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COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

DAVID W. WALL, D.C.,

Appellant.

v.

STATE OF WASHINGTON, DEPARTMENT OF HEALTH,

Respondent.

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in denying Dr. David Wall's motion for the court to only instruct the panel on the clear and convincing standard of care.

2. The trial court erred by not sustaining Dr. Wall's objection that the panel's instructions were not made a matter of record.

3. The trial court erred in not sustaining Dr. Wall's objection that the presiding officer retire with the panel for deliberations and that no record was made of the questions arising from the panel to the presiding officer during deliberations.

Issues Pertaining to Assignments of Error

1. Whether the trial court committed reversible error in instructing the panel on both preponderance of the evidence and clear and convincing standards of proof, where the Washington Supreme Court has ruled that the clear and convincing standard should be used.

2. Whether the trial court committed reversible error when it denied Dr. Wall due process of law by not making a record of the jury panel instructions.

3. Whether the trial court committed reversible error when the presiding officer deliberated with the jury panel and no record was made

of questions the jury asked of the judge and when counsel was not permitted to participate in the answering of these questions, thus denying Dr. Walls due process.

B. STATEMENT OF THE CASE

This case arises out of a State of Washington Department of Health Chiropractic Quality Assurance Commission decision to discipline David Wall, D.C. a chiropractor from Wenatchee, Washington. AR¹ 422.

Dr. Wall was licensed to practice as a chiropractor by the state of Washington in 1992. He operates Wall Chiropractic Clinic in Wenatchee, Washington. AR 425.

On July 30, 2004, the Department issued a Statement of Charges alleging Dr. Wall violated RCW 18.130 (1), (4) & (7) and WAC 246-808-380, WAC 246-808-560 (1) and (2) and WAC 246-808-565 (1), (4) and (5) in treatment of two patients. A hearing was held on November 19, 2005, before a panel of the Chiropractic Quality Assurance Commission. CP 31.

The Department presented the testimony of Dennis Austin, D.C. Dr. Wall testified on his own behalf and presented the telephonic testimony of Hugh Wilson, D.C. AR 424.

¹ Citation to the Administrative Record.

This hearing resulted in Findings of Fact, Conclusions of Law, and a Final Order holding Dr. Wall had violated various sections of the Uniform Disciplinary Act and imposing sanctions. AR 422-33.

During the proceedings Dr. Wall moved to redact his patients' names from the record. The Presiding Officer ordered all reference to the patients be transcribed patient A and patient B. AR 425.

1. The trial court did not instruct the jury panel to use only the clear and convincing standard of proof the Washington Supreme Court requires.

Dr. Wall moved that the only instruction as to the standard of proof given to the jury panel be that of clear and convincing evidence, as the Washington Supreme Court established in *Nguyen vs. the Dept. of Health*, 144 Wn. 2d 516, 29 P.3d 689 (2001). AR 590. *Nims v. Wash Board of Registration*, 113 Wn. 2d 499, 505, 53 P.3d 52 (2002) (applying *Nguyen* to professional engineers).

The Department argued that *Nguyen* was not applicable to the proceedings, and that the burden of proof should be preponderance of the evidence. AR 591.

The Presiding Officer ruled that the panel would consider the evidence under **both** the preponderance of the evidence standard and the clear and convincing standard. *Id.* (emphasis added). There is no record as to how the panel was instructed on the law or the issues.

2. The Presiding Officer retired with the jury panel for deliberations, and no record was made of questions arising from the panel to the judge during deliberations.

Dr. Wall objected that the court did not make a record of the questions that arose from the panel and were put to the presiding officer during deliberations. He objected that counsel was not involved in these questions, thus resulting in a violation of due process. AR 590-91.

The Presiding Officer denied these motions. *Id.*

The Presiding Officer retired with the panel for deliberations. *Id.*

3. The trial court made no record of instructions for the jury panel.

Dr. Wall moved that the instructions of law given to the jury panel be a matter of record so that there would be a record to take up on review if necessary. He further argued that this should include the standard of proof as well as any other instructions given the panel. AR 591-92.

The Presiding Officer denied this motion. *Id.*

This case was reviewed by the Thurston County Superior Court on May 4, 2007, where the judge did not change the order of the agency. CP 59. Dr. Wall now appeals both the decision of the commission and the Thurston County Superior Court.

C. SUMMARY OF ARGUMENT

The standard of proof for professional misconduct is clear and convincing evidence. *Ongom v. Dept. of Health*, 124 Wn. App. 935, 148 P.3d 1029 (2006). Because the panel was instructed to consider both the preponderance of the evidence and the clear and convincing evidence standards of proof without record of a clear instruction, it suggests the panel did not understand the requirements of “clear and convincing.”

It is vital the panel have a solid understanding of the clear and convincing standard. In *Wash. Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466,474, 663 P.2d 457 (1983) Washington Supreme Court held that “a professional license revocation proceeding has been determined to be ‘quasi-criminal’ in nature, and accordingly, entitled to the protections of due process.”

The very fact that the courts consider these proceedings quasi-criminal in nature shows the seriousness of the consequences that can potentially be imposed on the respondents in these matters. These proceedings bring with them the possibility of removing one’s ability to make a living, a respondent’s lively hood.

Because Dr.Wall’s request to have a record made of the panels’ instructions and of the panel’s questions to the presiding officer during deliberations was denied, Dr. Wall’s right to due process was violated.

D. ARGUMENT

1. The standard of proof for professional misconduct is clear and convincing evidence.

Nguyen v. Dept. of Health, 144 Wn.2d 514, 534, 29 P.3d 689, 697 cert. den. 535 U.S. 904, 152 L.Ed.2d 141, 122 S. Ct. 1203 (2002). Later that same year, Division II of the Court of Appeals applied the binding precedent in *Nguyen* to a registered professional engineer. *Nims v. Wash. Board of Registration*, 113 Wn. App. 499, 53 P.3d 52 (2002).² The year before, Division I took the opinion that *Nguyen* applied only to physicians, despite the fact all health care practitioners are subject to the Uniform Disciplinary Act. *Eidson v. Dept. of Licensing*, 108 Wn. App. 712, 32 P.3d 1039 (2001) (real estate appraisers); *Ongom v. Dept. of Health*, 124 Wn. App. 935, 148 P.3d 1029 (2005) (nursing assistants). The Washington Supreme Court resolved this matter conclusively: the burden of proof is clear and convincing evidence. *Ongom v. Dept. of Health*, 159 Wn.2d 132, 148 P.3d 1029 (December 14, 2006).³ Given the purported confusion as to what the burden of proof was, Dr. Wall asked that all instructions to the hearing panel and questions from the hearing panel be

² "*Nguyen* is the law of this state, whether one agrees with it or not. *Nguyen* held that a physician is entitled to a clear, cogent, and convincing burden of persuasion. A registered professional engineer is entitled to the same, so far as is shown here or in *Eidson*." *Nims*, at 505.

³ This case was handed down after the decision in this matter.

made a matter of record. AR 425. This motion was denied on the basis there was “no legal authority for Respondent’s [Dr. Wall’s] motion.” *Id.* To this day, we have no idea how it is the panel was instructed on the burden of proof, or what confusion or questions the panel may have had.

The rule in Washington is stated in WPI 160.02, the burden of proof in fraud:

When it is said that a proposition must be proved by clear, cogent, and convincing evidence, it means that the proposition must be proved by evidence that carries greater weight and is more convincing than a preponderance of the evidence. However, it does not mean that the proposition must be proved by evidence that is convincing beyond a reasonable doubt.

WPI 160.02, ¶ 2. Furthermore,

There must be more than a “preponderance of the evidence” but the proof need not be “beyond and to the exclusion of a reasonable doubt.” This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the Trier of fact without hesitancy.

In re Davey, 645 So.2d 398 (Fla. 1994), at 404 (quoting *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. Dist. Ct. App. 1983)). In Washington, a conclusion that misconduct has occurred by clear and convincing evidence must be supported by “direct evidence of misconduct.” *In re Discipline of Niemi*, 117 Wn.2d 817, 822, 820 P.2d 41 (1991). The high standard of

proof is one mechanism by which the risk of error is reallocated. It is required because professional disciplinary proceedings are quasi-criminal in nature and professional reputation is at stake. *Nguyen*, 144 Wn.2d at 523; quoting *Wash. Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983)

Here, the presiding officer recognized in conclusions 2.3 and 2.4 the uncertainty in the law regarding the standards of proof, and responds by instructing that both standards be used by the panel. AR 428. However, it is not enough that the panel was instructed in both standards of proof. Instructing a panel to use both standards is confusing on its face. There is no documentation of what specifically those instructions contained. There is no difference enunciated in the conclusions of 2.8. The panel merely conclusorily stated the Department proved its case by both standards. *Id.*

Washington courts consider professional disciplinary proceedings to be quasi-criminal in nature. *Nguyen*, 144 Wn.2d at 523. The United States Supreme Court concurs. *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). For this reason the best comparison may be to courts-martial. In courts-martial, the military judge gives the members appropriate instructions on findings. Manual for Courts-Martial

United States, § 920(a) (2005).⁴ One purpose of the instructions is to preserve the record for appeal. *See*, MCM, § 920(d), Discussion. Needless to say, the government's burden of proof (reasonable doubt) is one of the instructions to be given. MCM, §§ 918, 920.

These instructions are given orally on the record in the presence of all parties and the members. Written instructions are also allowed to be given to the members for use in their deliberations.

(d) *How given.* Instructions on findings shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or, unless a party objects, portions of them, may also be given to the members for their use during deliberations.

Courts-Martial, 920(d) (emphasis in original).

Here, as in other quasi-criminal proceedings the presiding officer should have made instructions to the panel part of the record. Record should have been made as to exactly how the jury panel was instructed regarding the standard of proof.

2. RCW 34.05.570 governs the standard of Agency orders in adjudicative proceedings.

A reviewing court shall grant relief from an Agency order in an adjudicative proceeding if it determines that:

⁴ A copy of §920 of the Manual for Courts-Martial is in the Appendix.

- The order, statute, or rule on which the order is based is in violation of constitutional provisions on its face or as applied;
- The agency has engaged in unlawful procedure or decision-making process, or failed to follow prescribed procedure;
- The order is not supported by substantial evidence in light of the whole record before the court; or
- The order is arbitrary and capricious.

RCW 34.05.570(3).

The court also may grant relief if the Agency's action is unconstitutional or arbitrary and capricious. RCW 34.05.570(4).

The court may grant relief in the form of declaratory judgment order, RCW 34.05.574(1)(b), and may also award damages, compensation, or ancillary relief expressly authorized by another provision of law. RCW 34.05.574 (3).

Here, the agency "engaged in unlawful procedure or decision-making process" by not making a record of the panel's instructions. The agency's failure severely attenuates the scope and opportunity for Dr. Wall's right of appeal, thus denying him due process under the U.S. Constitution. Due process was denied when the presiding officer did not make a record of questions arising from the panel to the presiding officer

during deliberations and when counsel was not allowed to participate in the answering of those questions. AR 425. Finally, the agency cannot prove the panel was properly instructed on the law and burden of proof because the record kept by the agency is inadequate.

3. The Agency decision violated the constitutional rights of Dr. Wall.

The record before the court is devoid of evidence as to how the panel was instructed on the applicable law and burden of proof. There is no record as to the instructions of the panel at all, except that the presiding officer said they would be instructed on both preponderance of the evidence and on clear and convincing standards of proof. AR 428-29. There is no record of what those instructions contained. Additionally, there is no record of any other instruction the panel used to come to its decision.

Moreover, concealing from counsel how the panel is instructed prevented Dr. Wall from commenting on the instructions and persuasively arguing their application to the evidence. In the absence of an adequate record, the right to appeal is meaningless. This is particularly true for judicial review of agency actions where review is exceedingly deferential

(“substantial evidence”).⁵ The agency has thus violated Dr. Wall’s rights to due process under the U.S. Constitution.

“The Due Process Clause of the Fourteenth Amendment to the United States Constitution precludes states from depriving any person of ‘life, liberty, or property, without due process of law.’ The ‘right’ is due process; [Dr. Wall’s] *interest* is his property, his liberty, or both.” *Nguyen*, 144 Wn.2d at 522 (emphasis in original).

The Due Process Clause includes a guarantee of fair procedure. *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 108 L. Ed.2d 100 (1990). “In procedural due process claims, the deprivation by state action of a constitutionally protected interest in ‘life, liberty, or property’ is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*.” *Id.* (emphasis in original); *Parratt v. Taylor*, 451 U.S. 527, 537, 101 S.Ct. 1908, 1913 (1981); *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042 (1978); *Nguyen*, 144 Wn.2d at 522. “[T]o determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.”

⁵ “The test for substantial evidence is modest. There must be more than a mere scintilla of evidence. It is sufficient if it would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *NW Pipeline v Adams County*, 132 Wn. App. 470, 131 P.3d 958 (2006).

Here, we do not know what process was provided because we do not even have a record of the instructions given the panel for deliberations.

E. CONCLUSION

The trial court committed reversible error when it failed to instruct the panel to use only the clear and convincing standard of proof as the Washington Supreme Court requires. The trial court also committed reversible error and violated Dr. Wall's right to due process when it failed to make a record of the jury instructions given to the panel and committed reversible error when it failed to make a record of the questions arising from the jury panel to the presiding officer during deliberations.

RESPECTFULLY SUBMITTED this 29th day of October, 2007.

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CERTIFICATE OF SERVICE

07 OCT 2007 11:28:11

I hereby certify that on October 29, 2007, I caused to be served a true and correct copy of:

BY

Summ

DEPUTY

Brief of Appellant

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APPENDIX

**MANUAL
FOR
COURTS-MARTIAL
UNITED STATES
(2005 EDITION)**

The 2005 Edition of the MCM is a complete revision of the 2002 MCM incorporating all Executive Orders (EO) through 3 December 2004 (EO 12473 promulgating the 1984 MCM; EO 12484, 15 Nov 84; EO 12550, 19 Feb 86; EO 12586, 3 Mar 87; EO 12708, 23 Mar 90; EO 12767, 27 Jun 91; EO 12888, 23 Dec 93; EO 12936, 10 Nov 94; EO 12960, 12 May 95; EO 13086, 27 May 98; EO 13140, 6 Oct 99; EO 13262, 11 Apr 02; EO 13365, 3 Dec 04). Copies of each Executive Order can be found in Appendix 25.

PREFACE

The Manual for Courts-Martial (MCM), United States (2005 Edition) updates the MCM, (2002 Edition). It is a complete reprinting and incorporates the MCM (2002 Edition), the amendment to Articles 43 and 111 of the UCMJ made by the National Defense Authorization Act for the Fiscal Year (FY) 2004, the addition of Article 119a of the UCMJ created by the Unborn Victims of Violence Act of 2004, 1 April 2004, and the 2004 amendments to the MCM Rules for Courts-Martial, Military Rules of Evidence, and Punitive Articles made by the President in Executive Order (EO) 13365. The EO can be found in Appendix 25.

JOINT SERVICE COMMITTEE
ON MILITARY JUSTICE

trial counsel may comment on the accused's failure in that testimony to deny or explain specific incriminating facts that the evidence for the prosecution tends to establish regarding that offense.

Trial counsel may not comment on the failure of the defense to call witnesses or of the accused to testify at the Article 32 investigation or upon the probable effect of the court-martial's findings on relations between the military and civilian communities.

The rebuttal argument of trial counsel is generally limited to matters argued by the defense. If trial counsel is permitted to introduce new matter in closing argument, the defense should be allowed to reply in rebuttal. However, this will not preclude trial counsel from presenting a final argument.

(c) *Waiver of objection to improper argument.* Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection.

Discussion

If an objection that an argument is improper is sustained, the military judge should immediately instruct the members that the argument was improper and that they must disregard it. In extraordinary cases improper argument may require a mistrial. See R.C.M. 915. The military judge should be alert to improper argument and take appropriate action when necessary.

Rule 920. Instructions on findings

(a) *In general.* The military judge shall give the members appropriate instructions on findings.

Discussion

Instructions consist of a statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine findings. Instructions should be tailored to fit the circumstances of the case, and should fairly and adequately cover the issues presented.

(b) *When given.* Instructions on findings shall be given before or after arguments by counsel, or at both times, and before the members close to deliberate on findings, but the military judge may, upon request of the members, any party, or *sua sponte*, give additional instructions at a later time.

Discussion

After members have reached a finding on a specification, instructions may not be given on an offense included therein which was not described in an earlier instruction unless the finding is illegal. This is true even if the finding has not been announced. When

instructions are to be given is a matter within the sole discretion of the military trial judge.

(c) *Requests for instructions.* At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on findings before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments.

Discussion

Requests for and objections to instructions should be resolved at an Article 39(a) session. *But see* R.C.M. 801(e)(3); 803.

If an issue has been raised, ordinarily the military judge must instruct on the issue when requested to do so. The military judge is not required to give the specific instruction requested by counsel, however, as long as the issue is adequately covered in the instructions.

The military judge should not identify the source of any instruction when addressing the members.

All written requests for instructions should be marked as appellate exhibits, whether or not they are given.

(d) *How given.* Instructions on findings shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or, unless a party objects, portions of them, may also be given to the members for their use during deliberations.

Discussion

A copy of any written instructions delivered to the members should be marked as an appellate exhibit.

(e) *Required instructions.* Instructions on findings shall include:

(1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;

(2) A description of the elements of each lesser included offense in issue, unless trial of a lesser included offense is barred by the statute of limitations (Article 43) and the accused refuses to waive the bar;

(3) A description of any special defense under R.C.M. 916 in issue;

(4) A direction that only matters properly before the court-martial may be considered;

(5) A charge that—

(A) The accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt;

(B) In the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;

(C) If, when a lesser included offense is in issue, there is a reasonable doubt as to the degree of guilt of the accused, the finding must be in a lower degree as to which there is not reasonable doubt; and

(D) The burden of proof to establish the guilt of the accused is upon the Government. [When the issue of lack of mental responsibility is raised, add: The burden of proving the defense of lack of mental responsibility by clear and convincing evidence is upon the accused. When the issue of mistake of fact as to age in a carnal knowledge prosecution is raised, add: The burden of proving the defense of mistake of fact as to age in carnal knowledge by a preponderance of the evidence is upon the accused.]

(6) Directions on the procedures under R.C.M. 921 for deliberations and voting; and

(7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given.

Discussion

A matter is "in issue" when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose. An instruction on a lesser included offense is proper when an element from the charged offense which distinguishes that offense from the lesser offense is in dispute.

See R.C.M. 918(c) and discussion as to reasonable doubt and other matters relating to the basis for findings which may be the subject of an instruction.

Other matters which may be the subject of instruction in appropriate cases included: inferences (see the explanations in Part IV concerning inferences relating to specific offenses); the limited purpose for which evidence was admitted (regardless of whether such evidence was offered by the prosecution of defense) (see Mil. R. Evid. 105); the effect of character evidence (see Mil. R. Evid. 404; 405); the effect of judicial notice (see Mil. R. Evid.

201, 201A); the weight to be given a pretrial statement (see Mil. R. Evid. 340(e)); the effect of stipulations (see R.C.M. 811); that, when a guilty plea to a lesser included offense has been accepted, the members should accept as proved the matters admitted by the plea, but must determine whether the remaining elements are established; that a plea of guilty to one offense may not be the basis for inferring the existence of a fact or element of another offense; the absence of the accused from trial should not be held against the accused; and that no adverse inferences may be drawn from an accused's failure to testify (see Mil. R. Evid. 301(g)).

The military judge may summarize and comment upon evidence in the case in instructions. In doing so, the military judge should present an accurate, fair, and dispassionate statement of what the evidence shows; not depart from an impartial role; not assume as true the existence or nonexistence of a fact in issue when the evidence is conflicting or disputed, or when there is no evidence to support the matter; and make clear that the members must exercise their independent judgment as to the facts.

(f) *Waiver*. Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify of what respect the instructions given were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 921. Deliberations and voting on findings

(a) *In general*. After the military judge instructs the members on findings, the members shall deliberate and vote in a closed session. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner in an attempt to control the independence of members in the exercise of their judgment.

(b) *Deliberations*. Deliberations properly include full and free discussion of the merits of the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request.

(c) *Voting*.

(1) *Secret ballot*. Voting on the findings for each charge and specification shall be by secret written ballot. All members present shall vote.

(2) *Numbers of votes required to convict*.

(A) *Death penalty mandatory.* A finding of guilty of an offense for which the death penalty is mandatory results only if all members present vote for a finding of guilty.

Discussion

Article 106 is the only offense under the code for which the death penalty is mandatory.

(B) *Other offenses.* As to any offense for which the death penalty is not mandatory, a finding of guilty results only if at least two-thirds of the members present vote for a finding of guilty.

Discussion

In computing the number of votes required to convict, any fraction of a vote is rounded up to the next whole number. For example, if there are five members, the concurrence of at least four would be required to convict. The military judge should instruct the members on the specific number of votes required to convict.

(3) *Acquittal.* If fewer than two-thirds of the members present vote for a finding of guilty—or, when the death penalty is mandatory, if fewer than all the members present vote for a finding of guilty—a finding of not guilty has resulted as to the charge or specification on which the vote was taken.

(4) *Not guilty only by reason of lack of mental responsibility.* When the defense of lack of mental responsibility is in issue under R.C.M. 916(k)(1), the members shall first vote on whether the prosecution has proven the elements of the offense beyond a reasonable doubt. If at least two-thirds of the members present (all members for offenses where the death penalty is mandatory) vote for a finding of guilty, then the members shall vote on whether the accused has proven lack of mental responsibility. If a majority of the members present concur that the accused has proven lack of mental responsibility by clear and convincing evidence, a finding of not guilty only by reason of lack of mental responsibility results. If the vote on lack of mental responsibility does not result in a finding of not guilty only by reason of lack of mental responsibility, then the defense of lack of mental responsibility has been rejected and the finding of guilty stands.

Discussion

If lack of mental responsibility is in issue with regard to more than one specification, the members should determine the issue of lack of mental responsibility on each specification separately.

(5) *Included offenses.* Members shall not vote on a lesser included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of an offense charged has been reached the members shall vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members shall continue the vote on each included offense on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each such offense.

(6) *Procedure for voting.*

(A) *Order.* Each specification shall be voted on separately before the corresponding charge. The order of voting on several specifications under a charge or on several charges shall be determined by the president unless a majority of the members object.

(B) *Counting votes.* The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

Discussion

Once findings have been reached, they may be reconsidered only in accordance with R.C.M. 924.

(d) *Action after findings are reached.* After the members have reached findings on each charge and specification before them, the court-martial shall be opened and the president shall inform the military judge that findings have been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the findings and may assist the members in putting the findings in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the findings.

Discussion

Ordinarily a findings worksheet should be provided to the members as an aid to putting the findings in proper form. See Appendix 10 for a format for findings. If the military judge examines