



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

REC
Docket No: 06628-09
27 October 2009

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

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

Ref: (a) 10 U.S.C. 1552
(b) Manual for Courts-Martial

Encl: (1) DD Form 149 with attachments
(2) Case summary
(3) HQMC JAM6 memo dtd 18 Aug 09
(4) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Marine Corps, filed enclosure (1) with this Board requesting reinstatement of his rank of sergeant, (pay grade E-5) effective 5 November 1975.

2. The Board, consisting of Ms. [REDACTED], Mr. [REDACTED] and Mr. [REDACTED] reviewed Petitioner's allegations of error and injustice on 15 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. Before applying to the Board, Petitioner exhausted all administrative remedies available under existing law and regulation 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 enlisted in the Marine Corps and began a period of active duty on 19 April 1972, at age 22. He served without disciplinary incident until 15 October 1975, when he received nonjudicial punishment (NJP) for failure to obey an order or regulation. Specifically, he was found guilty of possessing alcoholic beverages in the barracks. He was awarded a forfeiture of \$345.00 pay and reduction to corporal (pay grade E-4) but punishment was suspended for six months.

d. On 7 November 1975, Petitioner was again charged with failure to obey an order or regulation, specifically, failure to obey the lawful order of a staff sergeant to "take part in what the platoon was doing" on 3 November 1975. Petitioner's suspended reduction in rank to corporal was vacated on 5 November 1975, based on this alleged misconduct. The charge was referred to a summary court-martial (SCM). On 16 December 1975, the SCM found Petitioner not guilty.

e. Enclosure (3) is an advisory opinion from the Headquarters Marine Corps Military Law Branch, Judge Advocate Division (JAM6), recommending that Petitioner's request for reinstatement of his pay grade be denied. JAM6 points out that the suspended punishment from the NJP of 15 October 1975, was vacated on 5 November 1975, two days after Petitioner committed the offense for which the SCM was convened. Under the authority of reference (b), a commanding officer has broad authority to vacate a suspended punishment from a prior NJP. JAM6 believes that if the commanding officer, in this case, vacated the suspended punishment due to the events of 3 November 1975, he was well within his authority to do so, and the not guilty finding of the SCM does not invalidate his decision.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action, notwithstanding the advisory opinion. Although the not guilty finding at the SCM does not automatically invalidate the decision to vacate the suspended NJP, the Board believes that under the circumstances of this case the interest of justice would be better served by correcting the record to show that Petitioner was not reduced to corporal on 5 November 1975, but continued to serve as a sergeant until his discharge on 3 June 1976.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not reduced to corporal on 5 November 1975, but continued to serve as a sergeant until his discharge on 3 June 1976.

b. 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.

c. 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
BRIAN J. GEORGE
Acting Recorder

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

W. Dean Pfeiffer
W. DEAN PFEIFFER
Executive Director

Reviewed and approved:

Plasomeier 11/4/09
Acting AEC (MARA)