

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class JOSEPH P. BORDELON
United States Air Force**

ACM 37525

21 July 2010

Sentence adjudged 04 August 2009 by GCM convened at Tyndall Air Force Base, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Confinement for 10 months and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Reggie D. Yager, Major Patrick E. Neighbors, and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Lieutenant Colonel Jeremy S. Weber and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Judge:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of attempted robbery, absence without leave for less than three days, and wrongful use of cocaine, in violation of Articles 80, 86, and 112a, UCMJ, 10 U.S.C. §§ 880, 886, 912a. The court-martial sentenced the appellant to reduction to the grade of E-1, confinement for 13 months, and a bad-conduct discharge.

The appellant and the convening authority entered into a pretrial agreement that capped confinement at ten months and imposed no other limitations on sentence. In accordance with this agreement, the convening authority approved confinement for 10

months instead of the adjudged 13 months but did not expressly approve the bad-conduct discharge despite ordering the sentence executed “except for the bad conduct discharge.” This ambiguous Action requires remand to the convening authority for a corrected Action and promulgating order.

An Action must be given effect when it is complete and unambiguous. *United States v. Wilson*, 65 M.J. 140 (C.A.A.F. 2007). In *Wilson*, the Court considered the intent of an Action which stated, in part, “. . . that part of the sentence extending to confinement in excess of 3 years and 3 months is disapproved. *The remainder of the sentence, with the exception of the Dishonorable Discharge, is approved and will be executed.*” *Id.* at 141-42 (emphasis added). The Court found this language to be a “facially clear and unambiguous” disapproval of the punitive discharge: the Action clearly excludes the Dishonorable Discharge from the sentence which *is approved*. *Id.* at 142.

We find the convening authority’s Action in this case ambiguous. The Action does not expressly exclude the punitive discharge from the approved sentence as in *Wilson*; rather, the convening authority approved confinement for 10 months and reduction in grade without approving the adjudged punitive discharge, but then ordered the sentence executed *except for* the punitive discharge. This arguably shows intent to approve rather than disapprove the punitive discharge, but we will not assume intent from the facially unclear and ambiguous language of this Action. The Action of a convening authority approving or disapproving an adjudged sentence must be explicit, and we will not approve sentences by implication. *United States v. Schiaffo*, 43 M.J. 835, 836-37 (Army Ct. Crim. App. 1996); *see also* Rule for Courts-Martial (R.C.M.) 1107(d)(1).

Because our jurisdiction to review this case depends on whether the punitive discharge is approved, we will not substantively review the case until such time as a corrected Action clearly shows whether we have jurisdiction by the approval of a punitive discharge. The record of trial is returned to The Judge Advocate General for remand to the convening authority for withdrawal of the ambiguous Action and substitution of a corrected one along with a corrected promulgating order. R.C.M. 1107(g).

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

JACKSON, Senior Judge participated in the decision of this Court prior to his reassignment on 15 July 2010.

OFFICIAL



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over a horizontal line.

STEVEN LUCAS
Clerk of the Court