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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **J.F. FELTHAM**

UNITED STATES

v.

Eduardo T. FLORES, Jr.
Storekeeper First Class (E-6), U.S. Navy

NMCCA 200202396 Decided 29 August 2005

Sentence adjudged 2 August 2001. Military Judge: K.B. Martin. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Marianas, Agana, Guam.

LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, pursuant to his pleas, of assault consummated by a battery and reckless endangerment, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934. The adjudged sentence consisted of confinement for 18 months, reduction to pay grade E-1, and a bad-conduct discharge.

The pretrial agreement (PTA) required the convening authority (CA) to suspend confinement in excess of 90 days, suspend adjudged reduction in grade below E-3, and remit automatic reduction in grade. By the terms of the PTA the CA approved the deferral of a portion of automatic forfeitures until the date of the CA's action, to be calculated based upon a child support order expected to be issued by a Guamanian civil court and approved the waiver of automatic forfeitures for a period of six months from the date of the CA's action. The staff judge advocate's recommendation (SJAR) states that the anticipated child support order was never issued.

We have considered the record of trial and the assignments of error that: (1) the staff judge advocate (SJA) failed to inform the CA of the immediate commander's recommendation; and (2) the CA did not personally sign the CA's action. We have also considered the Government's response and the appellant's reply.

Failure of Convening Authority to Sign Action

RULE FOR COURTS-MARTIAL 1107(f)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) requires the convening authority to personally sign the CA's action. In this case, aside from the court-martial order (CMO), there is no separate CA's action in the record. The CMO is signed in this fashion:

/S/ P. W. Dunne
P. W. DUNNE
Rear Admiral, U.S. Navy
Commander, U.S. Naval Forces Marianas
Territory of Guam

E. J. LYNCH
Commander, JAGC, U.S. Naval Reserve
Force Judge Advocate
Commander, U.S. Naval Forces Marianas
By direction of Patrick W. Dunne
Rear Admiral, U.S. Navy
Commander, U.S. Naval Forces Marianas
Territory of Guam

CMO of 8 May 2002 at 3. What appears to be Commander Lynch's signature appears over his typed name. No other signature appears on the CMO.

If a separate CA's action personally signed by the CA were included in the record, we would have no issue in this case regarding the signature, since a staff judge advocate (SJA) may properly sign the CMO by direction after the CA takes and personally signs his action. R.C.M. 1114(e). However, that is not the case here, and other than the foregoing signature block on the CMO, we have no reason to believe that the convening authority ever personally took, much less signed, an action. Accordingly, we find merit in this assignment of error and will remand this case for a new CA's action

In our review of the CA's action, we noted additional issues that warrant discussion. Although not assigned as error, we conclude that the purported CA's action is ambiguous. The CA purported to approve and suspend a <u>portion</u> of the adjudged forfeitures, but since the court-martial did not adjudge any forfeitures, we cannot tell if this language was simply an oversight or a deliberate attempt to enforce the terms of the pretrial agreement regarding automatic forfeitures. If so, the language is ineffective since in the PTA the CA approved the

waiver of all automatic forfeitures. In any event, considering the requirements of the pretrial agreement, the language is confusing and ineffective in enforcement.

Additionally, despite the PTA requirement to remit the automatic reduction in rate entirely, the CA merely remitted that reduction below E-3. Thus, this provision is also ineffective in enforcing the PTA. We note however, that the CA remitted the adjudged reduction in rate entirely. We trust that the new CA's action will resolve these discrepancies.

Failure of SJA to Forward Commander's Recommendation to CA

The appellant contends that the SJA failed to inform the CA in either the Article 34, UCMJ, advice or his post-trial recommendation of the immediate commander's recommendation that the appellant not be punished or discharged. We decline to grant relief.

We note that this issue was raised in a pretrial motion. During the litigation of the motion, Lieutenant Commander (LCDR) Wisniewski, the appellant's immediate commander, testified that he felt that no disciplinary or judicial action should be taken against the appellant. In his ruling on the motion, the military judge ordered the SJA to prepare a new Article 34, UCMJ, advice letter reflecting LCDR Wisniewski's position. The SJA failed to do so, apparently because the accused later entered into the PTA requiring him to enter guilty pleas to some charges.

The PTA also included a provision by which the appellant agreed to waive all motions that did not deprive him of due process or the right to challenge the jurisdiction of the court-martial or were otherwise non-waivable. In discussing this matter with the appellant, the military judge interpreted the provision to mean that the appellant was waiving any motion issue previously ruled upon. The appellant and his counsel agreed. We conclude that the appellant thereby waived any complaint that the SJA failed to inform the CA of LCDR Wisniewski's recommendation before referral of charges.

As to the SJA's post-trial duties, the appellant argues that the SJA was obligated to inform the CA of the immediate commander's recommendation and contends that *United States v. Rivera*, 42 C.M.R. 198 (C.M.A. 1970) is controlling. We disagree. That decision was issued well before the Manual for Courts-Martial was revised in 1984. Since 1984, the SJA's post-trial recommendation is simpler than the pre-1984 recommendations that, in complex cases, often resembled law review articles. We conclude that *Rivera* does not control our decision in this case.

We note that the appellant's counsel submitted a clemency request and failed to include any reference to LCDR Wisniewski's opinion. Based on our review of the record, we find no merit in this assignment of error.

Conclusion

The purported convening authority's action is set aside. The record is returned to the Judge Advocate General for remand to the convening authority for a new action to be taken in compliance with R.C.M. 1107, along with a new SJAR that accurately informs the CA of his obligations under the PTA. Following completion of that action, the record shall be returned to this court for completion of appellate review.

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court