UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class NINA M. MERENE
United States Air Force

ACM S31492

12 February 2009

Sentence adjudged 22 April 2008 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: William Burd (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Maria A. Fried, Major Shannon A. Bennett, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Nurit Anderson, and Major Jeremy S. Weber.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

In accordance with the appellant's pleas, a military judge sitting as a special court-martial convicted her of one specification of making checks on divers occasions with intent to defraud, in violation of Article 123a, UCMJ, 10 U.S.C. § 923a. The adjudged and approved sentence consists of a bad-conduct discharge, three months confinement, a reduction to E-1, and a reprimand.[1] On appeal the appellant asks the Court to disapprove her bad-conduct discharge and reduction to E-1. The basis for her request is that she opines: (1) the staff judge advocate, in his Staff Judge Advocate Recommendation

[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty in return for the convening authority's promise not to approve confinement in excess of three months.

(SJAR), erroneously referred to her 12 February 2008 letter of reprimand despite the fact that the letter of reprimand was not admitted at trial and (2) her sentence is inappropriately severe. Finding no error, we affirm.

Background

On sixteen occasions between 18 and 26 November 2007, the appellant wrote checks to the Army and Air Force Exchange Service (AAFES) for merchandise. On each occasion, the appellant knew she lacked sufficient funds in or sufficient credit with her bank to cover the checks. During the sentencing portion of trial, trial counsel moved to admit the appellant's 12 February 2008 letter of reprimand she had received for failing her physical fitness test. The military judge refused to admit the letter of reprimand into evidence because the appellant was on a physical profile. In making his recommendation to the convening authority, the staff judge advocate referenced the appellant's 12 February 2008 letter of reprimand. The appellant, in her response to the SJAR, failed to comment on or otherwise object to the staff judge advocate's reference to the 12 February 2008 letter of reprimand. The appellant alleges error for the first time on appeal.

SJAR

If defense counsel does not make a timely comment on an error or omission in the SJAR, "the error is waived unless it is prejudicial under a plain error analysis." *United States v. Capers*, 62 M.J. 268, 269 (C.A.A.F. 2005) (citations omitted). Since, prior to this appeal, the appellant did not object to the SJAR, we must determine: (1) whether the staff judge advocate's reference to the appellant's 12 February 2008 letter of reprimand was error; (2) if so, whether the error was plain; and (3) if so, whether the error materially prejudiced a substantial right of the accused. *Id.* (citations omitted). On this latter point, we note that "the prejudice prong involves a relatively low threshold—a demonstration of 'some colorable showing of possible prejudice.'" *Id.* (quoting *United States v. Scalo*, 60 M.J. 435, 436-37 (C.A.A.F. 2005)) (citations omitted).

In the case at hand, we find that the staff judge advocate did not err in referring to the appellant's 12 February 2008 letter of reprimand. Several points support this conclusion. First, the staff judge advocate may comment on any matter he deems appropriate and "[s]uch matter may include matters outside the record." Rule for Courts-Martial (R.C.M.) 1106(d)(5). Second, the staff judge advocate, in providing his addendum to the SJAR, may comment on a new matter, one defined in part as a matter outside the record of trial, and the appellant has no cause to complain, provided the appellant has an opportunity to comment on such matters. R.C.M. 1106(f)(7); R.C.M. 1106(f)(7) Discussion. Lastly, the convening authority, in taking action, may consider matters he deems appropriate, including matters adverse to the appellant outside the record of trial, and the appellant has no cause to complain provided that he is provided an opportunity to comment on such matters. R.C.M. 1107(b)(3)(B)(iii).

Put simply: (1) the staff judge advocate was well within his right to comment on the appellant's 12 February 2008 letter of reprimand; (2) the convening authority was well within his right to consider the appellant's 12 February 2008 letter of reprimand; (3) the appellant was provided an opportunity to comment on such matters and failed to do so; and thus (4) it was not error for the staff judge advocate to comment on nor for the convening authority to consider the appellant's 12 February 2008 letter of reprimand. Moreover, assuming that it was error, the error was not plain or obvious. Lastly, assuming plain error, there has been no colorable showing of possible prejudice.

Inappropriately Severe Sentence

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of her offense, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004), *aff'd in part and rev'd in part on other grounds*, 60 M.J. 368 (C.A.A.F. 2004).

In the case *sub judice*, writing bad checks is a serious offense which compromises the appellant's standing as a military member. The fact that the appellant had repaid all but approximately $100 of her debt by the time of her court-martial does not minimize the seriousness of her crime. Moreover, the appellant's military record is not spotless—in addition to the letter of reprimand in question, she has received three letters of reprimand for dereliction of duty and a letter of counseling for failure to go. All evince a relative low rehabilitative potential. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offense of which the appellant was found guilty, we do not find the appellant's sentence inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000).

[2] The Court notes that the Court-Martial Order (CMO), dated 11 June 2008 incorrectly indicates that the appellant was an Airman Basic (E-1) at the start of trial when the appellant was in fact an Airman First Class (E-3). The Court orders the promulgation of a corrected CMO.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court