UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MALCOLM C. SPURLOCK
United States Air Force

ACM S30571

22 November 2005

Sentence adjudged 20 February 2004 by SPCM convened at Dover Air Force Base, Delaware. Military Judge: Kevin P. Koehler (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 94 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major L. Martin Powell, and Major Natasha V. Wrobel.

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

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of error, and the government's answer. The appellant contends the addendum to the staff judge advocate's recommendation (SJAR) contains "new matter" and that the staff judge advocate (SJA) erred by not serving the addendum on the defense. He also argues that the SJA's comment in the addendum misstates the law. We disagree and affirm.

In response to the SJAR, trial defense counsel submitted a letter complaining about the neglectful treatment the appellant received from his unit, especially during pretrial confinement. The SJA responded with an addendum to the SJAR. In one of her comments, she said, "While such treatment, if true, may reflect poorly upon the unit, it is in no way applicable to matters of clemency." The appellant contends this statement is a

"new matter" that tells the convening authority not to consider information submitted by the defense. Consequently, he argues the SJA should have served the addendum on the appellant prior to the convening authority's action. *See* Rule for Courts-Martial (R.C.M.) 1106(f)(7).

Whether an addendum to an SJAR contains "new matter" is an issue of law that we review de novo. *United States v. Key*, 57 M.J. 246, 248 (C.A.A.F. 2002) (citing *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997)). If it does contain "new matter," the addendum must be served on the accused and trial defense counsel. R.C.M. 1106(f)(7).

In the appellant's case, the comment by the SJA was not "new matter" requiring service of the addendum, nor did it contain erroneous legal advice. On the same page of the SJAR, in bold, underlined type, the SJA advised the convening authority he "**must consider all matters submitted by the accused prior to taking action in this case**." She reiterated this advice later in the letter. Placed in context, the SJA's comment did not communicate to the convening authority that he should not even *consider* the unit's treatment of appellant when contemplating clemency. Instead, the SJA told the convening authority he *must* consider everything the defense submitted. The addendum merely contained a one-sentence, contra-opinion on the effect the unit's actions should have on the sentence. This does not meet the "new matter" definition contemplated by R.C.M. 1106(f)(7).[1]

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

ANGELA M. BRICE
Clerk of Court

1 ""New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation." R.C.M. 1106(f)(7), Discussion.