



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

TJR
Docket No: 9119-13
3 June 2014

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

Subj: REVIEW NAVAL RECORD OF [REDACTED]
[REDACTED]

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

Encl: (1) DD Form 149 with attachments
(2) Case summary
(3) Service record/CD
(4) HQMC JAM memo dtd 2APR14

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 record be corrected by removing derogatory material regarding driving while impaired on or about 12 February 2011, which is reflected in the nonjudicial punishment (NJP) imposed on 17 February 2011. This request includes, but is not limited to, any/all documentation regarding driving while impaired. Enclosures (1) through (3) apply.

2. The Board, consisting of Ms. Bianchi, Mr. Marquez, and Ms. Montgomery, reviewed Petitioner's allegations of error and injustice on 28 May 2014 and, pursuant to its regulations, determined that the partial 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 opinion (AO) provided by Headquarters Marine Corps (HQMC), Military Justice Branch (JAM), Judge Advocate Division, a copy of which is provided as enclosure (4).

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 12 February 2011 Petitioner was issued a traffic citation by civil authorities for driving while subject to an

impairing substance and failure to maintain lane control. On 14 February 2011, in military traffic court, he pled guilty to impaired driving and his driving privileges aboard base were revoked for a period of one year.

d. On 17 February 2011 Petitioner received NJP and pled guilty to violation of Article 92 (failure to obey a lawful order) by driving a vehicle while impaired on 12 February 2011) and Article 111 (drunken or reckless driving) by driving a vehicle while impaired. He did not appeal the NJP.

e. Petitioner asserts that on 29 September 2011 civil authorities dismissed the 12 February 2011 charge against him.

f. In the AO from JAM, enclosure (4), it was recommended that Petitioner's request be partially granted by redacting the Article 92 (failure to obey a lawful order) offense because under the Ultimate Offense Doctrine an order to not drink and drive, does not create a new duty to obey the law. As such, the Article 92 offense was incorrectly applied in this case. Nevertheless, the Article 111 (drunken or reckless driving) was correctly applied since Petitioner was driving while subject to an impairing substance and failed to maintain lane control.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the AO from JAM, the Board finds the existence of an error and injustice warranting partial corrective action. In this regard, the Board concludes that the Article 92 violation inaccurately describes the offense for which Petitioner was found guilty of and should be expunged from the record. However, the Article 111 is administratively and accurately correct as written and as such, the NJP should remain in the record.

In view of the above, the Board directs the following partial corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by redacting the 17 February 2011 NJP, Article 92 (Drove a vehicle while impaired in Morehead City, NC at 0211, 12FEB11), from the offenses block of the unit punishment book.


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.

d. That no further relief be granted.

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