



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

BJG  
Docket No: 3433-08  
2 September 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 dtd 12 Dec 05 w/attachment
  - (2) HQMC MMR/PERB memo dtd 15 Jul 09
  - (3) HQMC JAM3 memo dtd 16 May 06
  - (4) HQMC MMR-2 memo dtd 31 May 06
  - (5) HQMC MIO memo dtd 2 Nov 07 w/encl
  - (6) Subject's ltr dtd 29 Jun 06 w/attachment
  - (7) Counsel's ltr dtd 30 Jun 06
  - (8) Memo for record dtd 26 Aug 09
  - (9) HQMC MMR-2 e-mail dtd 27 Aug 09
  - (10) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected by changing his primary military occupational specialty (PMOS) to 0351 (infantry assaultman); removing the adverse fitness report for 15 September 2002 to 13 March 2003, a copy of which is at Tab A (enclosure (2) shows the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) has directed removing this report); removing the service record page 11 ("Administrative Remarks (1070)") entries dated 18 December 2002 (two), 12 January 2003 (two) and 9 March 2003 (four), copies of which are at Tab B; promoting him to staff sergeant (pay grade E-6) effective 9 February 2003 (and by implication, setting aside his reduction from sergeant (pay grade E-5) to corporal (pay grade E-4) by action of a competency review board (CRB)) and setting aside his resulting removal from the Calendar Year (CY) 2002 Reserve Staff Sergeant Selection List); removing adverse entries from his medical record (the Board did not consider this request, as his medical record reflects no such entries); providing him a copy of his medical record (the Board did not consider this request, as it is not the custodian of his medical record); removing adverse

coding from his DD (Department of Defense) Form 214 ("Certificate of Release or Discharge from Active Duty") (the Board did not consider this request, as his DD Form 214 reflects no such coding); and removing documentation of the CRB (the Board did not consider this request, as his record reflects no documentation of the CRB).

2. The Board, consisting of [REDACTED] and [REDACTED] reviewed Petitioner's allegations of error and injustice on 26 August 2009, and pursuant to its regulations, determined that relief should be granted. Documentary material considered by the Board consisted of the enclosures (except enclosure (9)), 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 which were available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. In December 2002, Petitioner's Selected Marine Corps Reserve unit attempted to take nonjudicial punishment (NJP) action against him for alleged violations of Articles 80 (attempts) and 107 (false official statement) of the Uniform Code of Military Justice. After he had refused NJP and demanded trial by court-martial, the unit convened a CRB on 9 February 2003, charging him with unsatisfactory reserve participation/performance and TNPQ (temporarily not physically qualified) non-compliance. As a result of the CRB, he was reduced from sergeant to corporal. Because of this administrative reduction, he was removed from the CY 2002 Reserve Staff Sergeant Selection List. He was transferred to the Individual Ready Reserve on 13 March 2003 and discharged from the Marine Corps Reserve on 3 September 2003.

d. After investigation of Petitioner's unit, both the inspector-instructor (I-I) and the first sergeant received adverse fitness reports. The I-I was transferred on 4 January 2004 with an adverse transfer fitness report; and he has since resigned. The first sergeant, who was relieved of his duties on 4 June 2004, retired on 31 October 2004. His adverse fitness report stated "Relieved for failing to take care of Marines and accomplish duties of a First Sergeant. Most tangible accomplishment was crushing the morale of all within

his unit." These individuals were two of the three members of Petitioner's CRB.

e. Petitioner contends that his medical records were tampered with or destroyed, that the CRB was improperly used as a substitute for a failed disciplinary action, that two of the three members of the CRB were biased against him, that he had no reserve members on the CRB, that he did not have an adequate opportunity to prepare his defense, that his attorney was not permitted to appear, and that the allegations against him were unfounded. He provides supporting statements testifying that he was charged for unauthorized absence when he was actually present.

f. In enclosures (3) and (4), the HQMC Military Law Branch, Judge Advocate Division and the HQMC Enlisted Promotion Section commented to the effect that Petitioner's request to set aside his administrative reduction to corporal and promote him to staff sergeant should be denied.

g. In enclosure (5), the HQMC Manpower Information Operations, Manpower Management Information Systems Division (MIO) has commented to the effect that Petitioner's request to remove the page 11 entries should be approved. MIO felt that he should have been assigned PMOS 0351, but that since he is no longer in the Marine Corps Reserve, action granting him that PMOS is not required.

h. In enclosures (6) and (7), Petitioner and his counsel replied to the unfavorable advisory opinions at enclosures (3) and (4).

i. Enclosure (8) reflects the basis for the HQMC PERB decision to remove the adverse fitness report for 15 September 2002 to 13 March 2003.

j. The governing CRB directive, Marine Corps Order 1400.32C, Volume 2, paragraph 4.a(5)(a), provided that a CRB for a reserve Marine shall include a majority of reservists, if reasonably available.

4. Enclosure (9) verifies that 1 February 2003 (not 9 February 2003, the date Petitioner requested) is the date of rank Petitioner would have received, but for his removal from the CY 2002 Reserve Staff Sergeant Selection List.

CONCLUSION:

Upon review and consideration of all the evidence of record, notwithstanding enclosures (3) and (4), and in concurrence with enclosure (5), the Board finds an injustice warranting full relief.

The Board agrees with Petitioner that the CRB was an improper substitute for a failed disciplinary action. Further, the Board doubts the reliability of the CRB's findings, since two of its three members were the I-I and first sergeant whose credibility has been called into question by subsequent investigation. The Board also doubts that no reserve Marine was reasonably available to sit on the CRB. Finally, the Board is particularly troubled by the evidence that Petitioner was wrongfully charged with unauthorized absence. For all of these reasons, the Board finds his reduction by the CRB should be set aside.

The Board finds that but for Petitioner's unjust reduction by the CRB, he would not have been removed from the CY 2002 Reserve Staff Sergeant List, but would have been promoted to staff sergeant [per enclosure (9), the date of rank and effective date he would have received is 1 February 2003].

The Board agrees with enclosure (5) in finding Petitioner's requests regarding the page 11 entries and PMOS should be approved.

In view of the above, the Board recommends the following corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show he was not reduced from sergeant to corporal on 9 February 2003.

b. That his record be corrected further to show he was not removed from the CY 2002 Reserve Staff Sergeant Selection List, but was promoted to staff sergeant with a date of rank and effective date of 1 February 2003.

c. That his record be corrected further by removing the service record page 11 ("Administrative Remarks (1070)") entries dated 18 December 2002 (two), 12 January 2003 (two) and 9 March 2003 (four). This is to be accomplished by physically removing the page 11's on which the entries appear, or

completely obliterating the entries so they cannot be read, rather than merely lining through them.

d. That his record be corrected further to show that when he was discharged from the Marine Corps Reserve on 3 September 2003, he held PMOS 0351.

e. That any material or entries 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.

f. 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.

5. 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

*Jonathan S. Ruskin*  
JONATHAN S. RUSKIN  
Acting Recorder

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

*W. Dean Pfeiffer*  
W. DEAN PFEIFFER

Reviewed and approved:

*Robert T. Call*  
9-3-09

**Robert T. Call**  
Assistant General Counsel  
(Manpower and Reserve Affairs)