



DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
2 NAVY ANNEX  
WASHINGTON, D.C. 20370-5100

BJG  
Docket No: 8332-98  
29 April 1999

SSGT [REDACTED] USMC  
[REDACTED]  
[REDACTED]

Dear Staff Sergeant [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10, United States Code, section 1552.

Since you are still on active duty and have not been assigned a reenlistment code, your request to change it was not considered.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 28 April 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion from the Headquarters Marine Corps (HQMC) Military Law Branch, Judge Advocate Division (JAM4), dated 28 October 1998, the report of the HQMC Performance Evaluation Review Board (PERB) in your case, dated 30 November 1998, and a memorandum for the record dated 25 March 1999, copies of which are attached. They also considered the evidence considered at your nonjudicial punishment (NJP) proceedings, and your counsel's undated rebuttal letter.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board substantially concurred with the comments contained in the advisory opinion dated 28 October 1998 in finding that your contested NJP should stand. They noted that you did sign an advisement of rights form, so they did not consider it clear that your right against self-incrimination was violated. They observed that the military judge in your court-martial did not expressly find such a violation, rather, he granted the motion to suppress the use of your statement as evidence at your court-martial. In any event, they concluded that the

witness statement considered in your case would have provided compelling evidence of your guilt, even if your own statement had not been considered.

The Board substantially concurred with the report of the PERB dated 30 November 1998 in finding that your contested adverse fitness report should not be removed.

Since the Board found insufficient basis to remove your contested NJP or adverse fitness report, they had no grounds to restore your drill instructor MOS (military occupational specialty).

In view of the above, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER  
Executive Director

Enclosures

9332-98



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
2 NAVY ANNEX  
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:

1070  
JAM4  
28 OCT 1998

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF  
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION  
IN THE CASE OF STAFF SERGEANT ██████████  
██████████ U.S. MARINE CORPS

Ref: (a) Part V, Manual for Courts-Martial, United States (1995  
edition)

1. We are asked to provide an opinion regarding Petitioner's request that his nonjudicial punishment (NJP) of 12 September 1997, and the accompanying fitness report covering the period from 8 May 1997 to 12 September 1997, be removed from his official records.

2. We recommend that relief be denied. Our analysis follows.

3. Petitioner's battalion commander imposed NJP in the form of forfeitures of \$973.00 pay per month for 2 months (forfeitures of \$723.00 pay per month for 2 months was suspended for a period of 6 months) and a punitive letter of censure for adultery and fraternization. Petitioner pled guilty at the NJP and did not appeal.

4. After the NJP, the Commanding General, Marine Corps Recruit Depot, Parris Island, referred charges of adultery, fraternization, and dereliction of duty against Petitioner to a special court-martial. These charges arose from the same conduct that was the subject of the previous NJP. At the court-martial, the prosecution sought to use incriminating statements made by Petitioner during the NJP as evidence of his guilt. In accordance with the Military Rules of Evidence, the military judge prohibited the prosecution from using these statements to prove Petitioner's guilt because, at the time Petitioner made the statements, he had not been properly advised of his rights pursuant to Article 31, Uniform Code of Military Justice (UCMJ). Petitioner now argues that the NJP should be set aside based upon the military judge's ruling.

5. Under the reference, the NJP authority may impose punishment when he believes the preponderance of the evidence establishes the accused committed the offenses charged. Absent clear evidence of an abuse of discretion, the NJP authority's findings should remain undisturbed. The military judge's finding that

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION  
IN THE CASE OF STAFF SERGEANT [REDACTED]  
[REDACTED] U.S. MARINE CORPS

Petitioner's Article 31, UCMJ, rights were violated during the NJP hearing prohibited Petitioner's admissions of guilt from being used against him at his court-martial. The Military Rules of Evidence do not, however, apply at NJP. Therefore, Petitioner's argument is without merit.

6. The military judge also noted that the battalion commander failed to follow the NJP guide as he was so advised by his battalion legal chief. In reviewing Petitioner's case, however, we find no abuse of discretion in the battalion commander's decision to impose NJP. The punishment imposed upon Petitioner was well within legal limits, and Petitioner does not deny the events that led to his punishment.

7. Accordingly, we recommend that Petitioner's request for relief be denied.

[REDACTED]  
[REDACTED]

M. [REDACTED] B.  
Head, Military Law Branch  
Judge Advocate Division

8332-98



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3280 RUSSELL ROAD  
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:  
1610  
MMER/PERB  
30 Nov 98

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF  
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)  
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF STAFF  
SERGEANT ██████████ ██████████ USMC

Ref: (a) SSgt. ██████████ DD Form 149 of 4 Aug 98  
(b) MCO P1610.7D w/Ch 1-3

Encl: (1) CMC Advisory Opinion 1070 JAM4 of 28 Oct 98

1. Per MCO 1610.11B, the Performance Evaluation Review Board, with three members present, met on 24 November 1998 to consider Staff Sergeant ██████████ petition contained in reference (a). Removal of the fitness report for the period 970508 to 970912 (CD) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner believes that since he was acquitted of all charges at a Special Court-Martial, the nonjudicial punishment (NJP) at which he was found guilty of the same offenses should be eliminated from his record. Likewise, he contends the fitness report which references that NJP warrants removal.

3. In its proceedings, the PERB concluded that the report is both administratively correct and procedurally complete as written and filed. The uncontroverted matter of fact relative to the fitness report is that the NJP occurred and was rightfully recorded via the Performance Evaluation System. Unless and until the NJP is expunged or set aside, removal of the fitness report is not mandated.

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report should remain a part of Staff Sergeant ██████████ official military record. The enclosure is furnished to assist in resolving the petitioner's request for removal of the NJP.

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)  
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF STAFF  
SERGEANT [REDACTED] SMC

5. The case is forwarded for final action.

[REDACTED]

Chairperson, Performance  
Evaluation Review Board  
Personnel Management Division  
Manpower and Reserve Affairs  
Department  
By direction of the Commandant  
of the Marine Corps

MEMORANDUM FOR THE RECORD

BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR)  
PERFORMANCE SECTION

2 NAVY ANNEX, SUITE 2432

WASHINGTON, DC 20370-5100

TELEPHONE: DSN [REDACTED] OR COMM [REDACTED]

FAX: DSN 224-9857, COMM [REDACTED]

E-MAIL: [REDACTED]@HQ.NAVY.MIL

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DATE: 25MAR99

DOCKET NO: 8320-88 [REDACTED]

PET: SSGT HARP [REDACTED] USMC

PARTY WHO CALLED: PET

TELEPHONE NO: N/A

WHAT I SAID: I INFORMED PET THAT WE HAD RECEIVED THE NJP EVIDENCE IN HIS CASE. I READ OFF EACH PIECE OF EVIDENCE I HAD RECEIVED TO ENSURE PET HAD A COPY, AND HE EXPRESSED NO DESIRE TO SUBMIT A REBUTTAL.



BRIAN J. GEORGE