



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

CRS
Docket No: 7511-02
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 14 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 opinion furnished by Headquarters Marine Corps dated 26 September 2002, 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
26 SEP 2002

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

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

1. We are asked to provide an opinion on Petitioner's request to be restored to duty at the grade of lance corporal (pay grade E-3), with no lost time in service or grade. Specifically, we are asked to comment on allegations that (1) Petitioner's administrative discharge board did not sufficiently deliberate upon their decision against recommending suspension of Petitioner's discharge, (2) the separation authority did not properly consider the letter of deficiency, dated 31 May 2001, submitted by Petitioner's counsel, and (3) improper testimony at Petitioner's administrative separation board unfairly prejudiced the board's recommendations. Petitioner also requests to be restored to duty as an act of clemency in recognition that her positive urinalysis is the "only blemish" in an "otherwise exemplary record of service."

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

3. Background

a. In October 2000, Petitioner tested positive on a urinalysis for use of Amphetamine. The Commanding Officer, Headquarters Battalion, 1st Marine Division, Camp Pendleton, California directed that Petitioner's case be heard before an administrative separation board in accordance with paragraph 6210.5a of the Marine Corps Separation and Retirement Manual (MARCORSEPMAN), which requires processing for administrative separation for all substantiated instances of drug abuse.

b. On 25 April 2001, Petitioner's administrative separation board convened. Petitioner was represented by counsel and was afforded all applicable rights. The board unanimously recommended that Petitioner be involuntarily discharged for drug abuse and that her service be characterized as Under Other Than Honorable Conditions. The board did not recommend suspension of the discharge.

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[REDACTED]

c. On 31 May 2001, counsel for Petitioner submitted a letter of deficiency to the separation authority (the Commander (Cmdr), 1st Marine Division (MARDIV), Reinforced (Rein)) alleging that the board members failed in their duty to deliberate and make an independent recommendation regarding whether the separation authority should suspend the recommended discharge. The letter noted the evidence of Petitioner's good military character presented at the administrative separation board and contained Petitioner's request that the separation authority suspend the recommended discharge.

d. In his letter of 6 June 2001, the Cmdr, 1st MARDIV (Rein) directed Petitioner's discharge for misconduct due to drug abuse and that her service be characterized as Under Other Than Honorable Conditions. The Cmdr listed the letter of deficiency as enclosure (2), and specifically indicated that he reviewed it.

4. Analysis. No legal error occurred in the discharge of Petitioner for misconduct due to drug abuse. Each of Petitioner's claims is addressed separately below.

a. The board members did not deliberate upon suspension of the discharge. Petitioner complains that the board members did not consider suspension of the recommended discharge, and argues that this error warrants her restoration to duty. This argument is without merit.

(1) Service regulations regarding involuntary separation of enlisted Marines do not require that the board members make a recommendation with regard to suspension of a recommended discharge; hence, there is no requirement that they deliberate upon the issue. Paragraph 6319.5, MARCORSEPMAN, directs that board members shall recommend retention or separation, and if separation is recommended, a characterization of service. However, paragraph 6319.5b instructs that if the board recommends separation, it may recommend suspension.

(2) By asking BCNR to find error in the board's deliberations, Petitioner seeks to inject legal requirements regarding jury deliberations in criminal cases into an administrative context. Paragraph 6316.1, MARCORSEPMAN, is instructive. It provides: "There is a sharp and distinct

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delineation between the administrative process which has as its purpose the administrative elimination of unsuitable, unfit, or unqualified Marines, and the judicial process, the purpose of which is to establish the guilt or innocence of a member accused of a crime and to administer punishment when appropriate." The administrative board made all required findings in closed session. Second-guessing its deliberative process, a thing normally not permitted even in criminal cases, ignores the administrative nature of the board and invites BCNR to travel down a slippery slope toward invading the closed-session discussions of members.

(3) The evidence indicates that the board did consider suspension of the recommended discharge. The record of hearing indicates that the board recommended by a vote of 3 to 0 that the discharge not be suspended. Even Petitioner's counsel's recollection of his conversation with the board members shows that they felt that Petitioner "should be separated." Also, regarding a suspension of her discharge, the senior member, Major [REDACTED] indicated in his electronic mail (E-mail) of 12 June 2001 that the board members felt that Petitioner did not "rate one."

(4) In any event, the Cmdr, 1st MARDIV (Rein), directed Petitioner's discharge after having considered Petitioner's complaint about the lack of discussion regarding suspension of the discharge. Significantly, a recommendation for suspension of a discharge by the board is not binding upon the separation authority.¹ Thus, the Cmdr's action directing separation moots Petitioner's complaint.

b. Failure to consider counsel's letter of deficiency. Petitioner complains that the separation authority did not properly consider the letter of deficiency, dated 31 May 2001, submitted by Petitioner's counsel. This complaint is without merit. In his letter of 6 June 2001, the Cmdr, 1st MARDIV (Rein) listed the letter of deficiency as enclosure (2), and specifically indicated that he reviewed it prior to making his decision. Petitioner's description of this as mere "boilerplate" is nonsensical.

¹ See, paragraph 6310, MARCORSEPMAN.

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[REDACTED]

c. Testimony of Major [REDACTED] Petitioner objects to the testimony of Major [REDACTED] a trial counsel. Petitioner complains that Major [REDACTED] testimony was improper and tainted the board. This complaint is without basis. In his testimony, Major [REDACTED] explained why Petitioner's case was sent directly to an administrative separation board without first being adjudicated at a court-martial. Based upon the reported concentration of the metabolite in Petitioner's urine (expressed in nanograms per milliliter), Major [REDACTED] expressed his opinion that the Government could not prove that Petitioner had ever felt the physiological effects of the drug. Major [REDACTED] then opined that because it could not prove Petitioner felt the effects of the drug, the Government could not successfully prosecute Petitioner at a court-martial. This testimony was not improper. Rather, it was relevant to explain the Government's processing of Petitioner's case and to explain why the allegation of drug use had not been previously adjudicated in a judicial or nonjudicial forum. Moreover, counsel for Petitioner did not object to this testimony during the hearing.

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

[REDACTED]
Assistant Head, Military Law
Branch, Judge Advocate Division