

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
D.E. O'TOOLE, R.E. VINCENT, J.F. FELTHAM
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**GERALD R. PFLUEGER III
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200400213
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 24 March 2000.

Military Judge: LtCol K.B. Martin, USMC.

Convening Authority: Commanding Officer, 3d Light Armored
Reconnaissance Battalion, 1st Marine Division, MARFORPAC,
MCAGCC, Twentynine Palms, CA.

Staff Judge Advocate's Recommendation: Col J.J. Canham,
USMC.

For Appellant: Maj B. Jackson, USMC.

For Appellee: Capt Roger Mattioli, USMC.

13 NOVEMBER 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Senior Judge:

This case is before us for the third time. On 24 March 2000, the appellant was convicted, pursuant to his pleas, by a special court-martial composed of a military judge sitting alone, of making a false official statement, four specifications of larceny from another Marine, and obstruction of justice, in violation of Articles 107, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 921, and 934. The sentence included a bad-conduct discharge, confinement for four months, and reduction to pay grade E-1.

The convening authority approved the findings and the adjudged sentence, but suspended the bad-conduct discharge and confinement in excess of 90 days for a period of 12 months. With regard to the suspension, the convening authority directed that "the suspended portion of the sentence will be remitted without further action" at the end of the 12-month suspension period "unless sooner vacated." At the end of the 12-month period, the suspended portions of the sentence, including the bad-conduct discharge and confinement in excess of 90 days, were remitted.¹

During this court's first review of the case, the appellant claimed he was denied speedy review of his conviction. A previous panel of this court agreed, noting that nearly a year had elapsed between sentencing and the convening authority's action, and that "[i]t then took over three years to forward the case" for appellate review. *United States v. Pflueger*, No. 200400213, unpublished op. (N.M.Ct.Crim.App. 30 Jul 2004). The court approved the findings and only that portion of the sentence that extended to confinement for four months and reduction to pay grade E-1.

The Court of Appeals for the Armed Forces (CAAF) remanded the case to this court for further consideration of issues related to the question of meaningful relief. *United States v. Pflueger*, 61 M.J. 272 (C.A.A.F. 2005). We responded to a series of questions posed by CAAF and concluded that:

[i]n the instant case, the punitive discharge remained part of the adjudged and approved sentence, even though it was eventually remitted by the convening authority at the end of the 12-month suspension period. Because the punitive discharge remained part of the adjudged and approved sentence after it was remitted, it continued to qualify the appellant for automatic forfeitures until it was disapproved in our decision of 30 July 2004. But for our action, the appellant would have continued to qualify for automatic forfeitures, despite the remission of the punitive discharge.

¹ The appellant remained confined under this sentence until 16 June 2000, when he entered pre-trial confinement pending a second court-martial. Appellant's Brief of 20 Mar 2007 at 2. On 24 October 2000, the appellant was convicted of various drug offenses at a general court-martial, and sentenced to confinement for two years, forfeiture of all pay and allowances, and a bad-conduct discharge. Automatic forfeitures from the second court-martial became effective on 7 November 2000. Appellant's Brief of 20 Mar 2007 at Appendix A (General Court-Martial Results of Trial of 24 Oct 2000). A previous panel of this court affirmed the findings and the sentence of the second court-martial on 28 June 2002. *United States v. Pflueger*, No. 200200703 (N.M.Ct.Crim.App. 28 Jun 2002)(summary disposition). Although the appellant was convicted of additional misconduct during the period in which the execution of part of the sentence from the case now before us was suspended, the convening authority did not vacate the suspension. The appellant's second court-martial had no effect on the automatic forfeiture of pay and allowances during the confinement to which he was sentenced at his first court-martial.

Therefore, he was not entitled to financial compensation or other relief under Article 58b(c), UCMJ, or otherwise, as a result of the remission of the adjudged bad-conduct discharge by the convening authority.

United States v. Pflueger, 65 M.J. 542, 544 (N.M.Ct.Crim.App. 2006).

CAAF disagreed with our conclusion, holding that "[w]hen a punitive separation has been remitted, and consequently cannot be executed under Article 71, the servicemember is entitled to relief under Article 58b(c). In that context, the decision by the lower court to disapprove Appellant's bad-conduct discharge did not provide him with meaningful relief under *Tardif*." *United States v. Pflueger*, 65 M.J. 127, 131 (C.A.A.F. 2007). CAAF reversed our decision and remanded the case for this court "to determine and award meaningful sentence relief to Appellant pursuant to its powers under Article 66(c) and the principles set forth in *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002)." *Id.*

We have again carefully reviewed the record of trial, the parties' briefs, all the earlier appellate court decisions concerning this case, and CAAF's mandate to "determine and award meaningful sentence relief." Applying that mandate, we have determined that meaningful sentence relief may be provided by affirming the findings and a sentence of confinement for two months and reduction to pay grade E-2, resulting in reimbursement to the appellant of the difference in pay and allowances between an E-2 and E-1 from the date established by Article 57, UCMJ, and removing the automatic reduction to pay grade E-1 that would be required by Article 58a, UCMJ. See Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7C § 0152c(1) (Ch-3, 27 Jul 1998). See also Art. 66(c), UCMJ; *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

Conclusion

Accordingly, we affirm the findings of guilty and that portion of the sentence that extends to confinement for two months and reduction to pay grade E-2.

Senior Judge VINCENT concurs.

Chief Judge O'TOOLE (concurring in part, and dissenting in part)

I concur that this decision implements the mandate of the Court of Appeals for the Armed Forces by providing "meaningful sentence relief" in this case. However, I distance myself from the initial determination of the predecessor panel of this court, which found relief was appropriate in the nature of disapproving the bad-conduct discharge. That decision, providing what appears to be entitlement to a windfall, was inadequately justified by

this court's initial opinion on the matter, which merely invoked "the principals contained in *United States v. Tardif*" without the further and necessary analysis of all the facts and circumstances, as required by the cited precedent.

For the Court

R.H. TROIDL
Clerk of Court