resolved against the appellant.

IV

We must reassess the sentence because of the discussion in Part I of this opinion. Having done so we find the approved sentence to be entirely appropriate. In our view a dismissal is fully warranted in a situation where a medical officer becomes unconscious during an operation because of substance abuse. The findings of guilty, as modified, and the sentence are

AFFIRMED.

Senior Judge FORAY and Judge MICHALSKI concur.



OFFICIAL:

*Felix Landau*  
FELIX LANDAU  
Captain, USAF  
Chief Commissioner

ACM 25076