



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

Docket No: 1815-13
18 June 2013

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

Subj: REVIEW NAVAL RECORD OF [REDACTED]

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

Encl: (1) BCNR case summary with attachments
(2) Fraternalization regulations
(3) HQMC (JAM2) Advisory Opinion
(4) MCM, Part V (excerpt)

1. Pursuant to the provisions of reference (a), Petitioner, a member of the Marine Corps, filed enclosure (1) with this Board requesting that his record be corrected by removing derogatory material, specifically, the nonjudicial punishment (NJP) imposed on 12 April 2009.

2. The Board, consisting of Ms. A. Lapinski, Mr. W. Dean Pfeiffer, and Mr. E. Vogt, reviewed Petitioner's allegations of error and injustice on 11 June 2013 and, pursuant to its regulations, determined that no corrective action 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. In addition, the Board considered the advisory opinion provided by Headquarters Marine Corps, Military Justice Branch, Judge Advocate Division (JAM2) dated 23 May 2013, which is attached as enclosure (3).

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. Enclosure (1) reflects that Petitioner, while embarked upon USS ESSEX (LHD 2), received NJP on 12 April 2009 for two specifications of Article 92, failure to obey a lawful order. Specifically, the order was an alleged violation of OPNAVINST 5370.2C (Navy Fraternalization Policy) for fraternizing with two

junior female Sailors who were serving in paygrade E-4. The punishment imposed was restriction for 45 days and a \$1,972.95 forfeiture of pay. During NJP proceedings Petitioner admitted his guilt to both specifications and never appealed the punishment he received. In January 2013 he submitted an application to this Board requesting removal of the NJP stating that since he was not allowed to request a court-martial due to the fact that he was embarked aboard a ship, he was denied due process of law.

c. Enclosure (2) sets forth the directives regarding fraternization that are cited, in part, as "Article 134, UCMJ; U. S. Navy Regulations 1165 (applies to both Navy and Marine Corps); OPNAVINST 5370.2C (applies only to Navy); Marine Corps Manual 1100.4 (applies only to Marines)."

d. Enclosure (4) is an excerpt from the Manual for Courts-Martial (MCM), *Part V, Effects of Errors*, which states, in part, that "Failure to comply with any of the procedural provisions of this Manual shall not invalidate a punishment imposed under Article 15, unless the error materially prejudiced a substantial right of the servicemember on whom the punishment was imposed."

e. Enclosure (3) is an advisory opinion from Headquarters Marine Corps recommending that the NJP be removed from Petitioner's record due to the fact that he was punished for violating an order that did not apply to him. The advisory rejected Petitioner's argument that he was denied due process because he could not demand trial by court-martial. The advisory states that all personnel embarked aboard naval vessels cannot demand trial by court-martial and must accept NJP. However, the advisory opinion does recommend relief pointing out that OPNAVINST 5370.2C is the "Navy Fraternization Policy" and applies only to Navy personnel. The advisory opinion further states that the correct fraternization provision that applies to Petitioner is to be found in U. S. Navy Regulations, Paragraph 1165, which covers both Navy and Marine Corps personnel. The advisory opinion concludes that he received NJP for violating OPNAVINST 5370.2C, an "order he did not have a duty to obey."

CONCLUSION:

The Board concurs with the comments and conclusion of the Marine Corps AO that Petitioner was not denied due process of law on the grounds that he was not allowed to demand trial by court-martial.

Part V of the MCM as well as JAG Instruction 5800 7E and Article 15 of the UCMJ clearly establish that Navy and Marine Corps service members who are attached to or embarked in a vessel have no right to refuse NJP and demand trial by court-martial.

However the Board cannot concur with the conclusion of the AO that since Petitioner was charged and found guilty of violating the fraternization policy of OPNAVINST 5370.2C which only applies to Navy Personnel and not Paragraph 1165 of Navy regulations which applies to both Navy and Marine Corps personnel he is entitled to full relief. Instead the Board relies on the express language of Part V of the MCM that states a procedural error will not be a basis for invalidating NJP proceedings unless the error materially prejudiced a substantial right of the service member. After a careful review of all the facts and circumstances the Board concludes that none of Petitioner's rights, either substantive or procedural were materially prejudiced by charging him with a violation of the fraternization policy of OPNAVINST 5370.2C rather than Paragraph 1165 of Navy Regulations. Substantively the basic proscriptions against fraternization set out in OPNAVINST 5370.2C are virtually the same as those contained in Paragraph 1165 of Navy Regulations. Moreover the particular misconduct with which Petitioner was charged is unlawful under the provisions of both these authorities. Simply put the essential elements of his offenses remained the same and the outcome of Petitioner's NJP would not have been any different, had he been charged under Paragraph 1165 of Navy Regulations. In this regard it is important to note that Petitioner freely admitted to committing the acts he was charged with and after punishment was imposed he chose not to appeal. Regarding Petitioner's procedural rights, prior to NJP proceedings he was informed of the charges against him, the basis for the charges and his right to have witnesses appear during NJP proceedings for the purpose of making statements on his behalf. He was also advised that he could consult with a military lawyer prior to the commencement of NJP proceedings. These are the same procedures that would have been followed had Petitioner been charged under Paragraph 1165 of Navy Regulations.

The Board therefore concludes that the administrative irregularity in this case was harmless error and cannot serve as the basis for removing an otherwise valid NJP from Petitioner's record. Finally the Board would like to point out that NJP by its very nature is an informal administrative forum that empowers commanding officers to ensure good order and discipline by disposing of less serious offenses without resorting to the far more legally demanding venue of court-martial proceedings where the service member is exposed to the potential penalties of a substantial period of confinement, a punitive discharge and the stigma of a federal conviction.

RECOMMENDATION:

a. That Petitioner's request for removal of the NJP imposed on 12 April 2009 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.

ROBERT D. ZSALMAN
Recorder


BRIAN J. GEORGE
Acting Recorder

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


W. DEAN PFEIFFER
Executive Director

Reviewed and approved:

 7/10/13
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