UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class STEVEN A. LEMMER
United States Air Force

ACM S31846

08 February 2012

Sentence adjudged 11 June 2010 by SPCM convened at RAF Lakenheath, United Kingdom. Military Judge: William E. Orr, Jr. (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 295 days, fine of $3,500.00, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund, Lieutenant Colonel Gail E. Crawford; and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Deanna Daly; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

WEISS, GREGORY, and ROAN
Appellate Military Judges

PER CURIAM:

Before a special court-martial composed of military judge alone, the appellant entered pleas of guilty to (1) one specification of conspiracy to commit larceny; (2) three specifications of larceny; (3) one specification of failing to go to his duty location; (4) one specification of making a false official statement; (5) one specification of assault consummated by a battery; and (6) one specification of disorderly conduct, in violation of Articles 81, 86, 107, 121, 128, and 134, UCMJ, 10 U.S.C. §§ 881, 886, 907, 921, 928, 934. The military judge accepted the pleas, entered findings of guilty, and sentenced the appellant to a bad-conduct discharge, confinement for 10 months, a fine of $5,000.00, and reduction to the grade of E-1. A pretrial agreement limited the amount of any

adjudged fine to $3,500, and the parties agreed that the convening authority could approve the sentence adjudged except for a fine in excess of $3,500.00. The convening authority approved a bad-conduct discharge, confinement for 295 days, a fine of $3,500.00, and reduction to the grade of E-1. Before this Court, the appellant renews his argument made at trial that the court-martial lacked personal jurisdiction.[1] We also address errors in the court-martial promulgating order and Action.

Personal Jurisdiction

After an evidentiary hearing on the appellant's motion to dismiss for lack of personal jurisdiction, the military judge found that the appellant had twice voluntarily extended his enlistment: (1) from the original expiration of his term of service in December 2007 to 2 August 2009 to permit him to take an overseas assignment, and (2) from 2 August 2009 to 2 April 2010 to help avoid incarceration in a foreign jail for an incident that occurred in April 2009. Before the expiration of the second voluntary extension on 2 April 2010, the appellant's enlistment was involuntarily extended to 2 July 2010 due to a pending investigation with a view toward trial by court-martial. Based on the voluntary and involuntary extensions, coupled with the finding that the appellant never received a discharge certificate or a final accounting of pay, the military judge concluded that the appellant was subject to court-martial jurisdiction under Article 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1). We review de novo the issue of personal jurisdiction, accepting the military judge's findings of fact unless they are clearly erroneous or unsupported by the record. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000). The appellant contends that his second voluntary enlistment which extended his separation date to 2 April 2010 was invalid because it was made under duress in that he reenlisted in an effort to avoid detention by British authorities if his enlistment expired. A British liaison officer explained the options available to the appellant regarding the status of his enlistment and the possible impact of a pending British criminal investigation. Although the appellant was motivated to reenlist by a desire to avoid foreign incarceration, the record amply supports the military judge's finding that the appellant voluntarily extended his enlistment in July 2009. The appellant admits as much during his testimony on the motion:

> Q: On the date that you signed it what was your belief regarding your ability to back out of that extension in the future?
>
> A: My belief was since it was voluntary I was able to withdraw – for lack of better words – my extension, my voluntary extension.

The appellant continued to accept the benefits of his enlistment during this period, and at no point received a discharge certificate or final accounting of pay. Before the voluntary extension expired, a valid involuntary extension occurred based on an investigation with

[1] The issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

a view toward trial by court-martial. Under these circumstances, we find that the court-martial had personal jurisdiction over the appellant. *See Melanson*, 53 M.J. at 4; *United States v. Wheeley*, 6 M.J. 220 (C.M.A. 1979).

The Action and Promulgating Order

Although neither the Action nor the court-martial promulgating order, explicitly approve the bad-conduct discharge, each document exempts a bad-conduct discharge from execution. Additionally, the promulgating order neglects to show the pleas and findings for the specifications alleged under Charges IV, V, and VI. Such clerical errors show a lack of attention to detail but do not make the Action ambiguous where the surrounding documentation is sufficient to interpret an otherwise unclear Action. *Compare United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006) (setting aside an ambiguous Action, while acknowledging that, at times, an unclear Action can be reasonably interpreted in light of adequate surrounding documentation), *with United States v. Loft*, 10 M.J. 266, 267-68 (C.M.A. 1981) (Although the convening authority did not expressly approve a bad-conduct discharge, his action in suspending it shows that approval of a bad-conduct discharge is the only reasonable interpretation.).

The surrounding documentation in the present case clearly shows the convening authority's intent to approve a bad-conduct discharge along with the other explicitly approved components of the sentence: the parties agreed that under the pretrial agreement the convening authority could approve the adjudged bad-conduct discharge, the staff judge advocate recommended that the convening authority approve a bad-conduct discharge, and the appellant did not request disapproval of the bad-conduct discharge in his clemency request. Further, the Action itself excludes a bad-conduct discharge from the order executing the approved sentence – an exclusion that makes no sense if a bad-conduct discharge was not part of the approved sentence. As in *Loft*, we find that the only reasonable interpretation of the convening authority's Action is approval of a bad-conduct discharge, confinement for 295 days, a fine of $3,500.00, and reduction to the grade of E-1.[2] To avoid these recurring clerical errors, staff judge advocates should consult the advice of our superior court. *See Politte*, 63 M.J. at 26.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[2] To correct these clerical errors, we direct the convening authority to withdraw the original Action and substitute a corrected Action. Rule for Courts-Martial (R.C.M.) 1107(g). We also direct publication of a corrected promulgating order. R.C.M. 1114; Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 10.10 (3 February 2010).

Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court