

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
GALLUP, CHIARELLA, and MAGGS
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 JOSE D. VARGAS JR.
United States Army, Appellant

ARMY 20070361

U.S. Army Combined Arms Support Command and Fort Lee
Theresa A. Gallagher, Military Judge
Colonel Michael E. Sainsbury, Staff Judge Advocate

For Appellant: Colonel Christopher J. O'Brien, JA; Lieutenant Colonel Steven C. Henricks, JA; Major Teresa L. Raymond, JA; Captain Eugene Ham, JA (on brief).

For Appellee: Colonel John W. Miller II, JA; Major Elizabeth G. Marotta, JA; Captain Michael C. Friess, JA, USAR; Captain Sarah J. Rykowski, JA (on brief).

23 June 2008

MEMORANDUM OPINION

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of absence without leave terminated by apprehension (two specifications), wrongful distribution of cocaine (two specifications), and wrongful use of marijuana, in violation of Articles 86, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, and 912a [hereinafter UCMJ]. The military judge sentenced appellant to a bad-conduct discharge, and confinement for twenty-two months. Prior to his court-martial, appellant had entered into a pretrial agreement with the government that limited his confinement to fourteen months.

The convening authority's action reads in pertinent part: "Only so much of the sentence as provides for fourteen months confinement is approved and, except for the part of the sentence extending to a Bad-Conduct Discharge, will be executed." The convening authority also credited appellant with 154 days of confinement against the sentence to confinement. Although not raised by either

party, we conclude that the action is ambiguous because it does not *explicitly* approve the bad-conduct discharge.

Rule for Courts-Martial [hereinafter R.C.M.] 1107(d)(1) requires that the approval or disapproval of an adjudged sentence be “explicitly stated.” *See also United States v. Schiaffo*, 43 M.J. 835, 836 (Army Ct. Crim. App. 1996). “When an action fails to conform to the ‘explicit’ requirement of R.C.M. 1107(d)(1), it is either incomplete, ambiguous, or erroneous” and “the authority who took the . . . action may be instructed by an authority acting under Article 64, 66, 67, or 69 to withdraw the original action and substitute a corrected action.” *Id.* (quoting R.C.M. 1107(g)).

In this case, the convening authority did not take “explicit” action on the adjudged punitive discharge. Because the action is ambiguous on its face, we will return the record of trial to the convening authority for a corrected action which clarifies his intent.

The record of trial will be returned to the same convening authority to withdraw the action, dated 24 July 2007, and to substitute an action in accordance with Article 60(c)-(d), UCMJ, and R.C.M. 1107(g), clarifying his intention as to the discharge. The record of trial will be returned to this court for such further disposition or review as may be required.*



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", written in a cursive style.

MALCOLM H. SQUIRES, JR.
Clerk of Court

* In light of our decision, it is not necessary for us to decide the remaining assignment of error at this time.