

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

**Before
C.L. REISMEIER, J.K. CARBERRY, G.G. GERDING
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOSEPH E. ALFONSO
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201100202
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 9 February 2011.

Military Judge: LtCol Thomas J. Sanzi, 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 R.D. Evans, Jr., JAGC, USN.

For Appellee: LT Kevin D. Shea, JAGC, USN.

18 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 plea, of unauthorized absence (UA), in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. On 9 February 2011, the military judge sentenced the appellant to confinement for 75 days, forfeiture of "\$970 per month" for three months, and a bad-conduct discharge. On 31 March 2011, the convening authority (CA) approved the sentence as adjudged and, pursuant to a plea agreement, suspended all confinement in excess of time served (29 days) for a period of twelve months from the date of the action.

The appellant submitted two assignments of error: 1) his plea to unauthorized absence is not supported by the facts he provided to the military judge during the providence inquiry, and 2) the court-martial promulgating order erroneously summarizes the specification and erroneously references a reprimand.

We have examined the record of trial, the appellant's assignments of error, and the pleadings, and 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. However, errors exist in the CA's action and court-martial promulgating order that require correction, which we will order in our decretal paragraph.

Background

The appellant's UA arose during the time he was travelling from Camp Pendleton, California, to Naval Air Station (NAS), Meridian, Mississippi. He had orders to detach from Headquarters and Support Battalion, Camp Pendleton, and report to NAS Meridian, on 13 November 2010. He was given an airline ticket that allowed him to travel from San Diego, California, to Gulfport, Mississippi. Once in Gulfport, the appellant had no means to get to Meridian. The appellant unsuccessfully tried several times to reach his new command at Meridian. He ended up staying in a hotel for four nights in Gulfport. On 17 November 2010, the appellant spoke by telephone with a gunnery sergeant in Meridian who ultimately arranged a flight for him from Gulfport to Atlanta, Georgia, to Meridian. While on the flight to Atlanta, the appellant decided not to go to Meridian. Once he arrived in Atlanta, he took a bus to his mother's home in Tucson, Arizona. He was apprehended by civilian authorities on 11 January 2011 in Tucson and returned to military control.

Providence of the Plea

We review a military judge's decision to accept or reject an accused's guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). We will set aside a military judge's decision to accept a guilty plea only where the record of trial shows a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). "If an accused 'sets up matter inconsistent with the plea' at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea." *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (quoting Article 45(a), UCMJ); see RULE FOR COURTS-MARTIAL 910(h)(2), MANUAL FOR COURT-MARTIAL, UNITED STATES (2008 ed.). A failure to do so constitutes a substantial basis in law or fact for questioning the guilty plea. See *United States v. Phillippe*, 63 M.J. 307, 311 (C.A.A.F. 2006). However, the "mere possibility" of a conflict between the plea and the appellant's statements or other evidence of record is not a sufficient basis

to overturn the trial results. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007). Questions of law arising during or after the plea inquiry are reviewed *de novo*. *Inabinette*, 66 M.J. at 321.

The appellant contends his plea to UA should be set aside because he was charged with being UA from Camp Pendleton, but his unauthorized absence began after he had already detached from his command at Camp Pendleton. He asserts his place of duty for purposes of being charged with UA was NAS Meridian. He relies on the explanation to Article 86 which states "[a] person undergoing transfer between activities is ordinarily considered to be attached to the activity to which ordered to report." *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 10(c)(7). The appellant also notes the Court of Military Appeals has held that ordinarily a service member en route to a new command who fails to report is UA from the new command, not the former command. *United States v. Pounds*, 48 C.M.R. 769, 770 (C.M.A. 1974).

Contrary to the appellant's assertion, the specification does not allege he was UA from his former unit, H&S Battalion. It alleges he was UA from "his organization, to wit: the United States Marine Corps[.]" Charge Sheet. During the providence inquiry the military judge told the appellant the first element of unauthorized absence was that he "went from or remained absent from [his] organization, that is, the United States Marine Corps." Record at 10. A violation of Article 86(c), UCMJ, requires proof that a service member was absent without leave from his "unit, organization, or place of duty." The "United States Marine Corps" is an organization for purposes of Article 86 which encompasses the unit from which the appellant detached and to which the appellant was to report. See *United States v. Arisio*, 16 C.M.R. 367 (N.B.R. 1954) (holding absence from "the naval service" stated an offense).

There was no fatal variance between the charge and proof in this case. The appellant admitted to the military judge that on 17 November 2010, he absented himself from his organization, the United States Marine Corps, by not continuing to NAS Meridian and reporting for duty. The appellant was on notice of the conduct of which he was accused and there is no threat of double jeopardy under the circumstances of this case. See *United States v. Jack*, 22 C.M.R. 25 (C.M.A. 1956). Therefore, there is no substantial basis in law or fact to question the appellant's plea. We are convinced his plea of guilty to unauthorized absence was provident and the military judge did not err by accepting his plea.

Promulgating Order and Convening Authority's Action

The appellant correctly points out the summary of the specification in the court-martial promulgating order does not indicate a termination date for his UA or that the UA was

terminated by apprehension.¹ The appellant also correctly notes the court-martial promulgating order references a reprimand even though the military judge did not adjudge a reprimand. The CA approved the sentence as adjudged, which did not include a reprimand. The language in the action referencing a reprimand is unnecessary surplusage, likely the result of sloppy preparation of the action.

We can discern no material prejudice to the substantial rights of the appellant from these apparent scrivener's errors. However, the appellant is entitled to correct and accurate personnel records, which may be corrected through a supplemental court-martial promulgating order. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

Although not assigned as error, we note the military judge failed to indicate the forfeitures awarded the appellant were to apply to pay only and not to pay and allowances. See RULE FOR COURTS-MARTIAL 1003(b)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Instead, he simply said "\$970 per month." The report of results of trial repeats the error, indicating the military judge awarded a sentence that included forfeiture of \$970 per month. The CA's action then approved a sentence that included forfeiture of \$970.00 per month for three months without indicating the forfeiture is of pay, and not pay and allowances.

The appellant did not object to this oversight by the military judge at trial or on appeal. We discern no material prejudice to the substantial rights of the appellant from this error, but he is entitled to a corrected court-martial promulgating order. *Crumpley*, 49 M.J. at 539.

Conclusion

We affirm the findings and sentence as approved below, but direct that the supplemental court-martial promulgating order provide either the verbatim text or an adequate summary of the specification. R.C.M. 1114(c)(1); *United States v. Glover*, 57 M.J. 696 (N.M.Ct.Crim.App. 2002). The supplemental court-martial promulgating order shall not reference a reprimand or punitive letter. Finally, the supplemental court-martial promulgating

¹ Unauthorized absence is an instantaneous offense. *United States v. Gonzalez*, 39 M.J. 742, 748 (N.M.C.M.R. 1994), *aff'd* 42 M.J. 469 (C.A.A.F. 1995). The duration and termination are only aggravating facts.

order will indicate that the adjudged, approved, and affirmed forfeitures were of \$970.00 pay per month for three months.

For the Court

R.H. TROIDL
Clerk of Court