UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ANTONYO T. ADAMS
United States Air Force

ACM 36226

20 June 2007

Sentence adjudged 18 December 2004 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judges: David F. Brash and James L. Flanary.

Approved sentence: Bad-conduct discharge, confinement for 179 days, and reduction to E-1.

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

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, Major Michelle M. McCluer, Major Amy E. Hutchens, Captain Donna S. Rueppell, and Captain Daniel J. Breen.

Before

BROWN, FRANCIS and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

SOYBEL Judge:

The appellant pled not guilty to all charges and specifications. Appellant was convicted of being absent without leave under Article 86, UCMJ, 10 U.S.C. § 886, and of three specifications of dishonorably failing to maintain sufficient funds for payment of checks under Article 134, UCMJ, 10 U.S.C. § 934. He was found not guilty of rape under Article 120, UCMJ, 10 U.S.C. § 920, and of wrongful use of marijuana under

Article 112a, UCMJ, 10 U.S.C. § 912a. His adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 179 days, and reduction to E-1.

The appellant asserts one error for our review: Whether the military judge erred in denying the appellant's motion to dismiss all charges and specifications for denial of his right to speedy trial under Article 10, UCMJ, 10 U.S.C. § 810, and the Fifth and Sixth Amendments to the United States Constitution. After reviewing the entire record, this Court specified two issues: (1) Whether Master Sergeant (MSgt) R, appointed by Special Order AB-07, was properly excused from the court-martial and if he was not, whether the court was properly convened; (2) Whether the court-martial convened by Special Order AB-12 had proper jurisdiction when that order did not transfer members appointed by prior orders AB-01, AB-07, and AB-09, but members named in those orders nonetheless sat as members of the appellant's court-martial. Finding no error prejudicial to the appellant, we affirm.

Background Regarding the Speedy Trial Issue

The military judge made extensive and detailed findings of fact that we accept under the clearly erroneous standard adopted by our superior court in *United States v. Doty*. 51 M.J. 464, 466 (C.A.A.F. 1999) (quoting *United States v. Taylor*, 487 U.S. 326, 337 (1988)).

On 5 March 2004, the appellant was notified that because of a pattern of minor disciplinary infractions, he had been selected for involuntary separation with an honorable discharge before the expiration of his normal term of service under the Air Force, Force-Shaping Program. This was known as a "rollback" action, and his date of separation was set for 5 June 2004.

Just four days after his notification, the Air Force Office of Special Investigations (OSI) at Ellsworth Air Force Base (AFB), South Dakota, became aware of Airman (Amn) F's rape allegation against the appellant. According to Amn F, the rape occurred almost a year before she reported it to authorities. The OSI immediately opened an investigation and interviewed the appellant and Amn F that same day. The accused waived his right to remain silent and provided a statement to the OSI.

Over the course of the next few days, the OSI conducted an investigation that included a records review, a pretext phone call to the appellant, witness interviews, and attempts to locate other pertinent witnesses. Because of the late reporting of the allegation, the OSI conducted neither a rape protocol examination nor crime scene investigation. The trial court found "for all practical purposes, that the OSI completed [its] investigation on or about 11 March [20]04, within two days of the date [it] opened the investigation."

The military judge also found that "for some inexplicable reasons, the [report of investigation] was not rendered [to the legal office] until 13 May [20]04, some two months later." From 13 May 2004 to 5 August 2004, the legal office conducted one interview with Amn F to ascertain she was interested in pursuing the case. Other than very limited discussions with the trial defense counsel about scheduling a hearing pursuant to Article 32, UCMJ, 10 U.S.C. § 832, the case essentially sat idle during this period.

However, during this period of apparent government inactivity, things were happening with the appellant. He received a no contact order regarding Amn F and was reassigned to a new work section to avoid working in the same duty section with her. Starting on 1 August 2004 and continuing for several pay periods, the appellant received paychecks of less than $50.00 because the government was recouping excess money it had paid him during the preceding four months. On 1 June 2004, the appellant was placed on administrative hold, which required legal office coordination before he was allowed to go on temporary duty, take leave, or be reassigned to another base. Also, on 1 June 2004, the appellant's rollback action was cancelled and his original 21 October 2006 separation date was reestablished.

Between 9 March 2004 and 29 November 2004, the appellant expressed anxiety and frustration over the length of time his case was taking to move forward. Through his own observations, the appellant's first sergeant determined the appellant's stress level was high enough to warrant a visit to the counselors at Life Skills[1] office. This visit was not command directed, but rather borne out of the first sergeant's concern for the appellant's well being.

By 31 July 2004, almost five months after the OSI completed its investigation, the appellant's area defense counsel (ADC) was reassigned without an agreement in place on a date to conduct an investigation pursuant to Article 32, UCMJ. The military judge found that the failure to initiate a hearing pursuant to Article 32, UCMJ, was due to inaction on the part of the government.

On 2 August 2004, the appellant failed to report for duty. Three days later he was located on an Indian Reservation where he had traveled with a member of the local tribe. The appellant was held in civilian custody until he was returned to Ellsworth AFB, South Dakota, on 6 August 2004 and placed in pretrial confinement. The pretrial confinement hearing was held on 9 August 2004 and, due to a gap in ADC coverage at Ellsworth AFB, the ADC from Mountain Home AFB, Idaho represented the appellant at that hearing, by phone.

1 "Life Skills" refers to the mental health counseling services offered by the Air Force.

A hearing pursuant to Article 32, UCMJ, was initially scheduled for 9 September 2004 but, at the government's request, was delayed for two weeks due to the discovery of the appellant's alleged bad checks. The government was also aware of a positive urinalysis result for marijuana from a sample collected upon the appellant's return to military control on 6 August 2004. The appellant's ADC did not object to the date of the Article 32, UCMJ, investigation but did submit a request for a speedy trial on 10 September 2004. Charges were preferred on 22 September 2004. The Article 32, UCMJ, hearing was held on 23 September 2004, and the report was completed on 28 September 2004. The charges were served on the appellant on 13 October 2004. After a docketing conference, trial was set for 30 November 2004. The military judge excluded the period between 8 October and 30 November 2004 from the calculation of days used to determine compliance with Rule for Court Martial (R.C.M.) 707.

Meanwhile, on 7 October 2004, the defense requested an expert consultant in the area of forensic psychology. Due to avoidable problems on the government's side, an expert was not appointed and engaged with the defense until the week of 6-10 December 2004. Because of this delay, trial on the merits did not begin until 13 December 2004, although the appellant was arraigned at a session held on 29 November 2004.

Background Regarding the Specified Issues

The court was convened through the promulgation of four special orders. The first order, AB-01, issued on 8 October 2004, appointed ten officers to comprise the court-martial. On 24 November 2004, Special Order AB-07 relieved five of the original officers and appointed five enlisted members. Two of these enlisted members were MSgt R and MSgt B. Two weeks later, on 8 December 2004, Special Order AB-09 relieved MSgt B and two others, a major and a senior master sergeant, but not MSgt R. Additionally, Special Order AB-09 appointed an additional officer and two enlisted members. At trial, the first time the members were brought into the court, the trial counsel announced ten names; MSgt B, who was relieved in AB-09, was one of the names the trial counsel announced as being present. MSgt R, who was not relieved in any of the special orders, was not announced as being present and, in fact, was not present. After the trial counsel announced the names, the following exchange occurred between the military judge and trial counsel:

MJ: Captain, is there a Sergeant [B] here?

TC: Your Honor, Master Sergeant [B] is absent.

MJ: And he's absent because he was relieved. Is that correct?

TC: Master Sergeant [R], I believe, was excused, Your Honor, as was Master Sergeant [B].

MJ: Now counsel, you've thoroughly confused me. How many members are supposed to be here now?

TC: Nine, Your Honor.

MJ: And everyone like [B], all of them have properly been relieved by the convening authority. Is that correct?

TC: Yes, your honor

After this exchange took place the members were sworn and the military judge announced the court was assembled. MSgt B and MSgt R were not present. There was no objection from the trial defense counsel regarding the composition of the court.

During voir dire, the number of panel members fell to four; one officer and three enlisted members. At that point, Special Order AB-12, dated 15 December 2004, was promulgated. Unlike the two previous orders, which relieved certain members and detailed new members to the "general court-martial convened by Special Order AB-01," AB-12 purportedly convened an entirely new court-martial. It read: "A general court-martial is hereby convened. It may proceed at Ellsworth AFB, to try such persons as may be properly brought before it. The court will be constituted as follows . . ." The order then listed the names of five newly detailed members before going on to read:

> All cases referred to the general court-martial convened by Special Order AB-1, this headquarters, dated 8 October 2004, as amended by Special Order AB-7, this headquarters, dated 24 November 2004, and Special Order AB-9, this headquarters, dated 8 December 2004, in which the court has been assembled, will be brought to trial before the court hereby convened.

Despite the plain language of Special Order AB-12, it was clear that the trial participants considered the members named in that special order to be additional members to the partially assembled quorum rather than a separately constituted court. After quorum was broken and Special Order AB-12 was received from the convening authority, the military judge said, "We now have a new appointing order appointing new members to the panel." He went on to say they would voir dire the five new members outside the presence of the members who had "already previously been selected." After the newly named members underwent voir dire, they joined the four members remaining from the previous orders to make up the appellant's court-martial panel.

Speedy Trial

We review speedy trial issues de novo. *United States v. Proctor*, 58 M.J. 792, 704 (A.F. Ct. Crim. App. 2003); *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003); *Doty*, 51 M.J. at 465. While doing so we give substantial deference to the trial judge's findings of fact and will not overturn them unless they are clearly erroneous. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.F.F. 2005); *Proctor*, 58 M.J. at 795.

Several authorities give rise to an accused's right to a speedy trial. This right has been recognized under the Fifth and Sixth Amendments to the U.S. Constitution; Article 10, UCMJ; Rule for Courts-Martial (R.C.M.) 707; and case law. *United States v. Vogan*, 35 M.J. 32, 33 (C.M.A. 1992). Appellant has raised the issue under three of these authorities.[2]

Fifth Amendment

The Fifth Amendment's Due Process Clause has been recognized by the Supreme Court as protecting an accused from egregious pretrial delays caused by the government. *United States v. Lovasco*, 431 U.S. 783 (1977); *Vogan*, 35 M.J. at 34. In *Lovasco*, a trial for mail fraud and weapons charges, more than eighteen months elapsed between the commission of the offenses and indictment. *Lovasco*, 431 U.S. at 784. During that time, two witnesses the appellant claimed were material to his defense died. *Id.* at 785.

Despite the apparent setback for the defense in *Lovasco*, this is an area of the law where the government is given much latitude in deciding the speed at which it prosecutes a case. *Id.* at 795. In denying the appellant's Fifth Amendment challenge to the charges, the Supreme Court held that judges, in defining due process, are not allowed to substitute their own "personal and private notions of fairness" for the "prosecutor's judgment as to when to seek an indictment." *Id.* at 790 (quoting *Rochin v. California*, 342 U.S. 165, 170 (1952)). The Court looked at the case as a whole and decided that the extent of prejudice to the appellant's case, notwithstanding his assertions about the materiality of the two witnesses, was not very severe. *Id.* at 796. The Court also saw no bad faith on the part of the government and refused to craft a rule that required the government to proceed to trial as soon as it had enough evidence to establish probable cause. *Id.* at 796-97.

In *Lovasco*, the Court discussed many valid reasons why the government might wait before formally bringing charges even though it possessed enough information to establish probable cause. *Id.* at 797 n.19. Several of these reasons would benefit the accused. *Id.* Finally, the Court recognized that statutes of limitation provide the "primary guarantee against bringing overly stale criminal charges." *Id.* at 789 (citing *United States v. Marion*, 404 U.S. 307, 322 (1971)). In short, the Court said that the

2 The appellant has not raised the 120-day rule under R.C.M. 707, nor do we perceive a violation of that rule.

government is free to exercise its judgment in deciding when to bring charges against an individual, and, unless bad faith or substantial prejudice to the defense's case is evident, the government's judgment will not be disturbed. *Id.* at 783. *See also United States v. Reed*, 41 M.J. 449 (C.A.A.F. 1995), which instructs that not only is the length of the delay important, but the reason for the delay must also be examined in a Fifth Amendment speedy trial test. The appellant has the burden of proof regarding these two prongs. Mere speculation or conjecture will not suffice. *Id*. at 452.

In this case, one of the appellant's chief complaints focuses on the initial four-month delay, during which the government only accomplished a week or two of actual work. Even though the military judge found this delay to be "egregious," he did not find it violated the Fifth Amendment. We agree. While the government could have, and should have, moved at a quicker pace, there was no evidence it stalled the investigative progress to gain some tactical advantage over the appellant. Nor did the delay "impair the ability to mount a defense." *Vogan*, 35 M.J. at 34 (citing *Lovasco*, 431 U.S. at 795 n.17).

In fact, some of the prejudices the appellant claims he suffered because of the delay were things totally within his control. We will not assign blame to the government because the appellant wrote bad checks and went AWOL between the time the OSI first opened its case and the time the government formally charged him. While we agree that 132 days in pretrial confinement can be prejudicial in some situations, that fact alone, without evidence of harsh or oppressive conditions, or some actual prejudice to the appellant's case, does not constitute a violation of the appellant's "substantial rights." *Mizgala*, 61 M.J. at 129.[3]

Sixth Amendment

Application of the Sixth Amendment speedy trial right is triggered at indictment or restrained by arrest and detention. *Lovasco*, 431 U.S. at 788 (citing *Marion*, 404 U.S. 307). The military equivalent to indictment is the bringing of a formal charge. *Vogan*, 35 M.J. at 33; *United States v. Nichols*, 42 M.J. 715, 719 (A.F. Ct. Crim. App. 1995). Delays occurring before preferral are irrelevant for Sixth Amendment speedy trial purposes. *Lavasco*, 431 U.S. at 788. The Supreme Court established the test for Sixth Amendment speedy trial violations in the case of *Barker v. Wingo*, 407 U.S. 514 (1972). In applying this four-part test, we look at the length of the delay in bringing the appellant to trial, the reasons for the delay, whether the appellant asserted his right to a speedy trial prior to trial, and the extent of any prejudice to the appellant. *Barker*, 407 U.S. at 530. *See also United States v. Becker*, 53 M.J. 229, 233 (C.A.A.F 2000); *Proctor*, 58 M.J. at 797-98.

3 While *Mizgala* addresses concerns related to Article 10, UCMJ, the pretrial confinement analysis is equally applicable for a discussion of the Fifth Amendment.

Here, just over two months elapsed between preferral and the appellant's arraignment, which occurred on 29 November 2004 at the first session of the trial. Then, because of problems obtaining a defense requested expert, the trial did not begin in earnest until 13 December 2004, two weeks and a day after arraignment and just less than three months after preferral. We do not find this delay to be excessive or prejudicial to the appellant.

For the second prong of the *Barker* test, a combination of factors caused the delay: scheduling the Article 32, UCMJ, hearing while accommodating the new ADC's upcoming temporary duty assignment; discovering additional charges; difficulty finding a mutually agreeable trial date; and the government's month-plus attempt to provide the appellant with a suitable expert witness. Although the government's attempt to find the requested expert was poorly executed and added a month to the pretrial delay, there was no indication the government deliberately tried to delay the trial to gain an advantage over the appellant. Negligence or even overcrowded courts were noted by the Supreme Court as among more "neutral" reasons that are weighted less heavily against the government when deciding this issue. *Barker*, 407 U.S. at 531. The month delay in finding an expert for the defense was caused by a conflict of interest between the first proposed expert and his supervisor, but there certainly was no bad faith shown on the government's part in making the initial selection. In that sense, this is a more neutral reason for the delay.

For the third prong of the test, the appellant asserted a demand for a speedy trial on 10 September 2004. However, three weeks later he made his request for an expert consultant in the area of forensic psychology. Even though the military judge was right in criticizing the government for taking more than 30 days to find an expert for the appellant, we must expect some delay in getting to trial while this request was being worked.

Finally, other than spending 134 days in pretrial confinement, the appellant has shown no prejudice to his ability to defend himself at trial because of the delay.[4] Under *Barker*, impairment of the defendant's ability to defend himself is the most important harm the right to a speedy trial seeks to prevent. *Id.* In that case, trial was delayed five years but with no prejudice to the appellant's ability to defend himself. In this case, no evidence or witnesses helpful to the appellant were lost, nor did the appellant identify any other prejudice to his ability to defend himself.

Applying the four-part test enunciated by the Supreme Court in *Barker*, there is not sufficient reason to warrant dismissal of all charges and specifications under the Sixth

4 The appellant in *Barker* spent ten months in jail before posting a $5,000 bond to obtain his release. *Barker*, 407 U.S. at 517.

Amendment Speedy Trial Clause, despite the government's sometimes sluggish pace in prosecuting this case. Considering the length of the delay, the reasons for it, the timing of the appellant's demand for a speedy trial, and the fact that the delay did not prejudice the appellant's ability to defend himself, we find the appellant's rights under the Sixth Amendment were not violated.

Article 10, UCMJ

Article 10, UCMJ, is triggered when a service member is placed under pretrial arrest or in confinement. From that point on, the government is compelled to take "immediate steps" to either "try him or to dismiss the charges and release him." "The test for compliance with the requirements of Article 10 [UCMJ] is whether the government acted with 'reasonable diligence.'" *Proctor*, 58 M.J. at 798 (citing *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999)). *See also United States v. Benavides*, 57 M.J. 550, 551 (A.F. Ct. Crim. App. 2002); *United States v. Kossman*, 38 M.J. 258, 261 (C.M.A. 1993). Our superior court has often said it does "not demand 'constant motion [from the government], but reasonable diligence in bringing the charges to trial.'" *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F 2007) (quoting *Mizgala*, 61 M.J. at 127); *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965). Each of these prior cases maintains that while Article 10, UCMJ, provides greater rights than does the Speedy Trial Clause of the Sixth Amendment, the four-part test set out in *Barker* is a proper analytical tool for deciding Article 10, UCMJ, issues.

In this case, even though the OSI opened an investigation against appellant in March of 2004, the protections of Article 10, UCMJ, were not triggered until the appellant was apprehended and placed in pretrial confinement on 6 August 2004. Approximately one week later, the legal office was first notified of the possible financial misconduct committed by appellant. It also learned of his positive urinalysis results.

Due to the temporary duty schedule of the appellant's defense counsel, an investigation pursuant to Article 32, UCMJ, could not be scheduled until 9 September 2004. In the week before the scheduled investigation, the government received evidence concerning the bad check offenses for the first time and asked for a postponement of the investigation until 23 September 2004. The report from the investigation was completed within five days and forwarded to the convening authority. Charges were referred to trial within ten days of the report's receipt by the convening authority. The government worked the case continuously throughout October 2004, conducting witness interviews, issuing subpoenas and consulting with personnel at the Air Force drug testing laboratory. Because the parties could not agree on a trial date, a military judge set trial for 30 November 2004. This date took into account proposed dates from each side as well as the availability of a government expert witness.

During the month of October 2004, the government also tried to find a suitable expert witness to fulfill a request by the defense. It took almost 30 days to find one, though it probably should have taken less than a week. The military judge placed the blame for the loss of this time on the government.

During the month of November 2004, the government continued with its case preparation and responded to discovery requests. The appellant was arraigned on 29 November 2004, and trial on the merits began 14 December 2004. The defense's expert witness needed a week of that intervening time to work with the defense and prepare for trial. In all, the appellant spent 134 days in pretrial confinement.

We agree with the military judge that during this time the government exercised due diligence. Even the government's excessive time obtaining an expert for the defense does not change the overall assessment of government conduct during this period. Given the other pretrial work that was still ongoing during this delay and the fact that the trial date, which had already been set for 30 November 2004, precluded "any likely earlier action," we agree with the military judge that the delay should "not change the court's assessment of [the government's] conduct as a whole."

Composition of the Court-Martial Panel

Court Member MSgt R's absence

Government appellate counsel argues that MSgt R's excusal was properly announced on the record in conformity with R.C.M. 505(b), so the fact that the convening authority did not relieve him in any of the four special orders promulgated for this court is of no consequence. Indeed, R.C.M. 505(b) does say that "[a]n order changing the members of the court-martial, except one which excuses members without replacement, shall be reduced to writing before authentication of the record of trial." Government appellate counsel's position relies on the trial counsel's exchange with the military judge noted above.

The problem with this position is that we have absolutely no idea whether MSgt R was excused "without replacement." Inherent in the government's position is the underlying rationale that since MSgt R's excusal was not reduced to writing, it had to be "without replacement." Trial counsel did not say this was the case when he announced MSgt R's excusal in court, and, given the hazy nature of the exchange between trial counsel and the military judge, we are not confident MSgt R's excusal did not need to be reduced to writing. Besides, Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 5.8.1 (26 Nov 2003), tells practitioners to "[a]void oral amendments, unless absolutely necessary, and ensure they are confirmed by written orders." This instruction was not followed here. Of course, this entire issue could easily have been

resolved with an affidavit from the convening authority or staff judge advocate stating that MSgt R was in fact excused. None was provided.

Failure to transfer members

Another problem with the convening orders in this case is that Special Order AB-12 seems to be a stand-alone order, convening an entirely new court-martial while failing to transfer the members named in the previous orders to the new panel. Intentionally not having those members named in the previous sets of orders transferred to Special Order AB-12, but nonetheless having them sit on the panel hearing the appellant's case would make them "interlopers" on the court.[5] Intentionally failing to transfer them to Special Order AB-12 would also have denied the appellant his right to be tried by a panel composed of at least one-third enlisted members as he requested. Both of these situations would have been fatal defects.

It is easy to see from the record what was intended during member selection and the special order creation process of this court. AFI 51-201, ¶ 5.8.1 provides: "[g]enerally, issue no more than two amendments to the original order. If it is necessary to further amend the convening order, publish a new order convening the court-martial and transfer all cases in which the court has not yet been assembled to the new order." Since Special Order AB-12 would have been the third amendment, the legal office apparently tried to comply with AFI 51-201 by publishing a new order. In doing so, it neglected to name the previously selected members, making it appear they were no longer detailed to the court. However, there is no doubt everyone, including the defense, knew the five members named in Special Order AB-12 were additional members selected to bring the court back up to quorum and were not meant to constitute an entirely new and distinct court.

This case is similar to *United States v. Gebhart*, not only in the number of errors associated with creating the special orders, but also in the type of errors. *United States v. Gebhart*, 34 M.J. 189 (C.M.A. 1992). There, one enlisted member who was detailed and relieved in the same order sat as a member of the panel while another member who was detailed to the court failed to appear with no explanation, much like our MSgt R. Also, an amending order in *Gebhart* referred back to a court-martial convening order that was not associated with that case. Finally, the amending order itself was signed by the wrong person. Our superior court was displeased enough with these errors to refer to the administration of the court-martial orders in *Gebhart* as "slipshod." Yet despite all of the case's problems, the Court did not find a jurisdictional error. *Id.* at 192.

5 If the four previously selected members were not meant to be seated as members of the panel, they would have been deemed "interlopers" creating a fatal jurisdictional defect for this court. *United States v. Peden*, 52 M.J. 622, 624 (Army Ct. Crim. App. 1999).

A court-martial convening order is merely an "expression of the intent of the convening authority. . . . [i]f the document does not accurately reflect the convening authority's intent, it is the fault of the document's author, not the convening authority." *United States v. Glover*, 15 M.J. 419, 421 (C.M.A. 1983). *Glover* and *Gebhart* both instruct that we should look to the conduct of the parties involved in the court-martial to see what their understanding was of the convening authority's intent. *Id*.; *Gebhart*, 34 M.J. at 189. Here there is no question all parties considered Special Order AB-12 a third amending order and not an order constituting a new court. Clearly, there would be no reason for the convening authority to suddenly start over with a new court after so much effort had already gone into reaching the point of adding a third set of members to this panel. Plainly, the convening authority's intent was to appoint new members to the partially formed court in order to bring it up to quorum, while preserving the appellant's right to trial by a panel of at least one-third enlisted members. Finally, the military judge asked if there was any objection to the orders or the way they were going to handle the addition of the new members. There was none by either side.

Regarding the missing MSgt R, his absence does not create a jurisdictional flaw requiring reversal. In *United States v. Cook*, our superior court looked at a case where the staff judge advocate, who was delegated authority to excuse members from a court-martial, exceeded his authority and excused more than one-third of the detailed members. *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998). Thus, like in the instant case, at least one member who was absent should have been present and sitting on the panel. In *Cook* as in this case, the court checked if there was an objection by the defense, and there was none. *Id.* at 436. More importantly, the Court found the error caused no prejudice to the appellant. Like in *Cook*, not only was there was no objection to the court's composition in this case, there was also no argument put forth that the appellant was prejudiced by the empanelling process irregularities, and there is nothing in the record to suggest any prejudice occurred. *Id.* In fact, the military judge in the case now under review very liberally granted the appellant's challenges for cause, and we see no realistic possibility that the errors that did occur prejudiced the appellant.

Finally, in *Gebhart* the Court looked to see if, in the end, the appellant still received a fair trial. *Gebhart*, 34 M.J. at 193. We apply the same standard here. Despite the administrative errors that occurred in this case, we find the appellant was not prejudiced by these mistakes and received a fair trial. However, we advise military legal practitioners that a clear situational awareness regarding the status of court members and a strict attention to detail regarding the convening orders and amendments are basic proficiencies that we expect even the most inexperienced counsel to demonstrate.

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.

Chief Judge BROWN participated in this decision prior to his retirement.

OFFICIAL

MARTHA COBLE-BEACH, TSgt, USAF
Court Administrator