



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

SMW

Docket No: 9893-07  
7 February 2008

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C. 1552

Encl: (1) Case Summary  
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a member of the Marine Corps, applied to this Board requesting removal of the nonjudicial punishment (NJP) that he had on 8 November 2006, and the adverse fitness report that resulted from the NJP.

2. The Board, consisting of Mr. [REDACTED] and Mr. [REDACTED], reviewed Petitioner's allegations of error and injustice on 6 February 2008, and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, advisory opinion, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application was filed in a timely manner.

c. On 31 August 2004, Petitioner reenlisted in the Marine Corps after four prior periods of honorable service.

d. On 1 October 2006, Petitioner received a non-punitive letter of caution for an alcohol related incident. On 8 November 2006, he had NJP for drunk and disorderly conduct. On 13 November 2006, his appeal was denied.

e. On 17 January 2007, Petitioner received an adverse fitness report due to the NJP, in which his reviewing officer stated in

essence that following an alcohol related incident, an investigation was conducted which resulted in Petitioner receiving a non-punitive letter of caution, and the ESG Commander subsequently directed that Petitioner receive NJP for the same offense.

f. In his application, Petitioner states that he received a non-punitive letter of caution for an alcohol related incident and the command's decision to conduct NJP for the same incident resulted from undue command influence. With his application, Petitioner provided statements from his company commander and sergeant major, who both state that their battalion commander was directed by a superior officer to administer NJP.

g. Attached to enclosure (1) is an advisory opinion from Headquarters Marine Corps, Military Law Branch of the Judge Advocate Division, regarding the removal of Petitioner's NJP that was administered on 8 November 2006, which states, in part, as follows:

...The Reviewing Officer stated in [Petitioner's] 17 Jan 07 fitrep [fitness report] that "the ESG [Expeditionary Strike Group] Commander directed that [Petitioner] receive NJP for his actions and [Petitioner] was subsequently found guilty at BLT Commander level NJP." Further the Sergeant Major, 1st Battalion, 8th Marines and the Company Commander, Alpha Company, 1st Battalion, 8th Marines, both state that their Battalion Commander was directed by a superior officer to take the [Petitioner's] case to Non Judicial Punishment.[sic]

...Per paragraph 1(d)(2), Part V of the [Manual for Courts-Martial CM (2005 Edition)] states, "A commander who is considering a case for disposition under Article 15 will exercise personal discretion in evaluating each case, both as to whether nonjudicial punishment is appropriate, and, if so, as to the nature and amount of punishment appropriate. No superior may direct that a subordinate authority impose nonjudicial punishment in a particular case, issue regulations, orders, or "guides" which suggest to subordinate authorities that certain categories of minor offenses be disposed of by nonjudicial punishment instead of by court-martial or administrative corrective measure, or that predetermined kinds or amounts of punishments be imposed for certain classifications of offenses that the subordinate considers appropriate for disposition by nonjudicial punishment."

...It is illegal for a Commander to direct that a subordinate Commander impose a particular punishment on a servicemember. If either the MEU [Marine Expeditionary Unit] Commander or ESG Commander wished to intervene, they should have withheld disciplinary authority in this case from the Battalion Commander and then initiated disciplinary action at their respective level of authority. Instead it appears that a subordinate commander was directed to effect a desired result. Such interference amounts to unlawful command influence which should be remedied by granting [Petitioner's] requested relief.

h. Attached to enclosure (1) is the Headquarters Marine Corps, Performance Evaluation Review Board's decision letter of 17 January 2008, which removed Petitioner's adverse fitness report dated 17 January 2007.

CONCLUSION:

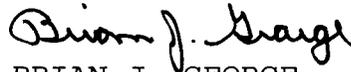
Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants relief. Specifically, the Board concurs with the advisory opinion. Therefore, the Board concludes that the NJP that Petitioner received on 8 November 2006, should be removed from his naval record.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the NJP dated 8 November 2006.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder

  
BRIAN J. GEORGE  
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

  
W. DEAN PFEIFFER  
Executive Director