



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

Docket No: 10555-07
17 March 2009

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

Subj: [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149
(2) HQMC memo 1070 JAM3, 18 May 07
(3) HQMC memo 1070 MIO 20 Sep 07
(4) HQMC memo 1610 MMR/PERB, 19 Nov 07
(5) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner applied to this Board requesting that his naval record be corrected by setting-aside the nonjudicial punishment (NJP) imposed on him on 4 December 2002, and removing the record of the NJP and all documents related thereto from his naval record.

2. The Board, consisting of Mr. [REDACTED], Mr. [REDACTED], and Ms. [REDACTED] reviewed Petitioner's allegations of error and injustice on 3 December 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, 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. Although it appears that enclosure (1) was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner initially enlisted in the Marine Corps on 17 August 1992. He was promoted to staff sergeant, E-6, on 1 April 2000. In an e-mail dated 22 October 2002, Petitioner asked KH, his former fiancée, to return the engagement ring he had given her. She replied that she would do so once he had paid the money he owed her on a (joint) credit card account. On 31 October 2002 the Commanding Officer, Recruiting Station Phoenix, issued a military protective order (MPO) to Petitioner in which he was

ordered to remain a minimum of 1,000 feet from KH; to make no contact with KH through phone, mail, e-mail, internet or third party other than his noncommissioned officer in charge (NCOIC) and Sergeant Major; and to report all contacts/attempts at contact initiated by KH.

d. Petitioner sent an e-mail to KH on 20 November 2002. The body of the message was as follows: "I found my father I just wanted to thank you for all the help in the past that you helped me with in finding him. It helped out. I need to also know the balance for the credit card please." In an undated letter, KH advised Captain W that Petitioner had contacted her by e-mail. Although she did not consider the message threatening, she felt Petitioner had disregarded her wishes as well as the protective order, which caused her to be concerned. She indicated that she did not want to make unnecessary trouble for Petitioner, and that she "just wanted to be left alone". She sent Captain W a copy of the e-mail and asked that he inform her of "what you do". She also asked Captain W to tell Petitioner that the credit card balance was \$5,657.14.

e. On 4 December 2002, while serving as a staff sergeant, Petitioner received NJP for violating a lawful written order, by contacting KH by e-mail on or about 21 November 2002 [sic] in violation of the MPO. The punishment consisted of the forfeiture of \$1,168.00 pay per month for one month, with the forfeiture of \$793.00 of that amount suspended for six months with provisions for automatic remission. On 16 December 2002, Petitioner received and acknowledged an Administrative Remarks, page 11, counseling entry which addresses his violation of the MPO and an unspecified verbal order, as well as a previous page 11 entry he received for failing to be at his appointed place of duty at the time prescribed.

f. On 23 January 2003, Petitioner received a fitness report for the period from 22 June to 31 December 2002. The reporting senior noted that Petitioner had received NJP for violating an MPO issued by his recruiting station commander, and been relieved of his duties as a canvasser recruiter as a result thereof. The reporting senior indicated that an MPO was put in place after Petitioner disobeyed a verbal order to refrain from contacting KH. In his opinion, Petitioner was immature at times, and still developing his leadership skills and traits. He described Petitioner as "extremely technically proficient in systematic recruiting", and a "solid Marine" with the potential to "recover from his past transgression". The reporting senior rated Petitioner as 23 of the 23 staff sergeants he reported on. The reviewing officer assigned Petitioner a rating of "Unsatisfactory" in the Comparative Assessment portion of the report, but described him as a successful recruiter with the

ability to move past his NJP and become a productive staff NCO.

g. In an addendum to the fitness report dated 23 January 2003, Petitioner expressed his regret for his actions during the reporting period and acknowledged that he was wrong to disobey a direct order. He discussed several factors that contributed to his lack of judgment, to include the stresses of recruiting duty, his impending permanent change of station, and his fraught two year relationship with KH, his former fiancée. He stated that since the relationship had been "off and on", he thought they might "get back together again". KH had helped him locate information about his father, whom he had not "known of" for twenty-nine years. When he finally located his father in November 2002, he reacted by contacting KH, and did so without thinking about going through his NCOIC (as required by the MPO). He resolved to think first before he reacts, and to work hard to continue his career in the Marine Corps.

h. In correspondence attached as enclosure (2), the Board was advised by the Head, Military Law Branch, Judge Advocate Division, Headquarters, U.S. Marine Corps (HQMC), in effect, that the Board should reject the application as untimely, as it was filed more than four years after the date of the NJP; Petitioner provides no justification for the untimely submission; and he has failed to make any showing that the interests of justice warrant consideration of the application by the Board. He also recommended that the Board deny Petitioner's request on the merits. He noted that the formal rules of evidence do not apply to NJP proceedings, and that the standard of proof is "preponderance of the evidence" rather than "beyond a reasonable doubt". Petitioner's commanding officer determined that he committed the charged offense, and Petitioner did not appeal the NJP. He has not presented sufficient justification to second guess the officer who imposed the punishment. Petitioner violated the MPO, and admitted in response to adverse comments in a fitness report that he was wrong to disobey the direct order of his commanding officer.

i. In correspondence attached as enclosure (3), the Head, Manpower Management Information Systems Division, HQMC, recommended that the Board disapprove Petitioner's request for corrective action. He advised the Board, in effect, that the counseling entry and MPO in this case are in substantial compliance with governing directives, and that it was reasonable for Petitioner's commanding officer to issue the MPO and counseling entry.

j. In correspondence attached as enclosure (4), the Board was advised by the Chairperson, Performance Evaluation Review Board (PERB), Personnel Management Division, Manpower and Reserve

Affairs Department, HQMC, in effect, that the PERB considered Petitioner's application on 7 November 2007 and determined that the fitness report in question is administratively correct and procedurally complete as written and filed, and that it should remain in Petitioner's official military personnel file.

k. Petitioner contends, in effect, the issuance of an MPO is generally appropriate after an incident of family violence or harassment. There was no violence in this case, and he did not harass KH. The fact that she objected to his request for the return of the engagement ring he had given her did not make the message harassing in nature. She became angry with him and "lashed out to" his command. He was not given the opportunity to rebut KH's allegations, and his commanding officer did not seek out additional information to substantiate the allegations. If Petitioner had been given that opportunity, he would have advised his commanding officer that KH was attempting to turn the Marine Corps against him because she thought he had been mean to her. He believes that had governing directives been followed, the MPO would not have been issued, and he would not have received NJP. He contends that his command allowed itself to be manipulated by KH into doing her bidding with regard to their personal relationship. He maintains it was wrong for a "disgruntled" ex-girlfriend to use a Marine Corps officer to deal with relationship issues, and unjust for his career to be harmed by his commanding officer's failure to exercise sound judgment.

l. Petitioner was promoted to gunnery sergeant, E-7, on 1 July 2008.

CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding the contents of enclosures (2), (3) and (4), the Board concludes that the sanctions taken against Petitioner for violating the provisions of a military protective order were too harsh, and that corrective action is warranted as a matter of clemency.

The Board believes that although Petitioner contacted KH by e-mail in violation of a lawful order, she had invited that contact from him when she indicated she would return an engagement ring to him once their joint credit card debt had been repaid. He sent the e-mail to inform her that their joint effort to find his father had been successful, and to determine the amount of their credit card debt so that he could resolve that issue. The e-mail was sent for an innocent purpose, and it was not threatening or harassing in tone or nature. Petitioner displayed poor judgment by sending the e-mail directly to KH,

rather than through his NCOIC as directed in the MPO, but the punishment he received for doing so is disproportionate to his offense.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by setting aside the nonjudicial punishment he received on 4 December 2002, and by the expunction of all related documents from his naval record and other systems of records where they may be filed, to include a Unit Punishment Book entry dated 3 December 2002, an Administrative Remarks, page 11, counseling entry dated 16 December 2002, and the following fitness report and related material:

Period of report: 20020622-20021231

Occasion of report: DC (CMC directed)

Reporting Senior: [REDACTED]

b. That a memorandum be inserted in Petitioner's naval record in place of the removed report, containing appropriate identifying data concerning the report; that such memorandum state that the report has been removed by order of the Secretary of the Navy in accordance with the provisions of federal law and may not be made available to selection boards and other reviewing authorities; and that such boards may not conjecture or draw any inference as to the nature of the report.

c. That electronic records maintained by Headquarters Marine Corps be corrected accordingly.

d. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

e. That any material directed to be removed from Petitioner's naval record be returned to this Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

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


JAMES R. EXNICIOS
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.


W. DEAN PFEIFFER

Reviewed and approved: Robert T. Cali
3-26-08

ROBERT T. CALI
Assistant General Counsel
(Manpower and Reserve Affairs)

Reviewed and disapproved: _____