



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

██████████
Docket No. 421-23
Ref: Signature Date

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

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

Ref: (a) Title 10 U.S.C. § 1552
(b) MCO P1070.12K CH1 (IRAM)
(c) MCO 1900.16 CH 2 (MARCORSEPMAN)
(d) MCO P1400.32D CH 1-2 (ENLPROMMAN)

Encl: (1) DD Form 149 w/enclosures
(2) Administrative Remarks (Page 11) 6105 counseling entry, 16 May 22
(3) Administrative Discharge Board Report, 29 Aug 22
(4) Administrative Remarks (Page 11) counseling entry, 4 Oct 22
(5) Administrative Remarks (Page 11) counseling entry, 18 Jan 22 (18 Jan 23)
(6) Certificate of Release or Discharge from Active Duty (DD Form 214), 13 Feb 23
(7) HQMC Memo 1070 JPL, 15 Mar 23

1. Pursuant to the provisions of section 1552 of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records, hereinafter referred to as the Board, requesting that his record be corrected by removing enclosures (2) and (4).

2. The Board reviewed Petitioner's allegations of error and injustice on 2 May 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 Petitioner's naval records, and applicable statutes, regulations, and policies.

3. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulation within the Department of the Navy. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, found as follows:

a. On 16 May 2022, Petitioner was issued a counseling entry for violation of the Uniform Code of Military Justice, Article 112a, for "wrongful use of cannabinoids, THS (level above 50 mAbs)" on or about 12 April 2022 as confirmed by the ██████████, ██████████. Petitioner acknowledged the counseling and chose not to submit a written statement. Enclosure (2).

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b. An Administrative Discharge Board (ADB) convened on 29 August 2022 to hear allegations against Petitioner and to make findings and recommendations. The ADB determined by majority vote the preponderance of evidence did not prove any of the acts or omissions alleged in the notification. Further, the ADB recommended by majority vote that Petitioner be retained in the Marine Corps. Enclosure (3).

c. On 4 October 2022, Petitioner received a Page 11 counseling him that he was selected for promotion to Sergeant effective 1 October 2022, but not recommended due to recent legal action. Petitioner refused to sign the entry. Enclosure (4).

d. On 18 January 2022,¹ Petitioner received a Page 11 counseling him that he was not eligible for reenlistment due to failure to meet the physical/medical standards. On 15 April 2023, Petitioner was honorably discharged from the Marine Corps by reason of disability, with severance pay, not combat related. Enclosures (5) and (6).

e. Petitioner contends that the 16 May 2022 counseling entry should be removed because the ADB determined that the preponderance of evidence does not prove any of the acts or omissions alleged in the counseling entry. Further, he claims the 4 October 2022 counseling entry is erroneous because the comment “due to recent legal action” refers to his 29 August 2022 ADB. Finally, he claims that his promotion to Sergeant was withheld for no just reason. Enclosure (1).

f. The advisory opinion (AO) furnished by the Headquarters Marine Corps Military Personnel Law Branch (JPL) recommended Petitioner’s request be denied based on the following. The AO noted that Petitioner was checked into the Naval Hospital aboard [REDACTED] for suicidal ideations. At the hospital, Petitioner provided a urine sample, which tested positive for cannabinoids. The AO noted the resulting ADB’s finding of “no basis” for separation does not automatically negate the Commanding Officer’s (CO’s) contradictory conclusion that Petitioner committed misconduct. The AO further determined that Petitioner did not provide sufficient evidence for the Board to conclude that he was “exonerated.” Nor has he provided sufficient evidence to overcome the presumption of regularity. Thus, the AO recommended that, without additional evidence, the Board should presume the counseling entry accurately stated an offense and that the CO acted properly within his authority to issue it. Specifically, formal counseling is governed by references (b) and (c), which grant commanders wide discretion in using this administrative mechanism to address deficiencies where there exists a possibility for the Marine to overcome such deficiencies.

In regards to the Petitioner’s request for retroactive promotion, the AO determined that Petitioner failed to demonstrate that retroactive promotion is warranted. Pursuant to reference (d) it states that the determination of which eligible corporals will be promoted, subject to composite score stipulation, “is the sole responsibility of the commander.” Furthermore, promotions will not be backdated for the purpose of increasing pay and allowances, nor when a period of promotion restriction or delay has ended and the commander subsequently recommends delivery of the promotion. Moreover, reference (d) explicitly prohibits issuing an original date of rank, except when the Marine is subsequently “exonerated of all wrongdoing.” Thus, the AO concluded that

¹ 18 January 2022 Page 11 date is a clerical error and should read 2023.

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Petitioner did not provide substantial evidence that his promotion non-recommendation was erroneous, or that he was completely exonerated, and therefore, retroactive promotion is not warranted. Enclosure (7).

CONCLUSION

Upon review and consideration of all the evidence of record, and in light of the AO, the Board determined the Petitioner's request partial warrants relief. The Board disagreed with the AO and agreed strongly that although the purpose of the ADB is to determine suitability for continued service, it agreed that because the ADB majority vote determined a preponderance of the evidence did not prove any of the acts or omissions alleged in the notification, the 16 May 2022 counseling entry was an injustice and therefore should be removed.

However, the Board substantially concurred with the AO that Petitioner did not provide sufficient evidence to determine that his 4 October 2022 "WILL NOT PROMOTE" entry was in error.

RECOMMENDATION

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

Petitioner's naval record be corrected by removing enclosure (2), his 16 May 2022 Administrative Remarks (Page 11) 6105 counseling entry.

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

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 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. The foregoing action of the Board is submitted for your review and action.

5/18/2023

[REDACTED]
[REDACTED]
Executive Director

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XXX XX [REDACTED]

From: Assistant General Counsel (Manpower and Reserve Affairs)

____ Reviewed and Approved Petitioner's Request (Grant Relief)

Reviewed and Approved Board Recommendation (Partial Relief)

____ Reviewed and Approved Advisory Opinion Recommendation (Deny Relief)

5/19/2023

[REDACTED]

[REDACTED]

Assistant General Counsel (M&RA)

Signed by: [REDACTED]