UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman DELVIN J. BARNES
United States Air Force

ACM 35048 (f rev)

29 June 2005

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, Colonel Carlos L. McDade, Major Terry L. McElyea, Major Sandra K. Whittington, Major Andrew S. Williams, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel William B. Smith, Major Matthew J. Mulbarger, and Captain C. Taylor Smith.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

This case is before our Court for further review because the original action by the convening authority was set aside by the United States Court of Appeals for the Armed Forces (CAAF). The appellant was convicted, contrary to his pleas, by a general court-martial of attempted larceny, conspiracy to commit larceny, larceny, forgery, uttering worthless checks with the intent to defraud, and dishonorable failure to pay just debts in violation of Articles 80, 81, 121, 123, 123a, and 134, UCMJ, 10 U.S.C. §§ 880, 881, 921, 923, 923a, 934. A panel of officer members sentenced him to a bad-conduct discharge,

confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged, and forwarded the record for review by this Court under Article 66(c), UCMJ, 10 U.S.C. § 866(c).

On 24 December 2003, this Court affirmed the findings and sentence. *United States v. Barnes*, ACM 35048 (A.F. Ct. Crim. App. 24 Dec 2003) (unpub. op.). On 21 July 2004, the CAAF set aside the decision of this Court and the convening authority's action. *United States v. Barnes*, 60 M.J. 284 (C.A.A.F. 2004). Our superior court returned the case to the convening authority for a new action in light of the decisions in *United Sates v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002), and *United States v. Lajaunie*, 60 M.J. 280 (C.A.A.F. 2004). On 14 January 2005, the convening authority completed a new action approving only so much of the sentence as provided for a bad-conduct discharge, confinement for 1 year, reduction to E-1, and forfeiture of all pay and allowances, "except only forfeiture of $1,105.50 pay and allowances for the period of 20 March 2002 and 19 September 2002." Additionally, the convening authority waived the automatic forfeiture of all pay and allowances for a period of six months or release from confinement, whichever was sooner, for the benefit of the appellant's children.

The appellant has submitted the record and new action for further review. He asserts that the new action is erroneous because it does not effect the convening authority's intent. The appellant believes that the convening authority intended to waive automatic forfeitures for the maximum allowable time and to disapprove all pay and allowances in excess of $1,105.50 of the adjudged forfeitures each month, for a six-month period. The appellant contends that, because the new action does not include the words "per month," the plain language of the action only approves a total forfeiture of $1,105.50 over the entire six-month period. The appellant expresses concern that the wording of the new action would allow the government to recoup some of the funds paid to his dependents at a later time.

In response, the government asserts that the new action is not ambiguous. The government argues that the convening authority's intent is clear because the appellant received full pay and allowances minus the $1,105.50 for a six-month period. Additionally, the new action reiterates that the mandatory forfeitures had already been waived. The government contends that neither the appellant nor his dependents face recoupment action in the future. Therefore, no corrective action is required. We disagree.

We are convinced that the convening authority intended to disapprove the appellant's adjudged forfeitures in excess of $1,105.50 per month for a six-month period. Unfortunately, without the words "per month," the new action only disapproves the adjudged forfeitures in excess of $1,105.50 for one month. *See* Rule for Courts-Martial 1003(b)(2). Consistent with the holdings in *Emminizer* and *Lajaunie*, this Court may not

disapprove a portion of the adjudged forfeitures to ensure that the intent of the convening authority is satisfied.

Accordingly, we return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the erroneous action and substitute a corrected action and promulgating order. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

Chief Judge PRATT participated in this decision prior to his retirement.

OFFICIAL

ANGELA M. BRICE
Clerk of Court