



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

[REDACTED]
Docket No: 3625-21
Ref: Signature Date

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

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

Ref: (a) Title 10 U.S.C. § 1552
(b) MCO 1070.12K W/CH 1

Encl: (1) DD Form 149 w/attachments
(2) Page 11 Not Recommended for Promotion of 13 Sep 19
(3) Notification of Separation of 1 Oct 19
(4) 6105 and Page 11 Not Recommended for Promotion of 14 Oct 19
(5) Not Recommended for Promotion of 5 Dec 19
(6) Administrative Discharge Board Report of 30 Jun 20
(7) Superior Court of the State of [REDACTED] Dismissal of 29 Apr 21
(8) Advisory Opinion by HQMC memo 1070 SEC of 6 Jul 21

1. Pursuant to the provisions of the reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requests to remove enclosures (2), (4), and (5).

2. The Board, consisting of three members reviewed Petitioner's allegations of error and injustice on 4 January 2022 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, found that, before applying to this Board, he exhausted all administrative remedies available under existing law and regulations within the Department of the Navy. The Board made the following findings:

a. On or about 14 April 2019, an incident occurred that involved Petitioner's former girlfriend. Petitioner was accused of sexual assault, kidnapping, making threats, intimidating, and simple assault. See enclosure (3).

b. On 13 September 2019, Petitioner was issued a Page 11 entry notifying him that he is eligible but not recommended for promotion due to recent or pending legal action. The entry was annotated "SNM not available for signature." See enclosure (2).

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

[REDACTED] USMC

c. On 1 October 2019, Petitioner was notified that he was being recommended for separation for commission of a serious offense. Petitioner was accused of sexual assault, kidnapping, making threats, intimidating, and simple assault. See enclosure (3).

d. On 14 October 2019, Petitioner was issued a 6105 and Page 11 counseling entries. The first entry, 6105 counseling, counseled Petitioner for violating Articles 115 (Malingering), 120 (Rape and Sexual Assault), 128 (Assault), and 128b (Domestic Violence), of the Uniform Code of Military Justice (UCMJ). The entry notified Petitioner that he was being processed for administrative separation according to paragraph 6210.6, Marine Corps Separations and Retirement Manual (MARCORSEPSMAN). Petitioner acknowledged the entry and elected not to submit a written rebuttal. The second entry, Page 11 counseling, notified Petitioner that he was eligible but not recommended for promotion to sergeant due to his pending administrative separation. Petitioner acknowledged the entry and elected not to submit a written rebuttal. See enclosure (4).

e. On 5 December 2019, Petitioner was issued a Page 11 entry notifying him that he is eligible but not recommended for promotion to sergeant due to pending legal action. Petitioner acknowledged the entry and elected not to submit a written rebuttal. See enclosure (5).

f. On 30 June 2020, an administrative separation board (ASB) unanimously found that the preponderance of the evidence did not prove any of the acts or omissions alleged warranting separation. The ASB recommended that Petitioner be retained in the Marine Corps. See enclosure (6).

g. On 29 April 2021, the Superior Court of the State of [REDACTED] filed an Order of Dismissal and dismissed charges against Petitioner without prejudice. See enclosure (7).

h. Petitioner contends that the requested relief should be granted because the ASB determined that he did not commit misconduct, and he was retained in the Marine Corps. Petitioner also contends that his case in the [REDACTED] County Superior Court was dismissed and he was cleared of all charges. See enclosure (1).

i. The advisory opinion (AO), furnished by the Headquarters Marine Corps recommended approving Petitioner's request. The AO noted that according to reference (b), Page 11 entries are to be authenticated by the commanding officer (CO) and/or acknowledged by the Marine. The AO determined that the 13 September 2019 Page 11 entry is invalid and should be removed because it was not signed (acknowledged) by Petitioner.

The AO noted, too, that according to reference (b), "Do not make entries on Page 11 which concern administrative discharge or competency review proceedings if they do not, upon final review, result in discharge or reduction." The AO determined that because Petitioner was retained in the Marine Corps, the two 14 October 2019 entries at enclosure (3) should also be removed.

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

The AO also determined that the charges prompting the issuance of Petitioner's 5 December 2019 Page 11 entry were later dismissed without prejudice by the State of [REDACTED], thus Petitioner's 5 December 2019 Page 11 should be removed. The AO indicated that Petitioner's record would be corrected administratively by removing enclosure (3), however, the entries in enclosure (3) are still on file in Petitioner's record. See enclosure (8).

BOARD MAJORITY CONCLUSION

Upon review and consideration of all the evidence of record, the Board majority found the existence of an error warranting full relief. In this regard, the Board majority substantially concurred with the AO that Petitioner's contested 6105 and Page 11 entries, enclosures (2), (4), and (5) should be removed.

Concerning Petitioner's 13 September 2019 Page 11 entry, enclosure (2), the Board majority noted that Petitioner did not acknowledge the entry and was not afforded the opportunity to provide a statement, the Board majority determined that according to reference (b) the entry is in error and should be removed.

Concerning Petitioner's 14 October 2019 6105 and Page 11 entries, the Board majority noted enclosure (8) and that reference (b) do not permit Page 11 entries regarding administrative separation if, upon final review, do not result in separation. Accordingly, the Board majority determined that the two entries at enclosure (4) should be removed.

Concerning Petitioner's 5 December 2019 Page 11 entry, the Board majority noted that the State of [REDACTED] dismissed the charges against Petitioner. The Board majority determined that the counseling was issued based upon the pending charges, thus dismissal of Petitioner's charges by the State of [REDACTED] is sufficient to warrant removal of enclosure (5).

BOARD MAJORITY RECOMMENDATION

In view of the above, the Board majority members recommend the following corrective action.

Petitioner's naval record be corrected by removing enclosures (2), (4), and (5).

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 no such entries or material be added to the record in the future. This includes, but is not limited to, all information systems or database entries that reference or discuss the expunged material.

BOARD MINORITY CONCLUSION

Upon review and consideration of all the evidence of record, the Board minority found the existence of an error warranting partial relief.

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

Concerning Petitioner's 13 September 2019 Page 11 entry, enclosure (2), the Board minority noted that Petitioner did not acknowledge the entry and was not afforded the opportunity to provide a statement, the Board minority determined that according to reference (b) the entry is in error and should be removed.

Concerning Petitioner's 14 October 2019 6105 entry, the Board minority noted reference (b) and that Petitioner ultimately was not administratively separated from the Marine Corps, however, the Board minority determined that the entry was not in error at the time Petitioner's Commanding Officer (CO) issued the counseling, and the entry documents Petitioner's misconduct as determined by a preponderance of evidence standard. The Board minority also noted that an ASB recommended Petitioner be retained on active duty and ultimately, Petitioner was not separated and the charges against Petitioner in civilian court were later dismissed without prejudice (i.e., dismissed temporarily, and charges may be re-filed). The Board minority, however, determined that although the ASB did not find sufficient evidence to warrant Petitioner's separation from the Marine Corps, that finding does not impact the validity of the CO's determination that Petitioner committed misconduct warranting a counseling entry, and it is conceivable and permissible that the two processes with separate considerations and purposes may arrive at different findings. The Board minority reasoned that, when applying the presumption of regularity, the CO's determination was based upon a preponderance of the evidence that Petitioner committed misconduct, Petitioner's CO was within his discretionary authority to issue the 6105 entry, and the entry creates a permanent record of a matter his CO deemed significant enough to document. The Board minority thus determined that the administrative separation notification within the 6105 entry should be redacted, thereby making the entry valid and in compliance with reference (b).

Concerning Petitioner's 14 October 2019 not recommended for promotion Page 11 entry, the Board minority concurred with AO that Petitioner's Page 11 entry should be removed.

Concerning Petitioner's 5 December 2019 not recommended for promotion Page 11 entry, the Board minority noted that according to reference (b), the entry is valid. Specifically, Petitioner's not recommended for promotion is not documented elsewhere in his record, and it documents an event in his career that is useful for future commanders. The Board minority concluded that Petitioner's 5 December 2019 Page 11 entry is valid and should remain on file.

BOARD MINORITY RECOMMENDATION

In view of the above, the Board minority member recommends the following corrective action.

Petitioner's naval record be corrected by removing enclosures (2) and the 14 October 2019 not recommended for promotion Page 11 entry, enclosure (4).

Petitioner's naval record be corrected by redacting the sentence "I understand that I am being processed for the following judicial or adverse administrative action: administrative separation per para 6210.6 of the MARCORSEPSMAN" from his 14 October 2019 6105 entry at enclosure (4).

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

No other 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.

1/24/2022

[REDACTED]

Executive Director

From: Assistant General Counsel (Manpower and Reserve Affairs)

Reviewed and Approved Majority Recommendation (Grant Relief)

Reviewed and Approved Minority Recommendation (Partial Relief)

Reviewed and Approved (Deny Relief)

2/7/2022

[REDACTED]

Assistant General Counsel (M&RA)

[REDACTED]