UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant ROBERT J. DUTTON
United States Air Force

ACM S32002

5 June 2013

Sentence adjudged 5 October 2011 by SPCM convened at Hanscom Air Force Base, Massachusetts. Military Judge: Joshua E. Kastenberg (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $978.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for the appellant: Captain Christopher D. James and Robert J. Dutton (pro se).

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

A special court-martial composed of a military judge sitting alone convicted the appellant, consistent with his pleas, of larceny of military property and fraud against the United States, in violation of Articles 121 and 132, UCMJ, 10 U.S.C. §§ 921, 932.[1] The adjudged sentence consisted of a bad-conduct discharge, confinement for 2 months,

[1] Prior to pleas, the military judge granted the defense's unopposed motion to dismiss two fraud specifications for lack of jurisdiction since the offenses were alleged to have occurred at a time the appellant was not on active duty orders.

forfeiture of $1,500 pay per month for two months, and reduction to the grade of E-1. The convening authority lowered the forfeitures to $978 per month for two months and approved the remainder of the sentence as adjudged.

On appeal, the appellant asserts the military judge abused his discretion when he found the Government had properly recalled the appellant to active duty, thereby allowing him to be punished with confinement. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant joined the Air National Guard on 13 November 1998, and remained a Guard member through the time of his October 2011 court-martial.[2] He was assigned to Pease Air National Guard Base in New Hampshire and attached to the 260th Air Traffic Control Squadron there.

Between 1 December 2007 and 30 June 2008 and again between 1 September 2009 and 31 October 2009, the appellant was placed on active duty orders to serve as a security forces augmentee to the 355th Security Forces Squadron at Davis-Monthan Air Force Base, Arizona, backfilling for deployed members of that unit.

While on these active duty orders, the appellant, along with two other Airmen, submitted multiple vouchers with a fake invoice that reflected he had paid the maximum allowable amount for lodging when, in fact, he had paid considerably less. These false vouchers resulted in him being overpaid between $800-1,800 per month.

Authority to Confine Reserve Component Members

After the guilty plea inquiry, the defense raised an issue about whether the appellant had been properly recalled to active duty for purposes of his court-martial, noting this would affect the maximum punishment the court-martial could adjudge. The defense did not contest the fact that the appellant was on active duty orders at the time of the court-martial and was thus subject to the UCMJ and could properly be tried by the court-martial. Instead, the appellant argued that because the Secretary of the Air Force (SECAF) had been presented with information that made it appear he was more culpable than he was, there was a limitation on the confinement the court-martial could adjudge. The defense also noted the package given to the SECAF failed to contain certain information required by the relevant Air Force Instruction (AFI).

[2] The Department of Defense Form 490, *Record of Trial Front Cover*, for the appellant's record of trial incorrectly states that the appellant's trial was held on 24-26 August 2011.

The military judge determined there was a clear deficiency in the package but that it did not rise to a level that would divest the court-martial of its full jurisdiction in sentencing the appellant since there was "substantial compliance" with the instruction's requirements. The appellant raises this issue again on appeal, focusing solely on the package's failure to include information about his background.

The interpretation of a statute or regulation is a question of law that we review de novo. *United States v. Watson*, 69 M.J. 415, 418 (C.A.A.F. 2011); *United States v. Faulk*, 50 M.J. 385, 390 (C.A.A.F. 1999).

A member of the reserve component (including the Air National Guard) may be involuntarily ordered to active duty for trial by court-martial but may not be sentenced to confinement "unless the order to active duty was approved by the Secretary concerned." Article 2(d)(1), (5), UCMJ, 10 U.S.C. § 802. The exercise of this authority will be in accordance with regulations prescribed by the President. Article 2(d)(3), UCMJ. Through Rule for Courts-Martial 204, the President further delegated to the service secretaries the authority to proscribe rules and procedures for the exercise of court-martial jurisdiction over reserve component members.

For the Air Force, these procedures are found in AFI 51-201, *Administration of Military Justice*, ¶ 2.9.5 (12 December 2007 (incorporating Change 1, 3 February 2010)). "[T]o preserve the possibility that the sentence may include confinement," the request is forwarded via command channels and must include "[t]he member's background, including civilian employment, family circumstances, and character of military service." *Id.* Here, the package sent to the SECAF contained the following information about the appellant's background:

> [He] has been a traditional Guardsman assigned to the 260th Air Traffic Control Squadron, Pease ANGB, since 13 November 1998. His current enlistment began on 7 February 2007 when he reenlisted for six years. He is an airfield manager, 32 years-old, and single with no dependents. [He] was on Title 10 orders at Davis-Monthan, AFB, AZ from October 2007 through June 2008, and again from October 2008 through September 2009 . . . . [His] record reflects satisfactory service; he has no record of prior convictions or nonjudicial punishment.

Because the package does not contain any information about his civilian employment or his two four-month deployments to Afghanistan and Iraq and provides no substantiation of its conclusion that his record "reflects satisfactory service," the appellant contends he was not "properly recalled" and had served two months of illegal confinement.

We disagree. The SECAF approved the recall of the appellant to active duty, and therefore the requirements of Article 2(d), UCMJ, have been met. Additionally, although the package used to procure that approval did not comply with AFI 51-201's requirement that it include information on the appellant's civilian employment and his two deployments, this failure did not affect the jurisdiction of the court-martial to impose confinement, as we find this part of the AFI to be a matter of policy rather than jurisdiction.[3] *See United States v. Hutchins*, 4 M.J. 190, 192 (C.M.A. 1978) (regulations cannot diminish the effectiveness of jurisdiction mandated by Congress); *United States v. Kohut*, 44 M.J. 245, 250 (C.A.A.F. 1996) (Navy regulation specifying TJAG approval on charges that were previously the subject of a state criminal proceedings "did not confer additional rights onto the accused" and its violation does not have jurisdictional significance). *See also United States v. Sloan*, 35 M.J. 4, 9 (C.M.A. 1992) (Army policy not to court-martial retired members does not confer a right or an enforceable benefit upon an accused). As such, this paragraph of the AFI bestows no standing on the appellant to complain about any violation of the policy announced therein. *See Kohut*, 44 M.J. at 250. Lastly, there is no reason to believe such factual information would have affected the SECAF's decision to authorize the appellant to receive confinement at his upcoming court-martial if the sentencing authority deemed that to be an appropriate punishment.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[3] We note that the corresponding regulations for the Army and the Navy do not require their service secretaries to be informed about the background of the reserve component member being considered for recall to active duty. *See* Army Regulation 27-10, *Military Justice*, ¶ 20-3h (3 October 2011); Navy Judge Advocate General Instruction 5800.7F, Part C, *Courts-Martial*, § 0123e(3) (26 June 2012).