



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

AEG

Docket No. 5187-99

28 June 2000

Mr. [REDACTED]

Dear Mr. [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 27 June 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary evidence 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 opinions from Headquarters Marine Corps (HQMC) dated 20 December 1999, and 3 and 23 February 2000, copies of which are 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 found that on 5 December 1991 you reenlisted in the Marine Corps for five years as a staff sergeant after more than 11 years of active service. After receiving an Excellent/Outstanding (EX/OS) fitness report (FITREP) and an OS FITREP, you were promoted to gunnery sergeant (GYSGT; E-7) on 1 February 1993. Shortly thereafter, you received another OS FITREP.

On 6 May 1993 a Not Observed (NO) FITREP showed that you had been disenrolled from the Staff NCO (SNCO) Academy advanced course due to a period of unauthorized absence (UA) from 30 April 1993 to 6 May 1993. On 10 May 1993 you received nonjudicial punishment (NJP) for this 6-day UA. You then received two more OS FITREPS.

On 17 August 1993 you began temporary additional duty (TAD) at a naval hospital, apparently for inpatient alcohol rehabilitation (Level III). You completed this TAD on 22 September 1993. You then received three more OS FITREPS. Additionally, a NO FITREP stated that you successfully completed the SNCO advanced course.

A service record entry of 29 December 1994 reveals that you were counseled concerning your failure to return from liberty in a timely manner while in Tangier, Morocco. You were then assigned to a "no liberty" status. A FITREP which closed out on 5 June 1995 referred to your late return from liberty, and the reviewing officer lowered the overall rating on this report from OS to EX/OS. You then received two more OS FITREPS.

On 10 January 1996 you received NJP for a UA of about nine hours. About two weeks later, on 26 January 1996, you requested reenlistment. On 14 March 1996 HQMC disapproved your request and directed one-half separation pay and assignment of an RE-4 reenlistment code.

On 21 May 1996 you were convicted by civil authorities of driving under the influence of alcohol. The EX FITREP for the period 27 December 1995 to 31 May 1996 noted the most recent NJP and civil conviction. The reporting senior completed this "DC" (directed by the Commandant) FITREP on 7 June 1996. The reviewer signed it on 18 June 1996 and the third officer sighting was accomplished at HQMC on 30 July 1996, indicating that no rebuttal had been submitted.

The EX/OS FITREP for the period 1 June to 10 December 1996 commented that you required "additional supervision to accomplish multiple tasks simultaneously." Also on that date, you received an honorable discharge by reason of expiration of enlistment and an RE-4 reenlistment code. In conjunction with your application to this Board, the Performance Evaluation Review Board (PERB) at HQMC has removed this comment from your last FITREP.

The Board first considered your contentions of error concerning the NJP of 10 January 1996, specifically, that although the service record entry of 8 January 1996 shows that the advice required by *United States v. Booker*, 5 M.J. 238 (CMA 1977) was given, it does not state that this advice was provided for the NJP of 10 January 1996; and the entry on the latter date does not reflect whether you appealed the NJP and, if so, the outcome of that appeal. However, the Board agreed with the HQMC advisory opinion of 20 December 1999 to the effect that any such errors were harmless. In this regard, the Board found that the entry of 8 January 1996 reflecting the *Booker* advice is on the same page and immediately above the entry reflecting the imposition of the NJP on 10 January 1996. Further, the only other time *Booker* advice would have been given was prior to the NJP of 10 May 1993, and the record clearly shows a separate *Booker* advice for this disciplinary action. Additionally, even though the NJP entry does not provide any information about an appeal of that action, the Board could not obtain any other documentation on this NJP since such documentation is routinely destroyed two years after its imposition. Accordingly, the Board adhered to a presumption of regularity and assumed that you either did not appeal the NJP of 10 January 1996 or, if you did, it was processed in accordance with applicable law and regulations.

Turning to the two FITREPS at issue, the Board first agreed with the conclusion of the 3 February 2000 advisory opinion that the "DC" FITREP for the period ending 31 May 1996 was properly prepared. The Board believed that subparagraph 3009.2 of Marine Corps Order 1610.7D, which states that a "DC" FITREP is not required for the first alcohol related incident, means only that such a report is not mandatory. A "DC" FITREP may still be written if appropriate under the general guidance set forth in subparagraph 3004.7a(1) of the directive. The Board also noted that you had already been through Level III rehabilitation, and concluded that the DUI conviction was a relapse worthy of a "DC" report under the guidance in that subparagraph. The Board also agreed that no relief is warranted based on your allegation that this report was not completed in a timely manner. Additionally, the Board could not help but note that even if you are correct and this "DC" FITREP should not have been written, the derogatory information in that report would have been included in the next FITREP. Since the Board has no authority to direct such action now, removal of the "DC" FITREP would provide an unjustifiable windfall for you since this information would not be reflected in your next (and last) FITREP. The Board further concluded that even though the FITREP for the period ending 10 December 1996 should have been referred to you for a possible rebuttal because of the comment to the effect that you required additional supervision to perform multiple tasks at the same time, the action of the PERB provided sufficient relief.

Finally, the Board concurred with the conclusion of the 23 February 2000 advisory opinion to the effect that the RE-4 reenlistment code was properly and appropriately assigned. In your last enlistment you received two NJP's, a civil conviction and an adverse service record entry. As a GYSGT, you should have been setting an example of exemplary behavior for junior Marines, but clearly failed to do so. Therefore, the Board believed that HQMC did not abuse its discretion in denying your request for reenlistment and directing the adverse reenlistment code.

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 a probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures

Copy to: Mr. 