



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

BJG
Docket No: 2818-99
1 June 1999

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

Subj: SGT [REDACTED], USMCR [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 19 Jan 99 w/attachments
(2) HQMC PERB memo dtd 22 Apr 99
(3) HQMC JAM2 memo dtd 29 Mar 99
(4) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected by removing his nonjudicial punishment (NJP) of 9 January 1997, documentation of which is at his attachment 1 to his application. He further requested removing reference to the NJP from his fitness reports for 24 August 1996 to 31 July 1997 and 1 August 1997 to 15 April 1998. Copies of these reports are at Tabs A and B. The Board did not consider the request to modify these reports, since enclosure (2) indicates the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) will deal with this if the NJP is removed. Finally, Petitioner requested removing his failure of selection to staff sergeant. The Board did not consider this request either, since he has not exhausted his administrative remedies. He may ask the HQMC Promotion Branch (MMPR-2) for remedial consideration for promotion on the basis of any corrective action approved by this Board or the PERB. If he is successful before the remedial promotion board, HQMC will strike his failure of selection.

2. The Board, consisting of Messrs. Lightle and Morgan and Ms. Moidel, reviewed Petitioner's allegations of error and injustice on 27 May 1999, 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, 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, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy concerning his contested NJP, as a result of which he received a forfeiture of \$1,394.00.

b. In correspondence attached as enclosure (3), the HQMC office having cognizance over the subject matter of Petitioner's request to remove his NJP has commented to the effect that this request has merit and warrants favorable action.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the contents of enclosure (3), the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing his NJP of 9 January 1997.

b. In light of this Board's decision to remove the contested NJP, that Petitioner's application, to be forwarded by this Board, be returned to the HQMC PERB, as agreed to in enclosure (2), for action on his request to correct his fitness report record.

c. 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.

d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) 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.

ROBERT D. ZSALMAN
Recorder

Jonathan S. Ruskin
JONATHAN S. RUSKIN
Acting Recorder

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.



W. DEAN PFEIFFER
Executive Director

EPS 24 **APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552**
 (Please read instructions on reverse side BEFORE completing application.)

Form Approved
 OMB No. 0704-0003
 Expires Aug 31, 2000

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0003), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.
PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ADDRESS. RETURN COMPLETED FORM TO THE ADDRESS ON THE BACK OF THIS PAGE.

PRIVACY ACT

AUTHORITY: Title 10 US Code 1552, EO 9397.

PRINCIPAL PURPOSE: To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record.

INDIV. _____

1. APPLICANT DATA

a. BRANCH OF SERVICE (X one)	<input type="checkbox"/> ARMY	<input type="checkbox"/> NAVY	<input type="checkbox"/> AIR FORCE	<input checked="" type="checkbox"/> MARINE CORPS	<input type="checkbox"/> COAST GUARD
b. NAME (Last, First, Middle Initial) (Please print)	c. PRESENT PAY GRADE E-5/SGT		d. SERVICE NUMBER (If applicable)	e. SSN	
2. TYPE OF DISCHARGE (If by court-martial, state type of court) NA	3. PRESENT STATUS, IF ANY, WITH RESPECT TO THE ARMED SERVICES (Active duty, Retired, Reserve, etc.) ACTIVE DUTY		4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY NA		
5. ORGANIZATION AT TIME OF ALLEGED ERROR IN RECORD MARINE CORPS RESERVE SUPPORT COMMAND 15303 ANDREWS ROAD, KANSAS CITY, MO 64147-1207			6. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (No expense to the Government) (X one) <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		

7. COUNSEL (If any)	b. ADDRESS (Street, Apartment Number, City, State and ZIP Code)
a. NAME (Last, First, Middle Initial) NONE	N/A

8. I REQUEST THE FOLLOWING CORRECTION OF ERROR OR INJUSTICE:
 SEE ATTACHED PETITION 970801-980415

9. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST IN THE FOLLOWING PARTICULARS:
 SEE ATTACHED PETITION

10. IN SUPPORT OF THIS APPLICATION I SUBMIT AS EVIDENCE THE FOLLOWING: (If Veterans Administration records are pertinent to your case, give Regional Office location and Claim Number.)
 SEE ATTACHED PETITION

11. ALLEGED ERROR OR INJUSTICE

a. DATE OF DISCOVERY 24 MAR 97	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THIS APPLICATION.
-----------------------------------	--

12. APPLICANT MUST SIGN IN ITEM 16. IF THE RECORD IN QUESTION IS THAT OF A DECEASED OR INCOMPETENT PERSON, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY APPLICATION. IF APPLICATION IS SIGNED BY OTHER THAN APPLICANT, INDICATE RELATIONSHIP OR STATUS BY MARKING APPROPRIATE BOX.

SPOUSE WIDOW WIDOWER NEXT OF KIN LEGAL REPRESENTATIVE OTHER (Specify)

13. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. (U.S. Code, Title 18, Sec. 287, 1001, provides that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)

14. a. COMPLETE CURRENT ADDRESS, INCLUDING ZIP CODE (Applicant should forward notification of all changes of address.)	b. TELEPHONE NUMBER (Include Area Code)	DOCUMENT NUMBER (Do not write in this space.)
[REDACTED]	[REDACTED]	

15. DATE SIGNED 19 JAN 99	16. SIGNATURE (Applicant must sign here.) [REDACTED]	FEB 2 1999 BCNR 4-27-99
------------------------------	---	----------------------------

INSTRUCTIONS

(All data should be typed or printed)

1. For detailed information see: Air Force Instruction 36-2603; Army Regulation 15-185; Coast Guard, Code of Federal Regulations; Title 33, Part 52; or Navy, Code of Federal Regulations; Title 32, Part 723.
2. Submit only original of this form.
3. Complete all items. If the question is not applicable, mark "None."
4. If space is insufficient, use "Remarks" or attach additional sheet.
5. Various veterans and service organizations furnish counsel without charge. These organizations prefer that arrangements for representation be made through local posts or chapters.
6. List all attachments and enclosures.
7. **ITEMS 6 AND 7.** Personal appearance of you and your witnesses or representation by counsel is not required to ensure full and impartial consideration of applications. Appearances and representations are permitted, at no expense to the Government, when a hearing is authorized.
8. **ITEM 8.** State the specific correction of record desired.
9. **ITEM 9.** In order to justify correction of a military record, it is necessary for you to show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the alleged entry or omission in the record was in error or unjust. Evidence may include affidavits or signed testimony of witnesses, executed under oath, and a brief of arguments supporting application. All evidence not already included in your record must be submitted by you. The responsibility for securing new evidence rests with you.
10. **ITEM 11.** 10 U.S.C. 1552b provides that no correction may be made unless request is made within three years after the discovery of the error or injustice, but that the Board may excuse failure to file within three years after discovery if it finds it to be in the interest of justice.

MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW

<p style="text-align: center;">ARMY</p> <p>(For Active Duty Personnel) Army Board for the Correction of Military Records 1941 Jefferson Davis Highway, 2nd Floor Arlington, VA 22202-4508</p> <p>(For Other than Active Duty Personnel) Army Review Boards Agency Support Division, St. Louis ATTN: SFMR-RBR-SL 9700 Page Avenue St. Louis, MO 63132-5200</p>	<p style="text-align: center;">COAST GUARD</p> <p>Chairman Board for Correction of Military Records (C-60) Department of Transportation 400 7th St., SW Washington, DC 20590</p>
<p style="text-align: center;">NAVY AND MARINE CORPS</p> <p>Board for Correction of Naval Records 2 Navy Annex Washington, DC 20370-5100</p>	<p style="text-align: center;">AIR FORCE</p> <p>Board for Correction of Air Force Records SAF/MIB 550-C Street West, Suite 40 Randolph AFB, TX 78150-4742</p>

17. REMARKS *(Applicant has exhausted all administrative channels in seeking this correction and has been counseled by a representative of his/her servicing military personnel office. (Applicable only to active duty and reserve personnel.))*

(Block 8)

a. I request that my official military records be corrected to reflect that I was not the subject of an Article 15 UCMJ hearing conducted on 970109.

b. I request that the Service Record Book page 12 entries dated 970108 and 970109 be removed from my Service Record Book.

c. Request the return of pay and allowance in the amount of \$1,394.00.

By imp, mod remove fit rep for 960824-970731

d. I request that portions of my CD fitness report for the period of ~~970811~~ to ~~980415~~ changed in the following blocks:
~~960824~~ 970731

- (1) Block 17(b) be changed to read "adverse no".
- (2) Block 17(c) be changed to read "disciplinary no".
- (3) Block 24 reflect no signature.

(4) In the Reviewing Officers Certification block on page 2 of the fitness report, stike-out all statements regarding the non-judicial punishment.

By imp mod ref to NJP in fit rep for 970801-980415

e. That my failure of selection to the grade of Staff Sergeant before the CY-98 SNCO promotion board be removed from my records and my records corrected to reflect that I am in the primary promotion zone for Active Reserve (AR) Staff Sergeant.

(Block 9)

I Believe the Record to be in Error or Unjust in the Following Particulars:

I believe that my Nonjudicial punishment of 9 January 1997 was unjust. On 9 January 1997 I appeared before the Deputy Commander, Marine Corps Reserve Support Command (MCRSC), Kansas City, Missouri, in response to allegations that I violated Articles 117, Provoking Words and Gestures; 128, Simple Assault; and, 134, Indecent Language, Uniform Code of Military Justice. Evidence of the alleged crimes considered by the Deputy Commander included an investigation conducted by [redacted] and the in-person testimony of Ms. [redacted]. I was alleged to have uttered the words "Is there a chance of us fucking by then" to Ms. [redacted] and by grabbing her jacket and pulling her forcefully toward me. During my NJP I alleged that [redacted] testified falsely at the request of her finance' Corporal [redacted] one of my subordinates. The Deputy Commander, Marine Corps Reserve Support Command relied heavily upon [redacted] testimony at the NJP, specifically discounted my argument that she was

testifying falsely at the request of her fiancée, Corporal [REDACTED]. At the conclusion of the NJP I was found guilty of violating Article 128 UCMJ, Assault, and Article 134 UCMJ, Indecent Language. My punishment included forfeitures of \$697.00 pay per month for two months and reduction to Corporal, E-4. The reduction was suspended. I appealed the NJP on 15 January 1998. The Command endorsement of 28 February 1997 clearly relies upon the testimony and credibility of [REDACTED]. I was recently informed that Ms. [REDACTED] approached the Marine Corps Reserve Support Command (MCRSC) Staff Judge Advocate (SJA) on 21 August 1998 indicating that she had provided false testimony at my NJP and seeking forgiveness. The SJA prepared a synopsis of her statement and had [REDACTED] attest to its correctness. During her interview with the SJA she stated that she had been pressured by Corporal [REDACTED] to testify falsely and that his career depended on her false testimony. I am further advised that too much time has passed to file another appeal of my NJP due to the discovery of new evidence.

The retraction of her earlier testimony and the acknowledgment that she agreed to testify falsely at my NJP support my contention that the NJP is unjust and should be removed from my official military records. Also enclosed in this appeal is a letter from the investigating officer attesting that he would not have recommended NJP in my case has [REDACTED] submitted a truthful statement. Also contained in the enclosures is a statement from Major General [REDACTED], Commanding General, Marine Corps Reserve Support Command at the time of my NJP, to the President of the FY 1999 AR SNCO Promotion Board.

The intent of Congress regarding the function of the BCNR, as well as the other service correction boards, is clearly presented in a letter dated 16 June 1949 by Congressman Mike Monroney, co-author of the Legislative Reorganization Act (10 U.S.C. 1552) that created the service correction boards, to the Honorable Dan Kimball, Acting Secretary of the Navy:

"In enacting the section dealing with the correction of military records, it was our idea that civilian boards properly staffed by professional assistants, carefully chosen for their experience, judgment and fairness, could carefully study each case. I do not believe the review should be limited to the bare fact of the military records but that these should be considered in light of collateral evidence which the claimant might present...as to the extent of authority delegated for the purpose of the Act, I considered it to be the fullest correction of an error or the removal of an injustice. Within reasonable limits I would consider that this authority would not limit in any way the rights of the board to determine what is an error or injustice."

Additionally, the federal courts in a great number of cases have considered 10 U.S.C. 1552 and have provided guidance to the Service

██████████ C.

E-5/SGT

██████████

Secretaries and the various Service Correction Boards. The following are a few excerpts:

This section creating the boards for correction of military records is remedial legislation giving the boards authority to correct errors or injustices in the records of service personnel, and that this should be construed liberally rather than narrowly or technically. Oleson v U.S., 172 Ct. Cl. 9 (1965).

Naval Board of Correction of Military Records has jurisdiction to consider whether a former serviceman's military record should be corrected if it is considered such correction necessary to correct an error or remove an injustice. The Board has a nondiscretionary, judicially enforceable duty to exercise that power and to correct the records.. ██████████ 652 F. 2d 181 (D.C. Cir., 1981). Correction Board may only correct records to benefit of petitioner not to his detriment. Doyle v U.S., 599 F. 2d 984 (Ct. Cl., 1979).

Once the BCNR has before it substantial evidence of error an/or injustice, the BCNR has significant leeway to fashion and determine an appropriate remedy that has the goal of restoring the member and his record to the position he or she would have enjoyed had the error an/or injustice not occurred. The Attorney General of the United States has stated the BCNR may go so far as engage in a fiction to provide an appropriate remedy and thereby give effect to its intended purpose. 41 Op Att'y Gen 71, 74 (1951)

Pursuant to paragraph 0114.j.(4) of JAGINST 5800.7C (JAG Manual), it appears that only the BCNR may correct my records. The statements of ██████████ to ██████████ clearly indicate that her statement of 9 December 1996 and her testimony at my NJP hearing were not truthful. Based upon the foregoing information I believe that the NJP of 9 January 1997 and my failure of selection to Staff Sergeant should be removed from my official military records.

(Block 10)

- Exhibit 1: Copy of page 12.
- Exhibit 2: NJP Hearing Records
- Exhibit 3: Rebuttal of Non-Judicial Punishment
- Exhibit 4: CD Fitness Report 970801 to 980415
- Exhibit 5: Major ██████████'s letter of 16 January 1999
- Exhibit 6: Captain ██████████'s letter of 19 January 1999
- Exhibit 7: Letter from Major General ██████████ of 13 October 1998
- Exhibit 8: Letter from Lieutenant Colonel ██████████ of 22 October 1998

2818-99



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:
1610
MMER/PERB
APR 22 1999

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
SERGEANT [REDACTED] USMCR

Ref: (a) Sergeant [REDACTED] DD Form 149 of 19 Jan 99
(b) MCO P1610.7D w/Ch 1-4

Encl: (1) CMC Advisory Opinion 1070 JAM2 of 29 Mar 99

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 21 April 1999 to consider Sergeant [REDACTED] petition contained in reference (a). Changes to the fitness reports for the periods 970801 to 980415 (AR) were requested. Reference (b) is the performance evaluation directive governing submission of the report. 24 Aug 96 - 31 Jul 97 and BB

2. The petitioner contends that the nonjudicial punishment (NJP) recorded in the fitness report was unjust and provides his commentary into the situation. Additionally, he furnishes documentation which he believes substantiates his case.

3. In its proceedings, the PERB concluded that the reports ^{are} both administratively correct and procedurally complete as written and filed. The uncontroverted matter of fact is that the NJP occurred and was correctly recorded via the Performance Evaluation System. Unless and until that action is set aside or otherwise eliminated from the petitioner's record, the requested modifications to the fitness reports are not warranted. NOTE: If BCNR should agree with the advisory opinion contained at the enclosure, and direct elimination of the NJP, the PERB will effect the necessary corrections to the petitioner's fitness reports BB

4. The Board's opinion, based on deliberation and secret ballot vote, is that **at this time**, the contested fitness reports should remain as configured. BB

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
SERGEANT [REDACTED] USMCR

5. The case is forwarded for final action.

[REDACTED]

Chairperson, Performance
Evaluation Review Board
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

2818-99
IN REPLY REFER TO:

1070

JAM2

29 MAR 1999

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF SERGEANT [REDACTED]
U.S. MARINE CORPS RESERVE

1. We are asked to provide an opinion on Petitioner's request for removal from his official record of the nonjudicial punishment (NJP) imposed by Commander, Marine Corps Reserve Support Command, on 9 January 1997.

2. We recommend that the requested relief be granted. Our analysis follows.

3. Background

a. On 9 January 1997, Petitioner was found guilty of assault and communicating indecent language, in violation of Articles 128 and 134, Uniform Code of Military Justice (UCMJ). He was awarded reduction to corporal and forfeiture of \$679.00 pay per month for 2 months. The reduction was suspended for 3 months. Petitioner's appeal claiming that the punishment was unjust was denied by Commander, Marine Forces Reserve, on 12 March 1997.

b. Petitioner asserted in his appeal that the alleged victim of his assault and indecent language [REDACTED] had fabricated her story at the request of her fiancé, a subordinate of Petitioner's who appeared as the government's one other witness at the NJP. In his forwarding endorsement to that appeal, the NJP authority noted that he relied heavily on the testimony of [REDACTED] finding her to be very credible and her testimony compelling.

c. On 21 August 1998, [REDACTED] provided a sworn statement to the Staff Judge Advocate, Marine Corps Reserve Support Command. In that statement, she admitted that she had been untruthful at Petitioner's NJP at the request of her then fiancé. She admitted that she had, in truth, taken Petitioner's comment as a joke and had not been offended.

ENCL (1)

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF SERGEANT [REDACTED]
U.S. MARINE CORPS RESERVE

4. Analysis

a. Petitioner should never have been found guilty of assault, as there was no evidence presented on the element of bodily harm. The offense of assault as charged against Petitioner requires the infliction of bodily harm. "Bodily harm" is defined as a harmful or offensive touching, however slight. "Harmful" in turn refers to infliction of physical injury. Even assuming that Petitioner did touch [REDACTED] as alleged, no evidence of physical injury was presented. Further, Ms. [REDACTED] testified at the NJP that she did not find the touching, which purportedly consisted of Petitioner tugging at the lapels of her jacket, either threatening or aggressive. There was also no evidence presented that she found the touching offensive in any other way. Accordingly, there was insufficient evidence to support finding by a preponderance that Petitioner did bodily harm to [REDACTED]

b. The offense of communicating indecent language requires that language be offensive or shocking under the circumstances. Although [REDACTED] claimed at the NJP that she took Petitioner's comment seriously and was offended, her recantation makes clear that, under the circumstances, she took the comment as a joke and was not offended. Moreover, her recantation confirms Petitioner's assertion that testimony against him was manufactured at the behest of [REDACTED] fiancé, who hoped to improve his lot at work by getting Petitioner in trouble.

c. The fact that [REDACTED] did not find the comment offensive further supports the conclusion that the touching which accompanied the comment, in addition to not being injurious, was also not offensive.

5. Conclusion. Accordingly, for the reasons set forth above, we recommend that the requested relief be granted.

[REDACTED]
[REDACTED]
Assistant Head
Military Law Branch
Judge Advocate Division