

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

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**No. ACM 39903**

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**UNITED STATES**

*Appellee*

**v.**

**Jesus MARTINEZ**

Airman First Class (E-3), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

Decided 21 May 2021

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*Military Judge:* Christopher M. Schumann.

*Sentence:* Sentence adjudged on 30 August 2019 by GCM convened at Fairchild Air Force Base, Washington. Sentence entered by military judge on 18 October 2019: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

*For Appellant:* Major Jenna M. Arroyo, USAF; Major Rodrigo M. Caruço, USAF; Allison R. Weber, Esquire.

*For Appellee:* Lieutenant Colonel Matthew J. Neil, USAF; Major Alex B. Coberly, USAF; Major Brian E. Flanagan, USAF; Major John P. Patera, USAF; Mary Ellen Payne, Esquire.

Before J. JOHNSON, KEY, and ANNEXSTAD, *Appellate Military Judges*.

Judge KEY delivered the opinion of the court, in which Chief Judge J. JOHNSON joined. Judge ANNEXSTAD filed a separate dissenting opinion.

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**This is an unpublished opinion and, as such, does not serve as  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

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KEY, Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault and one specification of attempted sexual assault in violation of Articles 120 and 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 880.<sup>1,2</sup> The specifications pertained to offenses Appellant committed in 2018. The members sentenced Appellant to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On appeal, Appellant raises eleven assignments of error, the eighth of which we reach here: whether the convening authority erred by not taking action on Appellant's 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. Appellant proposes this court remand his case to the Chief Trial Judge, Air Force Trial Judiciary, to resolve this matter.

We agree with Appellant. As a result, we conclude remand to the Chief Trial Judge, Air Force Trial Judiciary, is appropriate, and we do not reach his other ten assignments of error. Considering our resolution of Appellant's eighth assignment of error, we will defer addressing the remainder of his assignments of error until the record is returned to this court for completion of our review under Article 66(d), UCMJ, 10 U.S.C. § 866(d) (*Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*)).

## I. BACKGROUND

The specifications in this case were referred on 12 April 2019, and Appellant was tried by members in August 2019. Afterwards, Appellant's trial defense counsel submitted a petition for clemency on 9 September 2019 in which he identified a number of alleged legal errors occurring during Appellant's court-martial and asked the convening authority to disapprove Appellant's adjudged reduction in grade. On 23 September 2019, the convening authority's staff judge advocate completed a written recommendation to the convening authority noting, *inter alia*, that he found the alleged legal errors to be without merit and that he recommended the convening authority "take no action on the findings or sentence in this case." Appellant did not submit additional matters in response.

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<sup>1</sup> Unless otherwise noted, references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.).

<sup>2</sup> Appellant was acquitted of one specification of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920.

On 11 October 2019, the convening authority signed a Decision on Action memorandum. In the memorandum, the convening authority stated: “I take no action on the findings in this case.” He further wrote, “I take no action on the sentence in this case.” The Decision on Action memorandum also directed Appellant to “take leave pending completion of appellate review” upon release from confinement. The memorandum contained no further indication as to whether any element of Appellant’s sentence was approved, disapproved, commuted, or suspended. On 18 October 2019, the military judge signed the entry of judgment, setting out the adjudged sentence. He included the Decision on Action memorandum as an attachment.

## 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 when Appellant’s offenses first 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 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.), *rev. granted*, \_\_\_ M.J. \_\_\_, No. 21-0126, 2021 CAAF LEXIS 389 (C.A.A.F. 4 Mar. 2021). 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 the judges in *Aumont*—six of the ten judges—concluded the convening authority erred; four of those six judges, including the majority of the panel in the instant case, 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).

We recognize that other panels of this court have applied different reasoning in cases decided before and after *Aumont*. *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 found 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 is required to explicitly state whether the sentence is approved. R.C.M. 1107(f)(4)(A) (implementing the version of Article 60, UCMJ, applicable to Appellant’s case). “If only part of the sentence is approved, the action shall state which parts are approved.” *Id.* In this case, the convening authority explicitly stated he did not take action on the sentence. He implicitly referenced the adjudged punitive discharge by mentioning appellate leave, but he did not mention the confinement, reduction in grade, or forfeitures. 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, it must return the case to the convening authority. *Politte*, 63 M.J. at 25–26 (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 remand the record 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) (2019 *MCM*).

### III. CONCLUSION

The record 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;<sup>3</sup>
- (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):

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<sup>3</sup> The Statement of Trial Results failed to include the command that convened the court-martial as required by R.C.M. 1101(a)(3) (2019 *MCM*). 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.).

I respectfully disagree with my colleagues' conclusion remanding this case to the Chief Trial Judge, Air Force Trial Judiciary, because the convening authority's action was ambiguous and incomplete. Consistent with our court's decision in *United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346, at \*3 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.), I would find the convening authority's decision to "take no action on the sentence" was the equivalent of action. In coming to this conclusion, I note, as our court did in *Barrick*, that:

Air Force Instruction 51-201, *Administration of Military Justice*, Section 13D (18 Jan. 2019), correctly advises convening authorities to grant relief as circumscribed by the applicable version of Article 60, UCMJ, 10 U.S.C. § 860]. Additionally, it advises convening authorities to specify "no action" if not granting relief, which would include effecting "action" under the applicable version of Article 60, UCMJ.

*Id.* at \*3–4.

I also recognize 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 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 9 September 2019. In his matters, Appellant asked the convening authority to "disapprove reduction in grade to E-1." On 23 September 2019, the convening authority's staff judge advocate completed a written recommendation to the convening authority recommending that he "take no action on the findings or sentence in this case." On 11 October 2019, the convening authority memorialized his decision to "take no action" on the findings and sentence in his Decision on Action memorandum to the military judge. Consistent with the advice from his staff judge advocate and Section 13D of Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, the convening authority expressed his decision to not grant relief as "no action." See AFI 51-201, ¶ 13.23 (18 Jan. 2019). Additionally, the convening authority directed Appellant to "take leave" pending completion of appellate review upon release from confinement—an action only necessary when a convening authority cannot or chooses not to disturb an adjudged punitive discharge. On 18 October 2019, the military judge signed the entry of judgment (EoJ), reflecting the sentence as adjudged. The convening authority's Decision on Action memorandum was attached to the EoJ.

I would 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 would 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 to provide no relief at action was a “clear and unambiguous” determination to effectuate the adjudged sentence without modification. *See Politte*, 63 M.J. at 25–26 (footnote omitted). The action was consistent with the legal advice he was provided and 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. The sentence memorialized in the EoJ was the same as the sentence adjudged at trial, and neither party moved for correction of the Decision on Action memorandum or the EoJ. *See* R.C.M. 1104(b)(2)(B), (C) (2019 *MCM*). For these reasons, I would find no error in the convening authority’s action and would not delay our review under Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2019 *MCM*), by remanding the case to the Chief Trial Judge, Air Force Trial Judiciary.



FOR THE COURT

*Carol K. Joyce*

CAROL K. JOYCE  
Clerk of the Court