



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

ELP
Docket No.2792-98
8 March 1999

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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

Encl: (1) Case Summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Marine Corps, applied to this Board requesting, in effect, that his naval record be corrected by removing the nonjudicial punishment (NJP) awarded on 28 July 1995 and the fitness report for the period 15 July to 9 December 1995.

2. The Board, consisting of Ms. Gilbert, Ms. Taylor, and Mr. Tew, reviewed Petitioner's allegations of error and injustice on 10 February 1999 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. Although it appears that Petitioner's application to the Board was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. After about four years of active service, Petitioner reenlisted in the Marine Corps on 20 November 1993 for four years as a SGT (E-5). At the time of the NJP at issue, Petitioner was assigned to the Marine Corps Recruit Depot, Parris Island, SC, as a drill sergeant.

d. Petitioner served without incident until 28 July 1995 when he received NJP for violating a regulation by having a 9mm pistol with live ammunition in his possession, and creating a hazardous condition within the barracks by placing the pistol and a loaded magazine in the ceiling of the recruit casual barracks, in violation of Articles 92 and 134 of the Uniform code of Military Justice (UCMJ). Punishment imposed was a letter of reprimand.

e. Petitioner then appealed the NJP, stating that punishment was imposed on the basis of what could have happened and not on the pertinent facts. He explained that on 9 July 1995, his wife admitted to him that she had an affair with a SGT D. Petitioner then called SGT D, who confirmed this version of events. SGT D's wife was on phone when Petitioner called, and she threatened to kill his wife. During the conversation, Petitioner noted that he had a pistol belonging to SGT D in his car, and he likened SGT D's adultery to his killing someone with that weapon and then placing the blame on SGT D. When Petitioner told his wife about the threat from Mrs. D, she informed the provost marshal's office (PMO). The criminal investigation division (CID) then called and requested that he make a statement. In response, he stated that he was concerned about his marriage and the fact that both the PMO and CID were now involved. Since he did not want to have SGT D's pistol in his possession, he took the pistol and its magazine to the casual barracks and placed them in two different locations within the ceiling of the barracks. Later, when making his statement to CID, he was asked if SGT D owned any weapons. At that time, Petitioner told CID that he had placed SGT D's pistol in the ceiling of the casual barracks and requested that CID go with him to get the pistol. He was told the pistol was fine where it was for now and it would be retrieved after SGT D had been interviewed. Petitioner stated that early the next morning he was handcuffed, taken to the casual barracks, and the pistol was seized.

f. Petitioner's appeal was denied on 12 September 1995. He received an adverse fitness report for the period 15 July to 9 December 1995, which cited the foregoing NJP.

g. Petitioner extended his enlistment for additional 11 months in July 1996 and on 1 August 1996 he was awarded the Navy-Marine Corps Achievement Medal for superior performance of duty while serving as a drill instructor. His tour as a drill instructor/drill sergeant was completed on 12 August 1996.

h. On 5 February 1998, Petitioner's company commanding officer (CO) requested that the NJP be set aside. He stated that although Petitioner did violate UCMJ Articles 92 and 134, certain extenuating circumstances led him to believe that Petitioner was treated unfairly. After reviewing the facts, the CO noted that Petitioner's wife not only had an affair with SGT D, but also with three other Marines. Despite the extreme demands placed on him as a drill sergeant, he endured the additional personal anguish of an unfaithful wife and a disloyal friend, and performed with the highest degree of professionalism and leadership for which he received the Navy-Marine Corps Achievement Medal. The CO further noted that the other three Marines involved were not punished for their adulterous relationships. On 13 May 1998, the NJP authority who imposed punishment on 28 July 1995 responded that he did not have the authority to set aside the NJP, since it occurred almost three years ago. He recommended that Petitioner seek legal assistance and noted that it was evident that Petitioner had overcome his setback in 1995.

i. On 2 October 1996, the Performance Evaluation Review Board (PERB), Headquarters Marine Corps (HQMC) concluded that the fitness report for the period 15 July to 9 December 1995 was both administratively correct and procedurally complete and should remain in the record, unless the NJP is removed. This Board denied Petitioner's request for removal of the contested fitness report on 23 December 1996.

j. Attached to enclosure (1), is an advisory opinion from the Head, Military Law Branch, HQMC, which states that absent clear evidence of an abuse of discretion, the NJP authority's findings should remain undisturbed and the punishment imposed was not disproportionately severe for the offenses committed. The advisory opinion recommends that Petitioner's request be denied.

k. HQMC has advised the Board that Petitioner was promoted to SSGT (E-6) on 1 November 1998 and was reenlisted on 2 February 1999 for four years.

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 notes that that Petitioner

clearly violated regulations by having the pistol in his possession, and created a hazardous condition by bringing it into the barracks. However, the Board notes that even though Petitioner was not asked whether he had SGT D's pistol, or to reveal its location, Petitioner openly and truthfully told the authorities of his possession of that pistol and what he did with it. Concerning the creation of a hazardous situation, the Board noted that although placing the pistol in the ceiling of the barracks was unwise, CID apparently did not believe the situation was sufficiently hazardous to warrant the immediate removal of the weapon. The Board further notes that Petitioner did not lose his self-control during a very traumatic emotional situation or take any action against those who wronged him. In fact, he placed the pistol in the ceiling of the barracks so that he would not do so.

The Board particularly notes Petitioner has maintained an outstanding record prior to and subsequent to the NJP. The Board believes that the extenuating circumstances in this case contributed to his lapse in judgment. The Board further believes there are instances where an NJP has served its purpose and retention in the record does nothing but negatively reflect on the individual's overall service. At the time the incident occurred, he was serving in one of the Marine Corps' most demanding jobs as a drill sergeant. He successfully completed his tour despite severe personal problems, was awarded the Navy-Marine Corps Achievement Medal for his superior performance, and has been consistently rated as outstanding subsequent to the NJP.

The Board also finds it extremely disturbing and unjust that the others who were involved in an adulterous relationship with Petitioner's wife received no punishment, but this NJP will continue to negatively reflect on a fine Marine's overall service. Although the Board notes that Petitioner was promoted to SSGT, the NJP will most likely impact on future promotions opportunities because competition is significantly keener. Accordingly, despite the recommendation contained in the advisory opinion, the Board concludes that it would appropriate and just to remove all documentation pertaining to the NJP and the adverse fitness report for the period 15 July to 9 December 1995.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing all references in both the service record book and the OMPF to the NJP of 28 July 1995, including, but not limited to, the Offenses and Punishments (Page 12) entry of that date, the punitive letter of reprimand of 16 August 1995, and all documentation pertaining to Petitioner's appeal of the NJP.

b. That Petitioner's naval record be further corrected by removing the fitness report for the period 15 July to 9 December 1995. A memorandum should be inserted in its place which identifies the report; states that it has been properly 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 prohibits such authorities from speculating or drawing any inferences as to the nature of the report.

c. 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 futures.

d. 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.

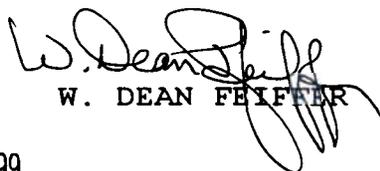
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



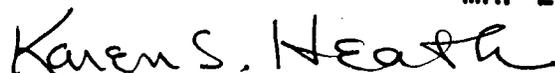
ALAN E. GOLDSMITH
Acting Recorder

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



W. DEAN FEIFER

Reviewed and approved: **MAY 21 1999**



KAREN S. HEATH
Principal Deputy Assistant Secretary of the Navy
(Manpower and Reserve Affairs)