

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

**Before
M.D. MODZELEWSKI, J.A. FISCHER, M.K. JAMISON
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MARK A. FOLEY
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201300167
GENERAL COURT-MARTIAL**

Sentence Adjudged: 15 January 2013.

Military Judge: LtCol M.G. Geffroy, USMC.

Convening Authority: Commanding General, 4th MAW, Marine Forces Reserve, New Orleans, LA.

Staff Judge Advocate's Recommendation: Col E.R. Kleis, USMC.

For Appellant: CDR C. Eric Roper, JAGC, USN.

For Appellee: LT Philip S. Reutlinger, JAGC, USN.

26 November 2013

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 conspiracy to commit wrongful disposition of military property and wrongful sale of military property in violation of Articles 81 and 108, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 908. The military judge sentenced the appellant to confinement for one year, reduction to pay grade E-1, a \$1,700.00 fine, and a bad-conduct discharge. The convening authority (CA) approved the

sentence as adjudged. Pursuant to the pretrial agreement, the CA suspended all confinement in excess of six months.

In the appellant's sole assignment of error, he contends that the CA did not personally sign the CA's action as required by RULE FOR COURTS-MARTIAL 1107(f)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). Subsequent to the appellant's submission of his brief, we granted the Government's consent motion to attach the unsworn declaration of the Deputy Staff Judge Advocate, U.S. Marine Corps Forces Reserve (MARFORRES). After carefully considering the record of trial and the submissions of the parties, we are convinced 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Background

On 10 January 2013, the Commanding General, 4th Marine Aircraft Wing (MAW), referred the appellant's case to a general court-martial convened by General Court-Martial Convening Order Serial Number 1-13. The appellant's court-martial was tried in Quantico, Virginia, on 15 January 2013. The military judge authenticated the verbatim record of trial on 24 February 2013. On 4 April 2013, the staff judge advocate (SJA) submitted the SJA recommendation to the convening authority. On 2 May 2013, Colonel W. J. Harkin II, U.S. Marine Corps, took the CA's action on the appellant's case. In the signature block, Colonel Harkin II, is identified as the Chief of Staff, 4th MAW.

Discussion

The authority to convene a court-martial may not be delegated and "vests in the office, not in the person of the authority so acting." *United States v. Vargas*, 47 M.J. 552, 554 (N.M.Ct.Crim.App. 1997) (quoting Naval Courts and Boards § 329 (1937) and Naval Courts and Boards § 746 (1923)) (additional citation omitted). Congress has specifically authorized a Commander of a Marine Corps Aircraft Wing to convene a general court-martial. Art. 22(a)(7), UCMJ. Additionally, the Secretary of the Navy, pursuant to his authority under Article 22(a)(8), UCMJ, has authorized "[a]ll flag and general officers, or their immediate temporary successors, in command of units or activities of the Navy or Marine Corps[]" to convene general courts-martial. Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7F § 0120(a)(1) (26 Jun 2012).

To ensure "full and effective control" and "efficient operation" of any command within the Marine Corps, orderly and well-understood succession to command is crucial in the event of the incapacity, death, or absence of the commander. *United States v. Kugima*, 36 C.M.R. 339, 342 (C.M.A. 1966). In the absence of the Commanding General of a MAW, the Assistant Wing Commander succeeds to command. Marine Corps Manual at ¶ 1007.4 (Ch-3 13 May 1996). In the event of the absence of the Assistant Wing Commander, succession to command within an aircraft wing devolves to the "line officer next in rank within the command." U.S. Navy Regulations, Article 1079.2; see MARCORMAN, paragraph 1007.4. To succeed to command within a MAW, the successor-in-command must be a "Marine Corps officer qualified as a naval aviator or naval flight officer." MARCORMAN, ¶ 1007.6b.

In this case, there is no doubt that the Commanding General, 4th MAW, had the statutory authority to convene, refer, and take action on the appellant's general court-martial. The appellant does not contest this matter. Instead, he argues that the CA did not personally sign the CA's action. Colonel Harkin II signed the CA's action; however, he signed it in his capacity as the "Chief of Staff." Under the unique facts of this case, as supplemented by the unsworn declaration of the Deputy SJA, MARFORRES, the Chief of Staff, 4th MAW was, in fact, the successor-in-command to 4th MAW due to the absence of both the Commanding General and the Assistant Wing Commander. Deputy SJA, MARFORRES Declaration at 3. Accordingly, Colonel Harkin II, a naval aviator, was the CA at the time he took CA's action.

At the time of CA's action, neither the Commanding General nor the Assistant Wing Commander, both members of the U.S. Marine Corps Reserve, were on active duty. Deputy SJA, MARFORRES, Declaration at 3. A Marine Corps officer of the reserve component who is not on active duty is not "considered to be an officer" for the purpose of "discharging any official function[.]" MARCORMAN, paragraph 2700.1b; see *United States v. Duvall*, 7 M.J. 832, 834 (N.C.M.R. 1979) (holding that only military officers subject to the UCMJ "are empowered to exercise disciplinary functions" and officers not subject to the UCMJ are not empowered to "convene a court or refer charges"). Subject to certain limitations not applicable in this case, members of the reserve component are not subject to the UCMJ unless they are on inactive-duty training. Art. 2(a)(3), UCMJ. Because the Commanding General, 4th MAW, and the Assistant Wing Commander were both absent from command, command devolved to the next senior officer within the command, Chief of Staff, 4th MAW.

While there is no doubt that Colonel Harkin II had succeeded to command at the time he took the CA's action, he should have taken action in his role as the Commander, 4th MAW. The billet of "Chief of Staff" lacks statutory or regulatory authority to convene, refer, or take CA's action in any court-martial. If, on the other hand, the Chief of Staff succeeds to command, as Colonel Harkin properly did in this case, his command authority vests in the office of the Commanding General, 4th MAW. Because the correct billet holder took the CA's action in this case based on his succession to command, we discern no prejudice. We disagree with the appellant's request that we remand the case for a new CA's action because we find that the correct billet holder took CA's action; however, the signature line identifying the CA as the "Chief of Staff" was a scrivener's error and the appellant is entitled to an accurate official record with regard to his court-martial conviction. *United States v. Brown*, 62 M.J. 602, 604 (N.M.Ct.Crim.App. 2005); *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). Accordingly, we will direct corrective action in our decretal paragraph.

Conclusion

The findings and the sentence as approved by the CA are affirmed. The supplemental court-martial order (CMO) will properly reflect that Colonel W.J. Harkin II, U.S. Marine Corps, took CA's action as the successor-in-command of 4th MAW and not as "Chief of Staff."

For the Court

R.H. TROIDL
Clerk of Court