

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman DELVIN J. BARNES
United States Air Force**

ACM 35048

24 December 2003

Sentence adjudged 25 January 2002 by GCM convened at Luke Air Force Base, Arizona. Military Judge: Steven B. Thompson.

Approved sentence: Bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Matthew J. Mulbarger.

Before

**BRESLIN, ORR, and GENT
Appellate Military Judges**

PER CURIAM:

A general court-martial found the appellant guilty, contrary to his pleas, of two specifications of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921, one specification of forgery, in violation of Article 123, UCMJ, 10 U.S.C. § 923, two specifications of uttering worthless checks with intent to defraud, in violation of Article 123a, UCMJ, 10 U.S.C. § 923a, one specification of dishonorable failure to pay just debts, in violation of Article 134, UCMJ, 10 U.S.C. § 934, one specification of attempted larceny, in violation of Article 80, UCMJ, 10 U.S.C. § 880, and one specification of conspiracy to commit larceny, in violation of Article 81, UCMJ, 10 U.S.C. § 881. The sentence adjudged and approved was a bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1.

The convening authority also granted the appellant's request for clemency, and provided that,

Pursuant to Article 58b, UCMJ, Section (b), the required forfeiture of total pay and allowances, after mandatory deductions, is waived for a period of 6 months or release from confinement which ever is sooner from the date of this action. The required forfeiture of total pay and allowances, after mandatory deductions, is directed to be paid to Ms. [CW], mother-in-law of the accused, for the benefit of the accused's dependent children.

The appellant notes that the convening authority did not disapprove or suspend the adjudged forfeitures before approving the waiver of the automatic forfeitures, as required by *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002), decided after the action in this case. The appellant expresses concern that because the waiver of the automatic forfeitures was not technically correct, the funds may be recouped at a later time. The appellant now invites this Court to take appropriate action to ensure that the intent of the convening authority is satisfied.

We find that the convening authority intended to take appropriate action to waive the automatic forfeitures under Article 58b(b), UCMJ, 10 U.S.C. § 858b(b). The convening authority's action is not ambiguous, even if it is not technically correct under *Emminizer*. As we stated in *United States v. Medina*, 59 M.J. 571, 572 (A.F. Ct. Crim. App. 2003):

There is no need for this Court to disapprove the appellant's adjudged forfeitures where the convening authority clearly intended to waive the mandatory forfeitures, the action carried out such waiver in a manner compliant with the understanding of Article 58b, UCMJ, at the time, and the appellant's [dependent] received the pay at issue. *Cf. United States v. Loft*, 10 M.J. 266, 268 (C.M.A. 1981) (holding that where the convening authority's action is subject to only one interpretation, a supervisory authority is not required to return the record of court-martial to the convening authority for clarification).

We hold that the convening authority intended to approve the waiver of forfeitures and that his action was effective to do so, even if it did not technically comply with *Emminizer*.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court