

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

**Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BRENT L. BURGESS
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200900521
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 18 June 2009.

Military Judge: LtCol Paul H. McConnell, USMC.

Convening Authority: Commanding Officer, Headquarters and Service Battalion, Marine Corps Base, Quantico, VA.

Staff Judge Advocate's Recommendation: Col Stephen C. Newman, USMC.

For Appellant: CAPT Paul Jones, JAGC, USN.

For Appellee: LCDR Clayton G. Trivett, JAGC, USN; LT Brian C. Burgdorf, JAGC, USN.

28 January 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his plea, of one specification of unauthorized absence in violation of Article 86, Uniform Code of Military 10 U.S.C. § 986. The military judge sentenced the appellant to confinement for 10 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) suspended all confinement in excess of 150 days and ordered the sentence executed [i]n accordance with the UCMJ, Rules of [sic] Court-Martial, applicable regulations, the pretrial agreement, and this action."

The appellant now asserts the following errors: that the Report of Results of trial was not included in the staff judge advocate's recommendation (SJAR) to the CA; that the SJA failed to serve the addendum to the SJAR on trial defense counsel; that the CA failed to sign the CA's action; that the CA erroneously executed the bad-conduct discharge; and, the CA failed to docket the case with this court within 30 days.

We find that these assignments of error are without merit and after carefully considering the parties' briefs and examining the record of trial, we are convinced that the finding and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

SJAR Did Not Include Report of Result of Trial

Assuming without deciding that the SJAR was defective because it did not include the Report of Results of Trial as an enclosure, we find no prejudice to the appellant as both the original and revised Report of Results of Trial, dated 23 June 2009 and 18 June 2009 respectively, were addressed to the CA; the results of the appellant's court-martial were incorporated into the body of the SJAR; both reports are attached to the record of trial; and, in his action, the CA specifically stated that he considered the results of trial and record of trial prior to taking his action.

Addendum to SJAR Was Not Served on Defense Counsel

"When new matter is introduced after the accused and counsel for the accused have examined the recommendation . . . the accused and counsel for the accused must be served with the new matter and given 10 days from service of the addendum in which to submit comments." RULE FOR COURTS-MARTIAL 1106(f)(7), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The appellant argues that the SJAR addendum is new matter. "'New matter' includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. [It] does not ordinarily include any discussion by the [SJA] of the correctness of the initial defense comments on the recommendation." *Id.*, Discussion. The addendum simply forwarded the appellant's clemency petition to the CA, stated the clemency requested, and recommended that clemency be denied. It contained nothing new and the information contained therein was not erroneous, inadequate, or misleading and we find that it did not contain new matter. Even if new matter were introduced, the appellant fails to demonstrate prejudice by stating what he would have submitted to "deny, counter, or explain" it. See *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997). We find no prejudice and conclude that this assignment of error is without merit.

CA Failed to Sign Action

The appellant's third assignment of error is without merit as the CA did sign the action. See R.C.M. 103(6). The fact that the officer who referred the charges did not sign the action is of no moment as the officer who did was a successor in command.

CA Purports to Execute BCD

As for the CA's action purporting to execute the bad-conduct discharge, we find that error harmless, as it is a legal nullity. See *United States v. Houston*, 48 M.J. 861, 863 (N.M.Ct.Crim.App. 1998); *United States v. Caver*, 41 M.J. 556, 565 (N.M.Ct.Crim.App. 1994). Thus, no remedial action is required.

CA Failed to Docket Case With This Court Within 30 Days

The appellant's case was docketed with this court 34 days after the CA took his action. Thus the case arrived at this court 4 days later than it should have and there exists a rebuttable presumption of unreasonable delay. See *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). The appellant offers no indication that he suffered any prejudice as a result of the 4-day-delay. Assuming, without deciding, that the appellant was denied his due process right to speedy post-trial review, we conclude that any error in that regard was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). Even if such error was not harmless, any relief we could fashion would be disproportionate to the possible harm generated from the delay in light of the appellant's offense. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006).

We are aware of our authority to grant relief under Article 66, UCMJ, and in this case we choose not to exercise it. *United States v. Simon*, 64 M.J. 205 (C.A.A.F. 2006); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005) (en banc).

Conclusion

Accordingly, we affirm the findings and the approved sentence.

For the Court

R.H. TROIDL
Clerk of Court