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

Before
R.E. VINCENT, J.F. FELTHAM, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

RICHARD L. LAWHORN
AVIATION BOATSWAIN'S MATE AIRMAN (E-3), U.S. NAVY

NMCCA 200600128
SPECIAL COURT-MARTIAL

Sentence Adjudged: 28 February 2002.
Military Judge: CAPT David Price, JAGC, USN.
Convening Authority: Commanding Officer, USS WASP (LHD 1), Norfolk, VA.
For Appellant: CAPT Salvador Dominguez, JAGC, USN.
For Appellee: Maj Tai Le, USMC.

27 February 2009

OPINION OF THE COURT

FELTHAM, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of larceny of military property, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The approved sentence was confinement for 135 days, reduction to pay grade E-1, and a bad-conduct discharge.

The 23 March 2003 action of the original convening authority (CA), stated, in pertinent part, as follows: "In the case of Aviation Boatswain's Mate (Handler) Airman Richard L. Lawhorn, U.S. Navy, . . . the sentence with the exception of the bad conduct [sic] discharge is approved and will be executed." Because the action was deemed ambiguous, this court returned the record to the Judge Advocate General on 24 March 2006, for remand to an appropriate CA to correct the original CA's action.

On 21 April 2006, a successor in command to the original CA took action, approving the sentence as adjudged. His action stated that he "considered the record of trial, the results of trial, the legal officer's recommendation, and the clemency request submitted by defense counsel on behalf of the accused on 9 July 2002."[1] The action did not state whether he consulted with the original CA, and a new legal officer's recommendation was not prepared. The appellant was not afforded a new opportunity to submit clemency matters before the second action was taken.

On 20 June 2007, this court concluded that because of the significant delay between the original action of 23 March 2003, and the 21 April 2006 action the CA erred by not obtaining and considering a new legal officer's recommendation. *United States v. Lawhorn*, No. 200600128, 2007 CCA LEXIS 195, at 6, unpublished op. (N.M.Ct.Crim.App. 20 Jun 2007). This court set aside the 21 April 2006 action, and again returned the record to the Judge Advocate General for remand to an appropriate CA, along with the following instructions:

> If that convening authority decides to clarify the original convening authority's intent in taking the 25 March 2003 action, then the new CA's action shall indicate in the action the means by which the original convening authority communicated his intent to the successor convening authority. Alternatively, if the new convening authority decides to take an entirely new action, that convening authority shall comply with R.C.M. 1105-1107, to include obtaining and considering a new R.C.M. 1106 recommendation, serving that recommendation on the appellant's counsel, and providing the appellant an opportunity to submit clemency matters and comment on the new recommendation.

Id.

On 11 June 2008, pursuant to this court's instructions, the CA formally withdrew the original action of 25 March 2003, substituting for it, in part, the words "the sentence is approved and, except for the bad conduct [sic] discharge, will be executed." The 2008 action stated that the CA considered the record of trial, the results of trial, a new legal officer's recommendation prepared for him on 23 April 2008, and a clemency request submitted by the appellant's defense counsel on 22 May 2008.

The record is now before this court for the third time. Citing the decision of the Court of Appeals for the Armed Forces (CAAF) in *United States v. Wilson*, 65 M.J. 140 (C.A.A.F. 2007), issued on 21 June 2007, one day after this court issued its

[1] Special Court-Martial Order No. 3-02 of 21 Apr 2006 at 1.

opinion in the instant case, the appellant now contends that this court lacks jurisdiction because the original CA's action of 25 March 2003 expressly disapproved his bad-conduct discharge. He also reasserts the remaining assignment of error not yet addressed by this court.[2]

We have carefully considered the record of trial, and the various pleadings of the parties. We agree with the appellant that the plain language of the original CA's action effectively disapproved the adjudged bad-conduct discharge. We will take appropriate action in our decretal paragraph.

The Original CA's Action

In *Wilson*, 65 M.J. at 142, the CAAF found the CA's action clear and unambiguous when it read, in pertinent part, as follows:

> In the case of Hospitalman Sean A. Wilson, U.S. Navy, . . . that part of the sentence extending to confinement in excess of 3 years and 3 months is disapproved. *The remainder of the sentence, with the exception of the Dishonorable Discharge, is approved* and will be executed.

Id. at 140-41 (emphasis added).] Accordingly, "[u]nder the plain meaning of this language, the dishonorable discharge was not approved." *Id*. at 142. In *Wilson*, the words "with the exception of the Dishonorable Discharge" were set off as a parenthetical element, by commas, from the remaining portion of the CA's action. This choice of punctuation had the direct effect of excluding the dishonorable discharge from that portion of the adjudged sentence which the CA approved and ordered executed. In the instant case, the original CA did not set off any portions of his action with punctuation marks. His action stated that:

> the sentence with the exception of the bad conduct [sic] discharge is approved and will be executed.

Therefore, the Government argues that he did not use "facially clear and unambiguous language that excluded the . . . discharge from approval." *Id.* The Government contends that, unlike the action in *Wilson*, this language is more similar to that in the CA's action reviewed in *United States v. Politte*, 63 M.J. 24 (C.A.A.F. 2006), both based of its internal structure and punctuation, and because it is susceptible to two distinct interpretations.

In *Politte*, the convening authority took the following action:

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[2] That unreasonable post-trial delay in the processing of his case has materially prejudiced his substantial right to speedy post-trial review.

> In the case of Hospital Corpsman Second Class Michael J. Politte, U.S. Navy, . . . *the sentence is approved except for that part of the sentence extending to a bad conduct [sic] discharge*.

Politte, 63 M.J. at 25 (emphasis added).

The CA in *Politte* approved the sentence, but failed to order it executed. The CAAF noted that the action suggested the CA intended to disapprove the bad-conduct discharge. However, it also noted that "the surrounding documentation provide[d] ample support for the opposite conclusion: that in fact, the convening authority intended to approve the adjudged bad-conduct discharge." *Politte*, 63 M.J. at 26. Because "the convening authority's action [was] open to two distinct interpretations, both of which have ample support in law and fact[,]" the CAAF concluded it was ambiguous, examined the surrounding documentation[3] and concluded that the CA had intended to approve the punitive discharge. The CAAF then returned the record to the Judge Advocate General of the Navy for submission to the CA for clarification.

The confusion in the instant case arose because the original CA's action failed to clearly articulate the approval or disapproval of the bad-conduct discharge by following the form language for actions when the sentence includes death, dismissal, or a dishonorable or bad-conduct discharge, provided in Appendix 16 of the 2002 edition of the Manual for Courts-Martial.[4] Had the action adhered to the model form, the bad-conduct discharge would have been clearly disapproved, or, assuming the CA intended to approve the bad-conduct discharge, the action would have read, in relevant part, as follows: "In the case of Aviation Boatswain's Mate (Handler) Airman Richard L. Lawhorn, U.S. Navy, . . . the sentence is approved and, except for the bad-conduct discharge, will be executed." By not following the model form, the action appeared ambiguous based upon applicable case law at the time.

We find that the 2008 CA's action was substantially similar to the action at issue in *Wilson*. Applying *Wilson* to the instant case, we find that the original CA effectively disapproved the bad-conduct discharge. Even in the absence of offsetting commas, placement of the exception clause before the word "approved" compels us to conclude that the plain meaning of the action is

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[3] The pretrial agreement allowing the CA to approve a bad-conduct discharge, the staff judge advocate's recommendation that the CA approve the adjudged bad-conduct discharge, the defense clemency request that did not request disapproval of the bad-conduct discharge, and the fact that the CA forwarded the case for appellate review pursuant to Article 66(c), UCMJ.

[4] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) App. 16, at A16-2. Appendix 16 of the 2008 edition of the Manual for Courts-Martial provides current examples of forms as guides for preparing the CA's initial action. Appendix 17 contains forms for later actions.

that the CA approved the sentence, with the exception of the bad-conduct discharge.

Unfortunately, this is not the first time that failure to adhere to the model forms in Appendix 16 has forced an appellate court to interpret a CA's action. In *Politte*[5] and *United States v. Gosser*, 64 M.J. 93 (C.A.A.F. 2006),[6] the actions were found to be ambiguous with respect to the approval of punitive discharges. In *United States v. Dowis*, 66 M.J. 384 (C.A.A.F. 2008), the CAAF held that under the plain meaning of the language in the CA's action, a bad-conduct discharge was not approved in the case of an appellant convicted of use and possession of cocaine.[7]

When an appellate court interprets a CA's action, there is always a risk that the result will not be what the CA intended. "Accordingly, the convening authority must exercise care in drafting the action." *Wilson*, 65 M.J. at 141.

While CAs ultimately bear the responsibility for the action, we recognize that these documents are usually prepared by legal support personnel. Pointing to the result in the instant case as an example, we caution those in the military justice community that they deviate from the model language in Appendix 16 of the Manual for Courts-Martial at their peril, and at the peril of their CA clients. When faced with an action that deviates from Appendix 16, and knowing that adherence to the Appendix generally results in an action whose meaning is unambiguous, this court may ultimately conclude that the use of different language is a deliberate, unambiguous attempt to produce a result other than that which the model language is intended to accomplish.

In light of *Wilson*, we hold that under the plain meaning of the language in the CA's action of 25 March 2003, the bad-conduct discharge was not approved. Because the approved sentence does not include a bad-conduct discharge or confinement for one year, the record of trial is returned to the Judge Advocate General of the Navy for remand to the CA, who shall forward it directly to a judge advocate for review under RULE FOR COURTS-MARTIAL 1112, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). This review shall include a response to each allegation of error made in writing by the appellant, including a response to the appellant's remaining assignment of error alleging that unreasonable delay in the post-trial processing of his case materially prejudiced his

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[5] ". . . the sentence is approved except for that part of the sentence extending to a bad conduct discharge." *Politte*, 63 M.J. at 25.

[6] ". . . except for the bad-conduct discharge, the sentence is approved and ordered executed." *Gosser*, 64 M.J. at 95.

[7] ". . . the sentence is approved, with the exception of the bad conduct [sic] discharge, and will be executed." *United States v. Dowis*, No. 200700428, 2007 CCA LEXIS 435, unpublished op. (N.M.Ct.Crim.App. 23 Oct 2007) at 3, *reversed and remanded, United States v. Dowis*, 66 M.J. 384 (C.A.A.F. 2008).

substantial right to speedy post-trial review. *See* R.C.M. 1112(d)(2).

Senior Judge VINCENT and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court