



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

SMS
Docket No: 3051-08
2 October 2008

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
[REDACTED]

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

Encl: (1) Case Summary
(2) HQMC JAM3 memo dtd 15 May 08
(3) HQMC PERB ltr dtd 7 Jul 08
(4) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Marine Corps, applied to this Board requesting to remove the nonjudicial punishment (NJP) dated 22 September 2005.

2. The Board, consisting of Ms. [REDACTED], Mr. [REDACTED], and Mr. [REDACTED], reviewed Petitioner's allegations of error and injustice on 1 October 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. Petitioner's application was filed in a timely manner.

c. On 24 August 2005, Petitioner reenlisted in the Marine Corps at age 24 while serving on combat duty with Third Reconnaissance Battalion in Iraq. On or about 11 September 2005, he received a transfer fitness report which

stated in essence that he participated in combat operations, patrols, raids, and was recommended for retention, promotion and assignment to the Defense Language Institute.

d. On or about 11 September 2005, Petitioner was reassigned to Headquarters and Service Company, Third Reconnaissance Battalion, pending disciplinary action for alleged offenses that occurred on 2 September 2005. On 22 September 2005, he had NJP for failure to obey a lawful order, attempt to commit an overt act, forgery, conduct bringing discredit upon the Marine Corps, conduct prejudicial to good order and discipline, wrongfully impersonating an official, and wrongfully passing a curfew exemption to an Iraqi citizen and not admitting to the wrongdoing. Punishment included forfeitures of pay, restriction, and extra duty. On 5 November 2005, he received an adverse fitness report due to having NJP.

e. On 6 November 2005, Petitioner reported to the Defense Language Institute to study Modern Standard Arabic and Iraqi Dialect. On 9 October 2007, he completed the school with a final grade point average of 3.7.

f. In his application, Petitioner states that he was not guilty of the alleged offenses and deprived of his Article 31 rights.

g. With his application, Petitioner provided a letter from the officer who administered the NJP which states, in part, as follows:

...There is, and was at the time, insufficient evidence to support all elements of each charge...

..."giving a fake curfew exemption pass to an Iraqi citizen" - I now know that [Petitioner] gave an Iraqi a handwritten note [sic] that was intended to be a joke between he and the Iraqi. Multiple statements corroborate this... There was no curfew exemption passes so there could be no fake curfew exemption passes.

...[Petitioner] was not a member of my company at the time of the offense. [Petitioner] was transferred to my company after the offense. [Petitioner's] parent command was engaged in combat operations and could not execute Article 15 requirements. As such, I had no prior knowledge of [Petitioner] before this time...

...[Petitioner] had the right to have witnesses present at the NJP proceeding. However, none of [Petitioner's] witnesses were available, due to combat operations, to make statements on [Petitioner's] behalf...

...Upon speaking to a defense counsel, [Petitioner] was advised that he could refuse NJP, but would undoubtedly be placed on legal hold until a trial by court-martial. It is my belief that [Petitioner] made the decision to accept NJP for offenses he did not commit, so that his school seat would not be jeopardized.

h. With his application, Petitioner provided a letter from his defense counsel which states, in part, as follows:

...I represent [Petitioner] in my capacity as a defense counsel. On 22 September 2005, [Petitioner] was subjected to a non-judicial [sic] punishment hearing that resulted in an unjust conviction and punishment. The non-judicial [sic] punishment was reported in a Unit Punishment Book entry and an adverse Fitness Report [sic] - the bases of which are also unjust...

...[The officer who presided over the NJP] joins this request...

i. Attached as enclosure (2) is an advisory opinion from the Headquarters Marine Corps Military Law Branch, Judge Advocate Division, which states, in part, as follows:

...[Petitioner] has sufficiently demonstrated that his Company Commander lawfully requested the removal of [Petitioner's] NJP...

...We recommend that [Petitioner's] OMPF [official military personnel file] be corrected to remove the NJP imposed on 22 September 2005...

j. As evidenced by enclosure (3), on 7 July 2008, the Headquarters Marine Corps Performance Evaluation Review Board removed the adverse fitness report that Petitioner received on 7 March 2006.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concurs with the recommendation provided by the advisory opinion. In this regard, the company commander who administered the NJP lawfully requested removal of it. Accordingly, the Board concludes that Petitioner's record should be corrected by removing the NJP dated 22 September 2005.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the NJP dated 22 September 2005, as well as the punishment imposed.

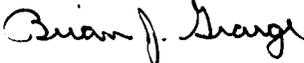
b. That Petitioner's naval record be further corrected by removing all subsequent adverse documents that resulted from the NJP.

c. 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.

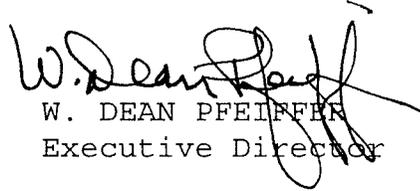
d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

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


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