



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

Docket No: 3147-11
14 April 2011

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 21 [REDACTED] hments
(2) [REDACTED]
(3) Subject [REDACTED] dtd 11 Apr 11 w/enclosures
(4) [REDACTED]
(5) [REDACTED]
(6) Subject's naval record

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 his naval record be corrected by removing the fitness reports for 1 to 24 September 2007, 4 October 2007 to 19 March 2008 and 20 March to 3 June 2008, copies of which are at Tabs A, B and C, respectively. As indicated in enclosure (2), the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) has directed completely removing the contested reports for 1 to 24 September 2007 and 4 October 2007 to 19 March 2008, and modifying the report for 20 March to 3 June 2008 by removing the entire section K (reviewing officer's marks and comments). The PERB further directed completely removing the uncontested report for 25 September to 3 October 2007 (copy at Tab D) and modifying the uncontested report for 1 October to 31 August 2007 (copy at Tab E) by removing the entire section K. In enclosure (3), Petitioner's counsel indicated that Petitioner was fully satisfied with the corrections PERB had directed to his fitness report record. Petitioner further requested removing the service record page 11 ("Administrative Remarks (1070)") entry dated 19 March 2008, a copy of which is at Tab F. Finally, he requested setting aside the Commandant of the Marine Corps (CMC)'s revocation dated 8 July 2008 of his selection by the Fiscal Year (FY) 2007 First Sergeant Selection Board and promoting him to first sergeant with the lineal precedence he would have had, but for the revocation. Copies of

the CMC letter dated 19 November 2007, delaying Petitioner's promotion, and the revocation letter are at Tab G. By implication, Petitioner also requested removing his failures of selection by the FY 2009 and 2010 Master Sergeant Selection Boards and correcting his record to show he was not defrocked. Enclosure (3) shows that by reason of service limitations applicable to gunnery sergeants, Petitioner, who is scheduled to transfer to the Fleet Reserve effective 1 October 2011, will not be permitted to reenlist absent favorable action on his request to set aside the revocation of his selection for promotion. This impliedly requests that action to effect his transfer to the Fleet Reserve be cancelled.

2. The Board, consisting of Dr. Garst and Messrs. Gorenflo and McBride, 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 which were available under existing law and regulations within the Department of the Navy.

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

c. The contested page 11 entry counseled Petitioner for the following:

Demonstrating poor judgment by operating a motorcycle at a high rate of speed after having consumed multiple alcoholic beverages in public establishments with other Marines, after which, at 0151 on 22 July 2007 you were involved in a collision with a civilian vehicle resulting in serious injuries to yourself including: extensive fractures of the mid-face, fracture dislocation through the radio carpal joint of the right wrist and general abrasions. While in the hospital for treatment of these injuries, your blood alcohol level was determined to be approximately 165 mg/dL, or equivalent to a blood alcohol concentration (BAC) of 0.165%; it is unlawful in the state of South

Carolina for a person to drive a motor [sic] cycle with a BAC of 0.08% or greater. A police officer who observed the accident estimated your speed at impact to be 65 miles per hour in a 40 mile per hour speed limit zone. You are also counseled for disobeying MCO [Marine Corps Order] 5110.1D by operating a motor [sic] cycle without insurance. As a senior SNCO [staff noncommissioned officer] you are expected to be an example for other Marines to emulate.

d. Petitioner was selected by the FY 2007 First Sergeant Selection Board, which convened on 17 October 2006. By virtue of his selection, he was frocked as a first sergeant. As a result of his subsequent accident, his promotion was delayed until completion of legal proceedings, he was defrocked, and the contested page 11 entry was issued. The page 11 entry was the stated basis for the CMC revocation of his selection for promotion.

e. In enclosure (4), the HQMC Judge Advocate Division commented to the effect that the page 11 entry and revocation of selection for promotion were legally proper and that Petitioner's request regarding these matters should be denied.

f. The PERB report at enclosure (2) stated that the decision to correct Petitioner's fitness report record was influenced by the following:

no charges were brought to court-martial, no charges were made by the local or state police, the petitioner was found not to be at fault for the accident, multiple statements from officers and senior [SNCO's] who were with the petitioner the evening of the accident attesting to the fact that he was not intoxicated and did not drink to excess, the command investigation did not find misconduct by the petitioner...[the PERB] did find the Commanding General's admission [in paragraph 2 of his third endorsement of 6 November 2007 on the report of investigation of the accident, at enclosure (1)] that 'the toxicology screening may have been contaminated...'. to be most compelling. The [PERB] also found that the petitioner's lack of insurance was proven to be an administrative error on the part of the insurance company and did not represent adverse behavior by the petitioner.

g. Enclosure (3) is Petitioner's counsel's rebuttal to the advisory opinion at enclosure (4), maintaining that the requested relief is warranted. Specifically concerning the revocation of selection for promotion, he asserts that Petitioner was not afforded an opportunity to make a statement.

h. Enclosure (5) shows that 1 November 2007 is the date of rank and effective date Petitioner would have received, had he been promoted pursuant to his selection by the FY 2007 First Sergeant Selection Board.

CONCLUSION:

Upon review and consideration of all the evidence of record, notwithstanding enclosure (4), and especially in light of the PERB's basis for correcting Petitioner's fitness report record, the Board finds an injustice warranting the full relief requested. In this connection, the Board finds that the matters the PERB cited effectively invalidate the page 11 entry, on which the revocation of Petitioner's selection for promotion was based, as well as his defrocking. The Board further finds that but for the revocation of his selection for promotion, he would have been promoted to first sergeant with the date of rank and effective date shown in enclosure (5). Finally, the Board finds that if his record is corrected, as it proposes, to show his selection for promotion was not revoked and he was promoted, it would serve no purpose for his record to continue to show that his promotion was delayed. In view of the above, the Board recommends the following corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the service record page 11 ("Administrative Remarks (1070)") entry dated 19 March 2008 (Official Military Personnel File (OMPF), Service - Contract, image 54). This is to be accomplished by physically removing the page 11 on which the entry appears, or completely obliterating the entry so it cannot be read, rather than merely lining through it.

b. That his record be corrected further to show that his promotion to first sergeant was not delayed, to include removing the CMC letter 1450/2 MMPR-2 dated 19 November 2007, Subject: Delay of Promotion ICO [in case of] Petitioner (OMPF, Commendatory Derogatory - Other, image 29); that he was not defrocked; and that his selection by the FY 2007 First Sergeant Selection Board was not revoked, to include removing the CMC

letter 1450/5 dated 8 July 2008, Subject: Revocation of Selection from the FY 2007 First Sergeant Selection Board (OMPF, Commendatory Derogatory - Other, image 30).

c. That his record be corrected further to show he was promoted to first sergeant with a date of rank and effective date of 1 November 2007; and that his lineal precedence be adjusted accordingly.

d. That his record be corrected accordingly by removing his failures of selection by the FY 2009 and 2010 Master Sergeant Selection Boards.

e. That the Marine Corps Total Force System data be corrected accordingly.

f. That any action to transfer Petitioner to the Fleet Reserve be cancelled and, if necessary, that related documentation be removed from his record.

g. That any material or entries relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries be added to the record in the future.

h. 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


JONATHAN S. RUSKIN
Acting Recorder

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


W. DEAN PFEIFFER

Reviewed and approved:

 5/10/11

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