

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

TRG
Docket No: 5693-03
12 May 2004

Dear

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 11 May 2004. 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 26 August and 10 September 2003, copies of which are enclosed.

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,

Enclosures

**DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX**

IN REPLY REFER TO:
1070
JAM4
AUG 26 2003

MEMOPATNTDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL
RECORDS

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

1. The military law branch was tasked with providing an opinion on Petitioner's request. Specifically, Petitioner asked to remove from his official military personnel file (OMPF) all entries relating to the Nonjudicial Punishment (NJP) conducted by the Commanding General, Marine Corps Base Hawaii on 21 December 2001, and the Letter of Censure imposed upon Petitioner as punishment at that hearing.

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

3. Background

a. In mid-July 2001, a XXX who worked for Petitioner at the Marine Corps Base Hawaii Post Office attempted suicide. The suicide brought command attention to the operation of the post office and led to the disclosure by Petitioner that funds were missing from the staff sergeant's Custodian of Postal Effects (COPE) account. A subsequent Naval Criminal Investigative Service (NCIS) investigation revealed that Petitioner knew, but failed to report, that the funds were missing. Additionally, it was discovered that Petitioner had not ensured that quarterly inspections of the COPE account were conducted, as required by regulations.

b. While Petitioner was pending investigation pursuant to Article 32, Uniform Code of Military Justice (UCMJ), he submitted, after consultation with counsel, a pretrial agreement wherein he voluntarily offered to plead guilty to two specifications alleging dereliction of duty. In exchange, the Convening Authority agreed to forward the charges to the Commanding General (CG), recommending disposition at NJP vice court-martial.

c. On 21 December 2001, the CG, Marine Corps Base imposed NJP upon Petitioner for dereliction of duty.

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violation of Article 92, UCMJ. The CG found that Petitioner was derelict in the performance of his duties under U.S. Navy Regulation 1137 by (1) negligently failing to report as missing a sum of \$3,000.00 entrusted to the care of Petitioner's subordinate, and (2) by negligently failing to report that his subordinate had been derelict regarding his duties to safeguard and account for the same sum of money. The CG also found that Petitioner was derelict in the performance of his duties under OPNAVINST 5112.4B by negligently failing to ensure that the COPE account was inspected quarterly. Petitioner was awarded a Letter of Censure and forfeiture of \$1,500.00 pay per month for 2 months (\$3,000.00 total) (suspended for 6 months)

d. On 2 April 2001, a Board of Inquiry (BOI) was convened at Marine Corps Base [REDACTED] to consider whether Petitioner should be retained in the U.S. Marine Corps. The BOI did not substantiate the allegations of misconduct and therefore recommended retention.

4. Analysis. Petitioner claims that removal of the NJP is warranted because (1) information provided to Petitioner's commanding officer by an NCIS agent was incorrect; (2) Department regulations prevent holding Petitioner accountable for the actions of his subordinate; (3) Petitioner was on temporary additional duty (TAD) during the times of required inspections; (4) other officers failed to conduct required inspections and were not punished; and (5) Petitioner did not commit any offense, a claim buttressed by the negative findings of his BOI. Petitioner's claims are without merit. Each is addressed below.

a. Information provided to Petitioner's commanding officer by an NCIS agent was incorrect. Petitioner claims that an NCIS special agent provided erroneous information to the Commanding Officer, Combat Service Support Group—3, and, by implication, that this information caused Petitioner to be wrongly punished at NJP. Although not specified clearly in the application, the erroneous" information appears to be the special agent's assertion that applicable regulations did not permit Petitioner the latitude to simply allow the staff sergeant to make restitution for the missing money. This claim is totally unsupported.

(1) Postal regulations do not excuse Petitioner's failure to report to superior authority Government funds missing due to the dereliction or theft by Petitioner's subordinate. Chapter 14 of the Department of Defense Postal Manual (DoD 4525.6-M) establishes procedures for handling and reporting postal offenses. The procedures exist to meet the Department's responsibility for ensuring the U.S. Postal Service is reimbursed for any loss of funds, postage stock, and accountable mail while in the custody of the Military Postal Service. C14.1, DoD 4525.6-M. The reporting requirements concern notification of the Military Postal Service Agency and do not supplant or countermand the requirement to report offenses under the UCMJ.

(2) The report of Petitioner's NJP indicates that one of duties he negligently failed to perform was imposed by U.S. Navy Regulation 1137, which reads, "Persons in the naval service shall report as soon as possible to superior authority all offenses under the Uniform Code of Military Justice which come under their observation, except when such persons are themselves already criminally involved in such offenses at the time such offenses first come under their observation." The Postal Manual does not relieve persons in the naval service from this obligation; as a matter of law, it does not, since Service regulations operate to impose duties in addition to those imposed by Department regulations. When Petitioner discovered that \$3,000.00 in Government funds under the care of his subordinate were "missing" without explanation, Petitioner then observed the offense of larceny or dereliction of duty. Whether or not Petitioner suspected larceny, he was under an obligation to report the offense(s).

(3) Petitioner's claim of authority, or honest confusion about the existence of authority, to permit restitution without informing his commanding officer would mean he lacked knowledge of any duty to report the missing funds and/or the dereliction or theft by his subordinate. This claim is not credible. The provisions of the Postal Manual aside, Petitioner was an officer with some 18 years of experience in the Marine Corps; that he was totally ignorant of his duty to apprise his commanding officer of \$3,000.00 in Government funds missing without explanation goes against reason. The CG, as fact-finder at the NJP, certainly could have rationally concluded that Petitioner

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had knowledge of his duty to report the offenses of the staff sergeant, based on the CG's findings of guilt.

(4) The CG specifically rejected Petitioner's claim that he misread or misinterpreted the Postal Manual, and thus lacked knowledge of his duty to report the staff sergeant's offenses. The following exchange on pages 13 and 14 of the verbatim transcript of Petitioner's NJP is instructive:

CG: Let me tell you what I think, and then I want to give you an opportunity to comment on what I think and maybe dissuade me from it. Is that fair?

CWO [REDACTED]: Yes, sir.

CG: I think you knew that your people stole the money, that XXXX stole the money, was stealing money, and that he stole it. And I think you were making efforts to help him come up with a large sum of money that he could pay back out, or either you felt that was good leadership and you were taking care of your people, or you were doing it for selfish reasons, which is to make the post office not look bad. I tend to think that it was maybe the former, that you had a misperception of what good leadership was, and you thought you were taking care of your people by doing that. That's what I believe from listening to you rd reading the investigation.

What I'm hearing you say is that's not the case. So, what would you say to convince me otherwise, that I'm wrong?

CWO [REDACTED]: Sir, I take care of my troops, sir. I ensured that none of my troops were hungry. I ensure none of their family members were hungry. I ensure that everybody has a place to sleep and things to have, and that's the way that I've been taught. I'm a second generation of Marines, sir. That's the way I was taught. I've seen the Marine Corps for 40 years, and that's the only way I know how to do it.

I did not intend to disgrace CSSG nor XXXXX nor yourself, sir, nor the Base Post Office. I thought what I was doing was right. I followed the DoD Manual, sir, to the best of my ability, and I've come to accept

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responsibility that I was misinformed and misinterpreting what I saw in front of me.

CG: You honestly thought that Staff Sergeant through dereliction, had lost over \$3,000.00, and so you were trying to make him pay back money that he had lost through .had honestly lost without any criminal intent? It doesn't seem to me to jive with what you said of taking care of Marines. I mean, if it was an honest error, making him pay back over \$3,000.00, a staff sergeant, that's pretty .I'm not sure that's taking care of him.

Of course the alternative to that is to know that he stole it, and the perception would be is that I'm taking care of him by making him pay it back so he doesn't get court-martialed. That's where I'm coming down. I mean, there's just something inside me that's telling me that you knew he stole the money, and that you're trying to help him. And the reason I'm pursuing this is I'm trying to get to the integrity issue here. Are you being perfectly honest with me, or are you not being honest with me?

The CG judged Petitioner's credibility and found it lacking. The CG rejected Petitioner's claim of confusion induced by language in the Postal Manual. Rather, he found that Petitioner failed to report his subordinate's offenses in an attempt, for whatever reason, to cover them up. This finding was certainly permissible and rational based upon the information considered.

b. Department regulations prevent holding Petitioner accountable for the actions of his subordinate. Petitioner next claims that the Postal Manual precludes punishment for acts committed by a subordinate. Petitioner cites paragraph C14.1.8.3, which reads in relevant part, "A COPE or MPO supervisor may not be held personally or pecuniary liable for acts of subordinates that result in shortages or losses of postal funds, accountable papers, or other property whether from honest error, theft, embezzlements, or manipulations." First, this provision concerns only civil liability, it does not in any way limit the authority of a commanding officer or convening authority to enforce discipline under the UCMJ. Second, Petitioner was not held liable for the act of a subordinate. Rather, he was punished for his failure to act in the face of a

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requirement imposed by both custom and regulations (dereliction of duty).

c. Petitioner was on temporary additional duty (TAD) during the times of required inspections. Petitioner next claims that his authorized absence excused his failure to conduct required inspections. This claim is without merit. Petitioner fails to note any specific efforts he made to conduct the required inspections. There is no evidence that his ability to properly supervise his subordinate was hindered by his TAD trips or other duties. In addition, Petitioner claimed at NJP that the failure was due to his misplaced reliance on his subordinates. In either case, his failure to properly supervise his subordinate was due to Petitioner's own negligence. His claims in this regard are merely unsupported excuses for his failure to properly perform his supervisory duties.

d. Others failed to conduct required inspections and were not punished. Petitioner also claims that others at "adjacent" or "higher" commands were not held to the same standard. This claim is without merit. How and why Petitioner was held to account for his dereliction was entirely up to his commander and the CG. The lawfulness of their prerogative to hold Petitioner accountable is not conditioned on how others are treated under similar circumstances. It was entirely within the discretion of Petitioner's commander and CG to exercise the discipline imposed. Furthermore, Petitioner's failure to inspect was distinguishable because his subordinate committed a serious crime and Petitioner failed to report it. Had he properly reported the offense and supervised his subordinate by conducting required inspections, he would not have been found derelict in the performance of his duties. Most important, however, is the fact that Petitioner was not punished for the crimes of his subordinate—he was held accountable for his failure to report a serious crime and to properly supervise. Finally, there is no evidence that Petitioner's punishment was motivated by any personal animosity or improper reason.

e. Petitioner did not commit any offense. Petitioner asserts that he was unfairly punished because he committed no offense. Petitioner offers up the negative findings of the BOI to buttress this claim. This claim is without merit. The NJP and BOI were two different forums, each charged with deciding

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whether the preponderance of evidence indicated guilt. That reasonable persons could (and did) disagree is not reason to set aside the CG's decision. Petitioner admitted guilt at NJP; he did so after consultation with counsel and in exchange for a bargained-for benefit. The significant benefit to Petitioner was that he

avoided a court-martial and the possibility of a dismissal. Petitioner now seeks to re-litigate his case before the BCNR. However, the CG's exercise of his authority to hold Petitioner accountable at NJP was proper, regardless of the findings of the BOI. Accordingly, the NJP should stand.

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

Head, Military Law Branch
Judge Advocate Division

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

IN REPLY REFER TO:
1070
MIFD
10 SEP 2003

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL
RECORDS

Subj: BCNR APPLICATION IN THE CASE OF

1. XXXXXX application with supporting documentation concerning his request for removal of “NJP and Punitive Letter of Reprimand dated 21 Dec 2001” from his official military personnel files (OMPF) has been reviewed. MCO 1070.12K, Marine Corps Individual Records Administration Manual (IRAM), chapter 1, sets forth guidance and provides information on the contents of the OMPF in use at Headquarters, U. S. Marine Corps. Limitations exist regarding the types of documents authorized for inclusion in the OMPF. Paragraph 4003 and 4004 of MCO P5800.1GA, Marine Corps Manual for Legal Administration (LEGADMINMAN) is the Marine Corps policy on NJP involving Marine Corps Officers. Paragraph 0114 of JAGINST 5800.7, Manual of the Judge Advocate General (JAGMAN) is the Department of the Navy’s policy concerning the Punitive Letter of Reprimand imposed as punishment by NJP proceedings and disposition instructions.

2. XXXXXXXX ‘s claim that his records are in error or an injustice was committed due to the findings of the Board of Inquiry (BOI) that a preponderance of the evidence did not prove the allegations is irrelevant. As noted in the MEMORANDUM 1070 JAM4 dated Aug 26, 2003 from the Military Law Branch of the Marine Corps Judge Advocate Division, the results of NJP imposed on 21 December 2001 and recommendations from the BOI convened on 2 April 2002 will not be the same. Additionally, they found that the NJP proceedings was legally sound and administrative actions completed per the LEGADMINMAN. Therefore, the NJP and Letter of Reprimand are properly filed in his OMPF per the IRAN.

3. In view of the above, it is recommended that the Board for Correction of Naval Records disapprove XXXXXX request for removal of “NJP and Punitive Letter of Reprimand dated 21 Dec 2001” from his OMPF. However, if the Board for Correction of Naval Records finds that his records are in error or an injustice was committed, approve his request. Point of contact is XXXXXX

Head, Field Support Branch
Manpower Management Information
Systems Division