UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JAIME PEDROZA
United States Air Force

ACM 36568 (f rev)

29 August 2006

Sentence adjudged 10 March 2004 by GCM convened at Holloman Air Force Base, New Mexico. Military Judge: James L. Flanary.

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Bryan A. Bonner, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major John C. Johnson, Major Lane A. Thurgood, and Major Nurit Anderson.

Before

ORR, JACOBSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

This case is before our Court for further review because the original action was set aside. *United States v. Pedroza*, ACM 36568 (A.F. Ct. Crim. App. 17 Jan 2006) (unpub. op.). This Court returned the case to The Judge Advocate General for remand to the convening authority for new post trial processing because the original staff judge advocate's recommendation (SJAR) incorrectly advised the convening authority that the appellant's active-duty wife was not a dependent for purposes of Article 58(b) UCMJ, 10 U.S.C. § 858(b). On 28 February 2006, a new SJAR was completed. On 16 March 2006, the appellant submitted a new

clemency request in which he asked the convening authority to reconsider waiving the automatic forfeitures he was subjected to after his March 2004 court-martial. On 23 March 2006, the staff judge advocate (SJA) signed an addendum to the new SJAR in which she recommended denying appellant's request for waiver of forfeitures. On that same day, the convening authority completed a new action that approved the findings and sentence as adjudged without waiving forfeitures. In an indorsment to the new addendum, the convening authority stated that he was denying the appellant's waiver request.

The case is now before this court for further review, and appellant asserts a new assignment of error. He claims that Major Hanscom, who misstated the law in preparing the original SJAR and addendum for the SJA's signature, should have been disqualified from preparing the new SJAR and addendum. We find the appellant's assertion to be without merit and affirm the findings and sentence.

Rule for Courts-Martial (R.C.M.) 1106(b) lists individuals who are disqualified from preparing an SJAR:

> No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in an case may later act as a staff judge advocate or legal officer to any reviewing or convening authority in the same case.

There is no allegation that Major Hanscom participated in the trial in any of the above-listed capacities. Since the plain language of the rule does not disqualify Major Hanscom, the appellant relies on the discussion to R.C.M. 1106, which includes, among others, persons with "other than an official interest" as individuals who *may* also be ineligible to prepare an SJAR in a particular case. The appellant claims that since Major Hanscom prepared the original SJAR and addendum, she is a person with "other than an official interest" in his case. We disagree.

First, we point out that discussions of rules are, of course, non-binding. Second, we disagree with the appellant's contention that Major Hanscom has "other than an official interest" in this case simply because she prepared the original documents that contained erroneous advice. While we share our superior court's concern that "the officers performing [these] important statutory responsibilities be, and appear to be, objective," *United States v. Dresen*, 47 M.J. 122, 124 (C.A.A.F. 1997), we fail to discern a lack of objectivity in the case sub judice. The facts of this case are far different and quickly distinguishable from the case law cited by appellant, which provide instances of where the SJAR

authors were found to have "other than an official interest" in the case. *See, e.g.*, *United States v. Rice*, 33 M.J. 451, 453 (C.M.A. 1991) (legal officer who testified for the government during sentencing disqualified from writing post-trial recommendation).

Third, we find it significant that the first addendum recommended against waiver of forfeitures "regardless of whether a military member qualifies as a dependent entitled to forfeitures," because the appellant's wife was an active-duty military member and the couple had no children or other dependents. Thus, the new addendum merely informs the convening authority that waiver of forfeitures is authorized, but repeats the original recommendation to disapprove the request. Finally, we observe that Major Hanscom merely prepared the new SJAR and addendum for her SJA's signature. The SJA then wrote, "[I] have reviewed the record of trial and the foregoing recommendation and concur." After the addendum was prepared, the acting SJA added language to the document stating, "[I] have reviewed the record of trial, the matters submitted under R.C.M. 1105, and the foregoing recommendations. I concur and recommend you approve the findings and sentence, as adjudged." Neither the SJA, nor the acting SJA were signatories to the original SJAR or addendum. Both individuals were authorized by R.C.M. 1106(a) to forward a recommendation to the convening authority. It is not unusual or improper for a SJA to assign work to his or her assistants, as occurred here, and we will normally not question a SJA's assertion that he or she reviewed the record personally and adopts an assistant's work as his or her own.[1]

In summary, we find that Major Hanscom was neither statutorily disqualified from preparing the SJAR and addendum, nor did the fact that she prepared the original post-trial advice make her a person with "other than official" interest in the case. Thus, her action in preparing the new SJAR and addendum for the SJA's review and signature was not improper.

[1] The result would be different if a statutorily disqualified individual prepared the SJAR on behalf of the SJA, but that is not the case here. *See United States v. Johnson-Saunders*, 48 M.J. 74, 75 (C.A.A.F. 1998) (assistant SJA who acted as assistant trial counsel in court-martial statutorily disqualified from preparing SJAR and her extensive participation in the trial would cause a disinterested observer to doubt the fairness of the post-trial proceedings).

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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator