

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

**Before
L.T. BOOKER, E.C. PRICE, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JONATHAN W. BACKER
PRIVATE FIRST CLASS (E-1), U.S. MARINE CORPS**

**NMCCA 200900591
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 13 August 2009.

Military Judge: CAPT Bruce MacKenzie, JAGC, USN.

Convening Authority: Commanding Officer, Headquarters and Service Battalion, Marine Corps Base, Quantico, VA.

Staff Judge Advocate's Recommendation: Col S.C. Newman, USMC.

For Appellant: CDR R.D. Evans, Jr., JAGC, USN.

For Appellee: LT Brian Burgtorf, JAGC, USN.

16 March 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of unauthorized absence and one specification of wrongful use of marijuana, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The appellant was sentenced to confinement for 100 days, reduction to pay grade E-1, forfeiture of \$825.00 pay per month for eight months, and a bad-conduct discharge. The convening authority approved the sentence.

The appellant asserts two assignments of error: (1) that the court-martial order, staff judge advocate's recommendation, and report of results of trial erroneously reflect his plea to the additional charge under Article 112a, UCMJ, and (2) that the convening authority erred by ordering the bad-conduct discharge executed.

After careful consideration of the record and the briefs of the parties, we conclude that the court-martial promulgating order inaccurately reflects the appellant's pleas and order corrective action in our decretal paragraph. Following that action, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Records erroneously reflect the appellant's pleas

At trial the appellant entered pleas of guilty to the charges and specifications, as alleged. Record at 8. Following the plea inquiry the military judge entered findings of guilty to the Charge, but entered findings by exceptions and substitutions to the specification under the Additional Charge. *Id.* at 45. The exceptions and substitutions reflected the exact date and location that the appellant used marijuana. *Id.* The "Report of Results of Trial", staff judge advocate's recommendation, and court-martial order each erroneously reflect that the appellant's plea to the sole specification under the Additional Charge was by exceptions and substitutions.

The appellant asserts this as error, and requests that we set aside the convening authority's action and remand for new post-trial processing. The Government agrees that the promulgating order erroneously reflects the appellant's plea to the specification of the Additional Charge, and that the appellant is entitled to accurate records. However, the Government asserts that in the absence of alleged or apparent prejudice, this court may resolve this error by ordering its correction in the supplemental court-martial order. We agree.

We conclude that the scrivener's errors with respect to the appellant's plea are harmless, as the convening authority was not misled concerning the nature of the offenses in this case or concerning the appellant's voluntary pleas. Nonetheless, the appellant is entitled to have his official record accurately reflect the results of his court-martial. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998); RULES FOR COURTS-MARTIAL 910(a)(1) and 918(a)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). We will direct appropriate corrective action in our decretal paragraph.

**Convening Authority's purported execution of the
bad-conduct discharge is a legal nullity**

The "execution" section of the court-martial action and order states: [i]n accordance with the UCMJ, Rules for Courts-Martial, applicable regulations, the pretrial agreement, and this action, the sentence is ordered executed." Special Court-Martial Order No. 32-2009 of 16 Oct 2009. The appellant asserts this language is "premature," and "erroneous," and that "the prejudice is obvious," and he requests that the convening authority's action and order be set aside. Appellant's Brief of 30 Dec 2009 at 7, 9.

Clearly, the convening authority lacked the authority to order the appellant's punitive discharge executed. Article 71(c)(1), UCMJ; R.C.M. 1113(c)(1)(B). We conclude that "[t]o the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a nullity." See *United States v. Bailey*, No. 10-01021/NA, 2009 CAAF LEXIS 1375 (C.A.A.F. 16 Dec 2009); see also *United States v. Caver*, 41 M.J. 556, 565 (N.M.Ct.Crim.App. 1994). Finding no prejudice, we decline to provide relief based on this assignment of error.

Conclusion

We direct that the supplemental court-martial order accurately reflect the appellant's plea to the specification of the Additional Charge as "G" for guilty. We affirm the findings and the sentence, as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court