UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KEVIN J. PENOUILH
United States Air Force

ACM S30494

15 April 2005

Sentence adjudged 28 October 2003 by SPCM convened at Dover Air Force Base, Delaware. Military Judge: Lance B. Sigmon.

Approved sentence: Bad-conduct discharge, confinement for 1 month, forfeiture of $767.00 pay per month for 1 month, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Major Lane A. Thurgood, and Major Kevin P. Stiens.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his plea, of one specification of wrongful use of ecstasy, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The special court-martial, consisting of officer members, sentenced the appellant to a bad-conduct discharge, confinement for 1 month, forfeiture of $767.00 pay per month for 1 month, and reduction to E-1. The convening authority approved the sentence.

The appellant submitted one assignment of error, asserting that the addendum to the staff judge advocate's recommendation (SJAR) contained "new matter" that should have been served on the appellant. Finding error, we order corrective action.

Whether comments in an addendum to an SJAR constitute "new matter" requiring service on the accused is a question of law to be reviewed de novo. *United States v. Key*, 57 M.J. 246, 248 (C.A.A.F. 2002) (citing *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997)). The Discussion to Rule for Courts-Martial (R.C.M.) 1106(f)(7) defines new matter as including:

> discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. "New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation.

Examples of "new matter" include written comments by the convening authority's chief of staff that the accused was "[l]ucky he didn't kill" the victim and that he was a "thug" (*United States v. Anderson*, 53 M.J. 374, 375-76 (C.A.A.F. 2000)); reference to a second positive urinalysis which was not presented at trial (*Chatman*, 46 M.J. at 323); and a statement that the accused's matters in extenuation and mitigation had been considered by "the seniormost military judge in the Pacific" (*United States v. Catalani*, 46 M.J. 325, 327 (C.A.A.F. 1997)).

If a comment constitutes "new matter," and if the appellant "makes some colorable showing of possible prejudice," *Chatman*, 46 M.J. at 323-24, then he or she will be entitled to relief. *See also United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

In the instant case, the appellant submitted clemency matters for the convening authority. One of the documents was a memorandum from the trial defense counsel, which requested the convening authority disapprove the bad-conduct discharge on the grounds that it was "overly harsh." It also stated that the court-martial "took place a year and a half since the last use and eight months after [the] investigation." The trial defense counsel asserted that, during that time, the appellant "continued to show his dedication to the Air Force."

The addendum to the SJAR responded to the appellant's request for clemency with the following comment: "The Court-Martial Members took these delays and his rehabilitation potential into consideration when determining [the appellant's] sentence, which is reflected on the amount of confinement time adjudged." The addendum was not served on the appellant, who contends that the quoted sentence constitutes "new matter."

We note that in *United States v. Gilbreath*, 57 M.J. 57 (C.A.A.F. 2002), a similar plea for disapproval of an appellant's punitive discharge was met with the following language in the addendum to the SJAR: "After hearing all matters, the jury determined a bad conduct discharge was appropriate and as such, I recommend you approve the sentence as adjudged." *Id.* at 59. As with the case sub judice, in *Gilbreath* the appellant was not served with a copy of the addendum. Our superior court noted that, among other things, this comment might be "construed as suggesting that the convening authority not provide the independent and fresh look by command authorities required by Article 60, UCMJ, 10 U.S.C. § 860." *Id.* at 61. Our superior court concluded that, had the addendum been served on the appellant, he would have had an opportunity to correct any false impressions caused by the challenged comment. *Id.* at 62. As a consequence, the Court found the potential response "*could* have produced a different result" and thus, directed new post-trial processing. *Id. See also United States v. Brown*, 54 M.J. 289, 293 (C.A.A.F. 2000).

In the case sub judice, we conclude that the language in question is similar to that in *Gilbreath*, in that it could be construed as advising the convening authority to substitute the judgment of the panel for his own. As the trial defense counsel stated in her affidavit, had the appellant received a copy of the addendum, she would have pointed out the convening authority's responsibility to provide "an independent review of his case" as required by Article 60, UCMJ. Further, she would have argued that the clemency submissions contain post-trial documents that "further substantiated [the appellant's] rehabilitation potential." We conclude, therefore, that the challenged comment constitutes "new matter" within the meaning of R.C.M. 1106(f)(7), and that the trial defense counsel has made a "colorable showing of possible prejudice." *Chatman*, 46 M.J. at 324. Further, we find that the appellant's potential responses "*could* have produced a different result." *Gilbreath*, 57 M.J. at 62; *Brown*, 54 M.J. at 293. Accordingly, we hold that the appellant is entitled to new post-trial processing.

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 U.S.C. § 866(b), will apply.

OFFICIAL

ANGELA B. BRICE
Clerk of Court