



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

██████████  
Docket No. 9137-22  
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) Title 10 U.S.C. § 1552  
(b) BCNR Docket No. 2525-22  
(c) MCO P1400.32D w/CH 2 (MARCORPROMMAN, Vol 2, ENLPROM)  
(d) Manual for Courts-Martial (2019 edition)  
(e) MCO 5800.16-V14 (LSAM-enlisted NJP)  
(f) SECNAVINST 5300.28E (Military Substance Abuse Prevention and Control)

Encl: (1) DD Form 149 w/enclosures  
(2) MCTFS Present Grade  
(3) ██████████ Magistrate's Order File No. ██████████, 7 Mar 20  
(4) NJP (UPB), 9 Mar 20  
(5) Administrative Remarks (Page 11) 6105 counseling entry, 9 Mar 20 and promotion-restriction entry, 9 Mar 20  
(6) Fitness Report, 19 Dec 19 to 9 Mar 20  
(7) ██████████ Petition and Order of Expunction  
(8) ██████████ ltr, 17 Aug 21  
(9) HQMC Memo 1070 JPL, 1 Jun 22  
(10) Petitioner's ltr 1000.34 CAP, 22 Aug 22  
(11) CO, ██████████ ltr 1000-34 CO (undated)  
(12) MCTFS Present Grade  
(13) MCTFS Legal Action 119 Remarks

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 reconsideration of reference (b), his petition to correct his naval record by removing enclosures (4), (5), and (6) and restoration of original date-of-rank (DOR) in the grade of Sergeant.

2. The Board, consisting of ██████████, ██████████, and ██████████ reviewed Petitioner's allegations of error and injustice on 31 January 2023, 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 the naval records, and applicable statutes, regulations, and policies.

3. Before applying to this Board, Petitioner did not exhaust all administrative remedies available under existing law and regulations within the Department of the Navy. The Board, having

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

reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

- a. Petitioner was promoted to Sergeant/E-5 effective 1 June 2019. Enclosure (2).
- b. On 7 March 2020 Petitioner was arrested for driving while impaired (DWI) and exceeding the posted speed limit. Enclosure (3).
- c. On 9 March 2020 Petitioner received Non-Judicial Punishment (NJP) for violating Article 113, Uniform Code of Military Justice (UCMJ) for drunken or reckless operation of a vehicle. The punishment imposed was a reduction in grade to Corporal/E-4, forfeiture of pay, and 45 days restriction and extra duty. Petitioner acknowledged his rights under Article 31, UCMJ and prior to imposition of NJP, he was afforded the opportunity to consult with a military lawyer. He was advised of his right to refuse NJP and demand trial by court-martial in lieu of NJP; he agreed to accept NJP, subject to his right of appeal; he did not appeal. See enclosure (4).
- d. On 9 March 2020 Petitioner was issued a Page 11 6105 counseling him regarding his arrest and subsequent NJP. He was also issued a promotion-restriction counseling in accordance with reference (c). Petitioner acknowledged the counseling entries and elected not to submit a written rebuttal to either. Reference (c) allows promotion-restriction within 12 months of conviction by civil authorities of driving under the influence or driving while intoxicated. For purposes of this policy, the term "conviction" includes a plea deal and any similar disposition of charges. Enclosure (5).
- e. Petitioner received an adverse grade change fitness report documenting his NJP for drunken or reckless operation of a vehicle. Petitioner acknowledged the adverse nature of the fitness report and chose not to make a statement. Enclosure (6).
- f. On 19 April 2021 Petitioner, with counsel filed a Petition and Order of Expunction to the [REDACTED] Court, requesting any and all records relating to his charge of DWI and civil revocation be expunged. The Court granted the petition. Enclosure (7).
- g. By memorandum to Petitioner's Sergeant Major on 17 August 2021, counsel advised that Petitioner's DWI charge was dismissed in civilian court because the arresting officer was unable to accurately state the evidence regarding the speed of the Petitioner's vehicle, and that the stop of Petitioner's vehicle was unconstitutional. Enclosure (8).
- h. The Advisory Opinion (AO), provided by the Headquarters Marine Corps Military Personnel Law Branch (JPL) for Petitioner's prior case at reference (b), noted that the Court's eventual dismissal of Petitioner's case does not invalidate the NJP. In this case, on 19 April 2021, a district court judge accepted a plea deal. The plea deal required Petitioner to admit guilt for exceeding the posted speed and pay court cost; in return for his plea, the DWI charge would be dismissed. That same day, Petitioner's DWI was expunged from his record. The AO also noted that Petitioner argues that he was charged under the wrong Article of the UCMJ, and that his signature on the UPB was forged. The AO explained that while the Article number changed with a new UCMJ, the underlying elements remained the same. Furthermore, the official

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

documents in Petitioner's official military personnel file (OMPF) cite the correct Article. Even assuming that the Petitioner's documents provided in support of his petition at reference (b) are legitimate and the command initially referenced the pre-2019 Article number, they apparently took steps to correct the proceedings/documentation. The AO determined that Petitioner furnished no evidence to support his claim.

Enclosure (9).

i. On 22 August 2022 Petitioner submitted to his Commanding Officer (CO), a request to set aside his 9 March 2020 NJP and 6105 entry "due to the [REDACTED] Court dismissing all charges as a result of an unconstitutional traffic stop, lack of evidence on excessive speed, and malfunctioning breathalyzer." Petitioner also asserted that he had been punished under the incorrect Article of the UCMJ, and that the UPB unjustly included fraudulent signatures, not his own. Enclosure (10).

j. Petitioner's CO set aside Petitioner's NJP in accordance with reference (d), by reason of the Court's dismissal and because Petitioner was "NJP'd for Article 111 (UCMJ) which is leaving the scene of a vehicle accident vice Article 113 (UCMJ) drunken or reckless operation of a vehicle, vessel or aircraft." The CO stated in his set aside approval letter that Petitioner's UPB and 6105 "will be" removed from his OMPF. Per reference (e), only the Secretary of the Navy acting through the Board for Correction of Naval Records may order removal of punitive letters and other documents in official records. Enclosure (11).

k. Petitioner was promoted to Sergeant/E-5 for the second time effective 1 February 2022. Enclosure (12).

l. Reference (d) provides that an officer who imposes NJP may set aside in whole or in part that punishment, whether executed or unexecuted, and may restore all rights, privileges and property affected by that punishment. The power to set aside an executed punishment or to mitigate an executed or unexecuted reduction in grade to a forfeiture of pay should ordinarily be exercised within four months after the date of execution.

m. Reference (f) states that commanders will direct a service record book entry be made after counseling a Marine for any alcohol-related incident. An alcohol-related incident occurs when a CO determines a Marine committed a UCMJ violation and the consumption of alcohol was a contributing factor.

n. A review of Petitioner's record reflects that the NJP at enclosure (3) has been removed from his OMPF. However, no other corrective action has been taken to "restore all rights, privileges, and property affected by the punishment." Specifically, the Marine Corps Total Force System Legal Action 119 remarks at enclosure (13) still reflects Petitioner's NJP imposed on 9 March 2020. Petitioner contends that the contested 6105 counseling and fitness report should be removed, and his DOR in the grade of Sergeant/E-5 be restored to 1 June 2019 because his CO set aside the NJP.

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

## CONCLUSION

Upon review and consideration of all the evidence of record the Board determined that Petitioner's request warrants partial relief as a result of his CO's decision to set aside the NJP.

The Board noted that, although not timely, Petitioner's CO had the authority to set aside his NJP. The Board concluded that all rights, privileges and property affected by that punishment shall be restored, to include restoration of his original DOR in the grade of Sergeant/E-5, and any forfeited pay.

The Board noted, however, that Petitioner's CO did not have the authority to direct removal of the 6105 or promotion-restriction counseling. The Board determined that the 6105 contains a factual account of an alcohol-related incident that warranted the issuance of a Page 11 entry. Additionally, due to Petitioner's conviction by civil authorities, as defined by reference (c), the Board determined that Petitioner's promotion-restriction counseling was also warranted. The Board noted, however, that the 6105 and promotion-restriction entries, as written, are now in error, given the NJP set aside. The Board thus concluded that, in order to correct the error, the verbiage "Non Judicial Punishment for" shall be redacted from the 6105 entry, and the verbiage "to Sgt" and "recent Nonjudicial Punishment for" shall be redacted from the promotion-restriction entry.

The Board determined that Petitioner has not yet exhausted all available administrative remedies regarding his request to remove fitness report for the reporting period 19 December 2019 to 9 March 2020. The Headquarters Marine Corps Performance Evaluation Review Board (PERB) is the initial action agency for fitness report appeals, therefore, he must first petition the PERB.

## RECOMMENDATION

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

Petitioner's naval record be corrected by redacting the verbiage "Your Non Judicial Punishment for" from his 6105 counseling at enclosure (5).

Petitioner's naval record be corrected by redacting the verbiage "to Sgt" and "recent Nonjudicial Punishment for" from the promotion-restriction counseling at enclosure (5).

Petitioner's naval record be corrected by restoring his DOR in the grade of Sergeant to 1 June 2019.

That the Defense Finance and Accounting Service (DFAS) conduct an audit of Petitioner's payment record to determine the pay entitlements that are due as a result of Petitioner's restoration to paygrade E-5 effective 1 June 2019.

That DFAS conduct an audit of Petitioner's payment record to determine the pay entitlements that are due as a result of Petitioner's restoration of forfeited pay as a result of his 9 March 2020 NJP.

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

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, to include the NJP entry in the MCTFS.

That part of the Petitioner's request for corrective action that exceeds the foregoing be denied.

That no further changes be made to 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. 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.

3/1/2023

[REDACTED]

Deputy Director

Signed by: [REDACTED]