



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

TRG
Docket No: 1543-02
30 April 2003

[REDACTED]

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

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 28 April 2002. 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 furnished by Headquarters Marine Corps, a copy of which is enclosed.

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. In this connection the Board substantially concurred with the comments contained in the advisory opinion.

Accordingly, 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

Enclosure



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

IN REPLY REFER TO:

1070

JAM4

APR 24 2000

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
ICO MAJOR [REDACTED] USMC

1. We are asked to provide an opinion on Petitioner's request for the removal from his service record book (SRB) and official military personnel file (OMPF) of all entries related to the non-judicial punishment (NJP) he received on 9 December 1999.

2. We recommend that Petitioner's request for relief be denied. Our analysis follows.

3. Background

a. On 16 October 1999, Petitioner, a Marine major, went to a bar in Monterey, CA, and became publicly intoxicated. Petitioner was the class leader of a Korean language class at the Defense Language Institute (DLI). Petitioner's class was comprised of both officer and enlisted students. In the presence of junior enlisted servicemembers, Petitioner fraternized with a female Army specialist (paygrade E-4) assigned to his class by slow dancing with her and allowing her to place her hands on his face and head as they danced.

b. On 9 December 1999, Petitioner received NJP for conduct unbecoming an officer and gentlemen in violation of Article 133, Uniform Code of Military Justice (UCMJ). Petitioner was awarded a Letter of Censure. Petitioner did not appeal the NJP or Letter of Censure.

4. Analysis. No legal error occurred in the imposition of Petitioner's NJP. Petitioner, however, claims that his NJP was unjust and/or in error because he did not commit misconduct. Alternatively, Petitioner requests removal of the record as an act of clemency.

a. At the time of his NJP, Petitioner admitted his guilt. See paragraph 1.g of the summarized record. The allegations were: "In that Major [REDACTED] U.S. Marine Corps, on active duty, did, at Monterey, California, on or about 16 October 1999, wrongfully and dishonorably commit acts that

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constituted conduct unbecoming an officer and gentleman, to wit: in the presence of junior enlisted servicemembers, becoming publicly intoxicated; wrongfully fraternizing and slow dancing with Private First Class [REDACTED] U.S. Army; and while dancing allowing her to place her hands on his face and head." See enclosure (3) to the report of nonjudicial punishment. The CG asked Petitioner whether he admitted or denied the allegations as set forth, and Petitioner stated that he admitted the allegations. Petitioner's attempt to now "re-litigate" the facts surrounding his offense is both untimely and contrary to his earlier express admissions.

b. We note that the acts for which NJP was imposed are legally sufficient to establish a violation of Article 133, UCMJ. Public intoxication alone can violate the article. Here, Petitioner's public intoxication was attended by inappropriate physical touching with a woman he knew was a junior enlisted service member of the command. The videotape clearly depicts the female specialist stroking Petitioner's head and face in an overly familiar manner. These acts took place in the presence of other junior enlisted members of the command, and Petitioner knew they were present. There is simply no doubt these acts may constitute conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ. Petitioner did not appeal his NJP and the record reveals no error or injustice.

c. Petitioner also requests removal of the NJP and related papers based upon his belief that this incident should not "torpedo" his career. Properly framed, these statements are a request for clemency. We note that clemency is a matter exclusively reserved to the convening authority, the Commandant of the Marine Corps, the Secretary of the Navy and the President. Consequently, Petitioner's plea for clemency to the Board of Corrections for Naval Records should be ignored as it is a matter reserved to other agencies.

d. Although not contained within petitioner's request, the 5 July 01 statement of Major [REDACTED], Commanding Officer, DLI, raises an issue relevant to the Board's consideration. Major [REDACTED] writes that he was advised, "that if Major General [REDACTED] decided to use the NJP forum, at worst he would award a 'non-punitive letter of caution.'" Major [REDACTED] writes further that "I had this conversation with LtCol [REDACTED] at least twice and passed this along to Major [REDACTED] as

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many times. I believe the assurances I passed on to Major ██████████ contributed to his decision to accept the NJP when it was later offered by ██████████. The issue raised is whether Major ██████████ made some promise or *de facto* grant of immunity, or entered into an agreement with Petitioner, that is now enforceable against the Government. We conclude that Petitioner has not met his burden to show that such a promise was made.

(1) Major ██████████ never claims that he made a promise to the Petitioner. Instead, he writes that he "believes" that "assurances" he made "contributed" to Petitioner's decision to accept NJP. This noncommittal language does not meet Petitioner's burden to show error or injustice.

(2) The representation, as described by Major ██████████ is incoherent. A "non-punitive letter of caution" is not an authorized punishment under Article 15, UCMJ. See Part V, Paragraph 5, Manual for Courts-Martial, (2000 Ed.). Rather, it is an administrative corrective measure imposed in lieu of NJP or courts-martial. See Rule for Courts-Martial (R.C.M.) 306(c)(2).

(3) In any event, Major ██████████ had no authority to bind the CG. If he made such representations, Major ██████████ should so state directly.

(4) Furthermore, the claims contained in Major ██████████ statement are directly contradicted by the official record in this case. Paragraph 1.d of the summarized record of NJP reads, "The CG asked if Major ██████████ had any questions regarding the maximum punishment that could be imposed. Major ██████████ indicated he did not. Paragraph 1.e of the summarized record of NJP reads, "The CG then advised Major ██████████ that Article 15 was not a trial and any determination of misconduct was not a conviction by court-martial. Further he was advised that the Military Rules of Evidence did not apply. Upon [sic] given those notifications, Major ██████████ was asked if he still was willing to agree to an Article 15 hearing. Major ██████████ indicated he was." Thus, the record establishes that Major ██████████ understood the possible punishments and accepted NJP.¹

¹ It also strains credibility to believe that Petitioner, a Marine major on active duty, did not know when he accepted NJP that the record of NJP would be included in his OMPF and that this might negatively impact his career.

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ICO MAJOR [REDACTED] /0802 USMC

5. Conclusion. Accordingly, we recommend that the requested relief be denied.



Head, Military Law Branch
Judge Advocate Division