

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.E. GEISER, R.G. KELLY, J.L. FALVEY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**SASHA M. DOWIS
AVIATION BOATSWAIN'S MATE (Handler) AIRMAN APPRENTICE (E-2),
U.S. NAVY**

**NMCCA 200700428
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 12 January 2007.

Military Judge: CAPT Dennis Bengtson, JAGC, USN.

Convening Authority: Commanding Officer, USS KITTY HAWK
(CV 63).

Staff Judge Advocate's Recommendation: CDR Michael D.
Lawrence, JAGC, USN.

For Appellant: LCDR Luis Leme, JAGC, USN.

For Appellee: LCDR Guillermo Rojas, JAGC, USN; LT Justin
E. Dunlap, JAGC, USN.

23 October 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, consistent with her pleas, of use and possession of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to a bad-conduct discharge, confinement for 60 days, forfeiture of \$800.00 pay per month for a period of two months, and reduction to pay grade E-1.

In a single assignment of error, the appellant asserts that the convening authority's action disapproved the bad conduct discharge and, therefore, this court lacks jurisdiction to review the case. We have examined the record of trial, the assignment of error and Government's response. We find that the convening authority's action is ambiguous and requires clarification. We will take appropriate action in our decretal paragraph.

Ambiguous Convening Authority's Action

We review questions of jurisdiction *de novo*. *United States v. Tamez*, 63 M.J. 201, 202 (C.A.A.F. 2006). Pursuant to Article 66(b), UCMJ, this court has jurisdiction to review all court-martial cases with an approved sentence that includes a punitive discharge or confinement for one year or more. A convening authority's action reflecting the approved sentence is required to be clear and unambiguous. *United States v. Politte*, 63 M.J. 24, 25-26 (C.A.A.F. 2006). When evaluating the clarity of a convening authority's action, we are limited to consideration of the 4-corners of that action and may not consider matters outside that document. *United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007). If a convening authority's action is found to be "incomplete, ambiguous, or erroneous," this Court is empowered to return the action for clarification or issuance of a corrected action. RULE FOR COURTS-MARTIAL 1107(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

In the instant case, the convening authority's action unambiguously states that "the sentence is approved, **with the exception of the bad conduct discharge**, and will be executed." Special Court-Martial Order No. 08-07 of 18 Apr 2007. We concur with the appellant that the language in the instant case is similar in construction to that appearing in *Wilson*. Our superior court held that the language in *Wilson* effectively disapproved the punitive discharge. *Wilson*, 65 M.J. at 142. We agree that, standing alone, this language appears to disapprove the punitive discharge. We also note, however, that the last paragraph of the action states that "The record of trial is forwarded to Navy-Marine Corps Appellate Review Activity, Washington Navy Yard, 716 Sicard St. SE Suite 1000, Washington, D.C. 20374-5047 **for review under Article 66, UCMJ.**" Special Court-Martial Order No. 08-07 of 18 Apr 2007.

This language unambiguously indicates that the convening authority believed his sentence was such as to trigger this court's Article 66 review jurisdiction. As this language stands in stark contrast to the words cited by the appellant, we find the action is internally inconsistent and must be returned to the convening authority for clarification or issuance of a corrected action in accordance with R.C.M. 1107(g), UCMJ.

We respectfully decline to adopt the course of action articulated by our dissenting colleague which, in our opinion,

would unnecessarily expand our superior court's holding in *Wilson*. Such an expansion would unnecessarily limit the evidence available to reviewing courts attempting to discern a convening authority's intent to only those words appearing within a particular sentence or paragraph of the convening authority's action.

Conclusion

We return the record of trial to the Judge Advocate General of the Navy for remand to an appropriate convening authority for clarification or issuance of a corrected action in accordance with R.C.M. 1107(g), UCMJ. See *United States v. Gosser*, 64 M.J. 93 (C.A.A.F. 2006); *United States v. Lower*, 10 M.J. 263, 265, (C.M.A. 1981). Following completion of this action, the record will be returned to the Court for further review pursuant to Article 66(c), UCMJ.

Judge KELLY concurs.

FALVEY, Judge (dissenting):

In taking his action, the convening authority stated that, "the sentence is approved, with the exception of the bad conduct discharge, and will be executed." Special Court-Martial Order No. 08-07 of 18 Apr 2007. "[W]hen the plain language of the convening authority's action is facially complete and unambiguous, its meaning must be given effect." *United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007). Because I find the plain language of the convening authority's action to be facially complete and unambiguous, I respectfully dissent.

Although the majority finds that the above language "appears to disapprove the punitive discharge," they find ambiguity in the last paragraph of the court-martial promulgating order which states that "[t]he record of trial is forwarded to Navy-Marine Corps Appellate Review Activity, Washington Navy Yard, 716 Sicard St. SE Suite 1000, Washington, D.C. 20374-5047 for review under Article 66, UCMJ." Special Court-Martial Order No. 08-07 of 18 Apr 2007.

In my view, such administrative instructions on disposition of the record of trial are not within the statutory definition of action and, therefore, should not be considered. In his dissent in *United States v. Politte*, 63 M.J. 24, 28 (C.A.A.F. 2006), Judge Erdmann, joined by Judge Baker, noted that Article 60(c), UCMJ, "defines and limits what constitutes an 'action'."

Nothing within the statute includes the administrative disposition of the record of trial as part of the convening authority's action on the findings and sentence. By including the administrative instructions

on disposition of the record of trial within the convening authority's "action", the majority has expanded the definition of "action".

Id. I agree with this reasoning. By going beyond the unambiguous language of the actual "action" and examining the administrative disposition instructions in the promulgating order, the majority exceeds the plain meaning of the statutory definition of "action". I decline to do so and, therefore, I must respectfully dissent.

The terms of the action itself were susceptible to only one interpretation—the punitive discharge was not approved. Accordingly, the action is not subject to R.C.M. 1107(g) which permits corrective action on an ambiguous action. Instead, the case should be remanded to the convening authority for appellate processing consistent with his action.

For the Court

R.H. TROIDL
Clerk of Court