



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

[REDACTED]
Docket No. 7620-20
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
XXX XX [REDACTED] USMC

Ref: (a) Title 10 U.S.C. § 1552
(b) ALNAV 049/10
(c) MCO P1070.12K (IRAM)
(d) MCO 1900.16 (MARCORSEPMAN)
(e) MCO P1400.32D (MARCORPROMAN, VOL 2, ENLPROM)

Encl: (1) DD Form 149 w/enclosures
(2) NAVMC 10132 (UPB) of 6 Jan 17
(3) Administrative Remarks (Page 11) 6105 counseling and promotion-restriction counseling of 6 Jan 17
(4) Fitness Report for the reporting period 1 Sep 16 to 8 Jan 17
(5) HQMC memo 1070 JPL of 12 Sep 21
(6) Petitioner's rebuttal of 12 Nov 21

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that his naval record be corrected by removing enclosure (2), a unit punishment book (UPB) entry documenting his non-judicial punishment (NJP) of 6 January 2017; enclosure (3) an Administrative Remarks (Page 11) with two counseling entries; and enclosure (4), an adverse fitness report, from his official military personnel file (OMPF). Petitioner also requests removal of his failures of selection (FOSs) for promotion to E-8 and a remedial promotion board for the Fiscal Year (FY) 2019 Sergeant Major through Master Sergeant Promotion Selection Board. Lastly, Petitioner requests removal of his extension contracts and to have them replaced with a reenlistment contract.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED] reviewed Petitioner's allegations of error and injustice on 30 November 2021 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, relevant portions of Petitioner's 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 did not exhaust all administrative remedies available under existing law and regulation within the Department of the Navy. Specifically, although Petitioner petitioned the Headquarters Marine Corps Performance Evaluation Review Board (PERB) on 30 September 2020, his request to modify or remove his fitness report at enclosure (4) has not yet been adjudicated by the PERB. Consequently, the Board did not take action regarding this request.

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b. On [REDACTED], Petitioner was arrested in [REDACTED], for driving under the influence (DUI) of alcohol with a blood alcohol content over the .08 legal limit. Petitioner notified his chain of command of his arrest. On [REDACTED], the commanding officer (CO) Marine Aircraft [REDACTED] notified Petitioner of his intent to impose NJP. On [REDACTED], Petitioner accepted NJP and was found guilty of violating Article 92 of the Uniform Code of Conduct (UCMJ), specifically violating Wing Order 1700.24 by driving under the influence of alcohol. Punishment included a letter of reprimand (LOR) and forfeitures of pay for two months (suspended). Petitioner did not appeal the NJP; enclosure (2). In addition, Petitioner received a Page 11 counseling regarding his NJP, and indicated that he wanted to submit a rebuttal; enclosure (3). Next, Petitioner received a Page 11 promotion-restriction counseling due to being subject to NJP; enclosure (3). Finally, Petitioner received an adverse fitness report for the reporting period [REDACTED] to [REDACTED]; enclosure (4). On [REDACTED], [REDACTED] Superior Court dismissed the DUI charge and Petitioner pled guilty to reckless driving.

c. Petitioner contends that his UPB entry and Page 11 counseling entries should be removed from his record due to the following errors and injustices.

Petitioner alleges that he properly notified the command of his arrest, but that the Command erroneously imposed disciplinary action. Petitioner argues that reference (b) states that regulations that require service members to report civilian arrests serve a regulatory or administrative purpose and that a CO may not take disciplinary action based solely on the self-report. Petitioner contends that current law supports the fact that the CO may take disciplinary action regarding self-reported misconduct only if the CO has independently derived evidence and that his Command had no evidence that he was driving under the influence of alcohol other than Petitioner's self-report that he was arrested for that offense.

Petitioner contends the UPB entry is invalid because it does not contain the required elements in Block 1, there was insufficient evidence to support the alleged offense, and it states that he received a LOR which he did not receive.

Additionally, Petitioner contends that the Page 11 6105 counseling is invalid for the following reasons: (1) the format is not in accordance with reference (c) or (d), (2) the Page 11 entry in his OMPF is a digitally altered image and not the original that he and the Commander signed, (3) the entry confirms a prematurely held NJP without formal counseling; and (4) the completed Page 11 counseling was not forwarded to Headquarters Marine Corps within the 30-day requirement.

Petitioner also asserts that he submitted a rebuttal to the Page 11 on 9 January 2017 but that it was not entered into his OMPF. With regard to the Page 11 promotion-restriction entry, Petitioner contends that it appears that (1) his and the Commander's signature is a photocopy of their signature from an earlier version of the entry they signed; (2) per reference (c), promotion-restriction entries are issued to Marines in the grades of private first class through sergeant, and they do not apply to staff non-commissioned officers; (3) promotion-restriction entries are required each month and/or quarter that a Marine is not recommended for promotion to the next [grade]; and (4) the Page 11 entry was not submitted to Headquarters Marine Corps within 30 days, as required.

d. Enclosure (5), an advisory opinion (AO) furnished by the Headquarters Marine Corps Military Personnel Law Branch (JPL) recommending denying Petitioner's request, noting that the CO does not have to wait until civilian legal action is resolved to impose NJP and to give formal counseling. In addition, the AO found that the Wing Order was valid and not contrary to state law, that Petitioner provided insufficient evidence to show that the Page 11 was false or materially altered, and that there is no evidence that Petitioner submitted a rebuttal for inclusion in his record.

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e. Petitioner argues that there are several administrative and factual errors within the JPL AO, and specifically noted that it “is quite concerning that HQMC AO did not acknowledge the invalid promotion restriction entry or address it to the Board as a matter of injustice at the HQMC level.” Petitioner further contends that the Page 11 6105 counseling was used to record the proceedings outside of the parameters of references (c) and (d). See enclosure (6).

CONCLUSION

Upon review and consideration of all the evidence of record, the Board determined that Petitioner’s request warrants partial relief. The Board substantially concurred with the AO that the NJP is valid. The Board noted there is a presumption of regularity and determined that Petitioner did not provide sufficient evidence that the CO relied solely on Petitioner’s self-report in order to find the Petitioner guilty at NJP. In short, there was no evidence that the command did not receive and rely on additional information with respect to Petitioner’s arrest prior to the NJP. Moreover, the Board determined that the Marine Corps properly followed all of its procedures for awarding an NJP. Petitioner was advised of his right to refuse NJP and demand trial by court-martial in lieu of NJP, but he chose not to. He was also given an opportunity to consult counsel prior to accepting NJP. He agreed to accept NJP subject to his right of appeal, but he did not appeal. The Board thus determined that Petitioner’s CO was well within his discretionary authority to impose NJP, and Petitioner disagreeing with the action taken against him does not make it improper.

The Board noted, however, that the UPB entry contains an error; the Board found the Petitioner did provide evidence that he did not receive the LOR as it is not in his OMPF. The Board thus concluded that reference to the LOR shall be redacted from the UPB entry.

With regard to Petitioner’s contentions that the Page 11 entries are invalid, the Board determined the 6105 counseling entry creates a permanent record of a matter his CO deemed significant enough to document, and Petitioner’s evidence did not prove otherwise. The Board determined the entry met the 6105 counseling requirements detailed in reference (d). Specifically, the Board noted that the entry provided written notification concerning his deficiencies (i.e., failure to obey an order or regulation), specific recommendations for corrective action indicating any assistance available, a comprehensive explanation of the consequences of failure to successfully take the recommended corrective action, and a reasonable opportunity to undertake the recommended corrective action. Petitioner was afforded the opportunity to rebut the counseling, and he chose to submit a written rebuttal. However, the Board noted Petitioner’s rebuttal is not included in his OMPF. The Board also found that his command did not properly document, in accordance with reference (c), whether Petitioner did or did not submit a rebuttal to his Page 11 counseling. The Board thus concluded that Petitioner shall be allowed to submit his rebuttal to the Page 11, provided it is in compliance with reference (c).

The Board determined Petitioner’s contentions regarding his Page 11 promotion-restriction counseling is without merit. The Board noted that the entry was issued under the provisions of reference (e), paragraph 1204, which does not limit promotion-restriction entries to Marines only in the grades of private first class through sergeant.

The Board determined that allowing Petitioner to add a rebuttal to the 6105 counseling in his OMPF and redacting the verbiage from the UPB corrects the material errors. The Board further determined that Petitioner failed to identify any other material errors that invalidated the UPB entry or the Page 11 6105 and promotion-restriction counselings of 6 January 2017. The Board thus concluded that enclosures (2) and (3) will remain in Petitioner’s record.

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The Board determined that removal of Petitioner's failures of selection or granting the convening of a remedial promotion selection board is not warranted. The Board also determined that removal and replacement of his extension contracts is not warranted.

RECOMMENDATION

In view of the above, the Board recommends the following corrective action:

Petitioner's naval record be corrected by redacting the verbiage "Letter of Reprimand," from enclosure (2), the UPB entry of 6 January 2017.

Petitioner is allowed to submit for inclusion in his OMPF, within 60 days of receipt of this decision document, his rebuttal to the Page 11 6105 counseling at enclosure (3), providing the rebuttal is in compliance with reference (c).

The part of Petitioner's request for corrective action that exceeds the foregoing is denied as the Board found no material error will exist in Petitioner's OMPF after corrections are made.

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. 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 Regulation, 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.

12/23/2021

[REDACTED]

Deputy Director

Signed by: [REDACTED]