



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

ELP
Docket No. 3117-01
31 August 2001

[REDACTED]

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 Navy Records, sitting in executive session, considered your application on 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 the Military Law Branch, Judge Advocate Division, Headquarters, Marine Corps dated 2 July 2001, a copy of which is attached.

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. The Board noted your explanation of the circumstances which led to the three nonjudicial punishments and your special court-martial conviction, and your response to the advisory opinion. However, the Board substantially concurred with the comments contained in the advisory opinion. Additionally, a Federal Bureau of Investigation report obtained by the Board shows that your post-service conduct has been marred by a conviction of bank robbery. 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

02 JUL 2001

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF PRIVATE FIRST CLASS [REDACTED]
[REDACTED] 1/3051 USMC

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 nonjudicial punishments (NJP) he received on 9 May 1986, 14 January 1987, and 28 April 1987. In addition, Petitioner request the removal from his SRB and OMPF of all entries related to his special court-martial (SPCM) on 18 June 1987. Petitioner also request the restoration of all property, privileges, and rights affected by his NJP's and his SPCM.

2. We recommend that Petitioner's request for relief be denied. Our analysis follows.

3. Background.

a. On 9 May 1986, Petitioner received NJP for disobedience of a lawful order in violation of Article 91 of the Uniform Code of Military Justice (UCMJ). Petitioner, then a lance corporal, pay grade E-3, was awarded a reduction to the pay grade of E-2 and a forfeiture of \$100.00 pay per month for 2 months. The reduction was suspended for a period of 6 months. Petitioner did not appeal.

b. On 14 January 1987, Petitioner received NJP for disobedience of a lawful order and wrongfully communicating a threat in violation of Articles 91 and 134 of the UCMJ, respectively. Petitioner was awarded a forfeiture of \$183.00 pay per month for 2 months. Petitioner did not appeal.

c. On 28 April 1987, Petitioner received NJP for unauthorized absence in violation of Article 86 of the UCMJ. Petitioner, then a lance corporal, pay grade E-3, was awarded a reduction to the pay grade of E-2 and 30 days of Correctional Custody. Petitioner did not appeal.

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

d. On 29 April 1987, Petitioner willfully disobeyed a lawful order. On 18 June 1987, Petitioner was convicted by a SPCM of disobedience of a lawful order in violation of Article 91 of the UCMJ. Petitioner was sentenced to 75 days of confinement and forfeiture of \$100.00 pay per month for 6 months.

3. Analysis

a. No legal error occurred in the imposition of Petitioner's NJP's or at his SPCM. Petitioner, however, now claims that: (1) his NJP's of 9 May 1986 and 14 January 1987 were unjust because he was not afforded an opportunity to review the evidence; (2) his NJP of 28 April 1987 should be expunged because he was subsequently tried by SPCM for the same offense; and, (3) his SPCM should be expunged because it was the result of his refusal of the punishment from the unjust NJP he received on 28 April 1987. Petitioner's claims are without merit.

b. Petitioner's claim that his NJP's of 9 May 1986 and 14 January 1987 were unjust because he was not allowed to review the evidence is without merit. Given that a presumption of regularity attaches to official records, the burden is on the Petitioner to establish any irregularity. Petitioner fails to satisfy this burden because he provides no evidence beyond his unsworn statement that any irregularity occurred. Furthermore, Petitioner was afforded an opportunity to consult with an attorney prior to accepting both NJP's and was aware of his right to refuse NJP. Petitioner, however, accepted both NJP's, was found guilty, and was punished. Petitioner did not appeal either NJP. If, at the time, he believed that his NJP's were procedurally defective, he should have appealed the NJP's then and not over 14 years later.

c. Petitioner's claim that his NJP of 28 April 1987 should be expunged because he was subsequently tried by SPCM for the same offense is without merit. Petitioner was not subsequently court-martialed for the same offense. Petitioner received NJP on 28 April 1987 for unauthorized absence in violation of Article 86 of the UCMJ. Petitioner was tried by SPCM for disobedience of a lawful order in violation of Article 91 of the UCMJ for disobeying a lawful order on 29 April 1987. While the

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF PRIVATE FIRST CLASS [REDACTED]
[REDACTED] 3051 USMC

order Petitioner disobeyed was related to the punishment he received at NJP, Petitioner's disobedience constituted a separated and distinct violation of the UCMJ.

d. Petitioner's claim that his SPCM conviction should be expunged because it is the result of his refusing the punishment of an unjust NJP is without merit. Neither his NJP on 28 April 1987 nor his subsequent SPCM were unjust. Petitioner's arguments are fundamentally flawed. Petitioner erroneously claims each NJP was unjust because the incidents were not adequately investigated; however, in each instance Petitioner was provided the opportunity to consult with counsel and not accept NJP. With respect to the NJP of 28 April 1987, Petitioner argues that he was subsequently tried by SPCM for the same offense. Petitioner then asks BCNR to set aside his SPCM because his NJP of 28 April 1987 was unjust. This argument is circular. As previously noted, Petitioner received NJP on 28 April 1987 for unauthorized absence. Even though related to the punishment he received at NJP, Petitioner's subsequent SPCM was for the separate and distinct offense of disobedience of a lawful order. Petitioner would have had the opportunity to object or request relief at the subsequent SPCM but instead pleaded guilty to the offense. The SPCM was subsequently reviewed in accordance with Article 64(a), UCMJ.

4. Recommendation. Accordingly, we recommend that Petitioner's request for relief be denied.

[REDACTED]
Head, Military Law Branch
Judge Advocate Division