



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

JSR
Docket No. 7838-10
14 April 2011

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

Subj: [REDACTED]

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

Encl: (1) DD Form 149 dtd 4 Mar 10 w/attachments
(2) HQMC MMR/PERB memo dtd 9 Jun 10
(3) HQMC JAM5 memo dtd 31 Mar 10
(4) HQMC MMR e-mail dtd 5 Aug 10
(5) MCRC memo dtd 14 Sep 10 w/enclosures
(6) HQMC MIO memos dtd 21 Oct and 1 Nov 10
and 10 Mar 11
(7) Subject's ltr dtd 7 Apr 11
(8) 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 the applicable naval record be corrected by removing the fitness report for 1 April to 10 August 2009 (copy at Tab A). Enclosure (2) shows that the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) has directed removing this report. He further requested removing references to the nonjudicial punishment (NJP) of 10 August 2009 (copies of unit punishment book (UPB) entry and Petitioner's NJP appeal statement dated 13 August 2009, all of which HQMC has administratively removed, at Tab B). He also requested setting aside his relief for cause (RFC) from recruiter duty (copy of first endorsement dated 21 September 2009 on Commanding Officer (CO), Recruiting Station (RS) Orange, California letter of 25 August 2009, requesting Petitioner's RFC, as modified by HQMC by removing the references to Petitioner's grade of corporal to which he was reduced and the sentence expressly referencing his NJP, at Tab C). In addition, he requested removing, from the Marine Corps Total Force System (MCTFS), the draw case code "AO" (relieved from recruiter duty for cause). He also requested removing two service record page 11 ("Administrative Remarks (1070)") entries dated 31 July 2009,

one concerning arrest on suspicion of driving under the influence of alcohol (DUI) and failure to notify the command, and the other concerning ineligibility for promotion pending adjudication of civil charges (copy at Tab D) and two dated 10 August 2009 regarding the NJP (copy at Tab E). HQMC has administratively removed the two page 11 entries dated 10 August 2009. Finally, he impliedly requested restoring his additional military occupational specialty (MOS) of 8411 (recruiter), restoring his special duty assignment (SDA) pay terminated on 25 August 2009 (extending entitlement through his transfer from RS Orange) and removing the page 11 entries dated 31 July and 25 August 2009 regarding termination of SDA pay (copies at Tabs D and F, respectively).

2. The Board, consisting of [REDACTED] and Messrs. [REDACTED] and [REDACTED] reviewed Petitioner's allegations of error and injustice on 14 April 2011, 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. The first endorsement on the CO, RS Orange letter of 25 August 2009 requesting Petitioner's RFC, paragraph 2, as it has been modified by HQMC, reads as follows:

[Petitioner's] actions have adversely affected the image of the Marine Corps. He was charged with failing to report to his command his charge and conviction of driving under the influence of alcohol. The offense for which he has been found guilty is serious in nature and go [sic] against our Corps' ethos and everything that we expect out of a Marine. [Petitioner] willfully withheld his conviction of a DUI in order to escape the consequences of his actions. As a result, I have lost all trust and confidence in his abilities to remain on this independent duty. Therefore, I recommend that [Petitioner's] 8411 MOS be voided.

c. In enclosure (3), HQMC JAM5 commented to the effect that documentation of the NJP should be removed, on the basis that Petitioner's CO had set aside the NJP. JAM5 stated that the NJP "stemmed from [Petitioner's] failure to report a civilian DUI arrest," however, the UPB entry actually says he was punished "for failing to notify his command of his DUI conviction [emphasis added]." JAM5 noted that "the requirement to report the conviction (rather than the arrest) is lawful."

d. Enclosure (4) explains that PERB directed removing the contested fitness report in light of enclosure (3).

e. In enclosure (5), the Marine Corps Recruiting Command (MCRC) commented to the effect that the RFC should stand because of Petitioner's DUI conviction.

f. In enclosure (6), HQMC MIO commented to the effect that the page 11 entry dated 31 July 2009 concerning arrest on suspicion of DUI and failure to notify the command, the entry dated 31 July 2009 concerning SDA pay, and both entries dated 10 August 2009 should be removed, but that the entry dated 31 July 2009 about ineligibility for promotion and the entry dated 25 August 2009 should stand.

g. Enclosure (7) is Petitioner's letter taking issue with the advisory opinion from MCRC and the unfavorable portions of the opinions from MIO. Contrary to the MIO opinion at enclosure (6), he contends that the page 11 entry dated 31 July 2009 that concerns ineligibility for promotion pending adjudication of civil charges should be removed, as the civil proceedings in his case ended in March 2008. The UPB entry indicates Petitioner's conviction had occurred by March 2008.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting partial relief, specifically, further modifying paragraph 2 of the first endorsement on the CO, RS Orange letter of 25 August 2009, requesting Petitioner's RFC, by removing the remaining reference to the NJP; and removing the page 11 entry dated 31 July 2009 concerning arrest on suspicion of DUI and failure to notify the command and the page 11 entry dated 31 July 2009 about SDA pay.

The Board finds the RFC should stand. In this regard, the Board concurs with MCRC, but further notes that the reason for the RFC

was Petitioner's failure to report his conviction, and that JAM5 advised the requirement to report the conviction is lawful. However, the Board finds the first endorsement on the request for RFC should be amended further by removing the remaining reference to the NJP that has been set aside. Finally, the Board concurs with MIO regarding the page 11 entries. Specifically regarding the page 11 entry dated 31 July 2009 about ineligibility for promotion pending adjudication of civil charges, the Board finds Petitioner's conviction had occurred before this entry was issued, but without documentation from the court concerned, it is unable to determine when the proceedings were entirely completed.

In view of the above, the Board directs the following limited corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected by deleting the following from paragraph 2 of the first endorsement dated 21 September 2009 on CO, RS Orange letter 5800 CO/mws of 25 August 2009 (Official Military Personnel File (OMPF), Commendatory Derogatory - Other, image 6):

He was charged with failing to report to his command his charge and conviction of driving under the influence of alcohol. The offense for which he has been found guilty is serious in nature and go against our Corps' ethos and everything that we expect out of a Marine.

Paragraph 2, as amended, will read as follows:

[Petitioner's] actions have adversely affected the image of the Marine Corps. [Petitioner] willfully withheld his conviction of a DUI to escape the consequences of his actions. As a result, I have lost all trust and confidence in his abilities to remain on this independent duty. Therefore, I recommend that [Petitioner's] 8411 MOS be voided.

b. That his record be corrected further by removing the service record page 11 ("Administrative Remarks (1070)") entry dated 31 July 2009 concerning arrest on suspicion of DUI and failure to notify the command and the entry dated 31 July 2009 relating to termination of SDA pay (OMPF, Service - Contract,

image 40). This is to be accomplished by reconstructing the page 11 on which the entries appear, or completely obliterating the entries so they cannot be read, rather than merely lining through them.

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.

e. That the remainder of Petitioner's request be denied.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) 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
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 Regulations, 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