

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Senior Airman DAMION J. CAMPBELL
United States Air Force**

ACM 35019

22 October 2003

Sentence adjudged 10 January 2002 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Gregory E. Pavlik.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of \$828.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel Michael E. Savage.

Before

**VAN ORSDOL, MALLOY, and GRANT
Appellate Military Judges**

OPINION OF THE COURT

MALLOY, Judge:

The appellant was tried by a general court-martial, composed of officers and enlisted members, on charges of conspiracy to commit aggravated assault, aggravated assault, and communicating a threat, in violation of Articles 81, 128, and 134, UCMJ, 10 U.S.C §§ 881, 928, 934. He was found guilty, in accordance with his pleas, of conspiracy to commit simple assault and communicating a threat. The members acquitted him of aggravated assault. They thereafter sentenced him to a bad-conduct discharge, confinement for 6 months, forfeiture of \$828.00 per month for 6 months, and reduction to E-1.

The convening authority approved the sentence as adjudged on 6 March 2002. His action also memorialized his earlier decision of deferring the adjudged and mandatory* forfeitures pending his action. *See* Article 57a, UCMJ, 10 U.S.C. § 857(a). In his action, the convening authority also waived the mandatory forfeitures of pay and allowances, for the benefit of his dependents, in accordance with Article 58b(b), UCMJ, 10 U.S.C. § 858b(b), for a period of six months from the date of the action or until release from confinement. It is the deferral and waiver of forfeitures that give rise to the appellant's single assignment of error.

The appellant now argues that we “should take appropriate action to ensure the intent of the convening authority is satisfied while fulfilling the requirements of *United States v. Emminizer* 56 M.J. 441 (2002).” We hold that we cannot determine the convening authority's intent because his action is ambiguous.

I. Background

Since the facts of the appellant's criminal misconduct are not germane to the assigned error, we limit our discussion to the post-trial processing of his case. Approximately two weeks after trial, the appellant submitted a letter to the convening authority asking that he defer mandatory forfeitures and reduction in rank until after taking action on the sentence. The appellant also asked for post-action waiver of forfeitures in the amount of \$800.00 per month for the benefit of his wife and soon-to-be born child, as well as a child from another relationship whom he was under a court order to support. He admitted in his post-trial submission to the convening authority that he failed to inform the members at trial that his pay was being garnished in the amount of \$404.00 per month for court-ordered child support to another woman.

On 11 February 2002, the convening authority, based on the recommendation of his staff judge advocate, granted the appellant's deferment request, in part. That decision indicates in part:

Pursuant to Article 57(a) and Article 58b, UCMJ, and AFI 51-201, paragraph 9.7.3, I hereby grant your request, in part. I direct that the adjudged/automatic forfeitures of all pay and allowances be deferred until action. However, I will not defer the adjudged reduction to airman basic, and thus the accused will continue to receive airman basic pay, effective 14 days after sentence was adjudged. I cannot direct an allotment be established for the benefits of the accused's dependents in conjunction with a deferral action. The accused may, however, elect to establish a voluntary

* Article 58b, UCMJ, forfeitures are often referred to by different terminology. The convening authority's action referred to Article 58b, UCMJ, forfeitures as “automatic” forfeitures. It is also common to see Article 58b, UCMJ, forfeitures referred to as “required” forfeitures. We have followed our superior court's terminology in *Emminizer* and refer to Article 58b, UCMJ, forfeitures as “mandatory” forfeitures.

allotment for the benefit of his dependents. Regarding your request to waive the adjudged/automatic forfeitures for six months, you may renew this request when you submit clemency matters.

The appellant renewed his request when he submitted his clemency matters and asked the convening authority to waive his mandatory forfeitures for the benefit of his dependents. The appellant's trial defense counsel noted in his submission on behalf of the appellant, that "[d]espite all other requests, [the appellant] renews his previously submitted request for waiver of automatic forfeitures in favor of his dependent wife." The appellant's clemency letter differed from counsel's request only in that it also referenced his dependent daughter whom he was under court order to support. Neither counsel nor the appellant asked for further relief from *adjudged* forfeitures, however.

The convening authority approved the sentence as adjudged and his action provided the following concerning forfeitures:

Pursuant to Article 57a, UCMJ, the adjudged forfeiture of \$828.00 pay per month for 6 months and required forfeitures of total pay and allowances were deferred from 11 February 2002 until the date of the action. Pursuant to Article 58b, UCMJ, Section (b), the required forfeiture of total pay and allowances, after mandatory deductions, is waived for a period of six months or release from confinement whichever 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 Mrs. [SC], spouse of the accused, for the benefit of herself and their unborn child, and the Pulaski County, Office of Child Support Enforcement, Little Rock, Arkansas, for the court ordered child support of another dependent child.

This action does not accurately reflect the convening authority's 11 February 2002 approval of the appellant's request for deferment of forfeitures. On 11 February 2002, the convening authority actually ordered that deferment of "adjudged/automatic" forfeiture of pay and allowances be retroactively "effective 14 days after sentence was adjudged" (24 January 2002). There is no indication, however, that the appellant was harmed by this mistake, since neither adjudged nor mandatory forfeitures were ever taken from his pay.

Post-trial, we admitted an affidavit from First Lieutenant Jeremy Heimgartner, Commander of the Financial Services Flight, 314th Comptroller's Squadron, Little Rock Air Force Base, detailing the administrative actions taken in response to the convening authority's initial deferment order and ultimate action on sentence. This affidavit provides in relevant part: (1) "No action was taken by the 314th Comptroller Squadron to implement the adjudged forfeitures of pay ordered by General Court-Martial Order No. 29 because of the six-month waiver provision in the order;" (2) "All net payments due AB Campbell were deposited into his designated account at the First Arkansas Bank;" and (3) Based on

information current as of 9 August 2002, the date of the affidavit, “no debt collection will be taken against the appellant because all of his debts to the United States have been paid in full.” The affidavit clarifies that the money was not used to pay the court-ordered child support to Pulaski County, Arkansas, as directed by the convening authority. It is unclear what, if any money, was provided to the appellant’s wife, since the appellant never executed a pay allotment and continued to have unrestricted access to the account in which the money was deposited.

II. Discussion

Action in this case was taken shortly before the Court of Appeals for the Armed Forces’ (CAAF) decision in *Emminizer*. The appellant now argues that the convening authority’s action is incorrect because the convening authority erred when he waived mandatory forfeitures without first modifying adjudged forfeitures. The appellant does not argue that he was harmed by this error but only that he could be harmed sometime in the future if the government attempts to recoup money from him to which he was not entitled. While we do not disagree with the appellant’s reading of *Emminizer*, we believe he overlooks a key distinction between his case and *Emminizer*. Here, the convening authority could waive mandatory forfeitures of pay and allowances for the benefit of the appellant’s dependents under Article 58b, UCMJ, without first modifying adjudged forfeitures when acting on the sentence under Article 60, UCMJ, 10 U.S.C. § 860.

In *Emminizer*, the appellant was convicted by general court-martial and sentenced to a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1. *Emminizer*, 56 M.J. at 441. After trial, he requested in his clemency submission that the convening authority waive mandatory forfeitures under Article 58b, UCMJ, for the benefit of his young son. *Id.* at 444. The staff judge advocate advised against approving this request because the convening authority would have to first disapprove adjudged forfeitures when acting on the sentence before he could waive mandatory forfeitures. *Id.* at 444-45. Our superior court found the advice misleading and prejudicial to the appellant because it failed to adequately distinguish between the convening authority’s discretion with respect to each type of forfeiture, and may have created the erroneous impression that the convening authority was required to disapprove adjudged forfeitures for the entire 18-month period before granting a waiver of mandatory forfeiture for the much shorter period allowed for in Article 58b, UCMJ. *Id.* at 445. As the Court noted, a convening authority has very broad discretion when acting on adjudged forfeitures under Article 60, UCMJ, but very restricted discretion when granting relief from mandatory forfeitures under Article 58b, UCMJ. *Id.* Given the complexity of this issue, we repeat some of the Court’s clarifying discussion:

In contrast to the power that a convening authority may exercise with respect to forfeitures adjudged as part of a court-martial sentence, the convening authority is not empowered to disapprove, modify, or suspend

mandatory forfeitures required by Article 58b during periods of confinement or parole. The convening authority has two limited powers with respect to mandatory forfeitures. First, upon application of the accused, the convening authority may defer a mandatory forfeiture until the date on which the convening authority approves the sentence under Article 60, and may rescind such deferment at any time. Art. 58b(a)(1); *see* Art 57(a)(2). Second, if the accused has dependents, the convening authority has discretion to provide transitional compensation to such dependents for a limited period of time. In any such case, the convening authority may waive all or part of any mandatory forfeitures required by Article 58b(a) for a period not to exceed six months, and the mandatory forfeitures subject to such waiver are paid directly to dependents of the accused. Art. 58b(b).

Id. at 443.

Since *Emminizer*, it is clear that in a case with an adjudged forfeiture of all pay and allowances, convening authorities must first disapprove, modify, or suspend the adjudged forfeitures before waiving mandatory forfeitures under Article 58b, UCMJ. There is nothing to waive under Article 58b, UCMJ, unless the convening authority first acts to ameliorate the effects of adjudged forfeiture of all pay and allowances. As CAAF explained:

Mandatory forfeitures are triggered only when three separate conditions occur at the same time: (1) the sentence falls within the qualifying sentences described in Article 58b(a)(2); (2) the member is in confinement or on parole; and (3) the member is otherwise entitled to pay and allowances that are subject to mandatory forfeitures. When a servicemember is not entitled to compensation covered by the mandatory forfeiture provisions of Article 58b; there is nothing to waive. For example, if a servicemember's term of enlistment has expired, the waiver authority cannot be used to provide compensation to dependents. Likewise, when total forfeitures become effective under Article 57(a) as a result of a qualifying general court-martial sentence, or two-thirds forfeitures become effective as a result of a special court-martial sentence, there are no mandatory forfeitures that can be waived. Similarly, if partial forfeitures take effect under Article 57(a), the waiver authority applies only to any mandatory forfeiture under Article 58b.

Id. at 444. In applying this reasoning to a case where, as here, partial forfeitures were adjudged, waiver authority only applies to the remaining mandatory forfeitures under Article 58b, UCMJ, unless the convening authority modifies, suspends, or disapproves the adjudged forfeitures.

The appellant, in this case, was sentenced to forfeit \$828.00 of his pay per month for 6 months, a bad-conduct discharge, confinement for 6 months, and reduction to E-1. However, neither the adjudged nor the mandatory forfeitures went into effect because the convening authority granted the appellant's request to defer both forfeitures "effective 14 days after sentence was adjudged." Thus, his action in approving the sentence that included partial forfeitures, and at the same time waiving mandatory forfeitures was consistent with *Emminizer*. Assuming this is what he intended to do, his actions clearly fall within his "broad discretion over the adjudged forfeitures" under Article 60, UCMJ, and his "restricted discretion over mandatory forfeitures" under Article 58b, UCMJ. *Id.* at 445. This is an assumption, however, we are unwilling to make given the ambiguity of the action and the benefit of now knowing how finance personnel executed the action.

The action of the convening authority as it stands is consistent with *Emminizer* since the partial adjudged forfeitures were less than the mandatory forfeitures. As stated before, the convening authority could approve the sentence as adjudged and also waive the remaining mandatory forfeitures. Several factors cause us, however, to pause in determining the convening authority's intent concerning forfeitures. First, the staff judge advocate (SJA) did not provide the convening authority with advice in his addendum to his post-trial recommendation on the convening authority's discretion to waive mandatory forfeitures under Article 58b, UCMJ. Thus, we do not have the benefit of the SJA's analysis and advice to the convening authority on his ultimate decision to waive mandatory forfeitures. Second, we are aware as a result of First Lieutenant Heimgartner's affidavit, that comptroller personnel viewed the action as providing a six-month waiver of adjudged forfeitures. This reinforces our view that the action is ambiguous since we found another interpretation of the action as stated above. Third, the appellant asked for a waiver of \$800.00 per month in his first request to the convening authority. While he did not again specify this amount in his clemency submission, he did indicate he was renewing his original request for waiver of "automatic forfeitures in favor of [his] wife and dependent daughter." Nothing suggests the convening authority would not have been receptive to the original \$800.00 per month request or that he did not have this sum in mind at the time he decided to grant the waiver. Finally, the order neither states a sum certain for either of the dependents to whom waived forfeitures were to be paid, nor does it provide any guidance on how an unspecified amount was to be divided. Thus, we are left with the unanswered question of exactly how much was waived and how that amount was to be divided between unrelated dependents.

In sum, the convening authority's action leaves us uncertain, not as to his authority under Article 58b, UCMJ, but as to whether he intended to waive only those forfeitures that remained after deduction of adjudged forfeitures, or whether he intended to waive all mandatory forfeitures for the benefit of the appellant's dependents for a

period of six months, requiring a suspension, modification, or disapproval of the partial adjudged forfeitures. In addition, it is unclear how the convening authority intended to divide the waived forfeitures for the appellant's dependents. Under these circumstances, we believe the fairest course of action is to return the record to the convening authority for a new action clearly stating his intent.

III. Conclusion

The action of the convening authority is set aside and the record of trial will be returned to him for a new action. The new action will reflect the correct effective date for deferment of adjudged and mandatory forfeitures under Article 57(a)(2), UCMJ, and will clarify the convening authority's intent concerning waiver of the mandatory forfeitures, taking into account the partial adjudged forfeitures and the appellant's dependents, Article 58b(b), UCMJ. Thereafter, Article 66(c), UCMJ, 10 U.S.C. § 866(c), shall apply.

OFFICIAL

HEATHER D. LABE
Clerk of Court