

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic JERRELL L. ROGERS
United States Air Force**

ACM S30061

18 July 2003

Sentence adjudged 19 November 2001 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 72 days.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jeffrey A. Vires, Major Jefferson B. Brown, Major Karen L. Hecker, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Major Jennifer R. Rider, and Major John D. Douglas.

Before

BRESLIN, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

This was a straightforward case made unnecessarily complex because of a small but crucial error. For the reasons discussed below, we find it necessary to order corrective action.

The appellant was convicted, in accordance with his pleas, of absence without leave from his unit for 77 days, in violation of Article 86, UCMJ, 10 U.S.C. § 886, violating a lawful general regulation by failing to remain on base, and failing to obey an order to check in regularly with the Charge of Quarters, both in violation of Article 92, UCMJ, 10 U.S.C. § 892, and larceny of \$400.00 from a fellow airman, in violation of Article 121, UCMJ, 10 U.S.C. § 921. A military judge, sitting alone as a special court-

martial, sentenced the appellant to a bad-conduct discharge and confinement for 75 days. He also noted that the appellant would be credited with 35 days of pretrial confinement.

As required by Article 60(d), UCMJ, 10 U.S.C. § 860(d), the staff judge advocate (SJA) prepared a formal recommendation for the convening authority and served it upon the defense for review and comment. The SJA recommended that the convening authority approve the sentence as adjudged. The appellant and his counsel submitted a request for clemency, specifically asking that the appellant's sentence be reduced by three days so the appellant could get home by Christmas. The defense did not ask that the convening authority disapprove the bad-conduct discharge. Thereafter, the SJA prepared an addendum to the earlier recommendation noting the original sentence of a bad-conduct discharge and 75 days' confinement and indicating it was appropriate. The SJA then wrote, "However, I recommend that you approve only so much of the sentence which calls for 72 days of confinement, allowing for the three days requested by the [sic] AB Rogers." The convening authority signed the proposed action that said, in pertinent part, "only so much of the sentence which calls for 72 days confinement is approved and, except for the bad conduct discharge, will be executed." The appellant now argues that the convening authority did not approve the bad-conduct discharge, and urges this Court to approve a sentence of only 72 days' confinement.*

The convening authority may "approve, disapprove, commute, or suspend a sentence, in whole or in part." Article 60(c)(2), UCMJ, 10 U.S.C. § 860(c)(2). The formal action by the convening authority is used to indicate the sentence approved and to order the sentence executed. A bad-conduct discharge may not be ordered executed until appellate review is completed, or the appellant waives or withdraws his case from such review. *See* Article 71(c)(1), UCMJ, 10 U.S.C. § 871(c)(1).

Reviewing the action, it was unclear what the convening authority intended to approve. The first portion of the language in the action quoted above suggests that the convening authority only intended to approve 72 days' confinement. However, the second portion relating to the execution of the sentence "except for the bad conduct discharge," suggests that the convening authority intended to approve the bad-conduct discharge. Furthermore, the action provided that the appellant "will be required, under Article 76a, UCMJ, to take leave pending completion of appellate review of the conviction," a requirement which would only be necessary if the bad-conduct discharge was approved. The SJA's recommendation and addendum are also somewhat unclear.

We concluded that the action of the convening authority is ambiguous. *United States v. McDaniel*, 21 C.M.R. 182, 185 (C.M.A. 1956). We ordered affidavits from the SJA and the convening authority to determine what they intended to approve. *See United*

* Of course, if the approved sentence only extended to 72 days' confinement, this Court would not have jurisdiction over the case. *See* Article 66(b)(1), 10 U.S.C. § 866(b)(1).

States v. Lower, 10 M.J. 263, 265 (C.M.A. 1981) (“[S]ome indication of the meaning of the published approval of sentence can only be forthcoming from the authority who drafted it. We decline to lay down a hard rule as to the evidentiary form this need take.”).

The SJA and the convening authority responded by affidavit. The convening authority clearly indicated that it was his intention to approve 72 days’ confinement and the bad-conduct discharge. The SJA indicated that it was her recommendation that the convening authority approve the bad-conduct discharge and 72 days’ confinement. We find that the convening authority intended to approve only so much of the sentence as included a bad-conduct discharge and confinement for 72 days.

According to Rule for Courts-Martial 1107(g), we may instruct a convening authority to withdraw an incomplete, ambiguous, or erroneous action and substitute a corrected action. *United States v. Vogle*, ACM S29646 (f rev) (A.F. Ct. Crim. App. 8 Feb 2001), *aff’d*, 53 M.J. 428 (2000) (summary disposition); *United States v. Scott*, 49 M.J. 160 (1998) (summary disposition); *United States v. Madden*, 32 M.J. 17 (C.M.A. 1990) (summary disposition); *United States v. Otero*, 26 M.J. 546, 549 (A.F.C.M.R. 1988); *United States v. Schiaffo*, 43 M.J. 835, 837 (Army Ct. Crim. App. 1996). Accordingly, we return the record of trial to the Judge Advocate General for remand to the convening authority to withdraw the erroneous action and substitute a corrected action and promulgating order. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

OFFICIAL

HEATHER D. LABE
Clerk of Court