



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

██████████
Docket No. 6707-22
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) 10 U.S.C. § 1552
(b) MCO 1610.7A, Performance Evaluation System

Encl: (1) DD Form 149 w/enclosures
(2) UPB entry, 29 July 2021
(3) Administrative Remarks (6105) NJP counseling entry, 29 July 2021
(4) Administrative Remarks (Page 11) promotion restriction counseling entry, 29 July 2021
(5) DC Fitness Report, 6 May 2021 – 29 July 2021
(6) Court Judgment, 25 Aug 22
(7) Commanding Officer, Set Aside Letter, 1 Sept 22
(8) Commanding Officer, Recommendation Letter, 1 Sept 22
(9) CH Fitness Report, 30 July 2021 – 15 April 2022
(10) Advisory Opinion by HQMC (JPL), 15 Nov 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 removal of his 29 July 2021 nonjudicial punishment (NJP), adverse fitness report for the period 6 May 2021 to 29 July 2021, and the associated Administrative Remarks (Page 11) 6105 counseling entries from his military record.

2. The Board, consisting of ██████████, and ██████████ reviewed Petitioner's allegations of error and injustice on 22 November 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 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 22 May 2021 Petitioner was arrested in ██████████ ██████████ ██████████ (██████████) for Driving While Under the Influence (DWI). Enclosure (2).

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c. On 29 July 2021 the Commanding Officer, Fleet Readiness Center imposed NJP for violation of Article 113, of the Uniform Code of Military Justice (UCMJ) for drunken or reckless operation of a vehicle, aircraft, or vessel: In that Petitioner did on or about 22 May 2021 in [REDACTED] [REDACTED], [REDACTED] physically control a vehicle while the alcohol concentration in his breath measured at .11 which exceeded the .08 limit under the law. Enclosure (2).

d. On 29 July 2021 Petitioner was issued two counseling's entries. The first, a 6105 counseling, memorialized his NJP. The second, a Page 11 counseling notified him of his promotion–restriction status due to his NJP. Petitioner acknowledged the entries and elected not to submit a written rebuttal to either counseling. Enclosures (3) and (4).

e. Petitioner was issued an adverse Directed by the Commandant of the Marine Corps (DC) Fitness Report for the reporting period 6 May 2021 to 29 July 2021 due to the imposition of NJP on 29 July 2021. Enclosure (5).

f. On 25 August 2022 a Judge in [REDACTED] granted the Petitioners motion to suppress the breathalyzer because the test was improperly conducted. The Judge found Petitioner not guilty due to lack of foundation. Enclosure (6).

g. On 1 September 2022 the Commanding Officer, Fleet Readiness Center East set aside Petitioner's NJP based upon the [REDACTED] Judge's 25 August 2022 ruling. Subsequently, his Commanding Officer favorably recommended that all related adverse materials be removed from Petitioner's Official Military Personnel File. Enclosures (7) and (8).

h. Petitioner contends the NJP, adverse fitness report, and the associated counseling entries, should be removed from his military record based upon the civilian court finding of not guilty of DWI. Petitioner further requested that should the Board grant the removal of his adverse fitness report, that his follow on fitness report covering the period 30 July 2021 to 15 April 2022, be modified by changing the "from" date to 6 May 2021. Enclosures (1) and (9).

i. The Advisory Opinion (AO) by Headquarters Marine Corps (JPL) recommended partial approval of Petitioner's request to remove enclosure (2), the Unit Punishment Book (UPB) entry regarding his NJP. The AO states that the Petitioners request to remove the UPB entry should be granted because the NJP was properly set aside. Although the AO suggested that the removal of the adverse fitness report to be appropriate, they recommended that removal of the adverse fitness report be denied because the Petitioner failed to exhaust his administrative remedies by first petitioning the Performance Evaluation Review Board (PERB) for removal in accordance with reference (b). The AO did not provide an opinion regarding the Petitioners corresponding Page 11 counseling entries. Accordingly, the AO concludes the UPB should be removed from Petitioner's record. Enclosure (10).

CONCLUSION

Upon review and consideration of all the evidence of record, and especially in light of the AO at enclosure (10), the Board concluded Petitioner's request warrants partial relief. The Board relied upon the AO's determination as well as the CO's set aside letter that the Petitioner was found not

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guilty and determined Petitioner's UPB entry and the associated counseling entries shall be removed. Further, the Board noted the AO's favorable recommendation to remove the adverse fitness report. The Board noted that in accordance with reference (b), a [REDACTED] report should be submitted when significant adverse action occurs that requires immediate reporting to the Commandant of the Marine Corps. Reference (b) further directs the reporting senior to consider the entire evaluation period when preparing the report and not just the action that caused the report. In this case, the Board noted that the RS submitted an adverse not observed [REDACTED] report in accordance with the reference but failed to document any other accomplishments for the reporting period. Furthermore, the Board determined that the Petitioner's counseling entries were given based upon the NJP that is no longer valid due to the CO's set aside letter. Finally, the Board noted that although Petitioner requested that his subsequent fitness report at enclosure (9) be modified with the removal of the adverse report at enclosure (5), the Board determined that Petitioner must first exhaust his administrative remedies with the PERB to modify enclosure (9).

RECOMMENDATION

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

Petitioner's naval record be corrected by removing enclosure (2), the 29 July 2021 UPB.

Petitioner's naval record be corrected by removing enclosures (3) and (4), (6105) NJP counseling entry, 29 July 2021, and (Page 11) promotion restriction counseling entry, 29 July 2021.

Petitioner's naval record be corrected by removing enclosure (5), [REDACTED] Fitness Report for the period 6 May 2021 to 29 July 2021.

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 Regulations, 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.

12/20/2022

[REDACTED]
Deputy Director
[REDACTED]