

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

**Before
J.F. FELTHAM, D.E. O'TOOLE, F.D. MITCHELL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DONALD A. SPENCER, JR.
PRIVATAE (E-1), U.S. MARINE CORPS**

**NMCCA 200700496
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 10 January 2006.

Military Judge: Col Reginald Baker, USMC.

Convening Authority: Headquarters and Headquarters
Squadron, Marine Corps Air Station, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col C.J. Woods,
USMC.

For Appellant: LtCol E.C. Durant, USMC; Maj Richard
Belliss, USMC.

For Appellee: Capt Geoffrey S. Shows, USMC.

31 January 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

O'TOOLE, Judge:

Consistent with his pleas, a military judge sitting as a special court-martial, convicted the appellant of one specification of unauthorized absence, one specification of false official statement, one specification of wrongful possession of marijuana, and five specifications of wrongful use of a controlled substance, including four uses of marijuana and one use of ecstasy, in violation of Articles 86, 107, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 907, and 912a. The military judge sentenced the accused to forfeit \$789.00 pay

per month for six months, to be confined for six months, and to be discharged with a bad-conduct discharge (BCD).

Following our corrective action, we conclude the findings and modified sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

The pretrial agreement (PTA) in this case provided that, if a BCD was adjudged, the convening authority (CA) would suspend confinement in excess of 160 days. However, upon the advice of his staff judge advocate (SJA) to remediate more than a year of post-trial delay, the CA issued Convening Authority Action 61-06 on 23 January 2007, which apparently limited confinement and forfeitures to 90 days: ". . . the sentence is approved and except for confinement in excess of 90 days, forfeitures of \$789.00 in excess of 90 days, and the bad-conduct discharge, is ordered executed."

Nearly five months later, without further explanation in the record, the CA withdrew his initial action and issued a second action, Convening Authority Action 61a-06, dated 11 May 2007, the language of which reflected the original 160-day terms of the PTA: ". . . the sentence is approved and, except for the bad-conduct discharge, ordered executed, but the execution of that part of the sentence extending to confinement in excess of 160 days is suspended for a period of 12 months from the date of this action."

Though this case was initially submitted for review on its merits without assigned error, we specified two issues:

- I. Whether SPCMO/Action 61a-06 is a valid modification of SPCM/Action 61-06, or is it a legal nullity?
- II. If SPCMO/Action 61a-06 is a legal nullity, what is the impact of the CA approving the sentence, but not ordering a portion of confinement and forfeitures executed?

The parties concede that the second action was issued after publication of the initial action and, since it purports to increase the active term of confinement and to extend forfeitures from 90 days to 160 days, its execution would result in action less favorable to the accused than the earlier action. As a result, the parties concede the second action is a legal nullity. We agree. RULE FOR COURTS-MARTIAL 1107(f)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

Before moving to consider the second specified issue, we pause to address our jurisdiction. While conceding that this court has jurisdiction pursuant to Article 66(b)(1), UCMJ, the appellant's counsel simultaneously assert that the ambiguity of

the CA's first action is such that, at a minimum, it is unclear whether the bad-conduct discharge was approved. We disagree.

We find that there is no reasonable grammatical construction of the CA's action that would result in disapproval of the punitive discharge. The action states "the sentence is approved *and* except for confinement in excess of 90 days, forfeitures of \$789.00 in excess of 90 days, and the bad-conduct discharge, is ordered executed." The exceptions clause would have been grammatically clearer had it included a comma after the word "and" as appears in the model forms for convening authority actions.¹ Even in the absence of grammatical exactitude, however, the plain meaning of the action is that the CA approved the whole of the sentence, but excepted the listed sentence components from execution. To reach the construction asserted by appellate defense counsel requires the reader to ignore the word "and" and its function setting apart the exceptions clause from the preceding language. Thus, we find that there is no ambiguity with respect to the CA's approval of the adjudged punitive discharge, or his thereafter excepting it from immediate execution, as he should. R.C.M. 1102(a)(2). The phrasing in this case distinguishes it from the CA's actions at issue in *United States v. Politte*² and *United States v. Gosser*.³ The actions in those cases were ambiguous with respect to approval of the punitive discharge. The action in this case is not. We conclude, therefore, that our jurisdiction is properly invoked. Art. 66, UCMJ.

Despite the anomalies in this case, a few things are clear. The appellant was convicted in accordance with his pleas of, *inter alia*, multiple drug offenses. He was sentenced to confinement and forfeitures for six months, but he had a pretrial agreement limiting active confinement and forfeitures to 160 days because he was also adjudged a BCD. After trial, to remediate post-trial processing delay in the appellant's case, the SJA recommended additional sentence reduction by further limiting active confinement and forfeitures to 90 days. The CA's action approved the sentence and implemented the SJA's recommendation, albeit awkwardly. The parties concede that, despite the CA's action, the appellant served 160 days in confinement and forfeited pay for an equal period. We conclude the appellant forfeited more money and was confined for longer than required by the initial -- and only valid -- CA's action. The Government

¹ See Forms for Action #14, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), App. 16, at A16-3.

² ". . . the sentence is approved except for that part of the sentence extending to a bad conduct discharge." *United States v. Politte*, 63 M.J. 24, 25 (C.A.A.F. 2006).

³ ". . . except for the bad-conduct discharge, the sentence is approved and ordered executed." *United States v. Gosser*, 64 M.J. 93, 95 (C.A.A.F. 2006).

concedes as much. At a minimum, we will restore the appellant with regard to the excess sentence served. Before doing so, however, we must address more precisely what the CA's action directed and what relief is proper.

Returning to the plain language of the CA's action, we are unable to follow the freewheeling grammatical construction urged by appellate counsel that yields a conclusion by which no amount of confinement or forfeitures was executed. The action approved the sentence and ordered it executed "except for confinement in excess of 90 days, forfeitures of \$789.00 in excess of 90 days." Regardless, as already noted, the confinement and forfeitures continued under the second CA's action for 160 days.⁴ We will restore the excess 70 days of forfeitures and since we cannot "unserve" the confinement, we will, instead, disapprove the remaining adjudged forfeitures and confinement in excess of 30 days. In doing so, we conclude this adequately redresses the error and we decline counsel's invitation to also disapprove the bad-conduct discharge. That would be an undeserved windfall under the facts of this case.

Finally, this case was tried prior to the date our superior court decided *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), but the case was docketed with this court after that case was decided. We have, therefore, reviewed post-trial delay to the date of the CA's action and the total delay in view of our authority under Article 66(c), UCMJ, and our superior court's guidance in *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); and the factors we articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). We thereafter applied the standards of *Moreno* and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), in assessing the delay incident to docketing this case for appellate review. Having found no evidence of record to explain the delay of more than a year in taking action on a 62-page record and another 150 days to submit the case to this court, we find both segments of the delay, and the total length of the delay, to be unreasonable.

Assuming that this unreasonable delay denied the appellant his due process right to speedy post-trial appeal and review, we conclude that, in view of our corrective action, any due process error is harmless beyond a reasonable doubt. The appellant asserted no right to a timely appeal prior to our specifying the issues in this matter and he has claimed no prejudice, other than the excess sentence, as previously set forth. While the appellant served too long in confinement and forfeited too much pay, our corrective action redresses the excess sentence and there is no claim that the post-trial delay, itself, otherwise caused any particularized anxiety, concern or other specific harm,

⁴ In crafting relief, we find it unnecessary to delve into the details of "good time" or other administrative matters collateral to the sentence adjudged and approved.

distinct from that ordinarily experienced by those awaiting appellate decisions. Finally, we found no error that requires a rehearing at which the appellant could be prejudiced by the delay.

In considering the totality of the circumstances in this case, we conclude that the only prejudice is principally attributable to the second, nullified CA's action, issued during the initial segment of delay, but that it was exacerbated by the continuing delay. Regardless, in view of our corrective action, any due process violation that may have occurred is harmless beyond a reasonable doubt. We also find that the sentence, as modified by our corrective action, is appropriate to the facts and circumstances reflected in the record, and thus, the sentence, as modified, should be approved. We decline to grant any additional relief under our Article 66(c), UCMJ, authority.

Accordingly, the findings of guilty are affirmed. Only so much of the sentence as extends to 20 days confinement and a bad-conduct discharge is affirmed.

Senior Judge FELTHAM and Judge MITCHELL concur.

For the Court

R.H. Troidl
Clerk of Court