UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BRETT T. BANWELL
United States Air Force

ACM S31585

22 January 2010

Sentence adjudged 30 October 2008 by SPCM convened at Laughlin Air Force Base, Texas. Military Judge: W. Thomas Cumbie.

Approved sentence: Confinement for 3 months, forfeiture of $898.00 pay per month for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Major Michael A. Burnat.

Appellate Counsel for the United States: Colonel Douglas P. Cordova and Lieutenant Colonel Jeremy S. Weber.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

PER CURIAM:

A military judge convicted the appellant in accordance with his pleas of one specification of willful dereliction of duty by consuming alcohol while under the legal drinking age and one specification of divers wrongful use of cocaine, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. The special court-martial composed of officer members sentenced the appellant to reduction to the grade of E-1, forfeiture of $898 pay per month for 12 months, confinement for eight months, and a bad-conduct discharge. The convening authority approved the reduction and forfeiture but reduced the adjudged confinement to three months. Further, the convening authority

directed that the appellant be entered in the Air Force Return to Duty Program. It is unclear whether he approved the bad-conduct discharge.

The appellant raises three issues on appeal: (1) whether the military judge should have sua sponte disqualified a court-martial member; (2) whether the military judge committed plain error by allowing sentencing testimony concerning the appellant's drug use during the charged period that was not mentioned by the appellant during the plea inquiry; and (3) whether the convening authority intended to approve the bad-conduct discharge. For now, we address only this third issue since our jurisdiction is dependent on whether the bad-conduct discharge is actually approved.

The Convening Authority's Action

The action reads: ". . . only so much of the sentence as provides for reduction to the grade of E-1, forfeiture of $898.00 pay per month for twelve (12) months, and confinement for three (3) months is approved and, except for the bad conduct discharge will be executed." The appellant and the government counsel agree that the action is ambiguous and request that this Court return the record of trial to the convening authority for a corrected action.[1] We agree and find the action in this case ambiguous: while neither approving nor disapproving the punitive discharge, the action orders the approved sentence executed "except for the bad conduct discharge." *Cf. United States v. Wilson*, 65 M.J. 140 (C.A.A.F. 2007) (discussing clear and unambiguous *disapproval* of punitive discharge in a poorly worded action).

Because our jurisdiction to review this case depends on the corrected action, we will not address the remaining issues until such time as a corrected action clearly shows whether we have jurisdiction of this case. The record of trial is returned to The Judge Advocate General for remand to the convening authority for withdrawal of the action and substitution of a corrected one.[2] Rule for Courts-Martial 1107(g).

[1] The caption of the appellant's argument on this issue states that the action intended to disapprove the bad-conduct discharge while his substantive argument states that the action is ambiguous and concludes with a request that we return the record to the convening authority for clarification.

[2] The court-martial order (CMO), dated 16 December 2008, fails to list the appellant's pleas and the findings to the specifications of the charges. The Court orders the corrected CMO include the missing pleas and findings.

If the bad-conduct discharge is approved, Article 66, UCMJ, 10 U.S.C. §866, shall apply.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court