



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

sn

BJG
Docket No: 6056-02
22 November 2002

SSGT [REDACTED] USMC
[REDACTED]
[REDACTED]

D [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 21 November 2002. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the report of the Headquarters Marine Corps Performance (HQMC) Evaluation Review Board (PERB), dated 27 June 2002, and the advisory opinion from the HQMC Military Law Branch, Judge Advocate Division (JAM7), dated 4 September 2002, copies of which are attached. They also considered your rebuttal letter dated 18 July 2002.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

In this connection, the Board substantially concurred with the comments contained in the report of the PERB and the advisory opinion from JAM7, except the reference, in paragraph 4.b of the JAM7 opinion, to an offense of adultery; and the statement, in paragraph 4.a of this opinion, to the effect that you do not claim you were denied the right to appeal the contested nonjudicial punishment (NJP). They noted that in fact, you do allege that you were not allowed to appeal; however, they were unable to accept this allegation. They were not convinced that your assignment with the United States Border Patrol precluded an appeal. They were likewise unable to find you were denied counsel; that you were not allowed to request a court-martial; or that you were not allowed to question your accuser, present witnesses in your defense, or display the condition of your hands. They were unable to find you were not on the firing line when the incident occurred. They were not persuaded that the

battalion commander, the officer who conducted the NJP, was not objective, even if he did, as you assert, interview recruits before assigning an investigating officer. They did not find it objectionable that the NJP proceedings were conducted at the battalion level, rather than the company level. They noted the provisions you cited from the Legal Administration Manual apply to the Unit Punishment Book, rather than the service record page 12 ("Offenses and Punishments"). Finally, your not having indicated, on the page 12, whether you did or did not wish to exercise your right to refuse NJP did not persuade them that you made no knowing waiver of that right.

Specifically regarding the contested fitness report, the Board was unable to find the reporting senior marked you only on the basis of the incident for which you received NJP. They found nothing objectionable in the comments of the third sighting officer (battalion commander) to the effect he would have marked you lower than the reporting senior did in certain areas. They were unable to find the reviewing officer changed his comments in response to undue influence from the third sighting officer. They found nothing improper about the dates and signing of material associated with the fitness report, regardless of when you were away from the command. Finally, they noted that the report said nothing about revocation of your 8511 military occupational specialty (MOS); on the contrary, item 4.e showed "8511" as your duty MOS.

In view of the above, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

6056-02

IN REPLY REFER TO:

1610
MMER/PERB
JUN 27 2002

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF STAFF
SERGEANT [REDACTED] USMC

Ref: (a) SS [REDACTED] DD Form 149 of 20 Mar 02
(b) MCO P1610.7D w/Ch 1-4

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 26 June 2002 to consider Staff Sergeant [REDACTED] petition contained in reference (a). Removal of the fitness report for the period 980110 to 980507 (CD) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner alleges he was not given the opportunity to appeal the nonjudicial punishment (NJP); that he was not given a chance to present physical facts concerning the situation that resulted in the imposition of NJP; that the report contains an administrative error; and that the Third Sighting Officer's remarks/marks disagree with those of the Reporting Senior. To support his appeal, the petitioner furnishes his own statements and letters from Mr. [REDACTED] Gunnery Sergeant [REDACTED] Staff Sergeant [REDACTED] and [REDACTED].

3. In its proceedings, the PERB concluded that the report is both administratively correct and procedurally complete as written and filed. The following is offered as relevant:

a. The petitioner has provided nothing to support his claim of injustice or that he was denied an opportunity to appeal the NJP (i.e., Unit Punishment Book (UPB)). Succinctly stated, the NJP occurred and was correctly recorded via the performance evaluation system. In this regard, the Board discerns neither an error nor an injustice.

b. The Third Sighting Officer of record was well within his prerogative when he offered his opinion concerning the severity of the petitioner's actions and his belief that lower marks were warranted. Such action is well within the spirit and intent of reference (b).

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF STAFF
SERGEANT [REDACTED] USMC

c. The advocacy statements included with reference (a), while further expanding on the petitioner's performance and accomplishments, do not refute the accuracy of the challenged fitness report.

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report should remain a part of Staff Sergeant [REDACTED]'s official military record.

5. The case is forwarded for final action.

[REDACTED]

Chairperson, Performance
Evaluation Review Board
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

605602
IN REPLY REFER TO:
1070
JAM7

04 SEP 2002

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF STAFF SERGEANT [REDACTED]
[REDACTED] USMC

Encl: (1) Copy of Petitioner's page 12 of 7 May 98

1. We are asked to provide an opinion on Petitioner's request for the removal from his service record book (SRB) and official military personnel file (OMPF) all entries related to the non-judicial punishment (NJP) received on 8 May 1998.

2. We recommend that Petitioner's request for relief be denied. Our analysis follows.

3. Background. On 8 May 1998, Petitioner, a staff sergeant, pay grade E-6, accepted battalion level NJP for failure to obey an order or regulation and cruelty and maltreatment in violation of Articles 92 and 93 of the Uniform Code of Military Justice (UCMJ). Petitioner was awarded a forfeiture of \$400.00 pay per month for a period of 2 months. The forfeiture of \$400.00 pay per month for 2 months was suspended for a period of 3 months. Petitioner elected to not appeal his NJP.

4. Analysis. No legal error occurred in the imposition of NJP. However, Petitioner now claims that the charges were unfounded, unjust, and untrue. As discussed below, Petitioner's claims are without merit.

a. Procedural rights. Because the NJP occurred over 4 years before Petitioner's BCNR application, records are no longer available regarding the NJP proceeding. However, enclosure (1) indicates Petitioner accepted NJP and chose not to appeal its results. Additionally, enclosure (1) also indicates that the Petitioner was given an opportunity to consult with a lawyer. If Petitioner truly believed he was not guilty then he should not have accepted NJP and instead forced the Government to prove his guilt beyond a reasonable doubt at a court-martial. Moreover, if Petitioner believed that his NJP was unjust, then his initial course of action was to appeal his NJP. If appealed, Petitioner's NJP would have been reviewed by the

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF STAFF SERGEAN [REDACTED]
[REDACTED] USMC

General Court-Martial Convening Authority to determine if the punishment imposed was disproportionate or unjust. However, Petitioner did not appeal his punishment and does not claim that he was denied the right to do so.

b. NJP authority's interpretation of the facts. The NJP authority was in the best position to determine the facts surrounding the case. Petitioner claims that there was insufficient evidence to conduct NJP and that he was unable to offer any evidence in his defense. However, it is the NJP authority, not Petitioner, who was responsible for determining whether the preponderance of the evidence supported the offenses ~~of adultery~~. At this time, because there is no longer a documentary record, we are not in a position to reexamine the factual conclusions of the NJP authority.

c. Allegations of misconduct by NJP authority. Petitioner implies that misconduct by the NJP authority, as evidenced by his subsequent relief of duty due to moral and ethical issues, contributed to the unjust NJP. However, no evidence was provided in support of his claim that the Battalion Commander's removal was in any manner related to his NJP.

5. Conclusion. Accordingly, we recommend that the requested relief be denied.

[REDACTED]

Head, Military Law Branch,
Judge Advocate Division