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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Randall S. HENDERSON
Private (E-1), U.S. Marine Corps

NMCCA 200400001 Decided 22 February 2005

Sentence adjudged 14 May 2003. Military Judge: J.G. Baker. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2d Battalion, 7th Marines, 3d Marine Division, Okinawa, Japan.

LT LUIS LEME, JAGC, USN, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of insubordination, failure to obey a lawful general order, drunken and reckless driving, larceny, wrongful appropriation (3 specifications), and fraudulent procurement of phone services, in violation of Articles 91, 92, 111, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 892, 911, 921, and 934. The appellant was sentenced to a bad-conduct discharge and confinement for 8 months. The convening authority approved the sentence as adjudged but suspended confinement in excess of 180 days pursuant to the pretrial agreement.

We have carefully considered the record of trial, the appellant’s three assignments of error, the Government’s response, and the appellant's reply brief. The appellant contends that the convening authority acted prematurely, that the convening authority did not consider clemency matters submitted by the trial defense counsel, and that his bad-conduct discharge is inappropriately severe. We disagree with all three contentions and conclude that the findings and sentence are

correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Convening Authority's Action

In his first assignment of error, the appellant claims that the convening authority erred by failing to wait ten days following service of the staff judge advocate's recommendation (SJAR) on the trial defense counsel before taking his action. The appellant also contends that the convening authority did not consider clemency matters submitted by the trial defense counsel because these matters were not referenced in the convening authority's action (CAA). We find no merit in these assignments of error.

The appellant erroneously contends, and the government erroneously concedes, that the CA erred by taking action on this court-martial less than 10 days after the SJAR was served on the trial defense counsel and without receiving a waiver or any comments from the trial defense counsel. See RULE FOR COURTS-MARTIAL 1106, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Based upon our review of the record, the SJAR was prepared on 15 August 2003 and served on the trial defense counsel three days later, on 18 August 2003. It is also evident that the convening authority took action 31 days later, on 18 September 2003, and not on the day the SJAR was served on trial defense counsel, as the appellant contends.[1] Thus, we find no error under these circumstances.

As to the appellant's second assignment of error, it is well-established that a convening authority must consider matters submitted by an accused under R.C.M. 1105 and 1106. *See United States v. Stephens*, 56 M.J. 391, 392 (C.A.A.F. 2002). Our superior court has held that "speculation concerning the consideration of such matters simply cannot be tolerated in this important area of command prerogative." *See United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989)(citing *United States v. Siders*, 15 M.J. 272, 273 (C.M.A. 1983)).

On the basis of the trial record and post-trial documents before us, we find that the appellant's right to have his voice heard before the convening authority took action, his best chance at clemency, was not abrogated. Specifically, we note that the clemency matters submitted by the appellant's trial counsel on 26 June 2003 were referenced in the SJAR and included as enclosure (1) thereto. Additionally, the convening authority specifically stated that he considered the SJAR before taking his action. While the trial defense counsel did not waive the 10-day waiting period provided by R.C.M. 1106 following service of the SJAR, he expressly declined to submit further "clemency matters/comments

[1] In its concession of error, the Government incorrectly asserts that the SJAR receipt and CAA are dated 18 August **2004** [emphasis added].

on the SJA's recommendation." SJAR Receipt dated 18 Aug 2003. Thus, the appellant's post-trial affirmation on 24 September 2004 that he would have submitted additional clemency matters is not only untimely but also contrary to the express waiver of his trial defense counsel.[2] Based on our analysis of the foregoing, we find no prejudicial error to the appellant in the post-trial processing of his court-martial.

Sentence Appropriateness

In his third assignment of error, the appellant claims that his sentence to a bad-conduct discharge is inappropriately severe, and he requests that we disapprove it. After considering the entire record, including the extensive misconduct of which the appellant stands convicted and the evidence admitted in aggravation reflecting the appellant's prior non-judicial punishment and summary court-martial, as well as the matters submitted in extenuation and mitigation, we find that the adjudged sentence is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). To afford the appellant the relief he has requested, namely, disapproval of his bad-conduct discharge, would be to grant clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96.

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court

[2] In a post-trial affidavit dated 20 September 2004, the trial defense counsel asserts, "to the best of my knowledge", that the CAA was served on the same day as the SJAR. He also avers that he would have submitted additional matters had he been afforded an opportunity to respond to the SJAR in a timely manner. These assertions are directly contradicted by the SJAR Receipt dated 18 August 2003.