

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**C.L. CARVER**

**D.O. VOLLENWEIDER**

**A. DIAZ**

**UNITED STATES**

**v.**

**Adrian E. O'TOOLE  
Gas Turbine Systems Technician (Electrical) Third Class (E-4), U. S. Navy**

NMCCA 200600169

Decided 11 September 2006

Sentence adjudged 11 May 2005. Military Judge: C.L. Reismier.  
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial  
convened by Commanding Officer, USS MCCAMPBELL (DDG 85).

LT A.M. COOPER, JAGC, USNR, Appellate Defense Counsel  
Maj EDWARD DURANT, USMCR, Appellate Defense Counsel  
CDR CHARLES PURNELL, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DIAZ, Judge:

This case was submitted to us without assignments of error. It should not be before us at all. It is the responsibility of all involved in the post-trial processing of courts-martial to perform their statutory duties, and to do so **promptly and competently**. For the reasons we explain below, the post-trial processing of this case falls woefully short of competent staff work.

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of false official statement and larceny, in violation of Articles 107 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 921. The military judge sentenced the appellant to confinement for four months, a fine of \$2,300.00, reduction to pay grade of E-1, and a bad-conduct discharge. The pretrial agreement required the convening authority (CA) to **disapprove** the bad-conduct discharge and to suspend all confinement in excess of 60 days.

Following authentication of the record, the ship's legal officer prepared his post-trial recommendation. It is at this

point that the processing of the appellant's case veered completely off track. The legal officer incorrectly stated that the military judge had not adjudged a punitive discharge. He also improperly advised the CA that the terms of the pretrial agreement contained no restrictions on approval of a punitive discharge, and further told his commander that the agreement as a whole imposed no obligation on him with respect to his action. The legal officer then compounded his errors by recommending to the CA that "the sentence as adjudged be approved in accordance with the terms of the pretrial agreement." Legal Officer's Recommendation of 6 Sep 2005 at 3.<sup>1</sup>

The legal officer did serve the appellant's trial defense counsel with his recommendation. For reasons unknown to us, however, counsel felt no obligation to say or do anything in response to the obvious errors in the post-trial recommendation. With a fatally flawed recommendation in hand, and no protest from the appellant's trial lawyer, the successor CA attempted to take his action. To his credit, the CA correctly summarized the adjudged sentence. Lacking competent advice from his legal officer, however, the CA took the following action:

In the case of . . . , the sentence is approved and will be executed, except for the part of the sentence extending to a bad-conduct discharge, and the execution of that part of the sentence extending to confinement in excess of 60 days will be suspended for a period of 12 months from the date of the Convening Authority's action, at which time, unless sooner vacated, the suspended portion [sic] will be remitted without further action. . . .

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40), . . . for review under Article 66, UCMJ.

Special Court-Martial Order No. 2-05 of 26 Oct 05 at 1-2.

At best, this action is ambiguous as to whether the CA approved (but did not execute) the punitive discharge, contrary to the terms of the pretrial agreement. At worst, it demonstrates the CA's clear intent (by virtue of his affirmative action forwarding the case to us for review) to ignore the pretrial agreement and approve the adjudged punitive discharge. *See United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006).

Against this backdrop, we cannot comprehend appellate defense counsel's failure to bring these errors to our attention.

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<sup>1</sup> An accurate post-trial recommendation is essential in every case, but even more so where, as here, the convening authority charged with taking the action is the successor in command to the original convening authority, and thus likely lacks personal knowledge of the pretrial agreement negotiated by his predecessor.

The case should not be before us at all, as the appellant had negotiated a pretrial agreement requiring disapproval of any adjudged punitive discharge. The legal officer's post-trial recommendation, however, ignored that agreement, and the CA's action is at best ambiguous as to this critical issue. Yet these obvious errors were met with silence from the appellant's counsel.

To say we are displeased with the post-trial handling of this case is an understatement. To put it bluntly, these facts reflect a near total abdication of the statutory duties imposed on those responsible for the post-trial processing of the appellant's case. As a result, we have been forced to expend valuable time and resources on a case that had no business being on our docket. If the military justice system is to respond effectively to the demands placed on it by the Constitution, our superior courts, and other laws, the professionals who toil within it must take their obligations seriously.

### Conclusion

Following our corrective action, we find that the findings and the sentence are correct in law and fact and that no errors materially prejudicial to the appellant's substantial rights remain.

Pursuant to our authority to do that which the CA was obligated to do, we affirm the findings and only so much of the sentence as provides for reduction to pay grade E-1, confinement for four months, and a fine of \$2,300.00. We suspend the execution of all confinement in excess of 60 days for 12 months from the date of the original CA's action (26 October 2005).

Senior Judge CARVER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL  
Clerk of Court