

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

**Before
J.A. MAKSYM, J.R. PERLAK, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ANDREW T. WHITEFLOYD
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201100200
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 8 February 2011.

Military Judge: LtCol Gregory Simmons, USMC.

Convening Authority: Commanding Officer, Headquarters and Support Battalion, Marine Corps Base, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol A.M. Ray, USMC.

For Appellant: CDR Don Evans, JR., JAGC, USN.

For Appellee: LT Benjamin Voce-Gardner, JAGC, USN.

30 August 2011

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of a single specification of unauthorized absence, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to ninety days confinement and a bad-conduct discharge. The convening authority (CA) approved the

adjudged sentence and, in accordance with the pretrial agreement (PTA), suspended all confinement in excess of thirty days.

The appellant has submitted one assignment of error specifically that the convening authority's action (CAA) erroneously¹ recites the charge and specification and therefore mischaracterizes and overstates the appellant's conduct. The remedy, he argues, is for this court to direct a new staff judge advocate's recommendation (SJAR) and CAA.

We note that the CAA and promulgating order are combined in a single document.² A CA must specify action taken on the sentence and may, in his or her discretion, take action on the findings. See RULE FOR COURTS-MARTIAL 1107(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). In taking action, there is no requirement for a recital of the charges and specification(s). In contrast, a promulgating order, which publishes the result of the court-martial and the action taken, must set forth, among other things, the charges and specifications, or a summary thereof. See RULE FOR COURTS-MARTIAL 1114(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

In the instant case, the CA took no action on the findings, only on the sentence. The summary of the charge and specification is in a paragraph separate from the action and is listed in accordance with R.C.M. 1114(c). We agree with the Government that such errors in the promulgating order are subject to a harmless error standard. See *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998)(citing *Kotteakos v. United States*, 328 U.S. 750 (1946)). Here, the results of trial and the pretrial agreement accurately reflect the charge and specification. Under the heading "Matters Considered", the CAA reflects that the CA considered the results of trial, the SJAR, the appellant's service record, the record of trial and the appellant's clemency request. None of these matters considered by the CA contain an erroneous recital of the charge and specification.

We therefore find that the error was harmless. However, the appellant is entitled to have his court-martial records accurately reflect the proceedings.

¹ The appellant correctly notes that the CAA erroneously lists the sole specification of the Charge as "UA, from on or abt 3 Oct 09, **until he was apprehended** on or about 6 Jan 11." (emphasis added.) The appellant was charged and plead guilty to unauthorized absence without the aggravating element of termination by apprehension.

² Special Court-Martial Order No. 03-2011 of 31 March 2011.

We 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. The findings and sentence as approved by the CA are affirmed. We direct that the supplemental court-martial

order correctly list the charge and specification by removing the words "until he was apprehended".

For the Court

R.H. TROIDL
Clerk of Court