

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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UNITED STATES

v.

Airman First Class DANIEL A. ZARBATANY, JR.  
United States Air Force

ACM 37448 (rem)

9 January 2012

Sentence adjudged 5 December 2008 by GCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Don M. Christensen.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan; Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; Major Reggie D. Yager; Captain Robert D. Stuart.

Appellate Counsel for the United States: Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Jeremy S. Weber; Major Scott C. Jansen; Major Charles G. Warren; Major Kimani R. Eason; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS  
Appellate Military Judges

UPON REMAND.

This opinion is subject to editorial correction before final release.

PER CURIAM:

Our superior court set aside our decision affirming the findings and sentence, and remanded the case for a new review under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to determine whether the circumstances of the appellant's case warrant additional sentence relief for illegal pretrial confinement or whether such relief would be disproportionate. *United States v. Zarbatany*, 70 M.J. 169 (C.A.A.F. 2011). In making our previous

determination that the appellant's sentence was appropriate we considered, among other matters, the circumstances of the appellant's pretrial confinement. The Court, however, stated that the issue of meaningful relief for violations of Article 13, UCMJ, 10 U.S.C. § 813, must be reviewed independent of sentence appropriateness and that meaningful relief is required unless it is disproportionate in the context of the case. *Id.* at 177. Applying this directive, as well as the pronouncement that Rule for Courts-Martial 305(k) does not limit the remedies available for an Article 13, UCMJ, violation, we undertake a new Article 66(c), UCMJ, review.

Before a general court-martial, the appellant entered pleas of guilty to two specifications of absence without leave (AWOL) for a period less than three days, two specifications of wrongful use of cocaine, and two specifications of wrongful use of marijuana, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a. He entered a plea of not guilty to one specification of distributing cocaine, in violation of Article 112a, UCMJ. After the military judge accepted his pleas and entered findings of guilty, a panel of officers acquitted him of the remaining specification of distribution and sentenced him to a bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.

The appellant admitted having an addiction to illegal drugs. He describes his first use of cocaine as happening at his residence during a 2007 holiday party during which a civilian introduced him to it. He soon began using cocaine on weekends and days off, and his cocaine use continued into the summer of 2008. He also frequently used marijuana during February 2008 and the summer of 2008. His first AWOL followed staying out all night despite knowing he had to be at work by 0600, and he remained absent until he was apprehended at his residence at about 1000 hours. The second AWOL occurred about two weeks later when he failed to return to work after taking his wife to a medical appointment. He told the military judge during the plea inquiry that, during the 24-hour absence, he spent time with "a civilian off base." The appellant's recurring drug abuse only stopped when his wife reported him to law enforcement.

The appellant moved for administrative credit for illegal pretrial punishment based on conditions at the local civilian confinement facility where he was confined prior to trial. After hearing extensive evidence on the conditions of the appellant's pretrial confinement, the military judge found that, although the conditions violated both Air Force Instructions and the Memorandum of Agreement with the facility, there was no intent to punish the appellant. The military judge awarded 119 days credit for pretrial confinement plus an additional credit of 476 days for the unusually harsh conditions of his pretrial confinement. With adjudged confinement of six months, the credit resulted in the appellant's release from confinement at the conclusion of the court-martial. In acting on the sentence, the convening authority referenced the credit, disapproved the adjudged forfeitures, and approved the punitive discharge and reduction in grade.

Violations of Article 13, UCMJ, require meaningful relief unless such relief is “disproportionate in the context of the case.” *Zarbatany*, 70 M.J. at 177. Here, the appellant had already received some relief before the case reached our level: application of the pretrial confinement credit at trial to the adjudged confinement of six months resulted in the appellant’s immediate release from confinement following announcement of sentence, and the convening authority disapproved the adjudged forfeitures. “At this point, the only meaningful relief that could be provided to Appellant would have to be addressed to his punitive discharge.” *Id.*

We find that the appellant has already received meaningful relief in this case. For his multiple wrongful uses of cocaine and marijuana and his two unauthorized absences, the court-martial sentenced him to a bad-conduct discharge, confinement for six months, forfeiture of all pay and allowances, and reduction to E-1. Application of the pretrial confinement credit resulted in the appellant’s immediate release from confinement after serving 119 days of the adjudged six months, a benefit of 61 days off the adjudged confinement. Additionally, disapproval of the adjudged total forfeitures of pay and allowances provided meaningful financial relief to the appellant and his family.

We certainly do not condone the conditions under which the appellant was held prior to trial, but we find that granting additional relief by disapproving the punitive discharge would be disproportionate in the context of this case. A punitive discharge is a severe punishment that impacts the appellant’s personnel status and is a “qualitatively different” punishment than confinement. *United States v. Rosendahl*, 53 M.J. 344, 348 (C.A.A.F. 2000). While financial consequences related to potential veterans benefits flow from a punitive discharge, the primary result of a punitive discharge is a “severance of military status.” *United States v. Josey*, 58 M.J. 105, 108 (C.A.A.F. 2003). A bad-conduct discharge correctly characterizes the appellant’s misconduct and is appropriate in this case. Disapproval of the punitive discharge to provide additional meaningful relief is not warranted.

#### *Conclusion*

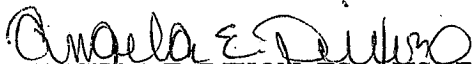
The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ;

*United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL



  
ANGELA E. DIXON, TSgt, USAF  
Deputy Clerk of the Court