

**UNITED STATES ARMY TRIAL JUDICIARY
SECOND JUDICIAL CIRCUIT, FORT BRAGG, NORTH CAROLINA**

UNITED STATES OF AMERICA

v.

**SGT Robert B. Bergdahl
HHC, STB, U.S. Army FORSCOM
Fort Bragg, NC 28310**

**Findings of Fact, Conclusions of Law
and Ruling -- Defense Motion for New
Pretrial Advice**

31 May 2016

1. The defense moves this court order a new Rules for Courts-Martial (RCM) 406 pretrial advice because, as they claim, the pretrial advice provided on 14 December 2015 by the Staff Judge Advocate (SJA) to the convening authority who referred this case to trial was defective.

FINDINGS OF FACT

2. I find the following facts by a preponderance of the evidence:

a. On 14 December 2015, the SJA for U.S. Army Forces Command sent a pretrial advice in this case to the Commander, U.S. Army Forces Command as required by RCM 406.

b. That pretrial advice advised the commander that the Article 32 officer recommended that the case be referred to a Special Court-martial (not empowered to adjudge a bad-conduct discharge).

c. In block 22 of the DD Form 457, Preliminary Hearing Officer's Report, the hearing officer checked the block by the word "Special" indicating he recommended trial by special court-martial. In block 23, the remarks section, he typed "Recommend trial by Special Court-martial (not empowered to adjudge a Bad-Conduct Discharge)" and also typed "See attached Memorandum for further explanation." In that memorandum narrative portion of the Article 32 Officer's report, he twice opined that the accused should not be confined or discharged as punishment for the alleged offenses. The pretrial advice contained no reference to those opinions.

d. The complete report from the Article 32 Officer, including the narrative portion, was attached to the pretrial advice.

e. On 15 December 2015, the Commander, U.S. Army Forces Command referred both charges and specifications to a general court-martial.

LAW AND ANALYSIS


3. RCM 405 requires that the contents of the Preliminary Hearing Officer report include, among other things, his "recommendations regarding disposition of the charge(s)." RCM 405 (b)(4). Nowhere in this rule is the preliminary hearing officer required to make recommendations as to the appropriate punishment. While nothing in the rule prohibits him from doing so, recommendations on punishment are logically inconsistent with the purpose of his report -- to recommend appropriate disposition (among others). This term has a discrete meaning in military law. When the general court-martial convening authority receives charges he has six options as to "Disposition." RCM 407(a). None of those involves deciding or directing the sentence of the accused. The defense reliance on RCM 601 to indicate that the convening authority may make such limitations in his referral instructions does not ring true. The defense has cited no case law supporting this proposition, and the court has found none. Indeed, though the discussion of RCM 601(e)(1) gives examples of the types of instructions the convening authority might include in any instructions accompanying the referral, none of those examples comes even close to the convening authority limiting the accused's punishment. Though he may refer the case to a special court-martial not empowered to adjudge a bad conduct discharge which would also cap potential confinement at 12 months, these are jurisdictional limitations provided by law, not discrete limitations on the punishment. While this may seem a technical distinction, it is an important one. Furthermore, if the convening authority wants to prevent the possibility that a particular accused receive confinement as part of his sentence, he may simply authorize non-judicial punishment or return the matter to a lower authority for disposition at his level.

4. Regardless of the convening authority's ability under the law to include such matters in his instructions, the question here is: Was the pretrial advice defective because it did not specifically inform the convening authority that the hearing officer had opined that the accused should not receive jail time as a form of punishment. Any matters included in the pretrial advice should be accurate. Information which is incorrect or so incomplete as to be misleading may cause the advice to be deemed defective. RCM 406(b) Discussion. Here, the advice was not defective because the opinions by the hearing officer regarding appropriate punishment were not required to be included under RCM 406. And, in spite of the fact that they were not required to be included, the SJA nevertheless attached the entire hearing officer report to the pretrial advice for the convening authority to review. By including the actual recommendation of the hearing officer in the body of her pretrial advice, as RCM 406 requires her to do, the SJA did not in any way mislead the convening authority as to the hearing officer's recommendations or opinions. The hearing officer's opinions as to appropriate punishment, not required to be included in the pretrial advice and not a "recommendation as to disposition" required by RCM 405, were nevertheless provided to the convening authority for his consideration without comment by the SJA. Nothing about the nature of this method of bringing such opinions to the

attention of the convening authority violates RCM 406; nor does it mislead the convening authority in any way. He had access to and freedom to consider both the recommendations the Preliminary Hearing Officer was required to make by law, and the opinions he expressed in his narrative about appropriate punishment. The fact that one was commented on in the pretrial advice, as required by law, and the other was not, does not prejudice the accused in any way.

RULING

5. Defense motion for a new pretrial advice is DENIED.


JEFFERY R. NANCE
COL, JA
Military Judge