

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

**Before
J.A. MAKSYM, J.R. PERLAK, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**EDWARD B. HOXWORTH-SWAIN
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100367
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 13 May 2011.

Military Judge: Maj Robert Palmer, USMC.

Convening Authority: Commanding Officer, Sixth Marine Corps District, Marine Corps Recruit Depot/Eastern Recruiting Region, Parris Island, SC.

Staff Judge Advocate's Recommendation: LtCol E.R. Kleis, USMC.

For Appellant: CAPT Diane Karr, JAGC, USN.

For Appellee: LCDR Matthew T. Schelp, JAGC, USN; LT Benjamin J. Voce-Gardner, JAGC, USN.

31 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 three specifications of violation of a general order or regulation and one specification of making a false official statement, in violation Articles 92 and 107, Uniform Code of Military Justice,

10 U.S.C. §§ 892 and 907. The appellant was sentenced to a bad-conduct discharge, confinement for ten months, and reduction to pay grade E-1. Pursuant to the pretrial agreement, the convening authority (CA) suspended all confinement in excess of 75 days. The CA approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

The appellant raises two assignments of error, averring that a bad-conduct discharge was inappropriately severe and grieving the wording of the CA's action as to the putative execution of that discharge. We decline to grant relief on either assignment of error.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

The appellant was a married Marine serving on recruiting duty, who violated the critical tenets of an oft-drilled general order by carrying on prohibited relationships with teenage high school students, prospective recruit applicants. He misused a government-furnished cell phone to this end. When confronted about the matter, which the students' parents brought to the command's attention, he made a false statement to the officer investigating the matter. After reviewing the entire record, acknowledging the combat service and submissions of the appellant both during and post-trial, we find that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. Granting additional sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority, and we decline to do so. *Healy*, 26 M.J. at 395-96.

As to the second assigned error, to the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. See *United States v. Tarniewicz*, ___ M.J. ___, No. 201100158, 2011 CCA LEXIS 150 (N.M.Ct.Crim.App. 30 Aug 2011).

We 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. The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court