



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

█
Docket No. 5756-23

Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF █
█ USMCR

Ref: (a) Title 10 U.S.C. § 1552
(b) MCBul 5810
(c) MCO P1070.12K w/CH 1
(d) MCO P1400.32D w/CH 2

Encl: (1) DD Form 149 w/attachments
(2) NAVMC 118(11) Administrative Remarks of 4 Nov 22
(3) NAVMC 118(11) Administrative Remarks of 29 Nov 22
(4) Statement of Trial Results of 17 May 23
(5) HQMC memo 1070 JPL of 15 Sep 23

1. Pursuant to the provisions of the reference, Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting to remove the 4 November 2022 and 29 November 2022 Administrative Remarks (page 11) entries.

2. The Board, consisting of █, █, and █, reviewed Petitioner's allegations of error and injustice on 31 October 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. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, found that, before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy. The Board made the following findings:

a. On 19 July 2022, Petitioner provided a urine sample. On 19 August 2022 Petitioner's command received confirmation from a Department of Defense (DoD) certified drug testing laboratory that Petitioner's urinalysis sample tested positive for a controlled substance.

b. On 4 November 2022, pursuant to reference (b), Petitioner was issued a page 11 entry notifying him that due to the positive urinalysis result he was prohibited from possessing a

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firearm or ammunition for 12 months. Petitioner was also directed to report to the servicing law enforcement agency within five working days of the entry. Petitioner acknowledged the entries and elected not to submit a statement. Enclosure (2).

c. On 29 November 2022, pursuant to reference (c), Petitioner was notified that he was eligible but not recommended for promotion to lance corporal based on the positive urinalysis result received on 2 August 2022. The counseling further notified Petitioner that the recommendation was to last for a period of 18 months in accordance with reference (d). Petitioner acknowledged the entry and elected not to submit a statement. Enclosure (3).

d. On 17 May 2023, a Special Court-Martial (SPCM) acquitted Petitioner of two charges of Article 92, Uniform Code of Military Justice (UCMJ) for his use of a controlled substance as evidenced by the positive urinalysis. Enclosure (4).

e. The Marine Corps Military Personnel Law Branch (JPL) provided an advisory opinion (AO) for the Board's consideration recommended partial relief. The AO noted that according to reference (b), the "unlawful user of or addicted to any controlled substance" prohibition applies "only after a finding of illegal use of a controlled substance at non-judicial punishment, an administrative separation proceeding, a [Summary Court-Martial, a Special Court-Martial, or a General Court-Martial]." The AO determined that the illegal use of a controlled substance was not substantiated at NJP, administrative separation proceedings, or any courts-martial, thus, Petitioner did not meet the definition of an "unlawful user of or addicted to any controlled substance." Accordingly, Petitioner was not prohibited from possessing, shipping, transporting, or receiving a firearm or ammunition. Therefore, the AO concluded enclosure (2) should be removed.

Concerning the 29 November 2022 counseling entry, the AO recommended that the request should be denied. The AO noted that reference (c) requires a counseling entry when a Marine is eligible but not recommended for promotion. On 29 November 2022, Petitioner was subject to an 18-month promotion restriction as required by reference (d). The 18-month promotion restriction was based on the confirmation of a positive urinalysis from the DoD certified drug testing laboratory. The AO determined that Petitioner's command appropriately issued the 29 November 2022 counseling entry. The AO explained that although Petitioner went to a SPCM and was found not guilty of violating lawful orders prohibiting the use of hemp products, the requirement to issue a counseling entry was triggered solely by the positive urinalysis result. Thus, the subsequent SPCM finding does not undermine the factual basis for the administrative counseling or otherwise necessitate its removal. The AO concluded that there is no demonstrated material error in the 29 November 2022 counseling entry. Enclosure (5).

f. In his application through a third party, Petitioner contends that he was found not guilty at SPCM. Enclosure (1).

CONCLUSION

Upon careful review and consideration of all the evidence of record, the Board found the existence of an error warranting partial corrective action.

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The Board substantially concurred with the AO. In this regard, the Board noted that since Petitioner was found not guilty at the SPCM, he does not meet the criteria of a person that is prohibited from possessing, shipping, transporting, or receiving a firearm or ammunition. Accordingly, the Board determined that the 4 November 2022 counseling entries were issued in error and should be removed.

The Board also substantially concurred that the 29 November 2022 counseling entry restricting Petitioner's promotion is valid and should be retained as filed. The Board noted that references (b) and (c) dictate the basis for promotion restriction after confirmation of a positive urine sample from a DoD certified drug testing laboratory. The Board concurred that the SPCM finding did not undermine the factual basis for the administrative counseling entry.

RECOMMENDATION

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

Petitioner's naval record be corrected by removing enclosure (2), the 4 November 2022 counseling entries.

No other corrections 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 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.

11/6/2023

