

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

**Before
C.L. REISMEIER, F.D. MITCHELL, J.A. MAKSYM
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ROBERT K. FOISY
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201000026
GENERAL COURT-MARTIAL**

Sentence Adjudged: 26 August 2009.

Military Judge: LtCol Robert Ward, USMC.

Convening Authority: Commanding General, 2d Marine Logistics Group, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Capt K.J. Gruver, USMC (4 Dec 2008); LtCol S.R. Stewart, USMC (30 Sep 2010); Maj J.R. Cherry, USMC (2 Dec 2010).

For Appellant: LT James Head, JAGC, USN.

For Appellee: Mr. Brian Keller, Esq.

20 January 2011

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

Members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of violating a lawful general order and aggravated sexual assault, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 920. The members sentenced the appellant to one year of confinement, reduction to pay grade E-1, total forfeitures, and a bad-conduct discharge. In his action dated 22 December 2009, the convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The appellant's sole assignment of error when this case was first docketed for appellate review was that the military judge abused his discretion by preventing the defense from presenting the appellant's initial statement to the Naval Criminal Investigative Service (NCIS) after the Government admitted his supplemental NCIS statement. We agreed, and affirmed the conviction under Charge I and its specification, set aside the findings of guilty for Specification 1 of Charge II and Charge II, as well as the sentence. *United States v. Foisy*, 69 M.J. 562 (N.M.Ct.Crim.App. 2010). The record was returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority who was given the option to order a rehearing on Charge II and its specification, order a sentence rehearing on the remaining charge and specification, or approve a sentence of no punishment.

The convening authority did not order a rehearing as to findings or sentence, and "disapproved" the sentence, but his 4 October 2010 action is unclear as to whether he dismissed Charge I and its specification or Charge II and Specification 1 thereunder.¹ We again returned the record of trial with direction that the convening authority withdraw his action of 4 October 2010 and substitute a corrected action. In an action erroneously dated 17 September 2010,² the convening authority dismissed Specification 1 of Charge II and Charge II, and disapproved the sentence, "in accordance with the post-trial agreement."

The record is before us for completion of our review without additional assignment of error. Having previously affirmed the findings as to the remaining offense, Charge I and its specification, we find that the findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant remains.

Although the convening authority's action does not explicitly approve a sentence of no punishment, the convening authority's intent in that regard is clear, especially when considered in light of the associated (and referenced) post-trial agreement in which the convening authority agreed "to impose no punishment for the remaining finding of guilt under Charge I." To find otherwise would elevate form over substance to the

¹ That part of the action reads as follows: "The finding of guilty to Specification 1 of Charge II, violation of Article 120, UCMJ, is disapproved. The Charge and its sole specification is [sic] dismissed with prejudice."

² The a memorandum from the staff judge advocate dated 14 December 2010, included a proposed action as enclosure 1, a staff judge advocate's recommendation (SJAR) dated 2 December 2010, an SJAR service sheet dated 9 December 2010 with associated waiver of post-trial submissions from the appellant, a post-trial agreement dated 14 September 2010, and our previous opinion and orders. The convening authority's action obviously post-dated those documents.

extreme. We conclude that the action approved a sentence of no punishment.

Conclusion

The sentence of no punishment, as approved by the convening authority, is affirmed.

For the Court

R.H. TROIDL
Clerk of Court