

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

**Before
J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOSE L. CERBANTEZ
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201100531
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 2 August 2011.

Military Judge: LtCol Kevin C. Harris, USMC.

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

Staff Judge Advocate's Recommendation: LtCol P.A. Tafoya, USMC.

For Appellant: CDR Christopher J. Geis, JAGC, USN.

For Appellee: CAPT James B. Melton, JAGC, USN; LT Benjamin J. Voce-Gardner, JAGC, USN.

29 February 2012

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, consistent with his pleas, of one specification of unauthorized absence and four specifications of breaking restriction in violation of Articles 86 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 934. The military judge sentenced the appellant to confinement for 100

days, forfeiture of pay in the amount of \$978.00 per month for four months, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority (CA) approved the sentence as adjudged, but suspended all confinement in excess of the thirty-two days the appellant had served in pretrial confinement and suspended execution of forfeitures for six months, at which time they were to be remitted without further action.

The appellant's sole assigned error is that, pursuant to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), each of the four specifications of Charge II (breaking restriction) fails to state an offense because the specifications do not allege the terminal element of Article 134. We disagree.

The appellant's case is significantly distinguishable from *Fosler* because: (1) the appellant did not challenge the adequacy of the specifications at trial; (2) he pled guilty to the specifications; (3) the military judge explained to the appellant that the specifications contained the terminal element during the providence inquiry; (4) the appellant acknowledged that he understood the terminal element as explained to him by the military judge; (5) the appellant provided an apt explanation to the military judge of how his conduct satisfied the terminal element, that is, how it was prejudicial to good order and discipline; and, (6) unlike the specification in *Fosler* alleging adultery, the language of a specification alleging a breaking of restriction implicitly contains the element of prejudice to good order and discipline. See *United States v. Hackler*, __ M.J. __, No. 201100323, 2011 CCA LEXIS 371 (N.M.Ct.Crim.App. 22 Dec 2011).

Accordingly, we resolve the assigned error adverse to the appellant.

After careful consideration of the record and the pleadings of the parties, we affirm the findings and the sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court