



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

SMC
Docket No: 05798-01
31 August 2001

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

Subj: GYSGT [REDACTED], USMC [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 dtd 12Apr01 w/enclosures
(2) HQMC MMER/PERB memo dtd 19Jul01
(3) Subject's ltr dtd 30Jul01
(4) MGySgt ltr dtd 15Aug01
(5) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, that the applicable naval record be corrected by removing the fitness report for 1 November 1992 to 15 January 1993. A copy of this report is at Tab A.

2. The Board, consisting of Messrs. Goldsmith and Zsalman and Ms. LeBlanc, reviewed Petitioner's allegations of error and injustice on 30 August 2001. Pursuant to the Board's regulations, the majority, Mr. Zsalman and Ms. LeBlanc, determined that the corrective action indicated below should be taken on the available evidence of record. The minority, Mr. Goldsmith, recommended that Petitioner's request be denied. 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 which were available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. On 15 January 1993, the Commanding Officer (CO), 12th Marine Corps District (MCD) relieved Petitioner of his duties as noncommissioned officer in charge (NCOIC) of Recruiting Sub Station Mesa, Arizona after having awarded him nonjudicial punishment (NJP) the day before for driving under the influence (DUI) on an Air Force base. The

punishment was a suspended forfeiture of \$1,706.00 and a punitive letter of reprimand. The contested fitness report, which mentions both the relief for cause and the NJP, reflects that the reporting senior was the CO, Recruiting Station Phoenix, Arizona.

d. The fitness report at issue, documenting Petitioner's performance as a staff sergeant (pay grade E-6), reflects marks of "EX" (excellent) or "OS" (outstanding), except for an adverse mark of "BA" (below average) in judgment (item 14g). In "general value to the service" (item 15), Petitioner is marked "EX" (third best), with 10 peers ranked above him (six "OS" (best) and four "EX" to "OS" (second best)), one with him and none below. He is marked as qualified for promotion. In the comment section, the reporting senior speaks favorably of his performance, but states that he was relieved of his duties as NCOIC after the CO, 12th MCD found him guilty of DUI on an Air Force base. The reporting senior adds that until this "gross error in judgment" occurred, Petitioner had performed in an outstanding manner; that he has been counseled; that the reporting senior feels this was an isolated incident; and that Petitioner has "learned a hard lesson" from his experience. The reviewing officer concurred with the mark and ranking the reporting senior gave Petitioner in item 15, but he added no comments. Petitioner did not make a statement in rebuttal. The third sighting officer review required for an adverse fitness report was not completed; however, as Petitioner had made no statement, the report received an administrative third sighting at Headquarters Marine Corps (HQMC). The fitness report is the only document in Petitioner's naval record reflecting the relief for cause; but his record includes other documentation of the NJP.

e. Concerning the incident for which he received NJP, Petitioner states that while he was attending a recruiting conference with a Marine Corps gunnery sergeant (pay grade E-7) and master sergeant (pay grade E-8), the three of them went out on liberty; that they had drinks; that he offered to call a taxi, as they had been drinking and he was concerned about his status as a recruiter; that he stated he did not feel comfortable or safe driving; and that the master sergeant nevertheless ordered him to drive back to the quarters on the base where the more senior Marines were staying, stating that Petitioner was only a staff sergeant, and that the master sergeant outranked him. Petitioner says the master sergeant was "very high tempered" and that he reluctantly agreed to drive, to avoid confrontation. He says he first drove to his own residence, where he suggested that they spend the night there, and he offered to drive them to the base in the morning. However, he reports, the master sergeant became aggravated, broke some items, and said he wanted to leave. Petitioner says he again offered to call a taxi, but the master sergeant again declined and demanded to be taken to the base immediately. Petitioner states he refused, causing the master sergeant to "become violent." He adds that the master sergeant continually reminded him that he outranked Petitioner and continued to order him around. He says he then agreed to drive to the base, and that he kept on asking the gunnery sergeant for guidance, but he "just said he was not going to be responsible if anything happened." Petitioner relates that when they arrived at the gate, the military policeman (MP) smelled the alcohol in the vehicle; that the MP said to leave the vehicle near the gate, walk to quarters, and pick up the vehicle in the morning; that Petitioner and the gunnery sergeant complied, but the master sergeant "got out of the car and

started to argue, insulting and finally tried to fight the MPs"; and that they were then all arrested, with Petitioner and the gunnery sergeant walking in freely, but the master sergeant being handcuffed. Petitioner, who is now a gunnery sergeant, notes he has been passed over three times for promotion to master sergeant; and he states he has been advised to seek removal of the DUI incident from his fitness report record.

f. In support of his application, Petitioner submitted two letters from the reporting senior, dated 1 September 1995 and 5 April 2001. The reporting senior states that he feels Petitioner was coerced into driving; and that the master sergeant and gunnery sergeant who figured in the incident for which Petitioner received NJP for a DUI offense were of less than solid reputation, and were later relieved because of violations "identifying their weak character." In paragraph 2 of his letter of 5 April 2001, he says the fact that Petitioner was the junior and least intoxicated, and was told to drive the car onto the base, was brought out at his NJP proceeding, where he received the lightest punishment of the three persons involved.

g. At enclosure (2) is the report of the HQMC Performance Evaluation Review Board in Petitioner's case. The PERB denied Petitioner's request, stating "there is absolutely nothing to show the petitioner was not a willing participant" in the DUI incident. They added "By his own admission in [his application], the petitioner had options other than getting behind the wheel of a vehicle when he had too much to drink."

h. Petitioner submitted a rebuttal statement, at enclosure (3), to the PERB report, expressing his disagreement with their opinion that he was a "willing participant" in the incident. He states there is a difference between being ordered to do something and volunteering; that at the time, he was inexperienced in dealing with senior enlisted Marines, making more awkward the situation of having such personnel order him to drive the car; and that he did as he was ordered "without thinking about any potential ramifications."

i. Petitioner provided an additional letter of support, at enclosure (4), from a Marine Corps master gunnery sergeant (pay grade E-9). He says he has a relatively clear memory of the events surrounding the DUI incident, as he was the head of the team conducting the training evolution when this incident occurred. He states there is no doubt that Petitioner made a difficult, but incorrect decision; that when Petitioner was faced with a senior enlisted Marine ordering him to drive after "having imbibed too heavily in alcohol," he succumbed; that the master sergeant who gave the order exercised great control over the direction of Petitioner's career through his ability to shape the commander's opinion of Petitioner; that Petitioner had every right to assume that a negative response would have led to further retribution; and that "There is also little doubt that the 'order' given by the Master Sergeant may have also included a physical threat if [Petitioner] did not comply." The master gunnery sergeant further states that "[Petitioner's] record before and after this incident is the true indicator of his integrity, professionalism, and worth to the Corps, not the one time incident." He concludes by asserting it is neither right nor just that Petitioner has not yet been promoted to master sergeant, while others involved in the incident have been.

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding the PERB report, the majority of the Board finds an injustice warranting the requested relief.

Contrary to the PERB statement that there is nothing to show Petitioner was not a "willing participant" in the DUI incident, the majority finds that the supporting letters he furnished from the reporting senior and the master gunnery sergeant establish he was coerced into driving while under the influence of alcohol. While they do not condone Petitioner's decision to yield to this coercion, they find it was unduly harsh, under the circumstances, to relieve him for cause.

The majority recognizes that much of the contested fitness report is not adverse. However, they find the entire report should be removed, as they cannot determine the extent to which treating the DUI incident as grounds for relief for cause prejudiced Petitioner's appraisal.

In view of the foregoing, the majority recommends the following corrective action.

MAJORITY RECOMMENDATION:

- a. That Petitioner's naval record be corrected by removing the following fitness report:

Date of Report	Reporting Senior	Period of Report	
		From	To
9Feb93		1Nov92	15Jan93

- b. That there be inserted in his naval record a memorandum in place of the removed report, containing appropriate identifying data concerning the report; that such memorandum state that the report has been removed by order of the Secretary of the Navy in accordance with the provisions of federal law and may not be made available to selection boards and other reviewing authorities; and that such boards may not conjecture or draw any inference as to the nature of the report.

- c. That the magnetic tape maintained by Headquarters Marine Corps be corrected accordingly.

- d. 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.

- e. That any material directed to be removed from Petitioner's naval record be returned to this 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.

MINORITY CONCLUSION:

Upon review and consideration of all the evidence of record, the minority of the Board concludes that Petitioner's application should be denied.

The minority agrees with the majority that Petitioner has provided evidence showing that a senior enlisted Marine did order him to drive. However, the minority particularly notes the acknowledgment, in the reporting senior's letter of 5 April 2001, that it was brought out at Petitioner's NJP proceeding that he had been told to drive the car onto the base. Notwithstanding the evidence that Petitioner was coerced, the minority does not agree it was unduly harsh to relieve him for cause, as he did exercise questionable judgment by acceding to the pressure to drive when he doubted his ability to do so safely.

In view of the above, the recommendation of the minority is as follows:

MINORITY RECOMMENDATION:

- a. That Petitioner's application be denied.
- 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.

ROBERT D. ZSALMAN
Recorder

Jonathan S. Ruskin
JONATHAN S. RUSKIN
Acting Recorder

- 5. The foregoing report of the Board is submitted for your review and action.

W. Dean Pfeiffer
W. DEAN PFEIFFER

MAJORITY REPORT

Reviewed and approved:

Joseph G. Lynch

NOV 28 2001

~~MINORITY REPORT~~

~~Reviewed and approved:~~

JOSEPH G. LYNCH
Assistant General Counsel
(Manpower And Reserve Affairs)



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

5798-01
IN REPLY REFER TO:
1610
MMER/PERB
19 JUL 2001

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
GUNNERY SERGEANT [REDACTED], USMC

Ref: (a) GySgt [REDACTED] DD Form 149 of 12 Apr 01
(b) MCO P1610.7C w/Ch 1-6

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 18 July 2001 to consider Gunnery Sergeant [REDACTED] petition contained in reference (a). Removal of the fitness report for the period 921101 to 930115 (CD) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner contends the fitness report at issue was the result of circumstances beyond his control. To support his appeal, the petitioner furnishes his own statement and letters from the Reporting Senior of record.

3. In its proceedings, the PERB concluded that the report is both administratively correct and procedurally complete as written and filed. Notwithstanding the testimonials by Lieutenant Colonel [REDACTED] concerning the petitioner's performance prior and subsequent to the incident that resulted in nonjudicial punishment (NJP), there is absolutely nothing to show the petitioner was not a willing participant. By his own admission in reference (a), the petitioner had options other than getting behind the wheel of a vehicle when he had too much to drink. Eight years of hindsight do not change the facts. Simply stated, the NJP occurred and was properly recorded via the performance evaluation system.

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report should remain a part of Gunnery Sergeant [REDACTED] official military record.

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

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



UNITED STATES MARINE CORPS

MARINE CORPS RECRUITERS SCHOOL
3500 CHOSIN AVENUE
SAN DIEGO, CALIFORNIA 92140

IN REPLY REFER TO:
1000
CLM/gfb
15 Aug 01

From: Master Gunnery Sergeant [REDACTED]
To: Executive Director, Board for Corrections of Naval Records
Via: Gunnery Sergeant [REDACTED]
Subj: Letter of Recommendation, Case of Gunnery Sergeant [REDACTED]
G [REDACTED]

1. I, Master Gunnery Sergeant [REDACTED] wish to provide the following comments regarding Gunnery Sergeant [REDACTED]

2. I have had the opportunity to observe Gunnery Sergeant [REDACTED] in many aspects, before and since the period in question. I find it especially difficult to bring to mind a Marine who has performed more professionally under difficult circumstances. I also have a relatively clear memory of the events in question, as I was the Head of the Mobile Training Team conducting the training evolution when this incident occurred. There is no doubt that Gunnery Sergeant [REDACTED] (then a Staff Sergeant) made a difficult, but incorrect decision. When faced with a senior enlisted Marine ordering him to drive the vehicle after having imbibed too heavily in alcohol, he succumbed. It should be pointed out that the Master Sergeant who gave the order exercised great control over the direction of the Gunnery Sergeant's career through his ability to shape the Commander's opinion of the Gunnery Sergeant, and the Gunnery Sergeant had every right to assume that a negative response would have led to further retribution. There is also little doubt that the "order" given by the Master Sergeant may have also included a physical threat if the Gunnery Sergeant did not comply. Regardless, Gunnery Sergeant [REDACTED] has paid for that error for several years now. For him to continue to bear the brunt of an error, which was relatively minor considering the circumstances, does not reflect the stated purpose of non-judicial punishment, as detailed in Part V, Manual for Courts-Martial, Paragraph 1.c. Specifically, that "Nonjudicial punishment... promotes **positive** behavior changes in servicemembers..." Positive change is not possible when the Marine in question believes the punishment to be lasting and insurmountable.

AUG 20 2001

3. Gunnery Sergeant [REDACTED] s endeavored for the last eight years to overcome this minor deviation from his otherwise stellar career. He has continued to seek and be assigned to billets of increasing responsibility and accountability. At the time of the incident, the Gunnery Sergeant had recently taken over a difficult recruiting sub-station as the Noncommissioned Officer in Charge. Newly promoted to the rank of Staff Sergeant at the time of the incident, he has since been promoted to Gunnery Sergeant, been chosen to become a Career Recruiter, been augmented to the active duty forces, recently moved to a new Recruiting Station, taken over as the Commander's chief trainer, and served well and faithfully, despite the agonizing outcome of promotion board results.

4. The Gunnery Sergeant's record before and after this incident is the true indicator of his integrity, professionalism, and worth to the Corps, not the one time incident. Not only has he served honorably and faithfully since the incident, he has received a Navy and Marine Corps Commendation Medal, a Navy and Marine Corps Achievement Medal, numerous Meritorious Masts and Certificates of Commendation. Meanwhile, other Marines involved in the incident have been promoted to Master Sergeant. Those promoted include one of the senior enlisted Marines who issued the order, and another who was subsequently relieved from Recruiting Duty for misconduct. While I am not a believer in the concept of "fair", I am a firm believer in the concept, and practice of, just and right. This is not right, and certainly not just.

5. The Gunnery Sergeant deserves to be promoted now, as he already serves as a Master Sergeant de facto, in carriage, bearing, and conduct. I implore the Board consider his request for a remedy under the auspices of the whole-marine concept. I have absolutely no reservations recommending this Marine for immediate promotion and continued service to the Marine Corps as a Master Sergeant.

[REDACTED]