



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

JRE
Docket No: 3660-02
17 December 2002

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the 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 12 December 2002. 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 Acting Head, Military Law Branch, Judge Advocate Division, Headquarters, U.S. Marine Corps, 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. In this connection, the Board substantially concurred with the comments contained in the advisory opinion. 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
23 AUG 2002

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL
RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
ICO [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 18 May 1999, and the related Board of Inquiry (BOI) conducted on 20 December 1999. Petitioner also asks that he be promoted to the grade of captain.

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

3. Background

a. On 25 September 1998, Petitioner, a Marine First Lieutenant, was returning to his assigned place of duty (Recruiting Station (RS) Buffalo, New York) from a professional school in Leesburg, Virginia. Petitioner telephoned his command and requested permission to delay his arrival until 1200 hours the following day. After receiving permission to delay his arrival, Petitioner arranged to meet several friends at a bar near Rochester, New York for a bachelor's party. Petitioner drank alcoholic beverages until he was intoxicated. At approximately 0200, Petitioner left the bar with an acquaintance (a corporal in the Marine Corps Reserve). In the early morning hours of 26 September 1998, Petitioner, a passenger in the corporal's automobile, sustained serious injuries when the corporal lost control of the car and crashed into a tree. The corporal was charged with driving while intoxicated.

b. On 11 November 1998, Petitioner made an official written statement to the officer assigned to conduct an investigation into the accident for the purpose of making a line of duty / misconduct determination. In this written statement, Petitioner falsely stated that he called the corporal prior to arriving at the bar, and that he met the corporal at the bar because it was a "neutral site" with which both were familiar. Petitioner

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ICO FIRST LIEUTENANT THOMAS P. HOFFMAN 133 64 1202

omitted any mention of the bachelor party, an event for which he arguably would not have been granted permission to miss work.

c. On 12 April 1999, Petitioner made another written statement concerning the accident. After waiving his right against self-incrimination and his right to counsel, Petitioner admitted, "I misled the investigating officer on the circumstance surrounding the accident due to fear that I would be found 'Not in the line of duty'. I was very concerned over my family's future if I did not recover from my injuries and did not want to place an undue burden on them. Once I had given a false statement, I felt trapped to continue with the lie."

d. On 18 May 1999, Petitioner received NJP for false official statement and conduct unbecoming an officer and gentlemen in violation of Articles 107 and 133, Uniform Code of Military Justice (UCMJ), respectively. Petitioner was awarded a Letter of Censure. Petitioner's appeal was denied.

e. On 5 August 1999, the Deputy Chief of Staff for Manpower and Reserve affairs (DC M&RA) ordered Petitioner to show cause for his retention in the Naval service at a BOI. The BOI, conducted on 20 December 1999, substantiated the alleged misconduct. The BOI found that Petitioner failed to demonstrate acceptable qualities of leadership required of an officer of his grade; failed to properly discharge the duties expected of an officer of his grade and experience; and engaged in personal or professional conduct unbecoming an officer as evidenced by the commission of a military or civilian offense that, if prosecuted under the UCMJ, could be punished by confinement of 6 months or more, or would require specific intent for conviction. The BOI further determined, however, that none of these reasons warranted separation, and therefore closed the case.

f. The BOI specifically found that, in his 11 November 1998 written statement, Petitioner, knowingly and with the intent to deceive, made a false official statement to the investigating officer in violation of Article 107, UCMJ.

g. On 28 April 2000, the Commandant of the Marine Corps (Code JA) delayed Petitioner's promotion to captain (scheduled for 1 May 2000). The delay was effected to consider Petitioner's possible removal from the promotion list because of the misconduct substantiated at his BOI.

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h. Prior to any decision regarding Petitioner's promotion to captain, Petitioner was medically retired as a first lieutenant on 31 May 2000.

4. Analysis. No legal error occurred in the imposition of Petitioner's NJP or the conduct of his BOI. Petitioner, however, claims that his NJP was unjust and/or in error because he did not commit misconduct.

a. Petitioner admitted guilt in his written statement of 12 April 1999. His attempt to now "re-litigate" the facts surrounding his offenses is both untimely and contrary to his earlier express admissions. Petitioner does not allege legal error occurred in the imposition of NJP. Rather, Petitioner offers his self-serving opinion (unsupported by any evidence) that the NJP was "unprofessional." We note that report of NJP dated 25 May 1999 reflects that (1) Petitioner voluntarily accepted NJP; (2) Petitioner was present at the hearing and was accorded all rights including the right to consult with a lawyer; and (3) all procedural requirements contained within paragraph 4, Part V of the Manual for Courts-Martial were satisfied. The record reveals no error or injustice and the NJP should stand.

b. Likewise, no error or injustice occurred at Petitioner's BOI. Petitioner, who was represented by counsel at his BOI, did not then raise any allegations of error. Indeed, Petitioner does not now complain of legal error. Rather, he claims that the BOI reached the wrong result, and/or was unjustly convened in light of Petitioner's closed head injury. We note that Petitioner's counsel did not claim that Petitioner was mentally incompetent to show cause for his retention. The BOI transcript makes clear that Petitioner was able to understand the issues and participate in the presentation of his case. Instead, Petitioner argued to the members that his injuries resulted in memory loss and traumatic brain injury, which caused Petitioner to misperceive his earlier false account as an intentional lie. The members rejected this fanciful rationalization and instead opted for a common sense determination -- that Petitioner lied. The record reveals no error or injustice in the show cause determination or BOI and the substantiated findings of the board are properly made part of Petitioner's records.

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c. Petitioner's request for promotion to the grade of captain is unsupported by law. Title 10, U.S. Code, section 14317 provides that if an officer is transferred to the Temporary Disability Retired List after having been recommended for promotion to a higher grade but, before being promoted, the officer shall be treated as if the officer had not been considered and recommended for promotion. Petitioner was medically retired following a lawful decision to delay his promotion. By law, he may not be promoted to the grade of captain.

5. Conclusion. Accordingly, we recommend that the requested relief be denied.

[REDACTED]

Acting Head, Military Law Branch
Judge Advocate Division