



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

*JSR*

JSR  
Docket No: NR9172-13  
21 August 2014

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

- Encl: (1) DD Form 149 dtd 17 Jul 13 w/attachments  
(2) HQMC MMRP-13/PERB memo dtd 4 Dec 13  
(3) Subject's ltr dtd 16 Dec 13  
(4) HQMC MMRP-13/PERB memo dtd 18 Jun 14  
(5) Subject's ltr dtd 21 Jul 14 w/attachments  
(6) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, that his naval record be corrected by removing the fitness report for 23 October to 21 November 2012 (copy at Tab A).

2. The Board, consisting of Messrs. Hicks, Spooner and Swarens, reviewed Petitioner's allegations of error and injustice on 21 August 2014. Pursuant to the Board's regulations, the Board 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 which were available under existing law and regulations within the Department of the Navy.

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

c. The contested fitness report is an adverse "not observed" report documenting Petitioner's disenrollment from the Staff Noncommissioned Officer Academy. Section I (reporting senior (RS)'s "Directed and Additional Comments") says the following:

MRO [Marine reported on] and another student [then Corporal, now Sergeant S---] drank alcoholic beverages at his home for approximately five hours. After drinking, MRO allowed his peer to drive from the safety of his home on base. These action [sic] resulted with that Marine receiving a ticket for driving under the influence of alcohol [DUI]. MRO's lack of judgment put many lives in danger. MRO's actions were not becoming of a noncommissioned officer nor in keeping with good order and discipline.

Section J.2 shows "Provided to MRO, no response." The reviewing officer (RO)'s comments, in section K.4, effectively mirrored those of the RS. The RO also stated "Due to administrative oversight and system error, this report is being submitted late." The RS submitted the report on 28 January 2013, just over two months after the reporting period, and the third sighting officer, who concurred with the "adverse nature" of the report, signed it on 12 February 2013. Marine Corps Order P1610.7F, Appendix A, provides that fitness reports should arrive at Headquarters Marine Corps (HQMC) no later than 30 days after the reporting period. Section K.6 shows the RO comments were not referred to Petitioner for an opportunity to make a statement.

d. Petitioner asserts he advised Sergeant S--- that if he drank, he would need to get a designated driver. He further asserts that to avoid a physical conflict with Sergeant S---, he allowed him to drive himself while intoxicated. Petitioner provided a supporting statement from Sergeant S---, affirming that since he had reason to believe his girlfriend, whom he thought was pregnant with his child, was receiving threats from her ex-boyfriend who still had a key to her house, Petitioner could not have stopped him from driving himself without a "physical altercation." Sergeant S---'s statement further reflects that "[Petitioner's] actions were that of a concerned Marine and were within [sic] good intent" and that "My actions were caused solely on my own and [Petitioner] only attempted to prevent me from driving."

e. Enclosure (2) is the first of two reports from the HQMC Performance Evaluation Review Board (PERB) in Petitioner's case. This first report commented to the effect that Petitioner's

request should be disapproved, as he "could have taken several other courses of action...to include notifying someone in the leadership chain of command." The PERB further noted that Petitioner had an opportunity to make a statement, but chose not to do so.

f. In enclosure (3), Petitioner's reply to the first PERB report, he stated that after he had made "multiple attempts at preventing Sergeant S--- from driving," Sergeant S--- told Petitioner his girlfriend was en route and would drive him. Petitioner said that when Sergeant S--- gestured to an approaching car, "stating that was his 'ride'," he did not question him. Petitioner further stated that "In no way did I simply 'allow him to drive himself away'," as the PERB characterized the incident, and that he "took the same steps that any reasonable individual would deem appropriate" to prevent Sergeant S--- from driving. In addition, Petitioner contended he had been denied the opportunity to rebut the contested fitness report.

g. Enclosure (4) is the second PERB report, which also commented to the effect that Petitioner's request should be denied. This second report stated that Petitioner had provided nothing new to show he took all reasonable steps to keep Sergeant S--- from leaving his house in an intoxicated condition. The PERB acknowledged that Petitioner "cannot be held accountable for a Marine getting behind the steering wheel of a car and driving drunk," but concluded that he "can be held accountable for creating an enabling environment of drinking to excess and exercising poor judgment in the entire affair." The PERB also noted that the RO stated, in section K.4, that Petitioner "refused to acknowledge the adversity of this report." Finally, the PERB stated "Late submission of fitness reports is not desirable" but "it is not, in and of itself, an invalidating factor."


h. Enclosure (5) is Petitioner's reply to the second PERB report, contending that "In both decisions, the PERB had made incorrect statements pertaining to the evidence given along with false conclusions." He provided a statement from his then current staff noncommissioned officer in charge (SNCOIC) stating "it is evident that [Sergeant S---] lied to, manipulated, and deceived [Petitioner] and other guests in order to defeat several measures put in place by his peers to prevent this [his DUI] from happening." The SNCOIC also supported Petitioner's assertion that he had not been afforded a chance to rebut the RS's comments, and he objected to the failure to refer the RO's comments to Petitioner as well as the contested report's late submission.

CONCLUSION:

Upon review and consideration of all the evidence of record, notwithstanding enclosures (2) and (4), and especially in light of Sergeant S---'s statement, Petitioner's letters at enclosures (3) and (5), and the statement from the SNCOIC, the Board finds an injustice warranting the requested relief. The Board is persuaded that Petitioner did make reasonable efforts to prevent Sergeant S--- from driving while intoxicated, that he did not exercise poor judgment, and that he has effectively been punished for the misconduct of another Marine. In view of the above, the Board recommends the following corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the following fitness report and related material:

Date of Rept	Reporting Senior	Period of Report	
		From	To
28 Jan 13		23 Oct 12	21 Nov 12

b. That there be inserted in his naval record a memorandum in place of the removed report, containing appropriate identifying data concerning the report; that such memorandum state that the report has been removed by order of the Secretary of the Navy in accordance with the provisions of Federal law and may not be made available to selection boards and other reviewing authorities; and that such boards may not conjecture or draw any inference as to the nature of the report.

c. That the magnetic tape maintained by HQMC be corrected accordingly.

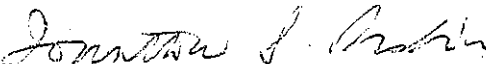
d. That any material or entries inconsistent with or relating to the majority's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries be added to the record in the future.

e. 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.

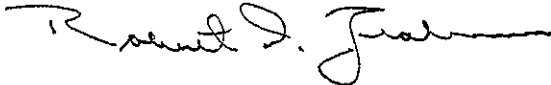
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and

complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder

  
JONATHAN S. RUSKIN  
Acting Recorder

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



ROBERT D. ZSALMAN  
Acting

Reviewed and approved:

10/24/19



ROBERT L. WOODS  
Assistant General Counsel  
(Manpower and Reserve Affairs)  
1000 Navy Pentagon, Rm 4D54  
Washington, DC 20350-1000