UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KELVIN L. JOHNSON II
United States Air Force

ACM 35739

4 November 2005

Sentence adjudged 26 August 2003 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Jack L. Anderson.

Approved sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade, Major Terry L. McElyea, and Captain David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Major James K. Floyd, and Clayton O'Connor (legal intern).

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We have considered the record of trial, the assignment of error, and the government's answer thereto. The appellant was released from confinement on 26 August 2003. The convening authority approved his sentence, which included forfeiture of all pay and allowances, on 31 October 2003. The appellant entered excess leave status on 6 November 2003. A convening authority should not approve forfeitures in excess of two-thirds pay for any month the accused is not serving confinement. Rule for Courts-Martial (R.C.M.) 1107(d)(2), Discussion. *See United States v. Craze*, 56 M.J. 777, 778-79 (A.F. Ct. Crim. App. 2002). For a member to perform duties for any period of time while receiving no pay would raise the real possibility of cruel and unusual punishment. *See United States v. Warner*, 25 M.J. 64, 65 (C.M.A. 1987).

Admittedly, the appellant has stated in his brief that he "makes no allegation that he was actually subject to full forfeitures." This might lead to the conclusion that the error in this case is harmless. *See Craze*, 56 M.J. at 779. However, there is a possibility that even a relatively minor inaccuracy in a convening authority action could redound to the financial harm of an appellant. *See, e.g.*, *United States v. Lajaunie*, 60 M.J. 280 (C.A.A.F. 2004). Therefore, we conclude that the better course of action is to return the case to the convening authority for a corrected action.

The action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for post trial processing consistent with this opinion. Thereafter, Article 66(b), UCMJ, 10 USC § 866(b), will apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court