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

CRS
Docket No: 4849-01
14 November 2002

[redacted]

[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 6 November 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 opinions furnished by Headquarters Marine Corps dated 1 August 2001 and 18 April 2002, copies of which are attached. The Board also considered your rebuttal statement of 23 August 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 opinions. The Board additionally concluded that your two nonjudicial punishments were more than sufficient to support the assignment of the RE-4 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 probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures

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

IN REPLY REFER TO

1070
JAM4

01 AUG 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 19 December 1997. Petitioner also requests the restoration of all property, privileges, and rights affected by that NJP.

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

3. Background. On 19 December 1997, Petitioner received NJP for unauthorized absence and disobedience of a lawful order in violation of Articles 86 and 92 of the Uniform Code of Military Justice (UCMJ), respectively. Petitioner, then a corporal, pay grade E-4, was awarded reduction in grade to E-3 and forfeiture of $598.00 pay per month for 2 months. The forfeiture was suspended for 6 months. Petitioner appealed. Petitioner's appeal was denied on 8 January 1998.

4. Analysis. No legal error occurred in the imposition of NJP. Petitioner, however, now claims that his NJP was unjust because he was not read or asked every question on the Office Hours Guide and Summary of NJP Hearing. In addition, Petitioner claims that his NJP was unjust because a piece of official correspondence erroneously referred to him as a corporal after his reduction. Petitioner's claims are without merit. First, while the Office Hours Guide and Summary of NJP Hearing provides useful guidance to NJP authorities, it is just that, guidance. NJP authorities are not required to use it much less follow it verbatim. Second, as a result of Petitioner's NJP, he was properly reduced to the grade of lance corporal. A clerical-error referring to Petitioner as a corporal after his reduction does not effect his promotion back to the grade of corporal.

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION IN THE CASE OF LANCE CORPORAL [redacted] USMC

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

[redacted]
Head, Military Law Branch
Judge Advocate Division

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

IN REPLY REFER TO:
1070
JAM2A
2002

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

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

Ref: (a) Our memo of 1 Aug 2001

1. We are asked to comment on two issues in Petitioner's case. First, under what circumstances, in this case, was it proper and appropriate to punish Petitioner for violations of both Article 86 and 92, Uniform Code of Military Justice (UCMJ). Second, was it proper and appropriate to punish Petitioner for missing remedial physical training (PT) on 17 December 1997, given his medical chits of 16 and 17 December 1997.

2. Short answers. First, the doctrine of unreasonable multiplication of charges discourages charging both offenses. Second, no error occurred in punishing Petitioner for missing remedial PT on 17 December 1997.

3. Background. On 19 December 1997, Petitioner received NJP for unauthorized absence and disobedience of a lawful order in violation of Articles 86 and 92 of the Uniform Code of Military Justice (UCMJ), respectively. Petitioner was assigned to remedial physical training (PT) by lawful written order and the both violations are for Petitioner's absence from remedial PT. Petitioner, then a corporal, pay grade E-4, was awarded reduction in grade to E-3 and forfeiture of $598.00 pay per month for 2 months. The forfeiture was suspended for 6 months. Petitioner appealed. Petitioner's appeal was denied on 8 January 1998.

4. Analysis

a. Appropriateness to punish Petitioner for violations of both Articles 86 and 92, UCMJ. As to the appropriateness and legality of the NJP itself, we refer back to our earlier response (reference (a)). In response to your specific question, the prohibition against unreasonable multiplication of

charges,[1] as applied at courts-martial, provides a traditional legal standard of reasonableness to address the consequences of charging abuses. Petitioner's Article 92, UCMJ, violation is for the unauthorized absence from remedial PT. As a result, Petitioner's absence triggered the Article 92, UCMJ, offense. Given the facts of this case, a court could conclude that Petitioner should not be punished for both offenses.

(1) However, there is no indication that Petitioner received increased punishment because of the two Article 92, UCMJ, violations. Unlike a court-martial, the maximum punishment at NJP is not subject to change by the severity or total number of offenses. Furthermore, merely by accepting NJP a servicemember potentially could receive the maximum punishment for just one violation of any UCMJ offense.

(2) Notwithstanding the Article 92, UCMJ, offenses, Petitioner still accepted NJP for two separate violations of Article 86, UCMJ. As punishment, Petitioner was awarded less than the maximum punishment. Moreover, the commanding officer suspended all forfeitures for 6 months. As a result, the only punishment Petitioner, a noncommissioned officer (NCO) at the time, received for two incidents of unauthorized absence was reduction to paygrade E-3/lance corporal.

b. Appropriate to punish for missing PT on 17 Dec 97. Petitioner received a lawful written order assigning him to remedial PT and requiring him to report to remedial PT at specific times and days. Therefore, Petitioner had a duty to report to remedial PT unless authorized by competent authority to be elsewhere. According to the Office Hours Guide and Petitioner's appeal of 22 December 1997, on 17 December 1997, Petitioner reported for work at his normal time with the civilian doctor's note restricting him from physical activities. At no point during the NJP nor in his NJP appeal letter, did

[1] The concept of unreasonable multiplication of charges is addressed in *United States v. Quiroz*, 55 M.J. 334 (2001). In *Quiroz*, the Court approved the following factors as a framework to determine if the "piling on" of charges is so extreme or unreasonable as to warrant some relief: "(1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications; (2) Is each charge and specification aimed at distinctly separate criminal acts; (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality; (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure; (5) Is there evidence of prosecutorial overreaching or abuse in the drafting of the charges?" *Quiroz*, 55 M.J. at 338-39.

Petitioner indicate that he went to remedial PT, waited around, and then went to work and presented SSg[redacted] with the civilian doctor's chit. In fact, the first time Petitioner asserts these "facts" is in his petition to the Board for Corrections of Naval Records. Additionally, assuming, as he claims, that Petitioner did report at 0625 for remedial PT and found no one else present, as an NCO, Petitioner should have known to locate someone associated with the remedial PT program. At a minimum, since Petitioner was late one time earlier that week, if he did in fact report for remedial PT, a reasonable NCO in his position should have went directly to the headquarters building and reported to someone senior to himself, rather than reporting to work at 0730.

5. Conclusion. Accordingly, we recommend that Petitioner's request to reduce his punishment be denied.

[redacted]
Head, Military Law Branch
Judge Advocate Division