UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic BROOKS S. GRESHAM
United States Air Force

ACM S30942

13 December 2006

Sentence adjudged 8 June 2005 by SPCM convened at Charleston Air Force Base, South Carolina. Military Judge: Ronald A. Gregory (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 6 months.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Steven R. Kaufman.

Before

BROWN, SCHOLZ, and BECHTOLD
Appellate Military Judges

PER CURIAM:

Appellant was convicted, in accordance with his pleas, of two specifications of failure to go to his appointed place of duty and one specification of absence without leave in violation of Article 86, UCMJ, 10 U.S.C. § 886; four specifications of making false official statements in violation of Article 107, UCMJ, 10 U.S.C. § 907; one specification of wrongful use of marijuana in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and one specification of breaking restriction in violation of Article 134, UCMJ, 10 U.S.C. § 934. His adjudged and approved sentence consists of a bad-conduct discharge and confinement for 6 months.

On appeal, the appellant has asked for unspecified meaningful relief on his adjudged sentence or new post-trial processing because of errors in the post-trial processing of his case. Specifically, appellant alleges error in the handling of his deferment and clemency requests. We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). In doing so, we determine whether there was, in fact, error; and if so, whether the error prejudiced the appellant. *United States v. Wheelus,* 49 M.J. 283, 288 (C.A.A.F. 1998). In this case, we agree with the appellant that error was committed in the post-trial processing. However, for the reasons set out below, we find that the errors are harmless and affirm.

Background

The first series of post-trial processing errors involved the appellant's request for deferment and waiver of forfeitures, dated 15 June 2005. By memorandum dated 7 July 2005, the convening authority disapproved the deferment, but granted the waiver. The appellant was never provided a copy of the convening authority's decision memorandum as required by Rule for Courts-Martial (R.C.M.) 1101(c)(3). However, notice of the decision was included in the 12 July 2005 staff judge advocate's recommendation (SJAR) and, thereby, provided the appellant the opportunity to comment. The decision memorandum was also not included in the record of trial in accordance with R.C.M. 1103(b)(3)(D). This error was remedied when the government moved, without objection, to submit documents. The 7 July 2005 decision memorandum was included among those documents. A basis for the disapproval of the deferment was not included in either the decision memorandum or the SJAR.

The next series of errors in appellant's post-trial processing involve his clemency request. In support of his request, the appellant's counsel submitted a memorandum, a letter from the appellant to the convening authority, a copy of all the sentencing exhibits introduced at trial, and a copy of the transcript that contained his sentencing argument. The record of trial received at this Court did not include the exhibits or the transcript as part of the clemency matters as required by R.C.M. 1103(b)(3)(C). Additionally, the staff judge advocate (SJA) did not prepare an addendum to his recommendations. Consequently, he did not follow the procedures we set out in *United States v. Foy*, 30 M.J. 664, 665-66 (A.F.C.M.R. 1990). Neither was there evidence in the record that he informed the convening authority of his responsibility to review the appellant's clemency matters. *See United States v. Pelletier*, 31 M.J. 501 (A.F.C.M.R. 1990).

Discussion

We review a convening authority's decision to deny a request for deferment of punishment under an abuse of discretion standard. R.C.M. 1101(c)(3). There can be no meaningful review of discretion if this Court is left to speculate as to the basis for the denial. Although the Discussion to R.C.M. 1101(c)(3) only recommends that a basis for denial be provided, our Superior Court has mandated it. "If there has been any doubt in any quarter before, let us now resolve it: When a convening authority acts on an accused's request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the accused) and must include the reasons upon which the action is based." *United States v. Sloan,* 35 M.J. 4, 7 (C.M.A. 1992).

The absence of any articulated reason for the denial of deferment in this case is clearly legal error. However, that error does not entitle the appellant to relief unless the error materially prejudices his substantial rights. As was noted by our sister Court, "Absent credible evidence that a convening authority denied a request to defer punishment for an unlawful or improper reason, an erroneous omission of reasons in a convening authority's denial of a deferment request does not entitle an appellant to relief." *United States v. Zimmer,* 56 M.J. 869, 874 (Army Ct. Crim. App. 2002). Applying a *Wheelus* analysis to this case, we find that the appellant has not raised even a specter of improper reasons. *See Wheelus*, 49 M.J. at 288-89. Without a colorable claim of possible prejudice, this error is harmless.

In its motion to submit documents, the government has attempted to rectify the deficiencies in the processing of the clemency request. The documents submitted by the government include the missing clemency matters and an affidavit by the SJA indicating that he hand-carried the clemency matters to the convening authority, although he did not indicate whether he informed the convening authority that she must consider all matters before taking action. *See United States v. Godreau*, 31 M.J. 809, 810-11 (A.F.C.M.R. 1990). However, he did state that the convening authority reviewed all matters before taking action and indicated that by her initials. Whether the SJA properly informed her or not, it is clear from the provided clemency matters that the convening authority properly executed her responsibility on clemency because every page of the appellant's submission was initialed by the convening authority. We are satisfied that the convening authority properly considered all of the appellant's clemency matters in this case.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator