

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

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

UNITED STATES OF AMERICA

v.

**CHANCE E. MIXON
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100665
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 24 August 2011.

Military Judge: LtCol Kevin Harris, USMC.

Convening Authority: Commanding General, 1st Marine
Division (REIN), Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Maj V.G. Laratta,
USMC.

For Appellant: LT Kevin Quencer, JAGC, USN.

For Appellee: CAPT M.A. Grover, JAGC, USN; LT Benjamin
Voce-Gardner, JAGC, USN.

30 April 2012

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 plea, of disobeying an order from a superior commissioned officer, in violation of Article 90, Uniform Code of Military Justice, 10 U.S.C. § 890. After the Government elected to proceed to trial on the remaining charge, the appellant was convicted by a panel

comprised of officer and enlisted members of missing movement by design, in violation of Article 87, Uniform Code of Military Justice, 10 U.S.C. § 887. The appellant was sentenced to a confinement for three months, forfeiture of \$491.00 pay per month for 3 months, reduction to pay grade E-1, and a bad-conduct discharge.¹ The convening authority approved the sentence as adjudged.²

The appellant asserts that his sentence is inappropriately severe.³ Appellant's Brief of 28 Feb 2012 at 1. He asks the court to reassess the sentence and affirm a sentence that does not include a bad-conduct discharge. *Id.* at 3.

After carefully considering the record of trial and the pleadings of the parties, we conclude that the findings and sentence, as modified herein, 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.

Background

The appellant was assigned to the 1st Construction Battalion (1st CEB) and received extensive training to be an improvised explosive device (IED) defeat dog handler. 1st CEB was scheduled to deploy to Afghanistan in October 2011. During the pre-deployment process, the appellant became aware that, in order to qualify for deployment, he was required to receive anthrax and smallpox immunizations. However, the appellant initially refused to obtain the required vaccinations, citing religious reasons for his noncompliance.⁴ He later refused them

¹ We note a discrepancy between the sentencing worksheet (Appellate Exhibit XIX) and the announcement of sentence in the record of trial as it pertains to that portion of the sentence extending to forfeiture of pay. Record at 462. AE XIX indicates the forfeitures awarded were to be \$489.00 pay per month for three months, whereas the record of trial indicates the senior member announced "to forfeit \$491.00 per month for three months." *Id.* at 462. There has been no assignment of error from the appellant in regard to this discrepancy. However, we will resolve this discrepancy to the advantage of the appellant in our decretal paragraph.

² 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*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

³ Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

⁴ The appellant had received numerous other immunizations earlier in his career, including Hepatitis A and B, influenza, pneumococcal, polio, yellow

based upon the concerns he had about the alleged yet unsubstantiated medical dangers of vaccines. While medical professionals tried to dispel his fears, the appellant continued to refuse to submit to the mandatory inoculations. The appellant's refusal was reported to his chain of command, which ultimately led to a counseling session and an order from his battalion commander to receive the required immunizations. The appellant thereafter disobeyed his battalion commander's order (Prosecution Exhibit 1) to obtain the mandatory inoculations for the upcoming deployment. This is the order to which the appellant pleaded guilty to violating. As a result of the appellant's failure to obtain all required immunizations prior to the deployment to Afghanistan, the appellant was not medically fit to depart on deployment.

On 12 October 2011, 1st CEB deployed to Afghanistan without the appellant. On 9 November 2011, the appellant appeared at medical and obtained the inoculations he had refused previously.

As an IED defeat dog handler, the appellant had a crucial specialized skill of which his unit was deprived when the appellant intentionally missed his unit's deployment to Afghanistan. 1st CEB was not able to replace the appellant with another dog handler on such short notice. Other IED defeat dog handlers had to fill in for the void created when the appellant failed to deploy with his unit to a war zone, clearly exposing his fellow Marines to greater risk of death or serious bodily injury.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). A court-martial is free to impose any lawful sentence that it determines to be appropriate. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). Sentence appropriateness involves the judicial function of assuring 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). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the 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)). We are mindful that sentence appropriateness is

fever, tetanus-diphtheria, measles-mumps-rubella booster, and meningococcal. Prosecution Exhibit 2; Record at 236.

distinguishable from clemency, which is the prerogative of the convening authority. *Healy*, 26 M.J. at 395.

In this particular case we do not find a bad-conduct discharge to be unjustifiably severe. We reach that conclusion after careful consideration of the entire record of trial, including the evidence presented in extenuation and mitigation, and the matters submitted in clemency. However, we balance that against the nature of the offenses committed by the appellant. Based on our review of the record we find the sentence appropriate in all respects for the offense and this offender.

Conclusion

Only so much of the sentence as provides for confinement for three months, reduction to pay grade E-1, forfeiture of \$489.00 pay per month for three months, and a bad-conduct discharge is affirmed.

For the Court

R.H. TROIDL
Clerk of Court