

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

No. ACM S32614

UNITED STATES

Appellee

v.

Michael J. LEWIS

Airman (E-2), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 8 January 2021

Military Judge: Andrew R. Norton.

Sentence: Sentence adjudged on 18 June 2019 by SpCM convened at Shaw Air Force Base, South Carolina. Sentence entered by military judge on 5 August 2019: Bad-conduct discharge, confinement for 90 days, reduction to E-1, and a reprimand.

For Appellant: Captain Amanda E. Dermady, USAF.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Mary Ellen Payne, Esquire.

Before MINK, KEY, and ANNEXSTAD, *Appellate Military Judges*.

Judge KEY delivered the opinion of the court, in which Senior Judge MINK joined. Judge ANNEXSTAD filed a separate dissenting opinion.

**This is an unpublished opinion and, as such, does not serve as
precedent under AFCCA Rule of Practice and Procedure 30.4.**

KEY, Judge:

A military judge sitting as a special court-martial convicted Appellant, in accordance with his pleas and pursuant to a pretrial agreement, of two specifications each of wrongful use and wrongful possession of controlled substances

in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a.¹ One of these four specifications pertained to an offense committed in 2018, while the remaining three pertained to offenses committed in 2019. The military judge sentenced Appellant to a bad-conduct discharge, confinement for three months, reduction to the grade of E-1, and a reprimand.

Appellant’s case was submitted to this court for review on its merits without any assignments of error. Although not raised by Appellant, we address an error in the post-trial processing of Appellant’s court-martial: whether the convening authority failed to take action on the sentence as required by Executive Order 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018), and Article 60, UCMJ, 10 U.S.C. § 860. We conclude he did and that remand to the Chief Trial Judge, Air Force Trial Judiciary, is appropriate. We defer completion of our Article 66, UCMJ, review until the record is returned to this court. 10 U.S.C. § 866.

I. BACKGROUND

The specifications in this case were referred in April and June 2019, and Appellant’s court-martial concluded on 18 June 2019. Before trial, the convening authority and Appellant entered into a pretrial agreement whereby, *inter alia*, the convening authority agreed not to approve any sentence to confinement in excess of 90 days. On 27 June 2019, Appellant submitted a request for clemency in which he asked the convening authority to further reduce his sentence to confinement. After reviewing Appellant’s clemency matters and consulting with his staff judge advocate, the convening authority signed a Decision on Action memorandum, dated 2 August 2019. In the memorandum, the convening authority stated: “I take no action on the findings in this case.” He then stated he was taking action on the sentence by reducing the confinement from 3 months to 90 days, in accordance with the pretrial agreement. The Decision on Action further set out the wording for Appellant’s reprimand and directed Appellant to “take leave pending completion of appellate review” upon release from confinement. The memorandum contained no further indication as to whether any other element of the sentence was approved, disapproved, commuted, or suspended. On 5 August 2019, the military judge signed the entry of judgment, setting out the modified sentence as well as the terms of the reprimand. He included the Decision on Action memorandum as an attachment.

¹ Unless otherwise noted, references to the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.).

II. DISCUSSION

Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted). Interpretation of a statute and a Rule for Courts-Martial (R.C.M.) are also questions of law we review de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted); *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005) (citation omitted).

Executive Order 13,825, § 6(b), requires that the version of Article 60, UCMJ,

in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60: (1) requires action by the convening authority on the sentence; . . . or (5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

See 2018 Amendments to the *Manual for Courts-Martial, United States*, 83 Fed. Reg. at 9890. The version of Article 60, UCMJ, in effect in 2018—the year in which the earliest of Appellant’s charged offenses occurred—stated “[a]ction on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this section.” 10 U.S.C. § 860(c)(2)(A) (emphasis added); see also *United States v. Perez*, 66 M.J. 164, 165 (C.A.A.F. 2008) (per curiam) (“[T]he convening authority is required to take action on the sentence . . .”). Article 60(c)(2)(B), UCMJ, further stated: “Except as [otherwise] provided . . . the convening authority . . . may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.” 10 U.S.C. § 860(c)(2)(B). The convening authority’s action is required to be “clear and unambiguous.” *United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006) (citation omitted).

This court addressed a similar situation in its recent en banc decision in *United States v. Aumont*, No. ACM 39673, 2020 CCA LEXIS 416 (A.F. Ct. Crim. App. 20 Nov. 2020) (en banc) (unpub. op.). In *Aumont*, the convening authority signed a memorandum stating that he took “no action” on the findings or sentence in a case involving offenses occurring prior to 1 January 2019. *Id.* at *19. *Aumont* resulted in four separate opinions, reflecting four distinct positions among the judges on this court as to whether the convening authority’s statement that he took no action was erroneous and, if so, whether remand for correction was required. *Id.* (passim). A majority of judges in *Aumont*—six of the ten judges—concluded the convening authority erred; four of those six judges found the error required remand for corrective action without testing for prejudice, *id.* at *89 (J. Johnson, C.J., concurring in part and dissenting in part),

and the other two determined that while there was “plain and obvious” error, they found “no colorable showing of possible prejudice” to the appellant. *Id.* at *32–33 (Lewis, S.J., concurring in part and in the result).

We recognize that panels of this court composed of other judges have applied different reasoning in other cases, before and after *Aumont* was issued. See, e.g., *United States v. Cruspero*, No. ACM S32595, 2020 CCA LEXIS 427 (A.F. Ct. Crim. App. 24 Nov. 2020) (unpub. op.); *United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.); *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.); cf. *United States v. Coffman*, 79 M.J. 820, 824 (A. Ct. Crim. App. 2020) (wherein our sister-service court finds the convening authority’s failure to take action was harmless error). Nevertheless, we continue to adhere to the view that—in situations where the convening authority fails to take action on the sentence as required by Executive Order 13,825 and the pre-1 January 2019 version of Article 60, UCMJ—the convening authority has erred.

In cases involving a conviction for an offense committed prior to 1 January 2019, the convening authority was required to explicitly state his approval or disapproval of the sentence. See *United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007) (citing R.C.M. 1107(d)(1)). “If only part of the sentence is approved, the action shall state which parts are approved.” *Id.* (quoting R.C.M. 1107(f)(4)(A)). In this case, the convening authority did take action on part of the sentence—specifically, he reduced the term of confinement from 3 months to 90 days and he set out the terms of a reprimand—but he did not take action with respect to the remainder of the sentence. He implicitly referenced the adjudged punitive discharge by mentioning appellate leave, but he did not mention the reduction in grade. The convening authority’s action was incomplete and ambiguous, and therefore deficient. See *Politte*, 63 M.J. at 26. The convening authority’s failure to take action on the entire sentence fails to satisfy the requirement of the applicable Article 60, UCMJ. See *United States v. Lopez*, No. ACM S32597, 2020 CCA LEXIS 439, at *11 (A.F. Ct. Crim. App. 8 Dec. 2020) (unpub. op.).

Our superior court has mandated that when a Court of Criminal Appeals identifies an ambiguity in an action, we must return the case to the convening authority. *Politte*, 63 M.J. at 27 (applying the earlier versions of Articles 60 and 66, UCMJ, 10 U.S.C. §§ 860, 866 (2000), reasoning which we find applicable here). In requiring the deficient action to be returned to the convening authority, our superior court did not evaluate the deficiency for prejudice; the deficiency in the action *ipso facto* required its return. *Id.*; see also *United States v. Scott*, 49 M.J. 160, 160 (C.A.A.F. 1998). For the reasons set forth in the dissenting opinion in *Aumont*, we find the record should be remanded to the Chief

Trial Judge, Air Force Trial Judiciary, to resolve the error. Unpub. op. at *89 (J. Johnson, C.J., concurring in part and dissenting in part); *see* Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3) (*Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*)).

III. CONCLUSION

This case is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, to resolve a substantial issue with the convening authority’s decision memorandum, as the action taken on Appellant’s adjudged sentence was ambiguous and incomplete.

Our remand returns jurisdiction over the case to a detailed military judge and dismisses this appellate proceeding consistent with Rule 29(b)(2) of the Joint Rules for Appellate Procedure for Courts of Criminal Appeals. JT. CT. CRIM. APP. R. 29(b)(2). A detailed military judge may:

- (1) Correct the Statement of Trial Results;²
- (2) Return the record of trial to the convening authority or his successor to take action on the sentence;
- (3) Conduct one or more Article 66(f)(3), UCMJ (2019 *MCM*), proceedings using the procedural rules for post-trial Article 39(a), UCMJ, 10 U.S.C. § 839, sessions; and/or
- (4) Correct or modify the entry of judgment.

Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66, UCMJ.

ANNEXSTAD, Judge (dissenting):

I respectfully disagree with my colleagues’ conclusion remanding this case to the Chief Trial Judge, Air Force Trial Judiciary, because the convening authority’s Decision on Action was ambiguous and incomplete. I would find the convening authority’s decision to “take action on the sentence” was clear and unambiguous. In coming to this conclusion, I note that we can use surrounding documentation to interpret an otherwise unclear convening authority action, including looking outside the four corners of the action’s language. *See United*

² The statement of trial results failed to include the command that convened the court-martial as required by R.C.M. 1101(a)(3). Appellant has not claimed prejudice and we find none. *See United States v. Moody-Neukom*, No. ACM S32594, 2019 CCA LEXIS 521, at *2–3 (A.F. Ct. Crim. App. 16 Dec. 2019) (per curiam) (unpub. op.).

States v. Politte, 63 M.J. 24, 26 (C.A.A.F. 2006) (citing *United States v. Loft*, 10 M.J. 262, 268 (C.M.A. 1981)).

In this case, the record demonstrates that Appellant submitted clemency matters to the convening authority on 27 June 2019. In his matters, Appellant asked the convening authority to reduce his sentence to confinement. On 2 August 2019, the convening authority’s decision to “take action” on the sentence was memorialized in his “Decision on Action” memorandum to the military judge. In this memorandum, the convening authority reduced the amount of confinement from 3 months to 90 days, in accordance with the pretrial agreement. Additionally, the convening authority set out the wording for Appellant’s reprimand. On 5 August 2019, the military judge signed the entry of judgment (EoJ), reflecting the modified sentence. The EoJ also included the language for the reprimand and the convening authority’s Decision on Action as an attachment.

I find that the convening authority’s decision met the legacy requirements of Article 60, UCMJ, 10 U.S.C. § 860 (*Manual for Courts-Martial, United States* (2016 ed.)) requiring the convening authority to effectuate the sentence. I also find the decision complied with the provisions of Rule for Courts-Martial (R.C.M.) 1109 of the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*), requiring convening authority action only when affecting the sentence. In this case, the convening authority’s decision on the sentence was a “clear and unambiguous” determination to effectuate the adjudged sentence without modification. *See Politte*, 63 M.J. at 25–26 (footnote omitted). The convening authority modified the sentence of confinement from 3 months to 90 days in accordance with the pretrial agreement and provided the language for the reprimand. While the convening authority did not specifically address the punitive discharge and reduction in grade, there is no indication in the record that the military judge or the parties were confused as to the convening authority’s decision to grant no relief as to those portions of the sentence. The sentence memorialized in the EoJ reflected the modified sentence, and neither party moved for correction of the Decision on Action or the EoJ. *See* R.C.M. 1104(b)(2)(B), (C) (2019 *MCM*). Furthermore, this issue was not raised by Appellant as an assignment of error in his submissions to this court. For these reasons, I would find no error in the convening authority’s Decision on Action and would affirm the findings and entered sentence.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court