

d. SGT Bergdahl's enlistment was extended one year as his 1 October 2011 ETS¹ date approached and he was, as far as the Army knew, still under the control of the Taliban. One year later, while he was still under the control of the Taliban, his enlistment was extended by 10 more years - to 1 October 2022.

e. On 4 August 2010 a Board of Inquiry convened to consider the accused's status. That board recommended that his status remain "missing-captured." The board also discussed whether the accused had violated the UCMJ but ultimately decided to wait until they had an opportunity to interview the accused to reach a conclusion on this issue.

f. The accused returned to military control on 31 May 2014 and his duty status was changed to "present for duty."

g. On or about 14 July 2014, after the accused had gone through medical examination incident to his return to military control and had participated in debriefings by other Army personnel, he was assigned to his present unit and a Flag² was initiated.

h. When the accused was about to be assigned to his unit, LTG Percy Wiggins, Commander of U.S. Army North and 5th Army, received a telephone call from the Secretary to the Army General Staff. He was told that the accused was being assigned to his unit and that he was responsible to take care of the accused but that UCMJ would be retained at a higher level. His SJA, who was present at the conversation, commented that he thought that meant FORSCOM would exercise jurisdiction. LTG Wiggins assumed that was true as well. When the accused came to him the Dahl³ AR 15-6 investigation was still under way. LTG Wiggins did not get involved in the FLAG process. That was done by his BN Commander. LTG Wiggins emphasized that his people focus on re-integrating the accused, making sure that he was safe, and ensuring that he was treated like every other soldier. Though he was aware of significant media attention regarding the accused, he did not pay much attention to it and did not really give their reports of desertion much credit.

i. On 14 July 2014, the accused was counseled by his new battalion commander on the plan to take care of him while the investigation occurred and that he had been FLAGd pending the investigation.

j. On or about 14 July 2014, the accused was put to work as a human resources NCO. He was counseled by his NCO chain of command on what was expected of him and how to conduct himself as an NCO. He has continued to perform these duties while investigations and UCMJ process have occurred.

¹ End Term of Service.

² Suspension of Favorable Personnel Action (Flag), AR 600-8-2.

³ Referring to Major General Dahl, the AR-15-6 investigating officer.

k. On 28 September 2014, MG Dahl completed his investigation and forwarded it to the Director of the Army Staff.

l. On 22 December 2014, the Director took action and forwarded the report of investigation to the FORSCOM commander for action, if any, that he deemed appropriate.

m. On 9 January 2015, the accused was attached to FORSCOM for the administration of military justice.

n. Charges were preferred against the accused and another Flag put in place on 25 March 2015 and, after an extensive Article 32 Pretrial Hearing, those charges were referred to General Court-Martial by the FORSCOM commander on 14 December 2015.

LAW AND ANALYSIS

3. To say that the doctrine of condonation of desertion is an infrequent issue in courts-martial jurisprudence is a great understatement. There is very little case law on the matter, and what does exist is ancient. Nevertheless, the principle of constructive condonation of desertion as a bar to prosecution has been clearly set out in the Manual for Courts-Martial since at least as far back as 1917. *A Manual for Courts-Martial, Courts of Inquiry and of Other Procedure Under Military Law*, Chapter IX, Para. 151, p. 70 (1917). In current day, Rule for Courts-Martial 907(b)(2)(D)(iii) provides that: "Constructive condonation of desertion established by unconditional restoration to duty without trial of a deserter by a general court-martial convening authority who knew of the desertion," is barred from prosecution.

4. For this bar to prosecution to apply, the accused must be restored to full duty by the General Court-martial Convening Authority (GCMCA). *United States v. Linerode*, 11 CMR 262 (CMA 1953). The decision must have been an informed one, that is, the GCMCA must have known of the desertion. *United States v. Scott*, 20 CMR 366 (CMA 1956); *United States v. Merrow*, 32 CMR 739 (CMA 1962). The decision must have amounted to an unequivocal decision by the GCMCA to essentially pardon the accused. *Merrow*, at 743. Finally, the return to duty must be unconditional. *Scott*, at 370. It is not sufficient if someone other than the GCMCA restores the accused to full duty, even if the GCMCA knew of the restoration. *Id.* And, the mere assigning a soldier pending investigation and/or trial with work to do while thus pending is not alone sufficient to constitute a full and unconditional return to duty. *Linerode*, at 271. Every soldier, regardless of his UCMJ status, must be given something useful to do.

5. In this case, LTG Wiggins was a GCMCA. However, it was clear to LTG Wiggins from the moment the accused was assigned to him, that he was not the accused's GCMCA -- that is, Wiggins knew that all UCMJ action over the accused was reserved to a higher level, probably FORSCOM. The case law is not clear that the condoner has to be the GCMCA with authority over the actual desertion offense. However, because condonation acts as a constructive pardon, it is only logical that the GCMCA with authority over the charge being constructively pardoned should be the one whose actions result in the constructive pardon. One cannot condone that which one has no authority to condemn.


6. Next, even assuming, for the sake of argument, that LTG Wiggins had the authority to condemn and condone, he had almost no knowledge of any desertion. By his testimony under oath all he knew of any desertion was that the media had used such words in connection with the accused. He properly discounted that information as unreliable media buzz. What he did know was that MG Dahl was conducting an investigation to get to the bottom of what actually happened. That investigation had just begun when the accused was assigned to LTG Wiggins' command. LTG Wiggins was not the commander in charge of the accused when the events later alleged to constitute desertion are alleged to have occurred. And, DA had told him to not concern himself with anything other than the care and feeding of the accused. As a dutiful Army officer, that is exactly what he did. LTG Wiggins did not have the requisite knowledge of the facts of the alleged desertion required in order to condone it.

7. Finally, it was LTC Fabiano, the accused's battalion commander, not a GCMCA, who restored him to duty by assigning him useful work to do. And, that restoration was not unconditional because LTC Fabiano initiated a Flag on the same day he took charge of the accused and gave him work to do. Furthermore, it would strain reason to suggest that a person in SGT Bergdahl's position in July 2014 should simply be shunted aside to fend for himself for something to do until all investigations and appropriate action had been taken -- no matter what that action turned out to be. If the defense position were to apply, no soldier pending charges for desertion could ever be given work to do while his case was pending or he would be pardoned. That is not logical, economical, smart, practical, or in the best interest of the accused in most cases and certainly not in the best interest of SGT Bergdahl in this case. The accused was returned by his BN Commander not his GCMCA and that return to duty was not unconditional. Even if news reports of what PAO said are true, no PAO officer can restore the accused to duty; and even if he or she did, they are not the GCMCA. Furthermore, there is no evidence any of these people were speaking on behalf of the GCMCA for purposes of condonation of desertion. A statement by a public affairs officer that "He is just another soldier in the U.S. Army" does not mean that the GCMCA has condoned his desertion.

8. The defense argument that because the two Flags were imposed by someone other than the GCMCA and because they were improper FLAGS they have no impact on the issue of condonation of desertion is not well made. It is true that the Flags were not imposed by the GCMCA. However, it is also true that the GCMCA did not return the accused to duty. That action was done by the officer who initiated the July 2014 Flag. It would make no sense for the GCMCA who had not been the person to place duties on the accused to be the person who initiated the Flag. The defense argument that the Flag did not serve as a condition on the accused's duties, ignores the purpose of a Flag. Under this Flag the accused could not be promoted, he could not PCS, he could not ETS, he could not reenlist, he could not be administratively discharged, he could not receive an award for his performance or good conduct, he could not attend military schools, he could not take advance or excess leave, and he could not receive a reenlistment bonus -- just to name a few. If those are not conditions on his duty, then there could be none. The defense contends that the return to duty by the BN Commander should be imputed to the GCMCA but in the same document contends that the conditions placed on that duty should not also be imputed. They are trying to have it both ways. The bottom line, however, is that the accused was not unconditionally returned to duty. He was being investigated for some serious allegations and he and everyone else knew that he was not free to go and needed something to do until everything was resolved. That is what happened. No one, especially not any GCMCA condoned any desertion with which the accused is now charged.

RULING

9. The defense motion to dismiss Charge I for condonation of desertion is DENIED.


JEFFERY R. NANCE
COL, JA
Military Judge