



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

█
Docket No. 5083-22
Ref: Signature Date

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

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

Ref: (a) 10 U.S.C. § 1552
(b) Uniform Code of Military Justice
(c) MCO 1610.7A

Encl: (1) DD Form 149 w/enclosures
(2) Unit Punishment Book dtd 10 Dec 2020
(3) Administrative Remarks (Page 11) counseling entry of 10 Dec 2020
(4) Administrative Remarks (Page 11) counseling entry Rebuttal of 17 Dec 2020
(5) Administrative Remarks (Page 11) entry of 10 Dec 2020
(6) Fitness Report for reporting period 7 Nov 2020 to 10 Dec 2020
(7) HQMC (JPL) Advisory Opinion, █ dtd 15 Sep 2022
(8) Petitioner's memo RE: Rebuttal to JPL Advisory Opinion, 16 Nov 2022
(9) HQMC (JPL) Supplemental Advisory Opinion, █ dtd 13 Mar 2023

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 the following corrections be made to her naval record:

a. Removal of Unit Punishment Book (UPB) associated with the nonjudicial punishment (NJP) of 10 December 2020;

b. Removal of Administrative Remarks (Page 11) 6105 counseling entry associated with NJP;

c. Removal of rebuttal statement associated with NJP;

d. Removal of adverse fitness report associated with NJP;

e. Removal of any and all references to the NJP that exist in any record within the Department of the Navy; and

f. Reimbursement of forfeiture of pay in the amount of \$2,214.00 imposed as a result of NJP.

2. The Board, consisting of █, and █, reviewed Petitioner's allegations of error and injustice on 30 March 2023, and pursuant to its regulations,

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determined 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 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 with the exception of her request to remove the adverse fitness report for the reporting period 7 November 2020 to 10 December 2020.

b. Petitioner received NJP, on 10 December 2020, for violations of reference (b) Article 92 (failure to obey order or regulation), Article 134 (extramarital sexual conduct), and Article 134 (fraternization). Specifically, the Commanding Officer (CO) determined Petitioner violated Article 92 when Petitioner, "having knowledge of a lawful order to not commit extramarital sexual acts of adultery, an order which it was her duty to obey," failed to obey by engaging in a romantic affair with another Marine in the unit. The CO further determined Petitioner violated Article 134 (extramarital sexual conduct) by wrongfully engaging in extramarital sexual conduct and that "such conduct was to the prejudice of good order and discipline" and of a "nature to bring discredit upon the Armed Forces." Lastly, the CO determined Petitioner knowingly fraternized, in violation of Article 134 (fraternization), with [REDACTED] on terms of military equality by "engaging in an extramarital romantic affair, in violation of the custom of the United States Marine Corps" and that conduct was "to the prejudice of good order and discipline" and of a "nature to bring discredit upon the armed forces." Petitioner was awarded forfeiture of \$2,214.00 pay per month for two months and 45 days restriction and extra duty. One month of Petitioner's forfeiture and the restriction/extra duty were suspended for six months. See enclosure (2).

c. On 10 December 2020, Petitioner was issued an Administrative Remarks (Page 11) entry counseling her for the deficiencies adjudicated by NJP. In response to the Page 11, Petitioner submitted a rebuttal statement to simply "explain the facts that led to the offense." Additionally on 10 December 2020, she acknowledged a Page 11 entry stating she was eligible but not recommended for promotion to First Sergeant or Master Sergeant for six months due to the NJP and she elected not to submit a rebuttal to this entry. See enclosures (3) through (5).

d. As required by reference (c), Petitioner was issued an adverse fitness report for the reporting period 7 November 2020 to 10 December 2020. In his directed comments, the Reporting Senior noted Petitioner received NJP on 10 December 2020 and was issued a 6105 counseling as a result of the NJP. See enclosure (6).

e. Petitioner contends the NJP she received was both in error and unjust because the evidence established [REDACTED] was no longer in a covenant marriage, there was no violation of any punitive article, the punishment received was excessive, and the NJP was initiated out of spite and greed by [REDACTED] ex-wife without consideration of any evidence or facts. Specifically, Petitioner contends the following:

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(1) Legal separation is an affirmative defense. She further contends the record contains clear evidence of [REDACTED] actions with a view toward divorce despite his inability to file for divorce in the state of [REDACTED] prior to his unit's deployment due to jurisdiction requirements.

(2) The relationship between herself and [REDACTED] was not prejudicial to good order and discipline or service discrediting. Petitioner further contends there was no evidence presented at NJP discussing conduct that was prejudicial to good order and discipline or that brought discredit upon the armed forces. Additionally, she contends the command did not investigate the allegations and the only evidence used against her at the NJP was [REDACTED] own statement of honesty.

(3) The NJP is unjust and unfair because all relevant evidence was not taken into consideration and "none of [REDACTED] evidence was taking into consideration."

(4) Article 134 (fraternization) does not apply to enlisted members; it is specific to officers fraternizing with enlisted. Further, there is no punitive article addressing fraternization amongst specific ranks of enlisted members, and there is no "custom" establishing unduly relationships amongst Senior Noncommissioned Officers. As a result, the presumption that unduly relationships are prejudicial to good order and discipline does not exist between enlisted members, therefore, evidence must demonstrate that the relationship was directly discrediting or prejudicial to good order and discipline. Petitioner contends that in her case, no such evidence exists.

(5) Petitioner was informed the fraternization charge was the result of [REDACTED] authority over her and not in connection with rank but this specification again fails because a superior-subordinate or direct supervisory relationship did not exist.

(6) The Article 134 (fraternization) charge is multiplicitous with the Article 134 (extramarital sexual conduct).

(7) The addition of the Article 92 (failure to obey an order or regulation) violation to the NJP charges was unjust and unfair because 1) no order was given and 2) no general order or regulation exists. Further, the specification is missing important and required information: who issued the order and when was it issued.

(8) The two character witnesses, the detachment Officer-in-Charge (OIC) [REDACTED] and [REDACTED], who were present at the NJP to speak on Petitioner's behalf were denied the opportunity to testify.

(9) The squadron handled the situation poorly and showed extreme bias towards Petitioner and favoritism towards [REDACTED] ex-wife.

(10) The NJP, although administrative in nature, still profoundly negatively impacts a member's career.

In support of her contentions, Petitioner submitted detailed supporting documentation and letters

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of recommendation.

f. In documentation submitted 13 July 2022, Petitioner contends the Superior Court of [REDACTED] determined [REDACTED] was legally separated from his spouse as of 26 September 2019. She further contends this solidifies her contention relief should be granted based on the affirmative defense that he was legally separated. See enclosure (1).

g. In a supplemental letter, dated 19 August 2022, Petitioner contends the NJP authority and his successor in command are arbitrarily interpreting the reference (b) articles and charges without proof and with a complete disregard for the evidence. See enclosure (1).

h. By memorandum, dated 15 September 2022, Headquarters Marine Corps (JPL) provided an Advisory Opinion (AO), enclosure (7), for the companion case NR20220002979, which applies to the facts and circumstances of this case, making the following points and recommendations:

(1) Petitioner's argument that she did not violate Article 134 (extramarital sexual conduct) because [REDACTED] marriage was pending legal dissolution at the time is incorrect. The affirmative defense (that the accused, co-actor, or both were legally separated by order of a court...) does not apply unless all parties to the conduct are either legally separated or unmarried. The record definitively shows [REDACTED] was not legally separated by order of a court at the time of the offense. Further, Petitioner incorrectly argues the CO was required to consider the fact the marriage was pending legal dissolution at the time of the offense. However, contrary to Petitioner's assertion, the pending legal dissolution of a marriage does not constitute an affirmative defense.

(2) Petitioner's argument the commander failed to consider whether a mistake of fact defense applied is in error because [REDACTED] has not demonstrated he raised the issue at his NJP or that evidence in the record supported such a defense.

(3) Petitioner raises several general procedural issues but none establish a material error or injustice. In each instance, she conflates the procedural protections ordinarily afforded to an accused at court-martial with the use of NJP as an administrative tool to address misconduct. Even if a procedural violation occurred, Petitioner has not explained what evidence a more thorough investigation would have uncovered, what evidence he would have obtained, or how her failure to obtain such evidence prejudiced her defense.

(4) Petitioner's argument her punishment was inappropriately severe is unconvincing because the punishment was far below the jurisdictional maximum punishment at NJP.

(5) Petitioner argues the CO failed to properly consider her military history or allow Petitioner to call character witnesses, however, the CO's decision to impose far less than the jurisdictional maximum suggests the CO did weigh other factors in deciding appropriate punishment.

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(6) Petitioner failed to demonstrate a material error or injustice with respect to the specifications alleging violations of Articles 92 and ART 134 (fraternization). The Article 92 specification alleges Petitioner failed to obey a lawful order to “not commit extramarital sexual acts or adultery...by engaging in a romantic affair with another Marine in the unit.” Further, Petitioner argues the specification for a violation of Article 134 (fraternization) is erroneous because the cited article only proscribes fraternization between officers and enlisted. Petitioner is correct that the article listed is erroneous. However, the error is not material. The fact Petitioner’s UPB lists Article 134 instead of Article 92 is not a material error because the UPB is only required to list “the UCMJ articles allegedly violated and a summary or each offense, to include date, time, and place...”

(7) Petitioner’s argument the reference (b) articles she was charged with at NJP were multiplicitous fails because the doctrine of multiplicity does not apply at NJP.

(8) The request to remove the Page 11 counseling and adverse fitness report should be denied for the same reasons as stated above. Further, Petitioner has not exhausted her administrative remedies for the fitness report removal.

(9) If the Board disagrees with this AO’s recommendation that Petitioner has not demonstrated a material error or injustice with respect to her NJP for violations of Articles 92 (failure to obey an order) and/or Article 134 (fraternization), the appropriate remedy would be to sustain Petitioner’s NJP for a violation of Article 134 (extramarital sexual conduct) and redact all references to either one or both of the violations.

i. By memorandum of 16 November 2022, Petitioner submitted a rebuttal to the AO at enclosure (8). The following are relevant comments and contentions taken from the AO rebuttal:

(1) To satisfy the requirement of the affirmative defense, a service member must only be legally separated according to the laws that govern the court of competent jurisdiction.

(2) Acceptance of NJP does not defeat material errors and injustices. As for [REDACTED] statement of honesty, she contends he was not educated on the law nor did he receive legal counsel to understand what he was writing. [REDACTED] ignorance and admission of guilt at that time do not defeat the material errors and injustices discovered now.

(3) Any mention of the relationship not being discreet in the petition pertains only to the awareness of [REDACTED] former spouse who found no reason to hide this information from her because they were already separated. The relationship was discreet to all others as evidenced by the fact the command was not aware of the relationship until November 2020, and only because they were notified by the ex-wife.

(4) Failing to appeal an NJP does not constitute a waiver to petition the Board for correction of errors or injustices.

(7) The issue as to whether [REDACTED] was legally separated at the time of the offense is unquestionably a matter of law of the state in which the court of competent jurisdiction

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lies. In [REDACTED] the court found [REDACTED] was legally separated during the time they were accused of the offenses. The date of the trial or when the order was approved is completely irrelevant. Analysis of the punitive articles does not mention anything concerning the court order; it requires only that the accused be legally separated.

(8) Petitioner's conduct was not prejudicial to good order and discipline or service discrediting. Petitioner did not supervise or create performance evaluations on [REDACTED] or vice versa, nor did they have tasking authority over each other or benefit in any way from their relationship. There was no misuse of any government time and resources to facilitate the conduct nor were there any accusations of this at NJP. The relationship occurred on their own time during personal liberty. Petitioner and [REDACTED] were not counseled or ordered to desist. There was no negative impact on the unit as evidenced by the record and the affidavit from the Detachment OIC. Lastly, the relationship was not a "fling" or an act of temptation, rather it was a relationship that developed after [REDACTED] was separated from his former spouse.

(9) A "mistake of fact" defense existed because [REDACTED] had an honest and reasonable belief he was legally separated because he had received legal counsel from a family attorney on 26 September 2019 following the restraining order hearing. Petitioner was advised that he was separated according to the laws that govern such issues. JPL failed to reconcile the fact [REDACTED] "honest and reasonable belief" actually became the reality when the court issued the "separation order".

(10) A more thorough investigation would have uncovered that there was no prejudice to good order and discipline or discredit to the Marine Corps.

(11) The Board should consider the denial of witnesses at the NJP as a material error because the witnesses were both readily available and present outside of the NJP authority's office. Further, the witnesses were relevant because they were members of the detachment.

(12) As confirmed by the Sergeant Major, the command nor its superior in command had a regulation prohibiting adultery.

(13) The JPL analysis of the Article 92 violation is flawed, an abuse of discretion, and not in accordance with the law.

(14) JPL claims the error of charging the Article 134 (fraternization), even though it does not apply, is not material and instructs the Board to simply disregard the Article 134 (fraternization) and presume a violation under Article 92. This recommendation demonstrates an abuse of discretion and runs counter to the Board's entire purpose of correcting a record for errors and injustices.

j. A supplemental AO was requested by the Board to provide a response to [REDACTED] and Petitioner's rebuttal, specifically focusing on Petitioner's contentions regarding the Article 134 (extramarital sexual conduct) and addressing the arguments Petitioner raised regarding pending legal dissolution, legal separation, affirmative defense, mistake of fact, and factors supporting a

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determination the relationship was prejudicial to good order and discipline and service discrediting. By memorandum of 13 March 2023, JPL provided a supplemental AO, enclosure (9), making the following points and recommendations:

(1) JPL stands by its legal analyses [in enclosure (10)]. Petitioner has not demonstrated that any single issue in her case constitutes sufficient error to warrant relief.

(2) However, the confluence of several issues, including an erroneous NJP charge for a violation of Article 92, the facts surrounding [REDACTED] contentious separation and divorce, and the tenuous impact of Petitioner's conduct on good order and discipline, are sufficient to create the appearance of an injustice. Accordingly, relief is appropriate.

(3) Petitioner's request to remove the UPB entry, the associated 6105, and to reimburse the forfeiture of pay should be granted. Her request to remove the associated fitness report should be denied because Petitioner has not demonstrated that she exhausted all administrative remedies by first petitioning the Performance Evaluation Review Board.

CONCLUSION

Upon review and consideration of all the evidence, the Board concluded Petitioner's request warrants relief.

The Board substantially concurred with portions of the JPL AO at enclosure (7) and the supplemental AO at enclosure (9). Specifically, the Board determined the charge/specification for a violation of Article 134 (fraternization) was erroneous because the cited article only proscribes fraternization between officers and enlisted. Further, with respect to the Article 92 violation for failing to obey a "lawful order to not commit extramarital sexual acts of adultery", the Board noted the record indicates the command did not have a regulation prohibiting adultery nor were Petitioner and/or [REDACTED] ordered to desist. Additionally, the record contains no evidence the relationship between Petitioner and [REDACTED] was prejudicial to good order and discipline or service discrediting. The Board determined Petitioner met the burden of overcoming the presumption of regularity in the command's decision to charge her with a violation of Article 92 and concluded it was error and unjust for the command to find Petitioner guilty of adultery using the Article 92 charge.

The Board concurred with the AO at enclosure (9) and determined the confluence of the erroneous NJP charge for violation of Article 92, the facts surrounding [REDACTED] contentious separation and divorce, and the tenuous impact of Petitioner's conduct on good order and discipline, sufficiently create the appearance of an injustice. The Board concluded Petitioner has overcome the presumption of regularity and established the NJP received 10 December 2020 was unjust and should be set aside, to include reimbursement of the \$2,214.00 forfeiture of pay. Additionally, the resultant Page 11 counseling entry of 10 December 2020, Petitioner's rebuttal response, and the Page 11 entry annotating Petitioner's non-recommendation for promotion also dated 10 December 2020 should be removed from Petitioner's record. Lastly, noting reference (c) required a directed fitness report following the 10 December 2020 NJP and the report issued was non-observed and only addressed the adjudication of misconduct at NJP, the Board made an

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exception to policy, reviewed Petitioner's request to remove the contested fitness report despite not having exhausted her administrative remedies, and concluded it was in the interest of justice to remove the adverse report based on its findings related to the NJP.

RECOMMENDATION

In view of the above, the Board directs the following corrective action.

Petitioner's naval record be corrected by setting aside the 10 December 2020 NJP, removing the associated UPB entry and any/all reference to the NJP that exists in Petitioner's record, and reimbursing the forfeiture of pay awarded by the NJP.

Petitioner's naval record be corrected by removing the Administrative Remarks (Page 11) counseling entry of 10 December 2020 at enclosure (3) and the associated rebuttal at enclosure (4).

Petitioner's naval record be corrected by removing the Administrative Remarks (Page 11) entry of 10 December 2020 at enclosure (5).

Petitioner's naval record be corrected by removing the fitness report at enclosure (6) for the reporting period 7 November 2020 to 10 December 2020.

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 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.

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.

4/20/2023

[REDACTED]
Executive Director
[REDACTED]