



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

LCC
Docket No. 11627-08
23 Nov 09

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD ICO
[REDACTED]

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

Encl: (1) DD Form 149 w/attachments
(2) NMCCA 200500985 decided 24 Apr 07
(3) Excerpt from DoD Instruction 1332.29 of 20 June 1991
(4) Appendix B of Enlisted Retention and Career Development Manual
(5) CMC 1040 MMEA of 14 Sep 09
(6) Excerpts from Petitioner's Military Personnel File

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, that the applicable naval record be corrected to show Petitioner is entitled to payment of involuntary separation pay when he was discharged on 30 July 2008.

2. The Board, consisting of Messrs. George, Pfeiffer, and Zsalman reviewed Petitioner's allegations of error and injustice on 26 October 2009 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. Prior to filing enclosure (1) with this Board, Petitioner exhausted all administrative remedies afforded under existing law and regulations within the Department of the Navy.

b. Petitioner enlisted in the Marine Corps in November 1997 for a term of 4 years and reenlisted in October 2001 for a term of 4 years.

c. On 28 August 2002, Petitioner participated in a close quarters Battle (CQB) exercise at the Military Operations in Urban Terrain (MOUT) aboard Marine Corps Base, Camp Pendleton, CA. The Petitioner and other Marines fast-roped from helicopters onto the roof of a building at the MOUT facility, breached their way into the structure, and proceeded to clear it. The building was defended by a force of "aggressor" Marines.

d. Prior to the exercise, Petitioner and other members of the assault force were ordered to remove all live rounds from their small arms magazines and to refill their magazines with blank ammunition. They were ordered not to carry live ammunition on the exercise.

e. Petitioner negligently commingled magazines containing blank ammunition and magazines containing live rounds, inserted a magazine containing live rounds into his M4A1 assault rifle, and failed to inspect his weapon to ensure it only contained blanks. During the exercise, he pointed his M4A1 assault rifle at [REDACTED] and fired several rounds of live ammunition at [REDACTED] thereby killing him.

f. In July 2003 Petitioner pled guilty at a General Court-Martial to a violation of Article 134 of the UCMJ (negligent homicide) specifying that he negligently and unlawfully killed [REDACTED]. Petitioner was sentenced to 18 months confinement at hard labor (CHL), forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad conduct discharge (BCD). The convening authority suspended all confinement in excess of 12 months in accordance with a pretrial agreement. He also granted clemency by disapproving the adjudged forfeitures and waiving automatic forfeitures for six months from the date of his action.

g. Petitioner then appealed the findings and sentence to the US Navy-Marine Corps Court of Criminal Appeals (NMCCA). Among other things, he averred that the military judge had erred

at the court-martial by excluding mitigating testimony about Petitioner's good military character and by excluding extenuation testimony about circumstances that surrounded the commission of the negligent homicide. The NMCCA agreed with Petitioner that the military judge had erred by excluding evidence in extenuation and mitigation and, moreover, found that the "excluded testimony may have substantially influenced the adjudged sentence." Accordingly, the NMCCA set aside the sentence and returned the case to the Judge Advocate General for remand to the convening authority for a rehearing on the sentence. Enclosure (2).

h. On 5 December 2007, a court-martial comprised of members with enlisted representation adjudged the following sentence: Reprimand and reduction to pay grade E-4. On 20 May 2008, the Convening Authority approved the sentence as adjudged.

i. On 30 July 2008, Petitioner was separated from active duty with an Honorable Discharge. He was an E-4 with over 10 years and 7 months of total service and was ineligible for retention due to Enlisted career force controls. A DD 214 (Certificate of Release or Discharge from Active Duty) was prepared at the time of Petitioner's separation. Blocks 26 (Separation Code) and 28 (Narrative Reason for Separation) of the DD 214 read "KBK1" and "Completion of Required Active Service" respectively. Block 27 (Reentry Code) reads "RE-1A."

j. On 2 December 2008, Petitioner submitted an application to this Board requesting a change to his record that would entitle him to involuntary separation pay.

k. The purpose of involuntary separation pay is to ease the transition to civilian life for career Marines who have been forced out of the service when the Marine is denied the opportunity for further service. Involuntary separation pay in this instance is governed by DoD Instruction 1332.29 of 20 June 1991 (Enclosure 3) and Appendix B of the Enlisted Retention and Career Development Manual (Enclosure 4).

l. In correspondence attached as enclosure (5), the Commandant of the Marine Corps (Code MMEA), which is the office having cognizance over the subject matter involved in Petitioner's application, recommended that Blocks 26 and 28 of the DD 214 be changed to "JGH3" and "INVOL DISCH (NON-RET ON

ACDU) HIGH YR TEN." ¹ The change, if approved, would have the effect of entitling Petitioner to one-half separation pay in accordance with the guidance found in Appendix B of the Enlisted Retention and Career Development Manual (Enclosure 4). CMC Code MMEA notes that the actual reason Petitioner was involuntarily discharged was because he was ineligible for further retention due to enlisted career force controls. CMC Code MMEA reasons that a separation code of "JGH3" and a narrative reason of "INVOL DISCH (NON-RET ON ACDU) HIGH YR TEN" provides a more accurate description of the true reason that Petitioner was separated than do the descriptors currently reflected on his DD 214. Additionally, CMC Code MMEA reasons that because Petitioner's separation was involuntary², Petitioner should be entitled to one-half separation pay.

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, a majority of the Board, consisting of Mr. Pfeiffer and Mr. Zsalman agree with the advisory opinion and recommend that the separation code and narrative reason be changed on Petitioner's DD 214 in order to entitle Petitioner to one-half separation pay. The majority accepts CMC's view that the actual reason Petitioner was discharged was because he was ineligible for further retention due to enlisted career force controls. The majority finds that Petitioner's DD 214 should accurately reflect that reason. Moreover, because Petitioner's separation was involuntary, the majority finds that Petitioner should be entitled to one-half separation pay as prescribed by Appendix B of the Enlisted Retention and Career Development Manual, in order to ease the transition to civilian life.

¹ CMC Code MMEA also recommended that Block 27 (Reentry Code) of the DD 214 be changed from "RE-1A" to "RE-1B." However, that change was not requested by Petitioner and could be considered to be adverse to the Petitioner. This Board is constrained from making recommendations that are adverse to a member. Accordingly, no action is recommended regarding Block 27 of the DD 214.

² Separation Code "KBK1" and Narrative Reason "Completion of Required Active Service" are descriptors that are used in circumstances when a member separates voluntarily at the completion of his/her standard enlistment contract. Service members properly separated with those descriptors are not entitled to involuntary separation pay under the governing regulations.

MINORITY CONCLUSION:

A minority of the Board, Mr. George, recommends that Petitioner's request for payment of separation pay be denied. In Mr. George's view, involuntary separation pay is intended to assist career Marines and is only payable to individuals who have more than six years of active service. He notes that although Petitioner had over ten years and seven months of total service, his misconduct occurred when he had only five years of service. More importantly, Mr. George notes that under the provisions of DoD Instruction 1332.29 in extraordinary cases the Secretary may determine that the conditions under which the member is separated do not warrant separation pay. In Mr. George's view, the instant case is extraordinary. Many members fail to progress in rank at a pace necessary to remain within enlisted career force controls. However, it is rare for a member to fail to advance in rank because of a conviction at a General Court-Martial and even more rare to so fail because of an offense as serious as the one Petitioner was convicted of here. In Mr. George's view, the serious nature of the offense that ultimately led to Petitioner's separation for exceeding enlisted career force controls is sufficient to warrant the extraordinary circumstances such that separation pay should be denied. And to pay separation pay to Petitioner under these circumstances would be a disservice to the memory and family of

MAJORITY RECOMMENDATION:

That Petitioner's naval record be corrected, where appropriate, to show that:

- a. Petitioner was authorized payment of one-half separation pay when he was discharged from the Marine Corps on 30 July 2008.
- b. Block 26 of Petitioner's DD Form 214 reads "JGH3" vice "KBK1".
- c. Block 28 of Petitioner's DD Form 214 reads "INVOL DISCH (NON-RETENTION OF ACDU) HIGH YR TEN" vice "COMPLETION OF REQUIRED ACTIVE SERVICE".

d. That any additional relief, as exceeds the foregoing, be denied.

MINORITY RECOMMENDATION:

Petitioner's request for payment of separation pay be denied.

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.



WILLIAM J. HESS, III
Acting Recorder

ROBERT D. ZSALMAN
Recorder

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



W. DEAN PFEIFFER

The majority recommendation is approved.



12/14/09

Assistant General Counsel
(Manpower and Reserve Affairs)