



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

JBH
Docket: 1360-13
18 February 2014

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) NDRB Decisional Document docket No. MD05-01153
(3) NDRB Decisional Document docket No. MD11-00775
(4) HQMC MEMO MMER/RE undtd
(5) HQMC Memo 1070 JAM2 dtd 27 August 2013

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 that his reenlistment code be changed to allow him to reenlist in the military, that he be reinstated to the rank of Lance Corporal (LCpl), that his security clearance in the ordnance field be reinstated, and that he be given credit for the time unserved on his contract as a result of his administrative separation. He contends that the Naval Discharge Review Board (NDRB) found that he did not knowingly use marijuana which was the basis for his demotion to Private First Class (PFC) and his subsequent administrative separation. NDRB voted 3-2 to upgrade the characterization of Petitioner's service to honorable and voted 4-1 to change the narrative reason to Secretarial Authority.

2. The Board, consisting of Mr. Zsaiaman, Mr. George, and Mr. Ruskin, reviewed Petitioner's allegations of error and injustice on 10 February 2014 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. On 11 February 2004 Petitioner provided a urine sample that tested positive for Tetrahydrocannabinol (THC). Enclosure (2)

c. On 2 March 2004 Petitioner was examined at Naval Hospital Camp Pendleton and stated that he unknowingly ate some brownies laced with marijuana. Enclosure (2)

d. On 22 March 2004 Petitioner was found guilty by his commanding officer at non-judicial punishment (NJP) proceedings of wrongfully using a controlled substance. Petitioner was awarded reduction to PFC, forfeiture of \$668.00 per month for 2 months, 45 days restriction and 45 days extra duty. Petitioner did not appeal the NJP. Enclosure (2)

e. On 24 March 2004 Petitioner was notified that his commanding officer intended to process him for administrative separation. Petitioner waived his right to appear before an administrative discharge board. Enclosure (2)

f. On 29 May 2004 Petitioner's commanding officer recommended him for administrative separation by reason of misconduct due to drug abuse. Enclosure (2)

g. On 18 August 2004 the Commander, 3rd Marine Aircraft Wing, directed that Petitioner be separated by reason of misconduct due to drug abuse with an other than honorable characterization of service. Enclosure (2)

h. On 23 August 2004 Petitioner was so discharged. Enclosure (2)

i. On 28 June 2005 NDRB conducted a review of Petitioner's discharge and found that an upgrade was not warranted. Enclosure (2)

j. On 3 February 2011 Petitioner filed a request for a personal appearance with NDRB. Enclosure (3)

k. On 27 March 2012 Petitioner personally appeared before NDRB and testified under oath. NDRB then determined that Petitioner did not knowingly use marijuana and therefore, there was no valid basis to support his separation for misconduct. Petitioner was granted a discharge upgrade to honorable and a change in the reason for discharge to Secretarial Authority. Enclosure (3)

h. In correspondence attached as enclosure (4), the office having cognizance over the subject matter addressed in Petitioner's application pertaining to his reentry code noted that at the time of Petitioner's original discharge, he was provided the appropriate reentry code of RE-4B.

i. As a result of the correspondence attached as enclosure (4), an additional advisory opinion was requested to address the legal aspects of the NDRB decision which determined that the Petitioner's discharge for misconduct was erroneous and the impact such determination had on the relief Petitioner requested.

j. In correspondence attached as enclosure (5), the office having cognizance over the subject matter addressed in Petitioner's application, Headquarters Marine Corps Code JAM2, provided an advisory opinion. The opinion noted that the Navy Central Adjudication Facility (DONCAF) is the proper venue for Petitioner to contact in regards to his security clearance. The opinion further stated that due to NDRB's decision to upgrade the characterization of service and reason for discharge, Petitioner's request to upgrade his reenlistment code should be approved and changed accordingly. The advisory opinion also stated that all adverse material pertaining to the administrative separation for misconduct due to drug abuse should be removed from Petitioner's Official Military Personnel File and all associated relief be granted. Such associated relief included the removal of the NJP from the Petitioner's OMPF and adjustment of the Petitioner's discharge date to reflect his original expiration of enlistment date.

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record and a favorable advisory opinion, a majority of the Board, consisting of Mr. Zsalman and Mr. Ruskin, concludes that Petitioner's request should be approved.

In reaching its conclusion, the majority relies on the determinations made by NDRB in granting Petitioner an upgrade to his characterization of service and reason for discharge. The majority concludes that since Petitioner had a personal appearance before the NDRB, their analysis of the circumstances surrounding the alleged misconduct of Petitioner was thoroughly assessed. The majority notes that the NDRB had the opportunity to observe and question Petitioner regarding the issue of whether Petitioner knowingly used marijuana. The majority relies on the NDRB decision which noted that after careful consideration of the entire record, documentation submitted by the applicant and his sworn testimony, that a majority of the NDRB members accepted Petitioner's assertion and made a factual finding that Petitioner did not knowingly use marijuana. The majority determined that in the absence of misconduct, Petitioner was erroneously discharged and relief was warranted.

The majority of the Board also relies upon the advisory opinion from the Marine Corps Judge Advocate Division which recommended an upgrade to Petitioner's reenlistment code; removal of all adverse material in Petitioner's Official Military Personnel File pertaining to administrative separation for misconduct due to drug abuse; and that all associated relief be granted. The majority concurs with this recommendation. The majority further concludes that the recommendation to remove all adverse material from Petitioner's OMPF includes the removal of the underlying NJP. The majority concluded that if there was no underlying misconduct, any documentation of such misconduct should be removed. Moreover, in the absence of the underlying misconduct which served as the basis for separation, the original discharge was erroneous. As a result the majority also concludes that the recommendation that all associated relief be granted includes correcting his record that he was not discharged on 23 August 2004 but continued to serve on active duty until the expiration of his enlistment on 21 October 2005 when he was honorably released from active duty.

Finally, the majority of the Board determined that Petitioner had not exhausted his administrative remedies regarding his security clearance and must seek relief from DONCAF.

MAJORITY RECOMMENDATION:

- a. That Petitioner's naval record be corrected to remove his nonjudicial punishment dated 22 March 2004 and that all rights and privileges be restored.
- b. That Petitioner's rank be restored to E-3/Lance Corporal and his original date of rank be restored.
- c. That any material or entries relating to the administrative separation on 23 August 2004 be removed from the Petitioner's Official Military Personnel File.
- d. The Certificate of Release or Discharge from Active duty (DD Form 214, Aug 2009), executed on or about 23 August 2004, is modified to read block 27 (Reentry Code) "RE-1A" vice "RE-4B".

e. The Certificate of Release or Discharge from Active duty (DD Form 214, Aug 2009), executed on or about 23 August 2004, should be corrected to read that he was released from active duty on 21 October 2005 and transferred to the Individual Ready Reserve.

f. Block 12c of the Certificate of Release or Discharge from Active duty (DD Form 214, Aug 2009), executed on or about 23 August 2004, is modified to read 04 years 00 months 00 days vice 02 years 10 months 02 days.

g. 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.

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 Proceeding, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

MINORITY CONCLUSION:

Mr. George, the minority, concurs with the unfavorable advisory opinion from Headquarters Marine Corps (HQMC), regarding the reentry code, found at enclosure (4). He finds that Petitioner accepted NJP for the wrongful use of marijuana, instead of requesting a trial by court-martial, where he would have been represented by an attorney. The minority particularly notes that Petitioner's commanding officer was in the best position to determine his guilt or innocence and had all available evidence present. The minority notes that Petitioner was found guilty and did not appeal the finding.

Petitioner was then notified that he was being administratively separated due to wrongful use of marijuana. He waived his procedural right to an administrative discharge board (ADB).

The minority is not persuaded by the favorable advisory opinion from HQMC found at enclosure (5). This opinion merely states that since NDRB found that Petitioner did not

"knowingly" use marijuana, his RE-4B reentry code should be upgraded. The minority finds it highly suspect to bring up the marijuana "laced" brownies defense more than seven years after his NJP. The minority also particularly notes Petitioner's waiver of his right to an ADB, where he would have been represented by counsel. The minority finds that an ADB would have been Petitioner's best opportunity for retention.

MINORITY RECOMMENDATION:

In view of the above, the minority recommends that no relief be granted.

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 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

Bronte I. Montgomery
BRONTE I. MONTGOMERY
Acting Recorder

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

18 February 2014

Robert D. Zsalm

ROBERT D. ZSALMAN
Acting Executive Director

~~MAJORITY REPORT~~

~~Reviewed and approved.~~

MINORITY REPORT

Reviewed and approved:

Robert L. Woods 11/7/14

I concur with and adopt the analysis of the minority member and agree that petitioner's Commanding Officer was in the best position to review the evidence and render appropriate judgment.

ROBERT L. WOODS
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