



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

TJR
Docket No: 8365-13
22 May 2014

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

Subj: REVIEW NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 with attachments
(2) Case summary
(3) Petitioner's naval record/CD
(4) HQMC MMER/PERB ltr dtd 14AUG13
(5) HQMC JAM memo dtd 2APR14
(6) HQMC MIQ memo dtd 30APR14

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Marine Corps, filed enclosure (1) with this Board requesting that his naval record be corrected by removing any and all derogatory material regarding the nonjudicial punishment (NJP) imposed on 17 September 2010 from both his official military personnel file (OMPF) and the Marine Corps Total Force System (MCTFS), where applicable. This includes, but is not limited to any/all administrative remarks (page 11) entries. Enclosures (1) through (3) apply. Also, this request included removal of the fitness report (FITREP) for the period from 1 July to 16 September 2010, which was removed as explained in enclosure (4).

2. The Board, consisting of Messrs. Exnicios, Hedrick, and Ruskin, reviewed Petitioner's allegations of error and injustice on 20 May 2014 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. In addition, the Board considered the advisory opinions (AO) furnished by Headquarters Marine Corps (HQMC), copies of which are provided in enclosures (5) and (6).

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. Enclosure (1) was filed in a timely manner.

c. On 5 September 2010, Petitioner was charged by civil authorities, of driving under the influence (DUI) of alcohol. As a result, he independently self-reported this information to his chain of command.

d. Petitioner's OMPF contains a unit punishment book entry which notes that he received an NJP for an Article 92 (failure to obey a lawful order) offense and an Article 134 (discredit upon the Armed Forces) offense, which resulted from the 5 September 2010 civil charge of DUI.

e. An AO received from the HQMC Military Justice Branch, Judge Advocate Division (JAM), enclosure (5), regarding Petitioner's request to remove the NJP, page 11, and all related references thereto, recommended relief be granted because he self-reported that he was cited by civil authorities for DUI. As such, and in accordance with regulations regarding self-reporting, his commanding officer was not to impose disciplinary action for a failure to self-report an arrest or criminal charge, nor disciplinary action for the underlying offense unless such action was based solely on the evidence derived of the self-report. With that being said, the commanding officer did not have the authority to impose NJP based solely on his self-reporting. Further, imposition of the NJP violated Petitioner's constitutional protection from self-incrimination. Finally, the charges, Article 92 and 134 are erroneous in that the Ultimate Offense Doctrine prohibits charging a violation of these articles when another offense would have been more appropriate. In this case, an Article 111 (drunken or reckless operation of a vehicle) offense would have been the more appropriate charge.

f. An AO received from the HQMC Manpower Information Quality Assurance, Manpower Information Systems Division (MIQ), enclosure (6), regarding Petitioner's request to remove the derogatory material also recommended relief be granted. This AO concurs with the legal opinion cited in the JAM AO.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's requests warrant favorable action. In this regard, the Board substantially concurs with the comments contained in the AOs furnished by JAM and MIQ, and concludes that the NJP, page 11, and all derogatory material referencing them, should be removed from the record since they were erroneously administered, written, and/or filed because they were based solely on Petitioner's self-reporting of the DUI.

In view of the foregoing, the Board finds the existence of an error and injustice warranting the following corrective action.

RECOMMENDATION:


a. That Petitioner's naval record be corrected by removing and/or totally obliterating the NJP dated 17 September 2010 and any/all page 11 entries, as well as all references thereto.

b. That any and all materials 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 materials be added to the record in the future.

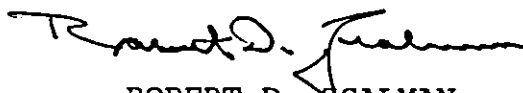
c. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross-reference being made a part of Petitioner's naval record.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)), 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


BRIAN J. GEORGE
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.


ROBERT D. ZSALMAN
Acting Executive Director