



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

ELP
Docket No. 7787-01
21 February 2002

[REDACTED]

Dear Sergeant [REDACTED]:

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

A three-member panel of the Board for Correction of Navy Records, sitting in executive session, considered your application on 20 February 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 advisory opinions furnished by the Performance Evaluation Review Board, Headquarters Marine Corps (HQMC), dated 26 November 2001, and the Military Law Branch of the Judge Advocate Division, HQMC, dated 27 December 2001, copies of which are enclosed.

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 advisory opinions. Your contention that a statement you provided prior to the imposition of NJP was used against you without first informing you of your rights was in violation of Article 31, Uniform Code of Military Justice is neither supported by the evidence of record nor by any evidence submitted in support of your application. Further, the Board is reluctant to substitute its judgment for that of the commanding officer (CO) who was on the scene, had all of the evidence, heard your version of the events and that of available witnesses. The Board could find no evidence that the CO abused his discretionary authority when he imposed nonjudicial punishment (NJP) on 10 March 2000. Absent such abuse, the Board concluded there was no compelling basis for setting aside the NJP and removing it from your record. Further,

it appeared to the Board that the appeal authority thoroughly and thoughtfully considered the contentions in your appeal, and despite recommendations to the contrary, acted favorably when he suspended the reduction in rank. Since the Board found no basis for removing the NJP, there is also no basis for removal of the contested fitness report. Accordingly, 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

IN REPLY REFER TO:
1610
MMER/PERB
26 NOV 2001

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
[REDACTED]

Ref: (a) Sergeant [REDACTED] DD Form 149 of 20 Sep 01
(b) MCO P1610.7E w/Ch 1-2

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 20 November 2001 to consider [REDACTED]'s petition contained in reference (a). Removal of the fitness report for the period 990702 to 000411 (DC) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner contends the report was prepared by someone who was not his Reporting Senior. Although not specifically stated, the petitioner infers that a Lieutenant Colonel [REDACTED] should have been the Reporting Senior of record since all work related issues pertaining to his duties went directly to that officer. The petitioner also points out that a Sergeant Gomez subsequently replaced him and filled the same billet description and was responsible for the same duties. Yet, Lieutenant Colonel [REDACTED] wrote Sergeant [REDACTED] fitness report.

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 offers absolutely no corroboration or evidence that CW04 [REDACTED] was not his correct Reporting Senior. We find no disclaimer from CW04 [REDACTED], Lieutenant Colonel [REDACTED], or Colonel [REDACTED]. Likewise, there is nothing from Lieutenant Colonel [REDACTED] indicating he should have been the Reporting Senior of record. That Sergeant [REDACTED] was subsequently reported on by Lieutenant Colonel [REDACTED] does not somehow question the validity of the challenged fitness report.

b. What is paramount in this case is the incontrovertible fact that the petitioner was the subject of nonjudicial

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ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF

[REDACTED]

punishment during the stated period. That matter has been correctly recorded via the performance evaluation system.

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

NAME [REDACTED]	SSN [REDACTED]	GRADE E5	RANK DESCRIPTION [REDACTED]	DOR 19960101	COMP USMC	LINEAL NO 00000000	PMOS 0151	AMOS-AMOS 0311 /	GT/GCT 86	PERM GR E5	PERM DOR 19960101
DOB 19680709	DEAF 19910322	PEBD 19910918	AFADBD 19910918	AC NAV BD 19910918	ACC 1ST COMM 19910918	DOR 1ST LDO 19910918	DCADB 19910918	DCTB 19990827	EAS 20020308	OSCD 19950529	CONTRACT LEGAL NONE. ALL RE
DECORATIONS		MILITARY EDUCATION									
NA 2	SGT NON-RESIDENT PROGR SNCO CAREER NONRESIDEN BASIC SECURITY GUARD SGT NON-RESIDENT PROGR MARINE COMBAT TRAINING RIFLEMAN CIVILIAN EDUCATION ARTS, LIBERAL BACCALAUREATE 16 MTACS-38 MACG-38 3RDMAW SPL SCTY: // INFO JT-MOS: Date: 10/05/2001										
										LANGUAGES UNKNOWN	PAGE 1 OF 1

MONITORED COMMAND ORGANIZATION/SCHOOL REPORTING SENIOR	DUTY ASSIGNMENT GRADE TYPE DUTY BILMOS REVIEWING OFFICER	BEGIN END DATE	MISSION CHARACTER				LEADERSHIP				INTELLECT				PROMOTION				REPORT SUMMARY																			
			PER PRO		COU	EFF	INI	LEA	DEV	SET	ENS	COM	PME	DEC	JUD	EVAL RESP	Y	N	NA	ACC	COM ADV	#RPTS @PROC	REL VAL @PROC	#RPTS CUM	REL VAL CUM	RO CONCLUS	Y	N										
			RO:		1/1		0/2	1/3	1/4	4/5	0/6	2/7	0/8																									
USMC RS EASTERN NEWENG CAPT [REDACTED]	ADMIN CLERK SGT N 0151	19980301 19990331	B	B	B	B	B	B	B	B	B	C	B	B	H	X						X			2	N/A	3	80.00	X	FIRep Avg: 2.08	RS Cum Avg: 2.26	RS High: 2.4						
2 USMC RS EASTERN NEWENG CAPT [REDACTED]	ADMINISTRATIVE CLERK SGT N 0151	19990401 19990701	B	B	B	B	C	H	H	C	H	B	D	B	B	H	X						X			3	100.00	3	100.00		FIRep Avg: 2.4	RS Cum Avg: 2.26	RS High: 2.4					
3 MTACS-38 MACG-38 3RDMAW CWO4 [REDACTED]	ADMIN CLERK SGT N 0151	19990702 20000411	B	B	B	B	B	H	H	B	B	B	B	B	A	H	X									X	1	N/A	1	N/A	X	FIRep Avg: 1.9	RS Cum Avg: 1.9	RS High: 1.9				
4 MTACS-38 3D MAW MCAS MIR CWO2 [REDACTED]	ORDERS CHIEF SGT N 0151	20000412 20010331	E	E	E	E	E	E	E	E	E	D	G	D	D	H	X									2	N/A	2	N/A	X	FIRep Avg: 4.92	RS Cum Avg: 4.46	RS High: 4.92					
5 SNCO ACADEMY MCB CAMP GYSGT [REDACTED]	STUDENT SGT A NA	20010626 20010810	H	H	H	H	H	H	H	H	H	H	H	H	H	H	X									X	N/A	N/A	N/A	X	FIRep Avg:	RS Cum Avg:	RS High:					



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

IN REPLY REFER TO:

1070

JAM7

27 DEC 2001

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

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

1. We are asked to provide an opinion on Petitioner's request that his non-judicial punishment (NJP) of 10 March 2000 be removed from his service record book and official military personnel file (OMPF).

2. We recommend that the requested relief regarding removal of the NJP be denied. Our analysis follows.

3. Background

a. On 25 February 2000, Petitioner, a sergeant, pay grade of E-5, was discussing an issue with a lieutenant colonel. Two captains overheard the conversation and joined in. During the conversation, the Petitioner was told by one of the captains, in a loud tone, to "shut up." The Petitioner responded by saying words to the effect "that the conversation was originally between him and the lieutenant colonel and if the captain was going to react that way then the captains should have kept their opinions to themselves." At this point the female captain told the Petitioner to leave her workspace. The Petitioner later approached the female captain and said, "If there is a problem with me you should take me outside and counsel me not yell and try to embarrass me." The two Marines stepped into a hallway and began to discuss the issue. The debate drew attention from other Marines in the workspace. The argument was observed by a Marine staff sergeant who subsequently controlled the Petitioner by ordering him to stand at attention and be quiet.

b. The following Monday, Petitioner was directed by the executive officer to provide a statement, and he did. On 10 March 2000, Petitioner was advised of his Article 31 rights; accepted NJP (acknowledged that he could demand trial); and was afforded the opportunity to consult with counsel. Petitioner received squadron level NJP for disrespect towards a superior commissioned officer, in violation of Article 89 of the Uniform Code of Military Justice (UCMJ). Petitioner was awarded

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IN THE CASE OF [REDACTED]
[REDACTED]

reduction to pay grade E-4, and forfeiture of \$200.00 pay per month for 2 months. The NJP authority suspended the forfeiture of \$200.00 pay per month for 2 months for a period of 6 months. Petitioner appealed. Upon appeal the sentence of reduction in grade was suspended for 6 months.

4. Analysis

a. Petitioner asserts two grounds for the relief he requests. First, he alleges a procedural error in the NJP proceeding in that a statement made by Petitioner was used against him in violation of Article 31, Uniform Code of Military Justice (UCMJ). Second, Petitioner claims that being punished for the incident was an injustice because the officer towards whom he was disrespectful was, "equally to blame." Both claims are without merit.

b. Article 31(a), UCMJ, states, "[n]o person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him." Article 31(d), UCMJ, provides the remedy for statements taken in violation of Article 31 (a): "No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." It cannot be determined, however, based upon the materials provided by Petitioner, whether or not Petitioner's statements concerning the incident in question were taken in violation of Article 31(a). We can, however, determine whether or not the statements were used against Petitioner at a court-martial. They were not; this was not a court-martial. Petitioner's claim is without merit.¹

c. Petitioner's claim that the punishment was an injustice because the officer was "equally to blame" is without merit. Petitioner's statement to the Board, provided as enclosure (2) to his application, provides the factual predicate for a finding of guilty to a charge of disrespect toward a superior commissioned officer in violation of Article 89, UCMJ.

¹ Petitioner also cites § M.R.E 305(c)(2), Manual for Courts-Martial. M.R.E. 305(c), like Article 31, UCMJ, only applies to courts-martial.

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IN THE CASE OF SERGEANT [REDACTED]
[REDACTED] ISMC

Petitioner directly challenged Captain [REDACTED] authority as a Marine officer, "I then asked her, "how am I going to obey a leadership style that was without tact or disregard of my position with the troops."" Petitioner then treated the captain as if he were her superior commissioned officer by imposing a requirement that Captain [REDACTED] listen patiently, without interruption, to Petitioner who audaciously complains that "[s]he [the captain] was trying to interrupt me." Finally, Petitioner admits being unable to show appropriate respect to Captain [REDACTED] "Due to Captain [REDACTED] yelling at me and putting her finger in my face, I found it very hard to render obedience to someone who treated me without any professionalism or with tact. As a result of my anger, I disregarded SSgt [REDACTED] request [to stand at attention for the captain]." In other words, Petitioner refused to come to the position of attention for Captain [REDACTED] in the presence of Captain [REDACTED], at the request of a staff noncommissioned officer. Additionally, Petitioner provides no evidence for Captain [REDACTED] being equally to blame, either in his own statement, or in the statement of the staff sergeant who observed the altercation and asked Petitioner to render obedience to Captain [REDACTED]. Moreover, the standard in evaluating the superior commissioned officer's conduct under Article 89, UCMJ, towards Petitioner, is not whether the superior commissioned officer was "equally to blame," rather the standard is whether or not the officer's behavior amounted to an abandonment of his or her rank. Nothing in either statement comes close. Even Captain [REDACTED] telling Petitioner to shut up does not meet the standard. Telling a subordinate to "shut up" may be rude and offensive, however it does not amount to abandonment of rank - - especially under the facts presented by Petitioner. This claim is without merit.

5. Conclusion. Accordingly, we recommend that Petitioner's request for relief be denied.

[REDACTED]
Head, Military Law Branch
Judge Advocate Division