

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

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**UNITED STATES**

**v.**

**Technical Sergeant ADAM MOORE  
United States Air Force**

**ACM 37452**

**13 December 2010**

Sentence adjudged 07 April 2009 by GCM convened at Yokota Air Base, Japan. Military Judge: Mark L. Allred (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 9 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Marla J. Gillman, and Major Darrin K. Johns.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Major Charles G. Warren, Major John M. Simms, Captain Matthew D. Talcott, and Gerald R. Bruce, Esquire.

Before

**BRAND, GREGORY, and ROAN**  
Appellate Military Judges

**OPINION OF THE COURT**

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

A general court-martial composed of a military judge convicted the appellant in accordance with his pleas of one specification of failing to obey his superior commissioned officer, two specifications of aggravated sexual contact with a child,<sup>1</sup> one

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<sup>1</sup> Specification one of Charge II alleged rape of a child, but the military judge found the appellant guilty in accordance with his pleas of the lesser offense of aggravated sexual contact with a child.

specification of indecent acts with a child under the age of 16 years<sup>2</sup>, and one specification of viewing and receiving child pornography<sup>3</sup> in violation of Articles 90, 120, and 134, UCMJ, 10 U.S.C. §§ 890, 920, 934. The military judge sentenced him to a dishonorable discharge, confinement for nine years, and reduction to the lowest enlisted grade. A pretrial agreement capped confinement at 10 years with no other limitations on sentence, and the convening authority approved the sentence as adjudged. The appellant argues that the convening authority's erroneous correction of his initial Action precludes us from affirming the adjudged dishonorable discharge.

### *Background*

The action of the convening authority referenced in the published court-martial promulgating order approves the sentence adjudged and orders it executed except for the dishonorable discharge. By motion before us, the appellant submits a second signed Action dated the same day that approves the sentence adjudged and orders it executed except for the *bad-conduct discharge*. In a declaration submitted with this other Action, trial defense counsel states that he received it as an attachment to an email that also included the addendum to the staff judge advocate's recommendation, and that two days later he received by email a copy of the Action referenced in the court-martial promulgating order.

A representative of the convening authority's military justice staff states in a separate declaration that the convening authority signed a second Action on the same day as the first that modified the Action to exempt from execution the adjudged and approved dishonorable discharge rather than bad-conduct discharge. She served the corrected Action on the appellant on 13 May 2009. The court-martial promulgating order references only the corrected Action which approves the sentence adjudged and orders it executed except for the dishonorable discharge. The appellant argues that the convening authority could not correct the first signed Action because the corrected Action approves a more severe punishment than the first and that we should, therefore, approve no more than a bad-conduct discharge.

### *Law and Discussion*

The action of a convening authority on an adjudged sentence must be clear and unambiguous. Rule for Courts-Martial (R.C.M.) 1107(d)(1); *United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006). In the event of error or other desired change, a convening authority may modify an Action any time before the accused has been officially notified. R.C.M. 1107(f)(2). He may also recall and modify any Action at any time prior to

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<sup>2</sup> The acts alleged occurred before 1 October 2007. See Punitive Articles Applicable to Sexual Assault Offenses Committed Prior to 1 October 2007, *Manual for Courts-Martial, United States (MCM)*, A27 (2008 ed.).

<sup>3</sup> Specification two of Charge III alleged possession of child pornography, but the military judge found the appellant guilty by exceptions and substitutions in accordance with his pleas of viewing and receiving child pornography.

forwarding the case for review, as long as the modification does not result in action less favorable to the accused than the earlier Action. *Id.* Since the modification in this case clearly occurred before the record was forwarded for review, the validity of the corrected Action depends on whether it resulted in action less favorable to the appellant.

We find the first Action signed by the convening authority ambiguous: He approved an adjudged sentence that included a dishonorable discharge but exempted from execution a bad-conduct discharge. Under these circumstances, we look to the surrounding documentation to determine a convening authority's intent behind a facially ambiguous Action. *Politte*, 63 M.J. at 26 (citing *United States v. Loft*, 10 M.J. 266, 286 (C.M.A. 1981)). Here, the surrounding documentation convinces us that the convening authority intended to approve a dishonorable discharge and exempt it from immediate execution: (1) After announcing the sentence the military judge explained that the pretrial agreement permitted the convening authority to approve the adjudged dishonorable discharge; (2) The staff judge advocate recommended approval of the adjudged sentence; (3) The appellant's clemency submissions do not argue against imposition of the dishonorable discharge but only seek a reduction in the length of confinement; (4) The addendum to the staff judge advocate's recommendation (the one emailed to trial defense counsel with the first Action) again recommends approval of the adjudged sentence which includes a dishonorable discharge; and (5) The corrected Action itself removes the ambiguity by approving the adjudged sentence and exempting the approved dishonorable discharge rather than bad-conduct discharge from execution.

Contrary to the argument of appellate defense counsel, the second Action does not "reflect a greater punishment" but simply clarifies the obvious ambiguity in the first. Therefore, the convening authority properly modified his Action to correct the ambiguity before forwarding the record for review. R.C.M. 1107(f)(2). The initial court-martial promulgating order properly reflects only the corrected Action. Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 10.8.2.4 (21 December 2007) ("When the convening authority modified an Action before publication or before the accused was notified of the action, the initial [court-martial order] reflects only the modified action.").

As Judge Crawford states in her concurring opinion in *Politte*, we find in this case that "[s]everal factors lead one to the common sense conclusion that there was an administrative oversight in the convening authority's action that was not consistent with the intent of the convening authority." 63 M.J. at 27. Once again, lack of attention to detail both in the preparation of the initial Action and in the forwarding of email attachments created an appellate issue where none should have existed. Commendably, however, the declarations show that the error was caught and corrected on the same day before publication, service, and forwarding for review.<sup>4</sup>

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<sup>4</sup> We find no contradiction in the declarations on this point: trial defense counsel states that the second Action he received on 13 May 2009 "*appeared to be back dated*" (emphasis added) to the same date as the first, but the declaration of the convening authority's military justice representative clarifies that the convening authority signed

*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). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over the seal.

STEVEN LUCAS  
Clerk of the Court

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the corrected Action on 11 May 2009 and that she served it on 13 May 2009. *See generally United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).