



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

█
Docket No. 4076-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF █
█ USMC

Ref: (a) Title 10 U.S.C. § 1552
(b) MCO 5354.1F
(c) Manual for Courts-Martial (2019 ed.)
(d) MCO P1070.12K w/Ch1

Encl: (1) DD Form 149 w/attachments
(2) Page 11 (6105) counseling entry, 27 Apr 21
(3) Rebuttal to Page 11 (6105), 3 May 21
(4) Advisory Opinion by HQMC JPL, 17 Aug 22

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 enclosures (2) and (3).

2. A three-member panel of the Board, sitting in executive session, considered Petitioner's application on 27 September 2022. The names and votes of the panel members will be furnished upon request. Petitioner allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of the Board. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval record, 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 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.

b. On 27 April 2021, Petitioner received a 6105 counseling entry for violating the Uniform Code of Military Justice (UCMJ) Article 117a (wrongful broadcast or distribution of intimate visual images) by wrongfully providing an underwear clad photograph of a Lance Corporal (LCpl) to a Corporal. Enclosure (2).

c. Petitioner acknowledged the counseling, and in his rebuttal explained that on

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23 September 2020, around 0200, he received a photograph of a female Marine, who was in his room, wearing just her underwear, purportedly under the influence of alcohol, and destroying his personal property. Petitioner noted that Marines are taught to report something when they see it, therefore, he subsequently sent the photograph to one of his direct non-commissioned officers (NCOs) to show that the female Marine “was in the wrong” and that action needed to be taken. Petitioner also acknowledged that he should have showed his NCO the picture instead of sending it via text message. Petitioner stated he did not “wrongfully” broadcast the photograph, had no intention of distributing the photograph, and it was not sent with the intent to cause humiliation, intimidation, harm or harassment. Petitioner explained he simply forwarded the photograph to notify one of his direct NCOs and then deleted the photograph from his phone. Enclosure (3).

d. In his application, Petitioner contends he submitted the photograph to one of his female NCOs only to report the incident. Petitioner also contends that according to reference (b), Article 117a, UCMJ is only wrongful if the person making the distribution did so without legal justification, knows or reasonably should know that the depicted person did not consent to the disclosure, and the intimate image is distributed or broadcasted with the intent to realize personal gain, humiliate, harm, harass, intimidate, threaten, or coerce the depicted person. Petitioner argues he did not intend any of the aforementioned actions, nor did he intend any other actions stated in reference (b), he simply reported it to his immediate chain of command. Enclosure (1).

e. The Marine Corps Military Personnel Law Branch (JPL) provided an advisory opinion (AO) for the Board’s consideration, recommending Petitioner’s application be denied. The AO stated that according to Article 117a, UCMJ, the distributor of an intimate visual image nonetheless violates the Article when it is reasonable for the distributor to know that the intimate visual image sent would harm the depicted person’s reputation or cause emotional distress. The AO determined it is reasonable that Petitioner’s transmission of the image to a NCO would harm the LCpl’s reputation and would likely cause her emotional distress. The AO also determined that Petitioner’s argument is purely based on his claim that he did not intend to harm the LCpl, however, Petitioner’s Commanding Officer (CO) determined that he violated Article 117a and issued the contested counseling. The AO noted that Petitioner freely admits he could have reported the LCpl’s actions without submitting the photograph, consequently, Petitioner did not have legal justification to send the intimate visual image. Enclosure (4).

MAJORITY CONCLUSION

Upon careful review and consideration of all the evidence of record, the Board Majority found the existence of an injustice warranting relief.

The Majority did not concur with the AO and instead found Petitioner’s above mentioned argument convincing. The Majority believed that Petitioner most likely lacked an awareness that his actions violated the UCMJ. The Majority noted although Petitioner admitted he should have handled the situation differently, the statement was made after he was counseled and it was based upon hindsight knowledge of reference (c). The Majority concluded that Petitioner’s counseling entry was disproportionate, unjust, and should be removed.

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MAJORITY RECOMMENDATION

In view of the foregoing, the Board Majority recommends the following corrective action:

Petitioner's naval record be corrected by removing enclosures (2) and (3), his 27 April 2021 6105 counseling entry and his 3 May 2021 rebuttal.

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. This includes, but is not limited to, all information systems or database entries that reference or discuss the expunged material.

That no further correction action be taken on Petitioner's naval record.

MINORITY CONCLUSION

Upon careful review and consideration of all the evidence of record, the Board Minority found no evidence of an error or injustice warranting relief.

The Minority substantially concurred with the AO. In this regard, the Minority noted that reference (c) clearly outlines the statute and elements of Article 117a, and Petitioner's submission of the photograph was a clear violation of the UCMJ. The Minority noted Petitioner's statement, however, found that Petitioner's statement was not supported by sufficient evidence that would overcome the presumption of regularity. The Minority also determined that in accordance with reference (d), the CO was well within his/her authority to issue the counseling entry.

MINORITY RECOMMENDATION

In view of the foregoing, the Board Minority recommends that no corrective action be taken on Petitioner's naval record.

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.

11/4/2022

[REDACTED]

Executive Director

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[REDACTED] USMC

From: Assistant General Counsel (Manpower and Reserve Affairs)

Reviewed and Approved Board Majority Recommendation (Grant Relief)

Reviewed and Approved Board Minority and Advisory Opinion Recommendation (Deny Relief)

11/22/2022

