

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic MIGUEL A. ROSADO III
United States Air Force**

ACM 35418

20 July 2004

Sentence adjudged 30 October 2002 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 135 days.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Bryan A. Bonner, and Major Anthony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain Kevin P. Stiens.

Before

STONE, MOODY, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT

JOHNSON, Judge:

In accordance with his plea, the appellant was convicted of one specification of illegal drug use in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was also charged with forgery in violation of Article 123, UCMJ, 10 U.S.C. § 923, but this charge was withdrawn after the plea was accepted, pursuant to a pretrial agreement. A general court-martial composed of a military judge, sitting alone, sentenced the appellant to a bad-conduct discharge and 135 days of confinement. The convening authority approved the sentence as adjudged. The appellant raises one error for our consideration: Whether the appellant is entitled to sentence relief or a new post-trial action where the convening authority's action is ambiguous and the convening authority was inadequately advised about waiver options under Article 58b, UCMJ, 10 U.S.C. § 858b, which led to an ambiguity in the action. We find error and take corrective action.

Background

On 8 November 2002, the appellant submitted a letter to the convening authority and requested a waiver of the automatic forfeitures on behalf of his wife. He included a letter from his wife requesting a waiver of forfeitures. On 13 November 2002, before a decision was made on this request, the Staff Judge Advocate Recommendation (SJAR) was prepared for the convening authority. The SJAR did not mention waiver of automatic forfeitures. Instead, on 19 November 2002, the staff judge advocate (SJA) drafted a staff summary sheet (SSS) for the convening authority concerning the appellant's 8 November request for waiver of forfeitures. The SJA recommended the convening authority deny the request because it did not contain sufficient financial information. Consequently, on 21 November 2002, the convening authority denied trial defense counsel's request for the waiver of automatic forfeitures. But in a handwritten note to defense counsel, the convening authority stated: "I am sympathetic and am ready to help Mrs. Rosado, but I need more than her 1 Nov 2002 memo. [Please] provide a basic financial statement of her & Crystal's situation and I will re-consider. Sooner is better please. . ."

The next day, the trial defense counsel submitted the appellant's clemency petition, again requesting the waiver of automatic forfeitures for the benefit of the appellant's dependents. She stated, "Mrs. Rosado is looking for some assistance—even if it is only \$350 - \$400 per month for food and baby items."

In the addendum to the SJAR, dated 26 November 2002, the SJA supported the waiver of automatic forfeitures. He recommended the convening authority "approve [the] waiver of automatic forfeitures in the amount of \$415.00 per month *during the accused's period of confinement*, for the benefit of the accused's wife and child. This will result in the family receiving approximately \$350.00 per month." (Emphasis added.)

The convening authority action, also dated 26 November 2002, reads, in pertinent part:

Pursuant to Article 58b, Section (b), Uniform Code of Military Justice, \$500.00 pay per month of the mandatory forfeitures is waived for a period of 135 days or release from confinement, whichever is sooner, *with the waiver commencing on the date of this action*. The \$500.00 pay per month is directed to be paid to Glendaly Rosado, spouse of the accused, for the benefit of herself and the accused's dependent daughter.

(Emphasis added.)

Also on 26 November 2002, the convening authority, in a memo addressed to the accounting and finance office, “approved the waiver of automatic forfeiture of pay and allowances provided for under 10 U.S.C. Section 858b in the amount of \$500 pay per month, minus applicable taxes and deductions, *for a period of 6 months* or the accused’s release from confinement, whichever is sooner.” (Emphasis added.) Additionally, in a memo dated 26 November 2002, addressed to the appellant’s spouse, the convening authority approved Mrs. Rosado’s request. He stated:

Your request for the waiver of automatic forfeitures, pursuant to 10 U.S.C. section 858b, is hereby approved in the amount of \$500 per month, minus applicable taxes and deductions, *for a period of 135 days* or when the accused is released from confinement, whichever is sooner. I will direct payment of \$500 per month, minus applicable taxes and deductions, to your account as you requested.

(Emphasis added.)

Discussion

The standard of review for determining whether post-trial processing was properly completed is de novo. *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000).

After having scrutinized the convening authority’s action, the SSS, the SJAR, the addendum to the SJAR, the convening authority’s 26 November 2002 memoranda to the accounting and finance office and to Mrs. Rosado, and the convening authority’s initial denial of the waiver request (in particular, the handwritten note to trial defense counsel), we are certain that the convening authority intended to waive automatic forfeitures for the entirety of the appellant’s period of confinement. The contradictory clause found in the action, “with the waiver commencing on the date of this action,” appears to be superfluous language that was inadvertently included. Poor attention to detail is the most likely cause for the superfluous language in the action, as well as for an erroneous fact mentioned in the formal memorandum to the accounting and finance office (the convening authority stated the duration of forfeitures was 6 months, instead of 135 days). We find there is a latent ambiguity in the action when read in conjunction with other documents in the record. Instead of returning the case for further action by the convening authority, we will order corrective action. *United States v. Loft*, 10 M.J. 266 (C.M.A. 1981). Accordingly, we grant relief to the appellant by ordering that the appellant’s wife receive an amount equal to the amount she would have been paid had the action been effective on the fourteenth day after trial, vice the date of the action.

In light of the corrective action taken above, 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 approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court