

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOEL D. BRYANT
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201000689
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 19 October 2010.

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: LtCol C.M. Greer,
USMC.

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

For Appellee: Capt Mark V. Balfantz, USMC.

12 May 2011

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 unauthorized absence terminated by apprehension, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to restriction for sixty days, hard labor without confinement for three months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

In the appellant's only assignment of error, he asserts that the CA erred in taking his action when he ordered the approved

sentence, including the bad-conduct discharge, executed in violation of Article 71, UCMJ.¹

After first approving the sentence as adjudged, the CA stated in his action, "In accordance with the UCMJ, Rules for Courts-Martial, applicable regulations, the pretrial agreement, and this action, the sentence is ordered executed. Pursuant to Article 71, UCMJ, the punitive discharge will be executed after final judgment." 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 CA'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). Thus, no remedial action is required.

Furthermore, to the extent that the objectionable language, "Pursuant to Article 71, UCMJ, the punitive discharge will be executed after final judgment," purports to direct anything, it is also a legal nullity. Article 71 is restrictive in its wording (a discharge "may not be" executed until after final action). It is not directive ("will be executed"), as the determination as to whether a discharge "will be" executed cannot be made until after judgment as to the legality of the proceedings, and, in case of death or dismissal, approval under Article 71(a) or (b). If reference to execution after finality is desired, the better practice would be to mirror the language of the statute (although that construct would add nothing legally to the action), or to follow the recommended forms for action in Appendix 16 of the *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.).

We are convinced that the findings and the 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. The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

¹ Appellant's Brief of 15 Feb 2011 at 3.