

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic JERMOND K. NICHOLS
United States Air Force**

ACM S30263

24 October 2003

Sentence adjudged 31 October 2002 by SPCM convened at Spangdahlem Air Base, Germany. Military Judge: Thomas W. Pittman (sitting alone).

Adjudged sentence: Bad-conduct discharge and confinement for 5 months.

Appellate Counsel for Appellant: Major Andrew S. Williams.

Appellate Counsel for the United States: Colonel LeEllen Coacher.

Before

BRESLIN, MOODY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A military judge sitting alone as a special court-martial found the appellant guilty, in accordance with his pleas, of using marijuana on divers occasions in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, striking a female service member in the face with his fist in violation of Article 128, UCMJ, 10 U.S.C. § 928, and resisting apprehension by security forces in violation of Article 95, UCMJ, 10 U.S.C. § 895. The military judge sentenced the appellant to a bad-conduct discharge and confinement for 5 months. There was a pretrial agreement limiting to 4 months the amount of confinement the convening authority would approve.

As required by Article 60(d), UCMJ, 10 U.S.C. § 860(d), the staff judge advocate (SJA) prepared a formal recommendation for the convening authority, and served it upon the defense for review and comment. The SJA recommended that the convening

authority approve the sentence as limited by the pretrial agreement: a bad-conduct discharge and 4 months confinement. The appellant and his counsel submitted a request for clemency, specifically asking that the convening authority further reduce the appellant's confinement to 3 months. The defense did not ask that the convening authority disapprove the bad-conduct discharge.

Thereafter, the SJA prepared an addendum to the earlier recommendation, and advised the convening authority that he must consider the matters submitted by the defense. Inexplicably, the SJA recommended that the convening authority approve the sentence as adjudged, rather than as limited by the pretrial agreement. The convening authority signed the proposed action that stated, in pertinent part, "only so much of the sentence as provides for four months confinement is approved and, except for the bad conduct discharge, will be executed."

Reviewing the action, we find it was unclear what the convening authority intended to approve. The first portion of the language in the action quoted above suggests that the convening authority only intended to approve 4 months of confinement but not the bad-conduct discharge. However, the second phrase relating to the execution of the sentence "except for the bad conduct discharge," suggests that the convening authority intended to approve the bad-conduct discharge. Furthermore, the action provided that the appellant "will be required, under Article 76a, UCMJ, to take leave pending completion of appellate review of the conviction," a requirement which would only be necessary if the bad-conduct discharge was approved. The SJA's recommendation and addendum, while not entirely consistent, recommend approving the bad-conduct discharge.

We conclude that the action of the convening authority is ambiguous. *United States v. McDaniel*, 21 C.M.R. 182, 185 (C.M.A. 1956). According to Rule for Courts-Martial (R.C.M.) 1107(g), we may instruct a convening authority to withdraw an incomplete, ambiguous, or erroneous action and substitute a corrected action. *United States v. Vogle*, 53 M.J. 428 (C.A.A.F. 2000) (summary disposition); *United States v. Scott*, 49 M.J. 160 (C.A.A.F. 1998) (summary disposition); *United States v. Madden*, 32 M.J. 17 (C.M.A. 1990) (summary disposition); *United States v. Otero*, 26 M.J. 546, 549 (A.F.C.M.R. 1988); *United States v. Schiaffo*, 43 M.J. 835, 837 (Army Ct. Crim. App. 1996). Where the convening authority is still in command, it is not necessary to order affidavits to determine his intent. *See United States v. Lower*, 10 M.J. 263, 265 (C.M.A. 1981) ("[S]ome indication of the meaning of the published approval of sentence can only be forthcoming from the authority who drafted it. We decline to lay down a hard rule as to the evidentiary form this need take."). Accordingly, we return the record of trial to the

Judge Advocate General for remand to the convening authority to withdraw the erroneous action and substitute a corrected action and promulgating order. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

OFFICIAL

HEATHER D. LABE
Clerk of Court