



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

██████████
Docket No. 259-20
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER ██████████
██████████ XXX XX ██████████ USMC

Ref: (a) 10 U.S.C. § 1552
(b) MCO P1070.12K

Encl: (1) DD Form 149 w/enclosures
(2) HQMC memo 1070 JPL of 12 Jul19
(3) Petitioner's rebuttal of 10 Jan 20

1. Pursuant to the provisions of reference (a), Petitioner, a former commissioned officer of the Marine Corps, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting the following corrections be made to his official military personnel file (OMPF):

- a. Void and remove his record of nonjudicial punishment (NJP).
- b. Void and remove all records pertaining to the show cause action.
- c. Correct DD Form 214 by removing "Misconduct (Other)" from the Narrative Reason for Separation and replace with "Completion of Active Service" or "Secretarial Authority."
- d. Replace the Separation Code with a code corresponding to the corrected Narrative Reason for Separation.

2. A three-member panel of the Board, sitting in executive session, considered Petitioner's application on 16 June 2020. The names and votes of the members of the panel will be furnished upon request. Petitioner's allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of Petitioner's application, together with all material submitted in support thereof, relevant portions of his naval record, and the enclosures, as well as applicable statutes, regulations, and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, found as follows:

- a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulation within the Department of the Navy.

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b. Petitioner, while stationed aboard [REDACTED] went on a liberty outing with a group of officers and enlisted personnel. The liberty party stopped at a local market to purchase snacks, beer, and liquor, and then they proceeded to a beach area. After consuming approximately one beer at [REDACTED] and a second beer at [REDACTED] Petitioner drove the vehicle a purported 100 meters to aid an injured member of the liberty party on the beach, in violation of [REDACTED] General Order No. 1, which prohibits operating vehicles within eight hours after consuming any amount of alcohol. The vehicle became stuck and required the assistance of locals to free it. While returning to [REDACTED], their vehicle collided with a camel, injuring the camel and damaging the vehicle. The group left the scene and returned to [REDACTED] without leaving any identifying information with the locals who had gathered. Upon their return, Petitioner checked the party in at the quarterdeck, but did not report the accident. The driver of the vehicle reported the accident several hours later.

c. On 5 March 2014, the Commander, [REDACTED] informed Petitioner that he intended to conduct an Article 15, Uniform Code of Military Justice (UCMJ) hearing due to Petitioner's alleged violations of the UCMJ, Charge I: Article 81 conspiracy; Charge II: Article 92, (failure to obey an order or regulation), Specification 1: (wrongfully driving a motor vehicle within eight hours of consuming alcohol), Specification 2: (fraternization); Specification 3: failure to obtain the proper authorization to proceed on liberty; Charge III: Article 107 (false official statement), and Charge IV: Article 133 (conduct unbecoming an officer).

d. Nonjudicial punishment (NJP) was held on 14 March 2014. Petitioner pleaded "not guilty" to all charges except Charge II, Specification 1: Article 92, failure to obey order or regulation by wrongfully driving a motor vehicle within eight hours of consuming alcohol. Petitioner was found guilty of Charge II, Specification 1, as well as Charge III: Article 107, false official statement, and Charge IV: Article 133, conduct unbecoming an officer (excepting the word "fraternization"). Petitioner was awarded 60 days of restriction.

e. On 18 March 2014, Petitioner appealed his NJP to the Deputy Commander for Military Operations (DCMO), United States [REDACTED]

f. On 25 April 2014, the DCMO, United States [REDACTED], affirmed the Article 92 finding, dismissed Article 107 (lesser included offense of Charge IV), and set aside the Article 133 finding. The imposed punishment was affirmed as being "neither unjust nor disproportionate to the offense committed."

g. On 5 May 2014, the Commander, [REDACTED], documented Petitioner's NJP in a Report of NJP, and recommended Petitioner be retained on active service until the expiration of his obligated active service, noting that "this incident reflects a deviation from [Petitioner's] usual and consistent outstanding performance." Petitioner acknowledged the Report of NJP, and indicated his desire to continue to serve.

h. On 11 Jul 2014, the Commander, Marine Forces Command (COMMARFORCOM) directed the Commanding General, [REDACTED] to convene a Board of Inquiry (BOI) to make a recommendation as to whether Petitioner should be retained in the Marine

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Corps.

i. On 16 September 2014, Petitioner submitted a request for unqualified resignation in lieu of further administrative separation processing. In his request, he admitted that he committed misconduct and that his performance of duty was substandard. Additionally, he requested his characterization of service be "Honorable."

j. On 15 June 2015, the Assistant Secretary of the Navy, Manpower and Reserve Affairs (ASN, M&RA), approved Petitioner's resignation request with an Honorable characterization of service, and directed a separation program designator (SPD) code of BKM1 – Resignation in lieu of further administrative action – misconduct (other).

k. Petitioner contends that his admitted misconduct was minor – driving approximately 100 meters down a beach, after consuming two beers approximately one and two hours earlier, to the aid of an injured member of his party – and that the misconduct did not warrant NJP or administrative separation. Petitioner, with counsel, requested that the Board specifically consider the following:

(1) Over the course of his five-year career in the Marine Corps, he committed one specification of misconduct, and he admitted to doing so and to violating General Order 1.

(2) He did not lie about the consumption of alcohol by others in the government vehicle; he did not engage in fraternization; he was not substandard in his duty performance; and he did not fail to demonstrate the qualities of leadership expected of him.

(3) The zeal of the Naval Criminal Investigative Service (NCIS) to find UCMJ offenses is also reflected in its conclusion that the liberty party members were lying about only being in an accident with the camel, opining that there was "unexplained, inconsistent damage to the vehicle that was not caused by striking an animal." However, all members of the party testified that there were no other accidents. That allegation simply disappeared as the case moved forward, as there was no evidentiary support for the NCIS opinion.

(4) NCIS also imputed ill motive to various individual party members at varying points, reflecting a prosecutorial mindset.

(5) NCIS also asserted [REDACTED] "drove the van along a treacherous off road trail down to the beach area," suggesting he was irresponsible. Yet the road was an established route to the beach, entirely passable, and produced no damage to the vehicle. Such gratuitous assertions by NCIS are indicative of their eagerness to find culpability.

(6) NCIS first questioned Petitioner on 1 February 2014. The interview focused on the accident and the timeline of the day's events. NCIS did not question Petitioner about alcohol consumption at that time. On 14 February 2014, NCIS administered questionnaires focused on alcohol to each member of the liberty party simultaneously. That was 19 days after the liberty party, with ample opportunity for memories to deteriorate.

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(7) From Petitioner's honest responses (and we note he did not invoke his rights to silence and to counsel) and the responses of the others, NCIS concluded there was a conspiracy among all party members to not report the vehicle accident, or to hide multiple accidents. Hence, Petitioner faced the Article 81 specification at NJP. Yet a close review of the NCIS records reveals that allegation to be purely speculative, if not imaginative. The same criticism applies to the fraternization allegation, for which there was no evidence other than the mixing of ranks on the liberty party itself. If NCIS' understanding of fraternization were correct, any Marine or Sailor participating in a social gathering of mixed ranks would run the risk of UCMJ charges.

(8) According to the Article 15 charge sheet, NCIS concluded there was evidence Petitioner made a false official statement in conspiring to cover up "the circumstances surrounding a liberty trip on 26 January 2013," and in denying that he was aware of alcohol consumption in the vehicle. The first specification was not seriously considered at NJP, and for good reason. [REDACTED] U.S. Army initially found Petitioner guilty of the second, lying about alcohol consumption in the vehicle. The second specification was set aside on appeal. Petitioner in effect was the navigator for the liberty party's transport from [REDACTED] to [REDACTED] [REDACTED] their ultimate destination. As Petitioner testifies, he was occupied with his maps and guiding [REDACTED] through unfamiliar terrain with many unmarked roads, and not on what was happening behind him in the van. We note that no member of the liberty party asserted that Petitioner was aware of alcohol consumption in the vehicle. Petitioner testifies here, unequivocally, that he was not aware of any alcohol consumption in the van and that he immediately would have ensured the consumption stopped if he had been aware.

(9) NCIS created an unnecessarily prosecutorial report that was unsupported by the record in key instances.

(10) Petitioner provided over five years of faithful and honorable service to Marine Corps. He was regarded as an officer of integrity who cared for his Marines and strived to provide the highest standards of training to Marines. There is simply nothing in his record to indicate he would sacrifice his career and his reputation for two naval reserve personnel who decided to consume alcohol in the government vehicle. Rather, Petitioner's record forcefully suggests that he would have immediately caused the consumption to cease.

(11) We respectfully submit that the record evidence did not support the findings of guilt made by [REDACTED] whether made under the Army's beyond reasonable doubt or the Navy's preponderance of the evidence standards.

(12) It is very significant that [REDACTED] recommended against requiring Petitioner to show cause. Indeed, he was quite clear and forceful in his statement supporting Petitioner's retention in the Marine Corps. According to [REDACTED] "I am equally aware that this incident reflects a deviation from [Petitioner's] usual and consistent outstanding performance and service as a United States Marine Corps officer. Immediately prior and since NJP was awarded, [Petitioner] has maintained a steady course exhibiting professionalism and unwavering commitment to [REDACTED] mission I do not support efforts to end [Petitioner's] service to the

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United States Marine Corps. I do not recommend that [Petitioner] be ordered to show cause for retention in the United States Marine Corps.”

(13) The Navy and Marine Corps are not “zero-defect” mentality organizations, and the imposition of NJP was more than sufficient to teach Petitioner the required lesson and to provide a life-long reminder that his conduct must be exemplary, as it was prior to and after NJP.

I. Petitioner asserts that he has continued to provide valuable National defense services and desires to do so with a U.S. Government entity. Petitioner asserts his record, as it stands, is a hindrance to his ability to serve. Petitioner, with counsel, requested the Board specifically consider the following:

(1) He has been employed as a Department of Defense (DoD) Field Security Agent since October 2015. His position requires extensive travel in hostile and austere environments to support DoD operations.

(2) He routinely utilizes his top secret/sensitive compartmented information (TS/SCI) clearance.

(3) Petitioner intends to continue his service to our National defense either through another government entity or as a member of the U.S. Army Special Forces Command.

(4) His ambitions should speak volumes to the Board about his commitment to our National defense and his value to the U.S. Government.

(5) Petitioner has good reason to believe his Marine Corps record, particularly his DD Form 214, will be an impediment to achieving his objectives.

(6) We respectfully submit that Americans of the caliber and commitment of Petitioner, who is only 30 years old, are a rarity and every reasonable effort should be made to clear a path for their continued service.

(7) The interests of justice and our National security plainly would be advanced by favorable action from the Board.

(8) Petitioner is likely not a typical applicant to the Board. He did not take unauthorized absence, incur a driving under the influence offense, engage in domestic violence, use illicit drugs, or otherwise engage in serious misconduct. Had he done so, the path pursued by [REDACTED] would have been court-martial, not NJP.

(9) In the circumstances, the actions taken by the Marine Corps, most certainly those subsequent to NJP, were far in excess of the seriousness of the “crime.” Truth be told, simple counseling, such as through a non-punitive letter of caution (NPLOC), would have satisfactorily resolved the matter.

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(10) He is highly conscientious, very self-critical, and learns from his errors. He is a good man and impediments to his service ambitions should be removed.

m. The advisory opinion (AO) at enclosure (2), furnished by Headquarters, Marine Corps (JPL) recommends that Petitioner's requests be disapproved.

With regard to the imposition of NJP, the AO determined that there was nothing erroneous or unjust regarding Petitioner's NJP. The AO noted that the Commander, [REDACTED] had the lawful discretion to impose NJP on Petitioner. NJP may be imposed for minor offenses, which this case entailed. The decision was properly scrutinized on appeal by a Marine Corps lieutenant general, who directed some relief but determined that the punishment was neither unjust nor disproportionate to the offense committed. Whether Petitioner or his attorney prefers that some lesser form of discipline had been imposed, because Petitioner "is a good man" is irrelevant.

With regard to Petitioner's administrative separation processing, the AO determined that there was nothing erroneous or unjust regarding the processing. The AO noted that, following his NJP, a decision was required on whether Petitioner should have to show cause for retention in the Marine Corps at a BOI, which is what properly happened in this case. The COMMARFORCOM, as an Alternate Show Cause Authority, had the authority and discretion to direct a BOI, which he did. The AO noted that Petitioner, who had a defense counsel advising and assisting him, then chose to request resignation instead of having a BOI, which was accepted and he was given an Honorable characterization of service, with the proper misconduct separation code.

With regard to the BOI notification and rights, the AO determined Petitioner and his attorney complain multiple times in their request that Petitioner never received the BOI notification, he was never informed of the specific allegations for the BOI, and he was never informed of his BOI rights. The Board noted that Petitioner had since requested and received his final OMPF from Headquarters, Marine Corps, and that this final OMPF contained the factual bases for the BOI action. Petitioner, with counsel, therefore withdrew the contention that the Marine Corps failed to comply with applicable regulations requiring notification to Petitioner.

n. In his rebuttal, enclosure (3), Petitioner asserts that while the Marine Corps was free to require Petitioner to show cause, and he has not argued differently, the Board exists precisely to consider and, where warranted, correct injustices resulting from "overreaching" by the Marine Corps. Petitioner contends that this is such a case. Specifically, Petitioner committed one specification of misconduct: consuming a beer while on a liberty trip and then operating a government vehicle for some 100 yards on a sparsely populated beach to assist an injured individual, and such an error is an insufficient basis to deny Petitioner further opportunity to serve his country in uniform.

Petitioner reiterated that his record, as it stands, precludes him from pursuing opportunities with a uniformed or other government service, even though he clearly has a great deal to offer. He forcefully maintains his innocence of the accusations that he was aware of others consuming alcohol and that he lied about that knowledge, and that this specification was set-aside on appeal as a lesser included offense of a separate charge. The only remaining charge, then, to which

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Petitioner admitted his guilt, was the violation of an order by consuming alcohol and operating the government vehicle on a beach. Petitioner asserts that he has paid a very dear price for that error, which he never denied.

Petitioner noted that this petition really is about giving Petitioner another chance to serve his country to his capability by correcting his official record to permit such service. The injustice of the case is the disproportionate punishment imposed and the life-long consequences of that punishment for him. The initial charge sheet contained six specifications, including the conspiracy and fraternization allegations. Had the specifications been limited to the violation of a general order, the response of the Marine Corps may well have been different. Also, Petitioner deeply regrets his error in operating a government vehicle after consuming alcohol. As the Board will appreciate, that is his only instance of misconduct. Petitioner is young and has a tremendous amount to offer our country. Lastly, Petitioner respectfully requests that the Board acknowledge the injustice of his punishment and afford him a deserved measure of clemency.

CONCLUSION

Upon review and consideration of all the evidence of record, and in light of the AO, the Board determined that Petitioner's request does not warrant relief.

With regard to his contention that his admitted misconduct was minor and did not warrant NJP, the Board noted that Petitioner's commander found, by a preponderance of the evidence, that he violated Articles 92 and 133 of the UCMJ, and that the imposition of NJP was within his commander's discretionary authority. The Board also noted that Petitioner was advised of his right to consult with counsel and to refuse NJP. He opted to proceed with NJP, and after his NJP, he availed himself of his right to appeal the NJP findings. His appeal was considered and partially granted. The Board noted that the violation of Article 92, failure to obey an order or regulation, to which he pleaded and was found guilty, was affirmed. The violation of Article 133, conduct unbecoming an officer, was set aside in the interest of justice. Dismissing one violation of the UCMJ did not reflect reduced culpability, but instead strict adherence to principles of law. Therefore, the imposed punishment was sustained without modification.

With regard to his contention that his admitted misconduct did not warrant administrative separation, the Board noted that Petitioner requested unqualified resignation in lieu of further administrative separation processing for cause. The ASN, M&RA, properly considered Petitioner's request, and all statutory and regulatory administrative separation procedures were followed. Additionally, the ASN, M&RA's decision was within his discretion as the Officer Separation Authority, and was based on Petitioner's admitted misconduct and substandard performance of duty.

The Board considered Petitioner's contention that he has continued to provide valuable National defense services, that he desires to do so with a U.S. Government entity, and that his record, as it stands, is a hindrance to his ability to serve. The Board acknowledged Petitioner's five years of honorable service while on active-duty, his entire naval service record, and his desire to continue his military service. The Board, however, determined that, despite his performance record,

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accomplishments, and length of service, the seriousness of his misconduct outweighed his desired relief.

The Board determined that the ASN, M&RA, considered all relevant factors when making his decision regarding Petitioner's request for resignation, and that his decision was within his discretion as the Officer Separation Authority, and that it was not unjust to separate Petitioner with a SPD of BKM1 – Resignation in lieu of further administrative action – misconduct (other).

The Board thus concluded that the correspondence documenting Petitioner's NJP and show cause action, as well as his narrative reason for separation were properly inserted into his OMPF in accordance with reference (b), and removal or modification of these documents is not warranted.

RECOMMENDATION

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

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

7/23/2020

[REDACTED]

Executive Director

ASSISTANT SECRETARY OF THE NAVY (M&RA) DECISION:

Reviewed and Approved Petitioner Request (Grant Relief)

JUN 22 2024

Reviewed and Approved Board Recommendation (Deny Relief)

[REDACTED]

Acting