

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

**Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**TERRY L. SPENCER, JR.
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201000197
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 18 December 2009.

Military Judge: CDR Douglas Barber, Jr., 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: Maj Justin Constantine, USMCR.

For Appellee: CAPT Jerry J. Bishop, JAGC, USN; LT Brian C. Burgtorf, JAGC, USN.

29 June 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, consistent with his plea, of unauthorized absence, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to confinement for seven months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended confinement in excess of 180 days in accordance with the pretrial agreement.

In his sole assignment of error, the appellant avers that the convening authority's action purports to execute the appellant's bad-conduct discharge awarded at trial. The convening authority approved the sentence, which included a bad-conduct discharge, and then stated, "In accordance with the UCMJ, Rules of [sic] Courts-Martial, applicable regulations, the pretrial agreement, and this action, the sentence is ordered executed." Under Article 71(c)(1), UCMJ, a punitive discharge cannot be ordered executed until, after the completion of direct appellate review, there is a final judgment as to the legality of the proceedings. Thus, to the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

We therefore conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ. Accordingly, we affirm the findings and the sentence.

For the Court

R.H. TROIDL
Clerk of Court