

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

**Before
C.L. REISMEIER, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MARVIN J. GARCIA
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201100352
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 14 April 2011.

Military Judge: Col Michael B. Richardson, USMC.

Convening Authority: Commanding Officer, Headquarters and Support Battalion, Marine Corps Base, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol A.M. Ray, USMC.

For Appellant: CAPT Diane L. Karr, JAGC, USN.

For Appellee: LT Benjamin J. Voce-Gardner, JAGC, USN.

25 October 2011

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of unauthorized absence, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The military judge sentenced the appellant to be confined for 75 days, to be reduced in pay grade to E-1, and to be discharged from the naval service with a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority (CA) approved

the sentence as adjudged, suspended all confinement in excess of time served.

The appellant has raised two errors: first, that the CA erred in ordering the approved sentence, including the bad-conduct discharge, executed in violation of Article 71, UCMJ; and second, that the CA did not consider the defense's clemency request before taking action, in violation of RULE FOR COURTS-MARTIAL 1107(b)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). We find merit in the appellant's second assignment of error, which the Government concedes.

The CA's action dated 29 June 2011 is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority for proper post-trial processing, including preparation and service on the trial defense counsel of a new staff judge advocate's or legal officer's recommendation and an appropriate opportunity for the submission of matters on behalf of the appellant. See R.C.M. 1105-1107. The CA shall then return the record of trial to this court for further review. *Boudreaux v. United States Navy-Marine Corps Court of Military Review*, 28 M.J. 181 (C.M.A. 1989). We have considered the remaining assignment of error and find it moot in view of the corrective action ordered above.

For the Court

R.H. TROIDL
Clerk of Court