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

**BEFORE**

**C.A. PRICE** **C.L. CARVER** **R.C. HARRIS**

**UNITED STATES**

**v.**

**Gary D. BURCHETT**
**Private (E-1), U.S. Marine Corps**

NMCCA 200200121 Decided 27 February 2004

Sentence adjudged 11 January 2001. Military Judge: M.H. Sitler. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters and Support Battalion, School of Infantry, Marine Corps Base, Camp Lejeune, NC.

LT G.G. GERDING, JAGC, USNR, Appellate Defense Counsel
Capt E.V. TIPON, USMC, Appellate Defense Counsel
Maj PATRICIO A. TAFOYA, USMC, Appellate Government Counsel



CARVER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of a 19-week unauthorized absence (UA) terminated by apprehension, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The military judge sentenced the appellant to confinement for 60 days, forfeiture of $400.00 pay per month for two months, and a bad-conduct discharge. Although the pretrial agreement (PTA) required the convening authority (CA) to suspend the bad-conduct discharge and confinement in excess of time served, the CA approved the findings and sentence as adjudged due to the appellant's post-trial misconduct.

The appellant contends, primarily, that we should set aside the bad-conduct discharge because of defects in the post-trial hearing and proceedings to withdraw from the PTA.

After considering the record of trial, the appellant's five assignments of error, the Government's response, and the appellant's reply brief, we conclude that the findings and the 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.

**Sufficiency of the R.C.M. 1109 Record**

In his first assignment of error, the appellant argues that the record of the RULE FOR COURTS-MARTIAL 1109, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), proceedings is insufficient for this court to conduct a meaningful appellate review. Specifically, the appellant contends that: (1) there is no summarized record of the R.C.M. 1109 proceedings; (2) there are only two documents attached to the R.C.M. 1109 report; (3) the special court-martial CA failed to provide any evaluation of the contested facts; (4) the special court-martial CA failed to state the facts upon which he based his recommendation; and (5) much of the evidence on which the general court-martial CA relied in reaching his decision is not attached to the record. We disagree.

The PTA obligated the CA to suspend the bad-conduct discharge and all confinement in excess of time served (56 days) for 12 months from the date of the CA's action. The agreement further provided that during the time between the date of trial and the date of the CA's action, the execution of the sentence to confinement would be deferred. Finally, the agreement made clear that should the appellant engage in misconduct after trial, but prior to the CA taking action, the CA would have the option of ordering the full sentence executed, provided the procedural mandates of Article 72, UCMJ, and R.C.M. 1109, were honored.

After his sentencing on 11 January 2001, according to documents attached to the record of trial, the appellant was UA on three occasions and was convicted of an offense by civilian authorities. He started a period of UA on 4 Feb 2001. While UA, he was apprehended by civilian authorities. He eventually pled guilty to a fraudulent financial transaction and was returned to military authorities on 12 June 2001. On 2 July 2001, the special court-martial CA conducted a hearing to determine whether he should seek authority to withdraw from the pretrial agreement. Instead, however, the CA imposed nonjudicial punishment. The appellant went UA again the next day and surrendered on 6 July 2001. The appellant was also

alleged to have been UA from 20 to 21 July 2001. However, this UA period was not mentioned in the report of the Article 72, UCMJ, hearing, so we have not considered it on review.

On 27 July 2001, the appellant was notified in writing of his rights before a proceeding to vacate suspension of his special court-martial sentence. Admittedly, the CA mistakenly refers to this proceeding as a vacation hearing. Because the CA had not yet acted in this case, there was no suspended sentence to vacate. This mischaracterization, however, is of no moment. R.C.M. 705(c)(2)(D) specifically authorizes a pretrial agreement to include a clause requiring the accused to conform his behavior to "certain conditions of probation before action by the CA . . . provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the CA of the obligation to fulfill the agreement." *See United States v. Bulla*, 58 M.J. 715, 721-22 (C.G.Ct.Crim.App. 2003)(holding that the procedures spelled out in Article 72, UCMJ, and R.C.M. 1109 must be honored whenever a CA desires to set aside or disregard a sentence limitation based on misconduct committed between the date of trial and the date of the CA's action).

The notice given to the appellant specified the date, time, and place of the hearing, provided both an explanation of the allegations of post-trial misconduct and an explanation of the appellant's right to counsel, and explained that he would have an opportunity to be heard, present witnesses and evidence, and to cross-examine adverse witnesses. This hearing was conducted by the special court-martial CA on 3 October 2001. The appellant was represented by his trial defense counsel. On that same date, the CA recommended to the general court-martial authority: "SUSPENSION OF SENTENCE TO BE VACATED TO INCLUDE DISCHARGE WITH A BCD." Block 16a, DD Form 455 (REPORT OF PROCEEDINGS TO VACATE SUSPENSION OF GENERAL COURT-MARTIAL SENTENCE OR A SPECIAL COURT-MARTIAL SENTENCE INCLUDING A BAD-CONDUCT DISCHARGE UNDER ARTICLE 72, UCMJ, AND R.C.M. 1109) of 3 Oct 2001.

After considering the recommendation of the CA, the officer exercising general court-martial CA over the appellant issued a 31 October 2001 directive vacating the suspension of the discharge. In reaching this decision, the general court-martial CA relied on:

> [e]vidence in the form of duty logs, statements, and emails indicat[ing] [that] SNM, post-trial, was absent

> from [his] appointed place of duty in February 2001, was IHAC for a period of 3 months, and plead[ed] guilty in South Carolina to a fraudulent financial transaction. SNM had an NJP subsequent to his SPCM.

Block 19d, DD Form 455 of 31 Oct 2001.

We interpret the directive of the general court-martial CA to vacate the suspension to mean that the special court-martial CA was free to disregard his earlier promise to suspend the appellant's bad-conduct discharge.

On 14 December 2001, the CA took action on the appellant's special court-martial. He approved the findings and sentence as adjudged and, with the exception of the bad-conduct discharge, ordered the sentence executed. The CA also rescinded the deferral of the appellant's sentence to confinement. The CA's action makes no mention of whether the remaining four days of the appellant's sentence to confinement were suspended.

The documentary evidence attached to the record reflects that the required procedural rules were observed. R.C.M. 1109(d), which applies to situations where a CA is considering disregarding an obligation to suspend a bad-conduct discharge, *see* R.C.M. 705(c)(2)(D) and 1109(f)(1), dictates that the special court-martial CA must personally conduct a hearing to determine whether the accused has violated the terms and conditions of his pretrial agreement. R.C.M. 1109(d)(1)(A); *see United States v. Smith*, 46 M.J. 263, 265 (C.A.A.F. 1997). The special court-martial CA is required to serve proper notice of the hearing and inform the accused of his rights with respect to the proceedings. R.C.M. 1109(d)(1)(B). At the conclusion of the hearing, the special court-martial CA will prepare a summarized record of the proceedings and make a personal recommendation. R.C.M. 1109(d)(1)(D). A portion of the special court-martial CA's report must evaluate any contested facts. *See United States v. Ward*, 5 M.J. 685, 686 (N.C.M.R. 1978)(citing *United States v. Bingham*, 3 M.J. 119 (C.M.A. 1977)); *see also Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

Contrary to the appellant's assertion, there is no requirement that the special court-martial CA specifically set forth the facts on which he relied when making his recommendation. The summarized record, along with the personal recommendation of the special court-martial CA then passes to the general court-martial CA for his decision. R.C.M. 1109(d)(1)(D).

If the general court-martial CA determines that the special court-martial CA shall disregard the obligation to suspend the accused's bad-conduct discharge, a statement outlining the evidence relied on and the reasons supporting his decision must be prepared. R.C.M. 1109(d)(2)(A); *see Ward*, 5 M.J. at 686.

We reject the appellant's contention that the special court-martial CA failed to prepare a summarized record of the proceedings. The remarks section of the DD Form 455 attached to the record of trial contains a sufficiently detailed summary of the appellant's post-trial misconduct. When properly completed, DD Form 455 may serve as the summarized record required by R.C.M. 1109. We acknowledge the appellant's concern that the R.C.M. 1109 report does not reflect whether witnesses were called or if the Government and the defense counsel presented any arguments.

The record as is, however, establishes that the appellant was an unauthorized absentee. The documents that are attached to the R.C.M. 1109 report demonstrate that the appellant was absent without authority from 4 July until 6 July 2001. Under these circumstances, it is very likely that the appellant offered no defense to the allegations that he engaged in post-trial misconduct. The R.C.M. 1109 report itself supports our belief in this regard because it indicates that the appellant declined to make a statement. We also note that the appellant has not provided this court with a declaration explaining his version of what occurred at the hearing. Moreover, conspicuously absent from his brief to this court is any indication that witnesses were called or that arguments and statements were presented to the special court-martial CA. Accordingly, absent some evidence that witnesses were called, arguments presented, or other statements were made, we will neither presume that such events transpired, nor will we fault the special court-martial CA for failing to recount such matters in his report.[1]

The Government admits that it cannot produce the emails the general court-martial CA cited as part of his factual basis for directing that the special court-martial CA disregard his obligation to suspend the appellant's bad-conduct discharge. Furthermore, the R.C.M. 1109 record contains no documentary evidence concerning the particular unauthorized absence

[1] The appellant's apparent decision not to challenge the allegations of post-trial misconduct most likely explains why the special court-martial CA's report does not contain an evaluation of contested facts. In short, there were no contested facts to evaluate. Absent contrary evidence, we will not assume that contested facts existed.

(February to March 2001) and civilian conviction cited by the general court-martial CA. However, the remarks section of the R.C.M. 1109 report contains numerous facts concerning these offenses. The report also intimates that the appellant, by not making any sort of statement, did not dispute that he engaged in the misconduct relied on by the general court-martial CA. Consequently, we find the R.C.M. 1109 report as a whole sufficient for appellate review purposes and deny the appellant's first assignment of error.

**Sufficiency of the Evidence Presented At the R.C.M. 1109 Hearing**

In his second assignment of error, the appellant argues that the evidence presented during the R.C.M. 1109 hearing did not establish that he committed one of the instances of post-trial misconduct outlined in the remarks section of the R.C.M. 1109 report. We have held that when it comes to determining whether to vacate a suspended sentence, or as in this case, whether to disregard an obligation to suspend a sentence, the Government must establish a violation of the conditions of probation by a preponderance of the evidence. *See United States v. Dupuis*, 10 M.J. 650, 654 (N.C.M.R. 1980)(holding that the preponderance of the evidence standard applies to R.C.M. 1109 proceedings); *see also Bulla*, 58 M.J. at 721-22.

The duty log attached to the R.C.M. 1109 report demonstrates that the appellant was absent, without authority, from an accountability muster on 4 July 2001. The statement of Captain M. Pearson, U.S. Marine Corps, establishes that the appellant was UA on 5 July 2001 and that he returned to military control shortly before speaking with Capt Pearson on 6 July 2001. This evidence proves, by a preponderance of the evidence, that the appellant violated his probation by absenting himself without authority in violation of Article 86, UCMJ. The appellant's second assignment of error is, therefore, denied.

**CA's Pre-Judgment of Appellant's Guilt**

The appellant's third assignment of error asks this court to reject the special court-martial CA's R.C.M. 1109 recommendation because that officer was predisposed to find that the appellant had violated the terms of his probation. The appellant tethers his position to a notation in the remarks section of the R.C.M. 1109 report that "ON 010709, THE BATTALION COMMANDER MADE THE DECISION TO VACATE THE SUSPENSION . . . ." (emphasis in original). We find this one statement, which may

be an unfortunate scrivener's error, an insufficient basis on which to question the impartiality of the special court-martial CA. We deny the appellant's third assignment of error.

**Jurisdiction of the Court-Martial Based on Size of the Appellant's Battalion**

In his fourth assignment of error, the appellant questions the jurisdiction of his court-martial based solely on the size of his battalion. The appellant argues that the Headquarters and Support Battalion of The School of Infantry is a battalion in name only and of insufficient size to qualify as a special court-martial CA. We rejected an identical argument in *United States v. Hundley*, 56 M.J. 858, 859 (N.M.Ct.Crim.App. 2002), *rev. denied*, 57 M.J. 311 (C.A.A.F. 2002), and do so again today. "No where does the UCMJ prescribe any specific requirements of structure or function for such a designated unit to exercise special court-marital jurisdiction." *Id*. The establishment of a command, and the duties and responsibilities entrusted to its commander, are administrative matters left to the military, not the courts. *Id*. (citing *United States v. Surtasky*, 36 C.M.R. 397, 399 (C.M.A. 1966)).

**CA's Failure To Suspend Four Days of Confinement**

In his final assignment of error, the appellant contends, and the Government concedes, that the CA erred by failing to suspend the four days of confinement deferred from the date of trial to the date of the CA's action. This particular sentencing limitation provision of the pretrial agreement was unaffected by the R.C.M. 1109 proceedings mentioned above.[2] The appellant, however, has not claimed that he served the four days in confinement, nor is there any evidence in the record to

[2] By way of a reply brief, the appellant asserts that the CA erred by only disregarding the obligation to suspend the bad-conduct discharge. The appellant argues that such matters are "all or nothing" propositions and the CA should ignore the entire sentencing limitation portion of the pretrial agreement. Appellant's Reply Brief of 3 Mar 2003. First, the appellant cites no precedent in support of his position. Second, he ignores the language of his pretrial agreement, which says "[t]he CA *may* order executed the full sentence . . . if . . . misconduct occurs after trial." Appellant Exhibit I at 2 (emphasis added). We interpret the use of the word "may" as a reservation of the CA's discretion over the sentence in the event of post-trial misconduct. *United States v. Finster*, 51 M.J. 185, 186 (C.A.A.F. 1999) (explaining the CA's discretion with respect to the sentence). Finally, a CA is free to vacate any portion of a suspension he previously imposed. *United States v. Glaze*, 22 C.M.A. 230, 231, 46 C.M.R. 230, 231 (1973). We see no reason why a CA cannot exercise his discretion by seeking authority to be released from only a portion of his obligations under the sentencing limitation section of a pretrial agreement.

suggest that he spent more time in the brig than was bargained for in the pretrial agreement.

An accused who pleads guilty pursuant to a pretrial agreement is entitled to the fulfillment of any promises made by the Government as part of that agreement. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Smith*, 56 M.J. 271, 272 (C.A.A.F. 2002). Thus, the convening authority erred by failing to enforce the terms of the pretrial agreement.

However, given the fact that the appellant was not required to serve confinement in excess of that contemplated by the pretrial agreement, and the fact that the appellant is no longer exposed to confinement, we conclude that the appellant has received the benefit of his bargain. While we do not condone the convening authority's error, remedial action is not required. *United States v. Caver*, 41 M.J. 556, 565 (N.M.Ct.Crim.App. 1994).

**Conclusion**

Accordingly, we affirm the findings and the sentence as approved by the convening authority.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court