

**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.**

**TEVON J. MITCHELL  
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201000564  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 29 July 2010.

**Military Judge:** CDR C.D. Stimson, JAGC, USN.

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

**Staff Judge Advocate's Recommendation:** LtCol Chris Greer, USMC.

**For Appellant:** LT James W. Head, JAGC, USN; LT Michael Hanzel, JAGC, USN.

**For Appellee:** CAPT James B. Melton, JAGC, USN; Capt Mark V. Balfantz, USMC.

**22 March 2011**

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

PER CURIAM:

A special court-martial, composed of a military judge alone, convicted the appellant, consistent with his pleas, of absenting himself from his unit without authority from 18 September 2006 until he surrendered on 1 February 2010, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886, and of disobeying a lawful general order by getting a tattoo of his daughter's name on his neck, in violation of Article 92, UCMJ, 10 U.S.C. § 892. The military judge sentenced the appellant to be confined for six months, to be reduced to pay grade E-3, and to be discharged from the Marine Corps with a bad-conduct discharge.

The appellant asserts that, considering his performance and character, his adjudged sentence is inappropriately severe and that we should disapprove the bad-conduct discharge. We disagree.

### **Facts**

When the appellant reenlisted in the Marine Corps in October of 2004, he was promised that he would not have to deploy for at least a year. His reenlistment contract promised "retention on station for 1 year." Nonetheless, seven months later, the appellant found himself in Haditha, Iraq.

Over the course of his career the appellant honorably served three deployments with the Marines, including two successful combat tours in Iraq. The evidence, including the appellant's performance evaluations, reflects that he conducted himself with distinction prior to his unauthorized absence. His performance evaluation from his second tour in Iraq, after he had reenlisted with the unfulfilled promise of a year on station, specifically cited his "tremendous courage after direct mortar attacks" and his "remarkable efforts to make repairs and continue serving chow."<sup>1</sup> These records also indicate that he conducted combat related operations outside his forward operating base and distinguished himself through his leadership and commitment to maintaining unit morale.

In September of 2006, sometime after he returned from this second tour in Iraq, and as his marriage was failing, the appellant was told that he would again be deploying soon. The appellant took 20 days of leave. However, he did not return to duty until February of 2010, when he turned himself over to the Marine Corps. The appellant presents no legal excuse for his unauthorized absence, but instead contends that, considering his character and service, his punishment should be ameliorated and we should disapprove his bad-conduct discharge.

### **Discussion**

The appellant was seemingly justified in feeling deceived as he deployed to Anbar Province in 2004, seven months after being told that if he reenlisted he would not have to deploy for a year. From his perspective, he was promised something by the United States and the United States did not tender specific performance. However, self-help is not an available option for United States Marines who find themselves in a dispute with the Service over an enlistment contract. See *United States v. New*, 55 M.J. 95, 108 (C.A.A.F. 2001) ("There [is] no constitutional right or statutory provision that [gives] an appellant 'authority for a self-help remedy of disobedience.' *United States v. Johnson*, 45 M.J. 88, 92 (C.A.A.F. 1996)").

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<sup>1</sup> The appellant's MOS was in food services.

It is well-settled that a court-martial is free to impose any lawful sentence that it determines appropriate. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). Our determination of sentence appropriateness under Article 66(c), UCMJ, requires us to analyze the record as a whole to ensure that justice is done and that the accused receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). In making this important assessment, we consider the nature and seriousness of the offenses as well as the character of the offender. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). In determining sentence appropriateness, we are mindful that it is distinguishable from clemency, which is a bestowing of mercy and is the prerogative of the convening authority. *Healy*, 26 M.J. at 395.

A bad-conduct discharge is a harsh punishment with serious ramifications, but in this particular case it is not an inappropriate punishment. We reach that conclusion after careful consideration and examination of the record of trial, including documentary evidence and witness testimony regarding the appellant's outstanding character as a dedicated family member and Marine and with a deep appreciation for his combat related service. However, we balance that consideration against the nature of the offenses committed by the appellant. The unauthorized absence for more than three years and four months, by a noncommissioned officer, notwithstanding the claimed underlying rationale for the misconduct, is clearly an offense of a military nature meriting a punitive discharge. RULE FOR COURTS-MARTIAL 1003(b)(8)(C), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

The appellant faced a jurisdictional maximum punishment of one year of confinement, a bad-conduct discharge, forfeiture of two-thirds of his pay for twelve months, and reduction to the lowest enlisted pay grade. After reviewing the entire record, we find the bad-conduct discharge is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 298. Further sentence relief, if granted by this court, would amount to clemency. *Healy*, 26 M.J. at 396.

### **Conclusion**

Accordingly, the sentence, as approved by the convening authority, is affirmed.

For the Court

R.H. TROIDL  
Clerk of Court