UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MICHAEL J. COVELUSKY, JR.
United States Air Force

ACM S31137

22 August 2007

Sentence adjudged 08 June 2006 by SPCM convened at Andrews Air Force Base, Maryland. Military Judge: Christopher A. Santoro (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of $500.00 pay per month for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Captain Christopher L. Ferretti, and Captain Timothy L. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Amy E. Hutchens, and Captain Jefferson E. McBride.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

SOYBEL, JUDGE:

The appellant was convicted, in accordance with his pleas, of one specification each of conspiracy to commit larceny and larceny, in violation of Articles 81 and 121, UCMJ, 10 U.S.C. §§ 881, 921. His approved sentence consists of a bad-conduct discharge, confinement for 4 months, reduction to the grade of E-1 and forfeiture of $500.00 pay per month for four months.

Appellant has raised a post-trial processing issue. We review those issues de novo. *United States v. Bakcsi*, 64 M.J. 544 (A.F. Ct. Crim. App. 2006); *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). The issue on appeal has to do with the Personal Data Sheet (PDS) submitted at trial and ultimately to the convening authority as part of post-

trial processing. It incorrectly reflected the appellant had no foreign service but in court, the trial counsel corrected it to reflect a 4-month deployment to Ali Al Salem, Kuwait from May to September 2004. However, the Staff Judge Advocate's Recommendation (SJAR) to the convening authority had attached to it the original, not the corrected copy. The appellant and counsel waived submission of Rule for Courts-Martial (R.C.M.) 1106 matters, which waives the issue on appeal unless there is plain error. *See* R.C.M. 1106 (f)(6); *Kho*, 54 M.J. at 65.

The test for plain error is whether there was an error, whether it was plain and obvious, and whether it prejudiced a substantial right of the appellant. *United States v. Scalo*, 60 M.J 435, 436 (C.A.A.F. 2005) (citing *United States v. Powell*, 49 M.J. 460, 463, 465 (C.A.A.F. 1998)).

The error certainly occurred and it was plain and obvious. The issue is whether the appellant suffered prejudice to a substantial right. Foreign Service in the form of a deployment to Kuwait during Operation Iraqi Freedom would be a significant aspect of any service member's career. The deployment had great significance for the appellant when, at the time of trial, he had amassed a total of two Enlisted Performance Reports as a military postal worker stationed in Maryland. Further, when the military judge permitted trial counsel to make the pen and ink change to the PDS, he commented on the record that he wanted to make sure appellant "gets appropriate credit for any foreign or combat service." Here he did not.

Given that the convening authority is the appellant's "best hope for sentence relief," *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003), and the fact that the standard for meeting the test for prejudice is low in this area, requiring only "some colorable showing of possible prejudice," *Kho* 54 M.J. at 65; *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F 1998), we hold that there was plain error in this case and the convening authority's action, which was taken without complete and accurate advice, should be withdrawn.

Accordingly, we return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the erroneous action and to complete a new action after consideration of a new SJAR that contains the appellant's corrected PDS. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of Court