UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ADAM T. HOFFMAN
United States Air Force

ACM 37597

07 February 2011

Sentence adjudged 18 November 2009 by GCM convened at Beale Air Force Base, California. Military Judge: Vance H. Spath.

Approved sentence: Bad-conduct discharge, confinement for 8 months, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Captain Nicholas W. McCue.

Appellate Counsel for the United States: Colonel Don M. Christensen, Major John M. Simms, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

PER CURIAM:

In accordance with his pleas of guilty to charges of conspiracy, sale, and theft of military property of a value of more than $500.00, in violation of Articles 81, 108, and 121, UCMJ, 10 U.S.C. §§ 881, 908, 921, a general court-martial composed of officer members sentenced the appellant to a dishonorable discharge, eight months of confinement, and forfeiture of all pay and allowances. The convening authority approved a bad-conduct discharge, confinement for eight months, and forfeiture of all pay and allowances. On appeal, appellant claims the convening authority violated the terms of the pretrial agreement by approving a sentence that included a bad-conduct discharge and requests this Court approve only so much of the sentence as provides for confinement for

eight months and forfeiture of all pay and allowances. Finding that the convening authority did not violate the terms of the pretrial agreement, we affirm the findings and sentence.

Background

The appellant entered into a pretrial agreement with the convening authority in which appellant agreed to plead guilty to all charges and specifications in exchange for a limitation on the sentence. The Appendix A to the Offer for Pretrial Agreement contained the following provisions: "[T]he convening authority will undertake that: 1. He will approve no confinement in excess of thirteen (13) months. 2. He will not approve a dishonorable discharge. There are no other restrictions on his ability to approve other forms of punishment that may be adjudged."

Prior to entering findings, the military judge conducted a thorough providence inquiry of appellant's guilty plea that included a discussion with the appellant about his understanding of the terms and provisions of the pretrial agreement, including the Appendix A, or quantum portion of the agreement. During this inquiry, the appellant clearly stated to the military judge that he understood the provisions of the Appendix A, that it was a correct statement of the agreement between him and the convening authority, that he was satisfied with his defense counsel's advice, and that he did not have any questions about the terms of the pretrial agreement or how they affected him.

In an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session following announcement of the sentence by the court members, the military judge discussed the interpretation of the effect of the pretrial agreement on the adjudged sentence with the parties as follows:

> MJ: Defense counsel and Airman Hoffman, I'm just going to discuss the operation of your pretrial agreement. I have a copy of Appellate—or I have Appellate Exhibit II—sorry—in front of me. My understanding of the effect of this pretrial agreement is the convening authority can approve the sentence as announced, with one exception: He cannot approve a dishonorable discharge, he can only approve a bad-conduct discharge. So the convening authority can approve the forfeitures of all pay and allowances, the confinement for a period of eight months, and a bad-conduct discharge. Again, he cannot approve a dishonorable discharge. Defense counsel, is that your understanding of this agreement?
>
> DC: Yes, Your Honor.
>
> MJ: Trial counsel, do you agree with this interpretation?
>
> TC: Yes, Your Honor.

DC: Are there any other matters we need to take up before this court-martial is adjourned; trial counsel?

TC: No, Your Honor.

MJ: Defense counsel?

DC: No, Your Honor.

Appellant first raised an issue about interpretation of the pretrial agreement in his post-trial clemency submissions to the convening authority. In her "Petition for Clemency" on behalf of the appellant, appellant's new defense counsel[1] requested the convening authority disapprove the bad-conduct discharge on the basis of "the incorrect interpretation of the [pretrial agreement] by the legal office and military judge—that a bad-conduct discharge can be approved." The defense counsel concluded that "[a] bad-conduct discharge was not adjudged by the court, and therefore, based on the [pretrial agreement], may not be approved." She further alleged that when appellant entered into the pretrial agreement, he did so under the belief that a bad-conduct discharge could only be approved if one was adjudged by the court and, because the agreement was not clearly drafted, the appellant's interpretation should prevail. In appellant's own "Petition for Clemency," he stated:

> My attorney explained the Charges, potential sentence, and pretrial agreement. I believed it was in my best interest to enter into the pretrial agreement, but the wording of the punitive discharge was not clear. If it meant that I could receive a bad-conduct discharge even when one was not adjudged by the court, I think it should have specifically said so. Please consider disapproving the bad-conduct discharge.

In the Staff Judge Advocate Recommendation (SJAR), the staff judge advocate advised the convening authority that, in accordance with the pretrial agreement, he could not approve the dishonorable discharge, but that he was not prevented from approving a bad-conduct discharge. In the Addendum to the SJAR, the staff judge advocate rejected the appellant's position regarding interpretation of the pretrial agreement and again recommended approval of a sentence that included a bad-conduct discharge.

Interpretation of the Pretrial Agreement

The appellant contends that because the wording of the pretrial agreement did not specifically state the convening authority could replace a dishonorable discharge with

[1] Appellant's defense counsel at trial separated from the Air Force after the trial and a new defense counsel was appointed for appellant's post-trial representation.

another type of discharge, the convening authority was precluded from approving a bad-conduct discharge and, that under the terms of the agreement, the most severe sentence the convening authority could approve in appellant's case was forfeiture of all pay and allowances and confinement for eight months. "The interpretation of a pretrial agreement is a question of law, which is reviewed under a de novo standard." *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999). Because a pretrial agreement is analogous to a commercial contract, courts have used basic principles of contract law to interpret pretrial agreements. *Id*. While keeping Constitutional Due Process protections at the forefront, "[w]e begin any analysis of a pretrial agreement by looking first to the language of the agreement itself. When the terms of a contract are unambiguous, the intent of the parties is discerned from the four corners of the contract." *Id*.

After reviewing the appellant's pretrial agreement, we find the wording is unambiguous. The agreement's plain language, although not specifically mentioning a bad-conduct discharge, does not prohibit the convening authority from approving a bad-conduct discharge as a less severe type of punitive discharge. The agreement only states that the convening authority would not approve the more severe dishonorable discharge.[2] Additional support for the convening authority's ability to approve a bad-conduct discharge is found in the agreement's provision that "[t]here are no other restrictions on [the convening authority's] ability to approve other forms of punishment *that may be adjudged*" (emphasis added). Despite appellant's suggestion to the contrary, this provision is most reasonably interpreted as being permissive, rather than restrictive, in allowing the convening authority to approve any other form of punishment within the jurisdictional limits of a general court-martial that (1) does not exceed the maximum for the offenses for which the appellant was found guilty, (2) is not more severe than the sentence actually adjudged at trial, and (3) is not otherwise expressly limited by the pretrial agreement. Rules for Courts-Martial (R.C.M.) 705(a) and (b), 201(f)(1), 1003, and 1107(d)(1) and its Discussion.

Viewing the parties' intent from the "four corners" of the pretrial agreement, we find the parties clearly intended that the convening authority could approve a bad-conduct discharge in the event that a dishonorable discharge was adjudged by the court members. Moreover, the actions of the participants at trial are entirely consistent with this interpretation. The record shows the appellant understood the terms of his pretrial agreement and the agreement's effect on his sentence. The military judge specifically asked appellant's trial defense counsel on the record with the appellant present if he concurred with the judge's interpretation that a bad-conduct discharge could be approved

[2] In *United States v. Acevedo*, 50 M.J. 169 (C.A.A.F. 1999), and its companion case of *United States v. Gilbert*, 50 M.J. 176, 178 (C.A.A.F. 1999), our superior court was not inclined to find a limitation or condition on the convening authority's ability to approve an otherwise lawful punishment absent an express prohibition or condition in the pretrial agreement, essentially concluding that if the appellant had indeed bargained for such a provision (in both these cases, a suspension of a bad-conduct discharge) then logically it would have been added to the pretrial agreement.

under the terms of the pretrial agreement. Defense counsel agreed unequivocally and appellant did not voice disagreement or question that interpretation at any time during the trial, despite the opportunity to do so.

Appellant's belated claims of misunderstanding first raised in his post-trial R.C.M. 1105 clemency matters do not persuade us otherwise. For even if we were to find that this pretrial agreement was susceptible to more than one interpretation, this Court will give the greatest weight in determining the parties' understanding of an ambiguous pretrial agreement "to the parties' stated understanding at trial, for it is at the pretrial and trial stages where pretrial agreement disagreements can better be resolved." *United States v. Craven*, 69 M.J. 513, 515 (A.F. Ct. Crim. App. 2010). The parties' stated understanding of the pretrial agreement at trial was that the convening authority could approve a bad-conduct discharge.

The appellant received the benefit of his bargain. As part of the sentence the court members adjudged a dishonorable discharge and in accordance with the plain terms of the pretrial agreement the convening authority did not approve the dishonorable discharge, but as permitted, he did approve a bad-conduct discharge. The convening authority did not violate the terms of the pretrial agreement and appellant is not entitled to any relief.

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, 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

STEVEN LUCAS
Clerk of the Court