



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

[REDACTED]
Docket No: 2476-16/
6031-13

FEB 22 2017

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

Subj: REVIEW OF NAVAL RECORD ICO [REDACTED] USMC,
XXX-XX [REDACTED]

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

Encl: (1) DD Form 149 dtd 10 March 2016 with attachment
(2) Original DD Form 149 dtd 27 May 2013
(3) Case summary

1. Pursuant to the provisions of reference (a) [REDACTED] hereinafter referred to as Petitioner, on March 10, 2016 filed a reconsideration (enclosure (1)) with this Board requesting, in effect, that the applicable naval record be corrected by upgrading his July 1989 punitive discharge from the Marine Corps. Specifically, the Petitioner is requesting an upgrade of the bad conduct discharge he received from a Special Court Martial (SPCM) because he contends that the punishment was too severe for the offense he committed. Enclosures (1) through (3) apply.

2. The Board, consisting of [REDACTED] reviewed Petitioner's allegations of error and injustice on 23 November 2016 and, pursuant to Board regulations, and in a vote of 3 to 0 determined that the evidence was insufficient to establish the existence of probable material error or injustice and that no corrective action should be taken. Documentary material considered by the Board consisted of the Petitioner's application, together with all material submitted in support thereof, the Petitioner's Marine Corps record, and applicable statutes, regulations, and policies. In addition, the Board also considered the documents contained with the Petitioner's original petition for relief from June 2013, which was denied in March 2014 (enclosure (2)). These documents are enclosed for your review. No advisory opinion was requested or obtained for this case.

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. Petitioner's case was reconsidered in accordance with Board for Correction of Naval Records procedures that conform to Lipsman v. Secretary of the Army, 335 F. Supp. 2d 48 (D.D.C. 2004).

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b. Enclosure (1) was not filed in a timely manner, however, the Board found it in the interest of justice to waive the statute of limitations and consider the Petitioner's full application on its merits.

c. Regarding Petitioner's request for a personal appearance, the Board determined that a personal appearance was not necessary and considered the case based on the evidence of record.

d. Petitioner originally enlisted in the Marine Corps on 23 April 1985. At a SPCM held on 25 February and 9 March 1988 at Marine Corps Air Station, [REDACTED] Petitioner was found guilty of the theft of a \$60.00 (sixty dollar) money order from his roommate. The Petitioner pled guilty to the single charge and specification. It appears from the records obtained that no pretrial agreement was in place. Petitioner was a Lance Corporal (E-3) at the time of the SPCM.

e. The sentence adjudged at the SPCM on 9 March was:

- 1) to be reduced to the paygrade E-1;
- 2) to be confined for a period of 4 (four) months; and
- 3) to be discharged from the USMC with a bad conduct discharge (BCD).

The Petitioner served his confinement at the [REDACTED] Base Brig. The maximum confinement sentence that the military judge could have awarded was 6 (six) months.

f. At the time of sentencing, Petitioner's average proficiency and conduct marks were 4.1 and 4.1, respectively. His service record was clean and he had no other previous court-martial convictions, nonjudicial punishments (NJP), or adverse Page 11 counseling entries in his record.

g. Petitioner was placed on appellate leave on 27 July 1988, and was ultimately discharged from the USMC on 23 July 1989 with a BCD, and assigned a reentry code of RE-4.

h. Petitioner's original request was denied by the BCNR on 6 March 2014, stating: "...The Board concluded that these [mitigating] factors were insufficient to warrant recharacterization of your service...*given the serious nature* of your misconduct." (emphasis added).

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concluded that Petitioner's reconsideration request did not warrant favorable action. The Board decided that the documentation provided was insufficient to establish the existence of probable material error or injustice.

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MAJORITY RECOMMENDATION:

The Board recommends that Petitioner's request be denied.

BCNR EXECUTIVE DIRECTOR CONCLUSION:

Notwithstanding the Majority Conclusion, I firmly believe, to the contrary, that the Petitioner's claim has merit, and he has established the existence of probable material error or injustice in his record, and that corrective action should be taken as outlined below. Justice was clearly not achieved in this case, and that the punishment the Petitioner received was unjust and wholly disproportionate to the offense committed.

In reviewing military case law regarding sentence appropriateness, it is clear that a court-martial is free to impose any lawful sentence that it considers fair and just. U.S. v. Turner, 14 C.M.A. 435, 34 C.M.R. 215, 217 (C.M.A. 1964). However, sentence appropriateness involves assuring that justice is done and that the accused gets the punishment he deserves, whereas clemency, a command prerogative, involves bestowing mercy – treating an accused with less rigor that he deserves. U.S. v. Healy, 26 M.J. 394, 395 (C.M.A. 1988). An assessment of sentence appropriateness requires individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender. U.S. v. Key, 71 M.J. 566 (N-M. Ct. Crim. App. 2012) (citing U.S. v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)).

First and foremost, considering the dollar amount in question and the factual circumstances present in this case, the more appropriate forum to adjudicate this matter should have been NJP at worst, or even simply a Page 11 counselling entry and restitution ordered to be made. Arguably, a \$60 larceny case should have never been elevated to the level of a SPCM. Much lower administrative options were available to the Commanding Officer that would have still maintained good order and discipline and provided the appropriate deterrent effect at the command.

And, assuming arguendo there would have even been an adverse finding at an NJP and the subsequent convening of an administrative separation board (ADB), such ADB would have been hard pressed to vote to separate this Marine, let alone recommend a discharge below a General characterization, especially for someone who had previously had a clean service record and above-average pro/con marks that would independently meet the requirements for an honorable discharge.

The court-martial sentence defies logic and is unjust and disproportionate to the offense committed. The military judge essentially “threw the book” at a first time offender for a relatively minor offense, and came close to giving the maximum sentence allowable at a SPCM – all for the theft of just \$60.

In the UCMJ, Rules for Courts-Martial 1003(b)(8)(A) states that a bad-conduct conduct discharge is “...appropriate for an accused who has been convicted *repeatedly* of minor offenses

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and whose punitive separation appears to be necessary.” (emphasis added). In this case, we have one minor offense involving a de minimus amount of money, completely lacking any aggravating circumstances.

In the absence of any aggravating factors, this overly harsh sentence clearly shocks one’s sense of equity and justice for even the most prosecutorial minded individuals. Moreover, the Petitioner pled guilty, thus saving the USMC from having to go to the time and expense of court-martial proceedings. Additionally, societal norms consider the first step to rehabilitation is to admit fault and accept responsibility for one’s actions – which is what happened in this case with the Petitioner’s guilty plea. Finally, pleading guilty at a court-martial is universally accepted to be a factor that should ultimately lessen and mitigate the severity of any punishment awarded.

Considering the undue severity of the sentence, the lack of any identifiable aggravating circumstances whatsoever, and the Petitioner’s clean service record, I am not convinced that justice was done and that the Petitioner received the punishment he deserved. The BCD awarded at the SPCM was inappropriately severe. This clear-cut injustice demands and dictates clemency in the form of changing the discharge from a punitive discharge to an administrative discharge.

BCNR EXECUTIVE DIRECTOR RECOMMENDATION:

The Executive Director recommends that Petitioner’s naval record be corrected to upgrade his discharge characterization from a BCD to General (under honorable conditions).

Accordingly, the Executive Director recommends that the following corrections be made to Petitioner’s Certificate of Release or Discharge from Active Duty (DD Form 214):

- a. That block 24 be corrected to read “General (under honorable conditions)”;
- b. That block 23 be corrected to read “Discharged”;
- c. That Petitioner be issued a new DD Form 214;
- d. That a copy of this Report of Proceedings be filed in Petitioner’s naval record; and
- e. That no further relief be granted.

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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 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.

[REDACTED]
Recorder

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

[REDACTED]
Executive Director

~~Reviewed and Approved the Board Majority Recommendation (deny relief)~~ [REDACTED]

Reviewed and Disapprove the Board Majority Recommendation – Concur with the BCNR
Executive Director (grant full relief)

[REDACTED]
Signature

3/3/17
Date