

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

CHARLES Wm. DORMAN

C.J. VILLEMEZ

R.C. HARRIS

UNITED STATES

v.

**Eric J. PHILLIPS
Sonar Technician (Surface) First Class (E-6), U.S. Navy**

NMCCA 200301457

Decided 15 January 2004

Sentence adjudged 30 April 2003. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Ocean Processing Facility, Whidbey Island, Oak Harbor, WA.

CDR MICHAEL J. WENTWORTH, JAGC, USNR, Appellate Defense Counsel
CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DORMAN, Chief Judge:

A military judge, sitting as a special court-martial, accepted the appellant's guilty plea and convicted him of a single specification of intentionally inflicting grievous bodily harm upon his wife, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The adjudged and approved sentence includes a bad-conduct discharge and confinement for 6 months. On 8 July 2003 the convening authority (CA) suspended confinement in excess of 120 days for a period of 12 months; he also suspended the automatic reduction below E-5, under Article 58a, UCMJ, for a period of 12 months from the date of trial. This action was taken in partial compliance with the terms of the pretrial agreement.

We have carefully examined the record of trial, the appellant's assignment of error, and the Government's response. Following that review, except as noted below, we conclude that the findings and sentence are correct in law and fact.

Following our corrective action we find that no errors remain that materially prejudice the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Facts

Under the terms of the appellant's pretrial agreement, the CA could approve the sentence as awarded, except for a bad-conduct discharge. If a bad-conduct discharge was awarded, the CA was obligated to disapprove it. The CA was also required to suspend confinement in excess of 120 days for a period of 12 months from the date the sentence was adjudged. In taking action in this case, the CA approved the adjudged bad-conduct discharge, and although he suspended confinement in excess of 120 days for a period of 12 months, he did not state that the suspension period would run from the date of trial.

Post-Trial Error

In his sole assignment of error, the appellant correctly argues that the CA erred in failing to disapprove the adjudged bad-conduct discharge. The Government concedes error. The appellant urges this court to return the case to the CA, directing him to disapprove the bad-conduct discharge. The Government urges us to disapprove the bad-conduct discharge. Both the appellant and the Government recommend that we return this case to the CA for review under Article 64, UCMJ.

Well-established precedent of the Court of Military Appeals, now the Court of Appeals for the Armed Forces, and this court, provides that where a CA has failed to take action that he was required to take under the terms of a pretrial agreement, this court has the authority to enforce the agreement. *United States v. Cox*, 22 C.M.A. 69, 72, 46 C.M.R. 69, 72 (1972); *United States v. Carter*, 27 M.J. 695, 697 (N.M.C.M.R. 1988). See also *United States v. Bernard*, 11 M.J. 771, 772-74 (N.M.C.M.R. 1981). In recognition of that authority, and the interests of judicial economy, we will take corrective action, rather than directing the CA to do so.

We, however, see no reason to return this case to the CA for review under Article 64, UCMJ. Although the CA erred in failing to take an action that conformed to the requirements of the pretrial agreement, by approving the appellant's bad-conduct discharge, this court was vested with jurisdiction over the case. Art. 66(b), UCMJ. We have conducted our review in accordance with Articles 59(a) and 66(c), UCMJ. Since Article

64, UCMJ, review is to be conducted only in those cases in which review under Articles 66 or 69(a), UCMJ, has not been conducted, we will not direct further review of our decision by a "judge advocate."

Conclusion

Following review of this case, the findings are affirmed. With respect to the sentence, we affirm only so much as extends to confinement for 6 months. We direct the issuance of a supplemental court-martial order that correctly reports the sentence as approved by this court. The supplemental court-martial order shall also state, as required by the pretrial agreement, that the period of suspension of that portion of confinement in excess of 120 days began to run on the date of trial.

Judge VILLEMEZ and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court