



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

CRS

Docket No: 8095-08
17 June 2009

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

Subj: [REDACTED] REVIEW OF
NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552
(b) Manual of the Judge Advocate General, par 0118

Encl: (1) DD Form 149
(2) Subject's naval record
(3) HQMC memo 1070 JAM3, 30 Mar 09

1. Pursuant to the provisions of reference (a), Petitioner applied to this Board requesting that his naval record be corrected by setting-aside the action which vacated the suspension of a portion of the nonjudicial punishment that was imposed on 15 May 2006 and suspended for a period of 180 days. He contends that the vacation action occurred after the period of suspension had expired.

2. The Board, consisting of Messrs. [REDACTED] and [REDACTED] reviewed Petitioner's allegations of error and injustice on 10 June 2009 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. 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 available under existing law and regulations within the Department of the Navy.

b. Petitioner enlisted in the Marine Corps on 18 August 2001. On 15 May 2006 he received nonjudicial punishment for violating a lawful general order by wrongfully possessing a 12 gauge shotgun with pistol grip, an ASP Baton, one 5.56 mm round, twenty-three .45 caliber rounds, and fifteen "slugger" 12 gauge shotgun rounds. The punishment that was imposed consisted of forfeiture of \$900.00 pay per month for two months, restriction and extra duties for 45 days, and reduction in rank from sergeant to corporal. The execution of the reduction in rank, restriction and extra duties was suspended for a period of 180 days.

c. On 28 October 2006, Petitioner was charged with wrongfully ordering a subordinate to perform extra guard duty in lieu of formal disciplinary action. An unsigned unit punishment book entry dated 8 December 2006 indicates that the suspension of the nonjudicial punishment was vacated on that date. In a letter dated 14 February 2007, Petitioner's battalion commander advised the director of the higher headquarters consolidated administrative center that the suspended portion of the punishment imposed on Petitioner on 15 May 2006 "...is hereby vacated" due to his commission of an offense on or about 28 October 2006, and that the effective date of the reduction "for all pay and entitlements is 13 November 2006". A USMC Fitness Report which covers the period from 8 August to 13 November 2006, was issued by Petitioner's reporting senior on 13 March 2007. An entry in section I of the report indicates that a "suspended reduction from a previous non-judicial punishment was vacated". A third sighting officer stated in an addendum dated 23 April 2007 that the "report is late due to administrative errors that required the report to be rerouted back through the reporting chain".

d. In correspondence attached as enclosure (3), the Head, Military Law Branch, Judge Advocate Division, by direction of the Commandant of the Marine Corps, recommends that Petitioner's request be denied. He states that Petitioner committed misconduct during the period of the suspension. The provisions of reference (b) permit the period of suspension to be interrupted pending action to vacate the suspension. That reference does not state that the vacation must take place within the [original] period the suspension, thereby allowing the vacation to take place following the original period of the suspension. Given the proximity in time between the date of the misconduct and the end of the period of suspension, it is neither unusual nor improper for the command to take the time needed to investigate and determine whether vacation of the suspension is justified. Petitioner had other administrative remedies to address any perceived procedural errors or injustices contemporaneously with this action. Petitioner did not utilize any of them. Petitioner raises no other errors which might attack the bedrock principles of due process in connection with nonjudicial punishment.

e. In his rebuttal to the advisory opinion, Petitioner contends that the suspension was vacated on 8 December 2006, as evidenced by the unit punishment book. He maintains that his battalion commander's letter of 14 February 2007 falsely states that the vacation action occurred on 13 November 2006.

f. Subparagraph (c) of reference (b) provides, in part, that the running of the period of suspension of nonjudicial punishment is interrupted by "the commencement of proceedings to

vacate suspension of the punishment". Subparagraph (d) provides, in part, that the order vacating a suspension must be issued "within 10 working days of the commencement of the vacation proceedings", and that the decision to vacate suspension of nonjudicial punishment "is not appealable under paragraph 7, Part V, MCM".

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. In this regard, the Board believes the vacation action occurred after the 180 day period of the suspension period, as extended, had expired.

RECOMMENDATION:

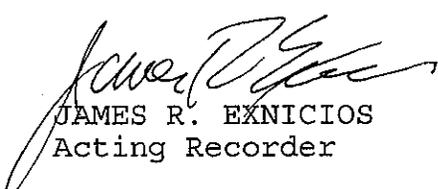
a. That Petitioner's naval record be corrected by setting aside the action which vacated the suspended portion of the nonjudicial punishment that was imposed on 15 May 2006, and restoring all rights, benefits and privileges lost as a result of the execution of the portion of the nonjudicial punishment that was suspended.

b. 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.

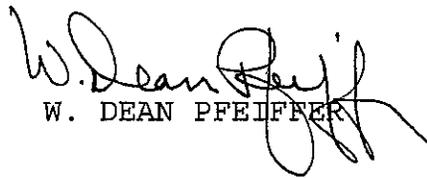
c. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

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.

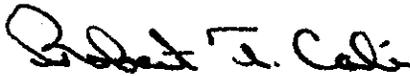
ROBERT D. ZSALMAN
Recorder


JAMES R. EXNICIOS
Acting Recorder

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


W. DEAN PFEIFFER

Reviewed and approved:



7-9-02

ROBERT T. CALI
ASSISTANT General Counsel
(Manpower and Reserve Affairs)