UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant RICKY A. COUNCIL
United States Air Force

ACM S30717

28 February 2006

Sentence adjudged 30 June 2004 by SPCM convened at Yokota Air Base, Japan. Military Judge: David F. Brash (sitting alone).

Approved sentence: Bad-conduct discharge and reduction to E-4.

Appellate Counsel for Appellant: Lieutenant Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major James M. Winner, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We examined the record of trial, the assignment of error, and the government's answer. The appellant asks us to order new post-trial processing because the record does not establish that the convening authority received or considered the appellant's clemency submissions pursuant to Rule for Courts-Martial (R.C.M.) 1105. *See* R.C.M. 1107(b)(3). For the reasons set forth below, we find error and return the case for new post-trial processing. Upon completion of post-trial processing, this Court will consider the appellant's remaining assigned errors.

We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004). Prior to taking final action, the convening authority must consider clemency matters submitted by the accused. *United States v. Craig*, 28

M.J. 321, 324-25 (C.M.A. 1989). We cannot be sure this happened here. The staff judge advocate 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 is 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). The government attempted to rectify these deficiencies by submitting an affidavit from the convening authority. *See United States v. Godreau*, 31 M.J. 809, 812 (A.F.C.M.R. 1990). However, this affidavit did not establish that the convening authority actually considered the appellant's post-trial submissions. It merely established that his procedure was to review post-trial submissions in all cases before taking final action. Although he remembered the appellant's case, he did not remember reviewing his clemency matters.

Without question, the government failed to follow the procedures set forth in *Craig*, *Foy* and *Pellitier*. It also failed to conclusively establish that the convening authority considered the defense submissions under *Godreau*. The government now urges us to take one step beyond our past decisions and presume that because the convening authority normally considered defense post-trial submissions, he did so in the appellant's case. We will not.

Accordingly, we return the record of trial to The Judge Advocate General for resubmission to the appropriate convening authority for a new action upon consideration of the clemency matters previously submitted by the appellant and his trial defense counsel. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court