

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Staff Sergeant DANIEL J. MCDOWELL
United States Air Force**

ACM 34448 (f rev)

27 March 2003

Sentence adjudged 10 November 2000 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: Mark A. Allred.

Approved sentence: Bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

BURD, EDWARDS, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

BURD, Senior Judge:

On 7-10 November 2000, the appellant was tried by general court-martial composed of officer and enlisted members at McGuire Air Force Base, New Jersey. Contrary to his pleas, he was found guilty of indecent acts upon a male under the age of 16 years, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was found not guilty of forcible sodomy with the same child. His adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1. The appellant initially raised four issues before this Court. This Court decided those issues adversely to the appellant and affirmed the approved findings and

sentence on 28 February 2002. *United States v. McDowell*, ACM 34448 (A.F. Ct. Crim. App. 28 Feb 2002) (unpub. op.). Before the United States Court of Appeals for the Armed Forces (CAAF), the appellant raised his original four issues and six new issues. On 29 October 2002, the CAAF decided that it was appropriate for this Court to consider two of the new issues. *United States v. McDowell*, 57 M.J. 471 (2002). The CAAF set aside our previous decision and remanded the case to us for further consideration in light of their order.

The appellant's first assignment of error before the CAAF was the following:

WHETHER THIS HONORABLE COURT SHOULD REMAND THIS CASE TO THE AIR FORCE COURT OF CRIMINAL APPEALS TO DISAPPROVE THE ADJUDGED FORFEITURES BEFORE IMPLEMENTING THE WAIVER OF FORFEITURES TO ENSURE THAT THE INTENT OF THE CONVENING AUTHORITY IS SATISFIED WHILE FULFILLING THE REQUIREMENTS OF UNITED STATES v. EMMINIZER, [56 M.J. 441 (2002)].

We initially had hoped to resolve this issue without resorting to further post-trial processing. However, a latent ambiguity in the action of the convening authority requires that the action be set aside.¹

The action of the convening authority, dated 28 February 2001, when read alone, appears unambiguous. In relevant part, the action states:

Pursuant to Article 58b, Uniform Code of Military Justice, Section (b), \$1,005 pay per month of the required forfeiture of total pay and allowances is waived for a period of 6 months, release from confinement or upon expiration of term of service whichever is sooner from 24 November 2000. The \$1,005 pay per month is directed to be paid to Janalee McDowell, spouse of the accused, for the benefit of herself and the accused's stepson.

The date, 24 November 2000, is 14 days after the date the sentence was announced. Under the operation of Article 58b(a)(1), UCMJ, 10 U.S.C. § 858b(a)(1) and Article 57(a)(1)(A), UCMJ, 10 U.S.C. § 857(a)(1)(A), 24 November 2000 was the date automatic² and adjudged forfeitures of pay and allowances would have commenced because the date the sentence was approved by the convening authority was thereafter. Art. 57(a)(1)(B), UCMJ.

¹ Given our decision to set aside the action and order new post-trial processing, we need not address the second issue until the record is returned for further review after the new action is taken.

² We note that our superior court refers to automatic forfeitures as mandatory forfeitures. *See Emminizer*.

Six days after his court-martial ended, the appellant, through his trial defense counsel, requested deferment and disapproval of adjudged forfeitures and waiver of automatic forfeitures. On 20 November 2000, the staff judge advocate (SJA), in a written recommendation on the appellant's request, made the following statement: "The convening authority does not have to disapprove adjudged forfeitures in order to waive automatic forfeitures. Any waiver of automatic forfeitures would also apply to adjudged forfeitures." As we know now, by the decision of the CAAF in *Emminizer*, this advice is incorrect. But it is the following statement by the SJA, in the same document, which appears to be the seed of the ambiguity in the convening authority's action.

Upon reviewing the requests made by the accused, we believe this is an appropriate case to waive forfeitures in regards to his current spouse, Janalee McDowell, for a period beginning on the 14th day after the date on which the sentence was adjudged and concluding on the date on which the sentence is approved, but no later than 10 January 2001, which is the accused's ETS. On that date, the accused would no longer be entitled to pay. The monthly amount to be approved is \$1,005, which is the base pay for an E-1. Thereafter, on the date on which the sentence is approved, Janalee McDowell will begin to receive transitional compensation of \$1,103 a month.

The SJA recommended disapproval of the requested deferral. The convening authority followed the recommendation by signing a memorandum dated 21 November 2000. In that memorandum, the convening authority stated:

Pursuant to Article 58b, Section (b), Uniform Code of Military Justice, \$1,005 pay per month of the required forfeiture of total pay and allowances is waived from 24 November 2000 until the date on which the sentence is approved or until 10 January 2001, whichever is sooner. The \$1,005 pay per month is directed to be paid to Janalee McDowell, wife of the accused, for the benefit of herself and the accused's stepson.

While 10 January 2001 is the controlling date for termination of any forfeitures because the appellant was not entitled to pay beyond that date, the action of the convening authority appears broader than his decision of 21 November 2000 on the requested waiver of forfeitures. The SJA recommendation (SJAR) accurately states the convening authority's decision: "On 21 November 2000, you directed that the adjudged and automatic forfeitures of total pay and allowances, in the amount of \$1005.00 per month, be waived from 24 November 2000 until the date action was taken or until 10 January 2001, whichever was sooner." No explanation appears in the SJAR or the addendum for modifying the waiver of forfeitures. While it appears likely that no modification was intended, we decline to make that finding.

The action of the convening authority dated 28 February 2001 is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for a new post-trial recommendation and action. Thereafter, the record of trial will be returned to this Court for further review.

Judge EDWARDS participated in this decision before his retirement.

OFFICIAL

DEIRDRE A. KOKORA, Major, USAF
Chief Commissioner