



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

CRS
Docket No: 3015-01
9 October 2001

Dear [redacted]

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 3 October 2001. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by Headquarters Marine Corps dated 26 June 2001, a copy of which is attached. The Board also considered your rebuttal statement of 28 September 2001.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion. However, the Board concluded that since all of the forfeitures from the nonjudicial punishment (NJP) were eventually suspended and you were never actually required to forfeit any of your pay, no useful purpose would be served by making a merely cosmetic change in the amount of forfeitures imposed at the NJP. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records.

Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure



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

IN REPLY REFER TO:

1070

JAM4

26 JUN 2001

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF [REDACTED]

1. We are asked to provide an opinion on Petitioner's request for the removal from his service record book (SRB) and official military personnel file (OMPF) of all entries related to the non-judicial punishment (NJP) he received on 6 July 2000. Petitioner also requests restoration of all property, privileges, and rights affected by his NJP.

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

3. Background

a. On 15 June 2000, Petitioner was issued a Military Protective Order (MPO) directing him to have no contact with a female Marine. Petitioner's command viewed the issuance of an MPO as the only avenue for dealing with an inappropriate and potentially dangerous relationship Petitioner was having with a female Marine who was not his wife. Of particular concern were two menacing letters Petitioner sent to the female Marine in which he threatened to kill himself if she told anyone about their relationship.

b. On 26 June 2000, Petitioner violated the MPO by having dinner with the female Marine. On 6 July 2000, Petitioner, then a sergeant, pay grade E-5, received NJP for disobeying a lawful order in violation of Article 90 of the Uniform Code of Military Justice (UCMJ). Petitioner was awarded a reduction to the pay grade of E-4, forfeiture of \$797.00 pay per month for 2 months, and 15 days extra duty. Forfeiture of \$797.00 pay per month for 1 month was suspended for 6 months. Petitioner appealed. On 7 July 2000, Petitioner's appeal was granted in part. Specifically, Petitioner's remaining forfeiture of \$797.00 pay per month for 1 month was also suspended for 6 months. No other relief was granted.

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IN THE CASE OF [REDACTED]
[REDACTED] USMC

4. Analysis

a. No legal error occurred in either the issuance of the MPO or the imposition of NJP. Petitioner violated a lawful order, accepted NJP, and was appropriately punished. Petitioner, however, now claims that his NJP was unjust because: (1) he was considering suicide when he violated the order; (2) he was not consulted with or counseled prior to being issued the MPO; (3) he believes that the MPO was not issued in accordance with OPNAVINST 1752.2a, and; (4) the female involved did not want the MPO.

b. Petitioner's claim that his NJP was unjust because he was considering suicide is without merit. Petitioner's emotional state does not alter the fact that he willfully disobeyed a lawful written order. Petitioner's emotional state, however, was relevant as a mitigating factor in determining punishment and was given due consideration when Petitioner's commanding officer suspended, on appeal, the remaining forfeiture.

c. Petitioner's claim that his NJP was unjust because he was not consulted with or counseled prior to being issued the MPO is without merit. Marine Corps Order P1752.3b specifically authorizes MPO's to be issued *ex parte* if the issuing authority considers it necessary to ensure the safety and security of persons for whom the command is responsible. Petitioner's suicidal ideations provided a reasonable basis for the issuing authority in Petitioner's case to consider the *ex parte* issuance of an MPO necessary.

d. Petitioner's claim that his NJP was unjust because the MPO he was charged with violating was not issued in accordance with OPNAVINST 1752.2A is without merit. As an initial matter, though they contain similar language, the issuance of MPO's in the Marine Corps is governed by MCO P1752.3b not OPNAVINST 1752.2A. Petitioner, however, is correct that under MCO P1752.3b *ex parte* MPO's "should have as short a duration as possible, normally not more than ten days, because opponents thereto have a right to be heard." Petitioner's argument lacks merit, however, because "not normally" does not constitute an absolute bar on the issuance of *ex parte* MPO's for longer than

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IN THE CASE OF [REDACTED]
USMC

10 days. Under MCO P1752.2b, Military Protective Orders "are based upon a balancing of interests. The greater the crisis and the need to protect, the greater the need to move quickly and to focus on the safety of the person(s) needing protection. As the crisis abates and long term solutions are considered and put into effect, the need for a MPO's diminishes." In light of the Petitioner's unstable mental state and the menacing tone of the letters he sent it was reasonable for the issuing authority to impose an *ex parte* MPO for longer than 10 days pending the implementation of long term solutions. Moreover, if Petitioner questioned the legality of *ex parte* MPO imposed for longer than 10 days, his appropriate course of action was to request mast, not flagrantly and willfully disobey the MPO on day 11.

e. Petitioner's claim that his NJP was unjust because the female Marine the MPO prohibited him from having contact with did not want the MPO is without merit. Commanding officers have a duty to ensure the health, safety, and welfare of the members of their commands. Petitioner's commanding officer, therefore, had an obligation to take all necessary precautions to ensure the safety of the female Marine involved. In this case, that obligation entailed the issuance of an MPO.

f. We note, however, that the forfeiture awarded Petitioner exceeds the maximum allowable forfeiture under Part V, paragraph 5b(2) of the Manual for Courts Martial, United States (2000 Edition). (MCM). Part V, paragraph 5b(2) authorizes a forfeiture of not more than one half of 1 months pay for 2 months. Per Part V, paragraph 5c(8), MCM forfeitures are computed on the basis of base pay and, where a reduction in rank is also involved in the punishment, the forfeiture must be premised on the new lower rank, even if the reduction is suspended. In this case the forfeiture appears to have been computed at Petitioner's pre-reduction rank. As a result, the \$797.00 forfeiture of pay per month for 2 months Petitioner was awarded exceeds the maximum allowable forfeiture of \$778.00 per month for 2 months. We, therefore, recommend that BCNR correct this error.

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IN THE CASE OF [REDACTED]
[REDACTED] USMC

5. Conclusion. For the reasons noted, we recommend that Petitioner's request for relief be denied. We, however, recommend that BCBN correct the excessive forfeiture awarded Petitioner.



Head, Military Law Branch
Judge Advocate Division