

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

**Before
J.A. MAKSYM, B.L. PAYTON-O'BRIEN, M. MCALEVY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOSEPH W. NORTHRUP, JR.
ELECTRONICS TECHNICIAN SEAMAN (E-3), U.S. NAVY**

**NMCCA 201100478
GENERAL COURT-MARTIAL**

Sentence Adjudged: 2 June 2011.

Military Judge: Col Daniel Daugherty, USMC.

Convening Authority: Commander, Navy Region Midwest, Great Lakes, IL.

Staff Judge Advocate's Recommendation: LCDR E.M. Baxter, JAGC, USN (8 Aug 2011); CDR R.C. DeTolve, JAGC, USN (15 Sep 2011).

For Appellant: Maj Rolando Sanchez, USMCR.

For Appellee: Mr. Brian Keller, Esq.

23 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 general court-martial convicted the appellant, pursuant to his pleas, of a single specification of attempting a sexual act with an individual who was substantially incapacitated, engaging in a sexual act with an individual who was substantially incapacitated, and indecent conduct in violation of Articles 80 and 120, Uniform Code of

Military Justice, 10 U.S.C. §§ 880 and 920. The military judge sentenced the appellant to confinement for ten years, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence but, in accordance with a pretrial agreement, suspended all confinement in excess of eighteen months from the date of the convening authority's action. The trial defense counsel submitted a clemency request, but no clemency was granted.

The appellant submitted the case on its merits to this court without specific assignment of error. We have examined the record of trial and find error in the convening authority's action. Specifically, in determining his action, the convening authority took into consideration matters outside the record, seemingly without informing the appellant and affording him an opportunity to address new matter.

Discussion

The findings and sentence of a court-martial are subject to review by the convening authority. Art. 60, UCMJ. RULES FOR COURTS-MARTIAL 1105-1107, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), prescribe the parameters of the convening authority's review. In determining his action, the convening authority is allowed to consider any matter he deems appropriate; however, R.C.M. 1107 states that "if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut." R.C.M. 1107(b)(3)(B)(iii).

In this case, the convening authority considered the "input of the victim in this case, which were [sic] communicated to me by my staff judge advocate." The content of the victim's input is not noted in either of the two staff judge advocate's recommendations, within the defense's clemency request, or anywhere else in the record. Similarly, the record is devoid of any evidence that either the appellant or his defense counsel were made aware of the content of this apparent input. From a facial review of the record, we discern that, contrary to R.C.M. 1107, the convening authority considered matters, presumably adverse to the appellant, from outside the record, knowledge of which is not chargeable to the appellant, and of which the appellant was not notified or given an opportunity to rebut.

Conclusion

The convening authority's action dated 16 September 2011 is hereby set aside and the record returned to the Judge Advocate General for remand to an appropriate convening authority for proper post-trial processing in accordance with R.C.M. 1105-1107. Thereafter the record will be returned to the Court for completion of appellate review. Art. 60, UCMJ; *Boudreaux v. U.S. Navy-Marine Corps Court of Military Review*, 28 M.J. 181 (C.M.A. 1989).

For the Court

R.H. TROIDL
Clerk of Court