

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic DONALD E. BROWN II
United States Air Force**

ACM S30783

19 July 2006

Sentence adjudged 10 September 2004 by SPCM convened at Osan Air Base, Republic of Korea. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 7 months.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Andrew S. Williams, and Captain Kimberly A. Quedensley.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Michelle M. McCluer, and Major Nurit Anderson.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JOHNSON, Judge:

We examined the record of trial, the assignment of error and the government's reply. The appellant asks this Court to order new post-trial processing and to provide conflict-free defense counsel to represent him in responding to the new staff judge advocate recommendation (SJAR) and submitting clemency matters. For the reasons set forth below, we find error and return the case for new post-trial processing in compliance with Rule for Courts-Martial (R.C.M.) 1106.

This is a classic case of miscommunication. After the appellant was served with a copy of the SJAR, he released his trial defense counsel because he thought that she was incompetent. He did, however, authorize her to request a delay so that a newly assigned counsel would have time to submit clemency matters on his behalf. Per his request, the appellant's trial defense counsel asked the staff judge advocate (SJA) for additional time to submit clemency matters. In response, the SJA granted an extension of time until 15 December 2004. The SJA assumed that the trial defense counsel had made an effort to secure a new defense counsel to assist the appellant with his post-trial matters. Because the appellant only authorized his trial defense counsel to ask for a delay, she took no effort to secure a new counsel. As a result, the appellant was not assigned new counsel and submitted no matters in clemency. Shortly after the deadline expired, the SJA forwarded the package to the convening authority who took action. In spite of the appellant's desire to have representation during the clemency process, none was provided.

R.C.M. 1106(f)(2) requires an appropriate authority to detail substitute military counsel to represent the accused for the purpose of preparing a response to the SJAR. Because the appellant was not provided representation during the clemency process, we find error. See *United States v. Knight*, 53 M.J. 340, 343 (C.A.A.F. 2000); *United States v. Johnston*, 51 M.J. 227, 229-30 (C.A.A.F. 1999); *United States v. Leaver*, 36 M.J. 133, 136 (C.M.A. 1992).

The convening authority's action is set aside. The record of trial is returned to The Judge Advocate General for new post trial processing in compliance with R.C.M. 1106. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

Judge JOHNSON authored this opinion prior to her reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator