

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, FLEMING, and WALKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant BRIAN M. WINTERS
United States Army, Appellant

ARMY 20200174

Headquarters, 82d Airborne Division
Christopher E. Martin, Military Judge
Colonel James A. Bagwell, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Kyle C. Sprague, JA; Captain Nandor F.R. Kiss, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Captain Allison L. Rowley, JA (on brief).

21 December 2020

SUMMARY DISPOSITION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

Per Curiam:

On 1 April 2020, a military judge sitting as a general court-martial convicted appellant, consistent with his pleas, of two specifications of selling military property and two specifications of theft of military property, in violation of Articles 108 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 908 and 921 (2018) [UCMJ]. The military judge sentenced appellant to a bad-conduct discharge and confinement for eight months. The convening authority took no action on appellant's sentence and judgment was entered on 12 May 2020.

The sole issue raised on appeal addresses the convening authority's decision concerning appellant's request to waive automatic forfeitures of all pay and allowances. *See* UCMJ art. 58b(b). On 10 April 2020, appellant requested that the convening authority waive automatic forfeitures of all pay and allowances for six months following entry of judgment, to be payable to appellant's dependent spouse,

DN. On 7 May 2020, the convening authority, in a signed memorandum, “approved” appellant’s request. The convening authority took action the same day. In his action, the convening authority again noted that appellant’s request for waiver of automatic forfeitures was “[a]pproved.” However, the convening authority specifically wrote, “Automatic forfeitures in the amount of \$2891.40 pay per month were waived for a period of 6 months, to be paid to [DN].” Unlike the signed memorandum that approved the waiver of pay *and allowances*, the convening authority’s action included only *pay* in the specified amount. On 12 May 2020, the military judge entered judgment, noted the convening authority’s decision to waive automatic forfeitures, and reproduced the language quoted above in the judgment of the court.

Before this court, both parties agree the convening authority’s action, which only waived automatic forfeitures of appellant’s pay in the specified amount, is ambiguous and in conflict with the convening authority’s 7 May 2020 memorandum, which clearly demonstrated the convening authority’s intent to waive the automatic forfeitures of appellant’s pay *and allowances*. Having reviewed the post-trial documents at issue, we agree there is an ambiguity in the convening authority’s action when compared to his 7 May 2020 memorandum. We conclude the convening authority intended to waive automatic forfeitures of appellant’s pay and allowances, not just his pay in the specified amount. Because there is a latent ambiguity between the convening authority’s memorandum and action, we must determine an appropriate remedy.

The parties agree on a proposed solution, specifically, they ask this court to modify the entry of judgment to reflect the convening authority’s intent to waive the automatic forfeitures of appellant’s pay and allowances. Consistent with the arguments of the parties, precedent of our court, and in the interests of judicial economy, we will modify the entry of judgment to reflect the clearly expressed intent of the convening authority rather than remand appellant’s case for a modified entry of judgment. *See United States v. Adney*, 61 M.J. 554 (Army Ct. Crim. App. 2005); Rule for Courts-Martial 1111(c).

On consideration of the entire record, we hold the findings of guilty and the sentence, as entered in the judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED. The convening authority’s action and the judgment of the court are modified by deleting the words “Automatic forfeitures in the amount of \$2891.40 pay per month” and substituting the words “All automatic forfeitures.” This modification to the entry of judgment reflects the convening authority’s clearly expressed intent to waive the automatic forfeitures of appellant’s pay and allowances for a period of six months, beginning upon the entry of judgment, with such funds payable to DN.

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FOR THE COURT:

[REDACTED]

JOHN P. TAITT
Acting Clerk of Court