



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

CRS
Docket No: 4078-00
15 January 2002

[REDACTED]

Dear [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.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 31 October 2001. 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 three advisory opinions furnished by Headquarters Marine Corps (HQMC) of 30 April, 30 May and 20 August 2001, copies of which are attached. The Board also considered your two rebuttal statements of 21 and 27 September 2001.

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 found that you reenlisted in the Marine Corps on 19 February 1986 after more than three years of prior active service, during which you received nonjudicial punishment (NJP) on 14 July 1984.

The record reflects that on 16 June 1986 you received NJP for an unauthorized absence and insubordination toward a noncommissioned officer. The punishment imposed consisted of a forfeiture of \$200, and suspended restriction and extra duty for 14 days. You did not appeal. On 8 July 1986 the suspended punishment was vacated.

On 9 July 1986 you were counselled and warned that further deficiencies could result in administrative separation. You were advised of recommendations for corrective action and told that

assistance could be obtained from various officials. You were also counselled on 19 May, 2 July and 4 August 1986. The record indicates that these counsellings were not as extensive as the one on 9 July 1986.

On 11 July 1986 you received NJP for an unauthorized absence. The punishment imposed consisted of a reduction in rank and forfeiture of \$204. You did not appeal.

On 8 August 1986 you received NJP for an unauthorized absence. The punishment imposed consisted of a forfeiture of \$190, and suspended restriction and extra duty for 14 days. You did not appeal.

On 25 November 1986 you received NJP for drunk and disorderly conduct. The punishment imposed consisted of a forfeiture of \$198 and restriction and extra duty for 14 days. All punishment was suspended for six months. You did not appeal. On 20 January 1987 the suspension was vacated.

Also on 20 January 1987, you received NJP for three instances of insubordination toward a noncommissioned officer. The punishment imposed consisted of a reduction in rank to private first class and a forfeiture of \$360. You appealed, but the appeal was denied.

The record reflects that on 30 June 1987 you received NJP for disrespect to a superior commissioned officer, disobedience of a lawful order, insubordination toward a noncommissioned officer, and assault. The punishment imposed consisted of a reduction in rank to private. You did not appeal.

Also on 30 June 1987, administrative separation action was initiated by reason of misconduct due to minor disciplinary infractions. You then elected to present your case to an administrative discharge board (ADB). On 30 July 1987 an ADB recommended that you be separated with an other than honorable discharge by reason of misconduct due to minor disciplinary infractions. During the ADB, a defense witness stated that one of your supervisors, a gunnery sergeant (GYSGT;E-7), "gives the impression that he doesn't like black people." Another witness testified about this GYSGT and stated "I've heard about his racism."

In its report, the ADB specifically stated that the 1984 NJP had been considered only on the issue of retention or separation, and not characterization. In his review of your case, the staff judge advocate (SJA) noted that you had preservice misconduct of battery and grand theft. However, he did not refer to this misconduct in his discussion of your case, or use it to justify his recommendation that you be separated under other than honorable conditions. After review by the discharge authority,

the recommendation for separation was approved and you were discharged with an other than honorable discharge on 12 August 1987.

The Board first concurred with the advisory opinion of 30 April 2001 furnished by the Assistant SJA for Military Law (JAM), HQMC. The opinion found no support for your contention that the adverse actions in your case were motivated by racial prejudice since the GYSGT mentioned in the ADB testimony did not impose NJP, initiate separation action or direct discharge. The JAM opinion also found that in spite of the testimony at your ADB, neither the administrative separation proceedings, the actions of your commanding officer, or the separation authority's actions were motivated by racial prejudice or any other improper purpose.

The opinion also found that your claim that four of the NJPs were unlawful because you were not permitted to consult with a lawyer was without merit, since there are service record entries showing that you were afforded the opportunity to consult with counsel. Further, consultation with counsel is not a prerequisite to a valid NJP.

Your claim that the NJP of 30 June 1987 never occurred because you refused to accept it was also found by JAM to be without merit. Even if you did refuse NJP, the Board agreed that you certainly would have appealed any NJP that was imposed despite such a refusal. However, the record shows that you did not do so. Additionally, it seems clear that some sort of disciplinary action occurred on 30 June 1987 since administrative separation action was initiated on that same day due to your disciplinary actions, and other than the NJP of that day, the most recent such action was in January 1987, more than five months earlier.

The opinion also concluded that your claim of inadequate representation at the ADB has no merit whatsoever. Finally, the claim that the ADB improperly considered the NJP of 14 July 1984 from a prior enlistment is also without merit. An NJP from a prior enlistment may be considered for the purpose of determining whether separation is appropriate, but not to determine characterization. This is what happened in your case.

Concerning the advisory opinion of 30 May 2001 from the Manpower Management Information Systems Division (MIFD), HQMC, the Board noted the statement to the effect that the three counseling (page 11) entries of 19 May, 2 July and 4 August 1986 did not meet all of the requirements for proper page 11 entries. However, the Board concluded that removal of these entries is not warranted because the defects are basically cosmetic, and you have not shown that the contents of those entries are in error. Further, removal of these entries would not invalidate your discharge or mandate recharacterization, since the 9 July 1996 counseling fulfilled all the requirements set forth in appropriate directives.

The MIFD opinion also recommended denial of your requests to remove the reduction entries, the page 11 entry of 9 July 1986 that mentions the 19 July 1984, and the entries on the Offenses and Punishments (page 12). The Board concurred with these recommendations.

In its review of your application the Board carefully considered all potentially mitigating factors, such as your prior honorable service. The Board also paid special attention to your contention that blatant racism caused your disciplinary actions and separation. In this regard, the Board especially noted the advisory opinion from the Equal Opportunity Branch (MPE), HQMC. However, the Board concluded that these factors and your contention were not sufficient to warrant recharacterization of your discharge or restoration to active duty given the six NJPs during your second enlistment, which lasted less than 18 months. In this regard, the Board specifically concurred with the advisory opinion from JAM and, after reviewing the ADB proceedings, disagreed with the preliminary conclusion set forth in the MPE advisory opinion. Along these lines, the Board also noted that your contention of racism was raised at the ADB and apparently received appropriate consideration, but was rejected. The Board saw no reason to overturn the judgment of the ADB on this issue.

The Board concluded that the SJA's notation of your preservice misconduct in his memorandum pertaining to your ADB, was of questionable validity. However, since the SJA did not rely on that misconduct in his recommendation, or even discuss it in his review of your case, the Board concluded that the SJA's notation had no impact on the separation authority's decision to direct an other than honorable discharge. Accordingly, any error in this regard was harmless.

The Board noted your request for modifications to the Certification of Military Service in the form of a correct social security number and rank. However, these are administrative corrections that do not require action by the Board. Accordingly, you should present that request and supporting evidence to the National Personnel Records Center, 9700 Page Boulevard, St. Louis, Missouri 63132.

Concerning your request for damages you have suffered from your discharge, the Board is not authorized by law to monetarily compensate individuals for damages. Further, since your discharge was proper and appropriate, no such damages are warranted. The Board also denied relief on your requests for promotions until retirement and the return of your reenlistment bonus. Since your discharge was proper and appropriate, you are not entitled to any promotions. Further, regulations require recoupment of the unearned portion of a reenlistment bonus when an individual is separated for misconduct.

Accordingly, your application has been denied. The names and votes of the members of the Board will be provided 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:

1. JAM 4 Memo of 30 Apr 01
2. MIFD Memo of 30 May 01
3. MPE Memo of 20 Aug 01



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

IN REPLY REFER TO:

1070
MPE
20 Aug 01

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

Subj: BCNR APPLICATION IN THE CASE OF FORMER [REDACTED]
[REDACTED]

1. As requested a review of former [REDACTED]'s application was conducted. Based on witness testimony, it appears that discrimination may have been a factor as seen in the portions of the administrative board results provided. Recommend that a copy of the complete board transcripts be reviewed before a final decision is made.

2. Point of contact is [REDACTED] at DSN 784-9371.

[REDACTED]
Deputy, Manpower
Equal Opportunity Branch
Manpower, Plans and Policy
Division



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

IN REPLY REFER TO:

1070
MIFD
30 MAY 2001

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BCNR APPLICATION IN THE CASE OF FORMER PRIVATE
[REDACTED]

1. Former [REDACTED] application and supporting documents concerning his request for the removal of fraudulent entries in his Service Record Book (SRB) has been reviewed.
2. MCO P1070.12D, Marine Corps Individual Records Administration Manual (IRAM), authorizes commanders to make SRB entries. Paragraph 4009 sets forth guidance and provides information on appropriate entries and maintenance requirements of the Record of Time Lost, Promotion, Reduction NAVMC 118(5) page 5. Paragraph 4014 sets forth instructions for commanders to record entries on the Administrative Remarks (1070) NAVMC 118(11) page 11 which are considered matters forming an essential and permanent part of a Marine's military history, which are not recorded elsewhere in the SRB and will be useful to future commanders. Paragraph 4015 sets forth guidance for recording information on the Offenses and Punishment, NAVMC 118(12) page 12.
3. The following comments concerning the Record of Time Lost, Promotion, Reduction NAVMC 118(5) page 5 are provided:
 - a. The time lost section is designed to record any periods of time lost and their effect on the pay entry base date, expiration of obligated service, and active duty base date.
 - b. The promotion and reduction section is designed for recording a history of promotion and reduction in the order in which they occur, to include the effective date, the grade, date of rank, and the authority by which effected.
 - c. Unauthorized absence (UA) entries recorded in the time lost section must be supported by documented evidence and match the recorded information on the Offense and Punishments NAVMC 118(12) page 12 after entering the information in his automated records.

Subj: BCNR APPLICATION IN THE CASE OF FORMER PRIVATE
[REDACTED]

a. A page 12 entry is designed for recording offenses and punishments, and for establishing command jurisdiction at time of the offense. These entries may be signed by the commander or a designated representative who will sign "by direction".

b. When nonjudicial punishment is imposed as authorized by Article 15 of the Uniformed Code of Military Justice and the Manual for Courts-Martial, entries will be made on the NAVMC 118(12) per paragraph 4015 of the IRAM.

c. The Offenses and Punishment (NAVMC 118(12)) page 12 entries dated 860618, 860711, 860808, 861125, 870120, and 870630 do meet the elements of a proper page 12 entry.

6. In view of the above, it is recommended that:

a. Disapprove former [REDACTED] request for removal of the reduction entries from the Record of Time Lost, Promotion, Reduction NAVMC 118(5) page 5.

b. Disapprove former [REDACTED] request for removal of the Administrative Remarks(1070) NAVMC 118(11) page 11 entry dated 860709 from his service records.

c. Approve the removal of the three page 11 counseling entries referenced in paragraph 4a above if the Board does find that an injustice was committed. However, removal of these entries would not appear to have a significant effect on the type of separation he received.

d. Disapprove former [REDACTED] request for removal of the Offenses and Punishments, NAVMC 118(12) page 12 entries from his service records.

7. Point of contact is Mr. Jerry Welch at DSN: 278-9049.

Very Respectfully,
C. L. Grotzky

C. L. GROTZKY
Director

Manpower Management Information
Systems Division



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

IN REPLY REFER TO:

1070

JAM4

80 APR 2001

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

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF [REDACTED]

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 nonjudicial punishments (NJP) he received on 14 July 1984, 16 June 1986, 8 July 1986, 7 August 1986, 19 November 1986, 9 January 1987, 30 June 1987, and the removal of all negative page 11 entries from his SRB and OMPF. Petitioner also requests restoration of all property, privileges, and rights affected by those actions. In addition, Petitioner requests promotion to sergeant, consideration for additional promotions, and retirement pay.

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

3. Background

a. On 14 July 1984, Petitioner received NJP for unauthorized absence and insubordination toward a noncommissioned officer, in violation of Articles 86 and 91 of the Uniform Code of Military Justice (UCMJ), respectively. Petitioner was awarded a reduction in rank to private first class. The reduction in rank was suspended for 6 months. Petitioner did not appeal.

b. On 16 June 1986, Petitioner received NJP for unauthorized absence and insubordination toward a noncommissioned officer, in violation of Articles 86 and 91 of the UCMJ, respectively. Petitioner was awarded a forfeiture of \$200.00 pay per month for 1 month, 14 days extra duty, and 14 days restriction. The extra duty and restriction were suspended for 6 months. Petitioner did not appeal.

c. On 8 July 1986, Petitioner received NJP for unauthorized absence in violation of Article 86, UCMJ. Petitioner was awarded reduction in rank to lance corporal and forfeiture of

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF [REDACTED]

\$204.00 pay per month for 1 month. Petitioner did not appeal.

d. On 7 August 1986, Petitioner received NJP for unauthorized absence in violation of Article 86, UCMJ. Petitioner was awarded a forfeiture of \$190.00 pay per month for 1 month, 14 days extra duty, and 14 days restriction. The extra duty and restriction were suspended for 3 months. Petitioner did not appeal.

e. On 19 November 1986, Petitioner received NJP for drunk and disorderly conduct in violation of Article 134, UCMJ. Petitioner was awarded a forfeiture of \$198.00 pay per month for 1 month, 14 days extra duty, and 14 days restriction. All punishment was suspended for 6 months. Petitioner did not appeal.

f. On 9 January 1987, Petitioner received NJP for insubordination toward a noncommissioned officer in violation of Article 91, UCMJ. Petitioner was awarded a reduction in rank to private first class and a forfeiture of \$360.00 pay per month for one month. Petitioner appealed. Petitioner's appeal was denied.

g. On 30 June 1987, Petitioner received NJP for disrespect to a superior commissioned officer, disobedience of a lawful order, insubordination toward a noncommissioned officer, and assault, in violation of Articles 89, 90, 91, and 128 of the UCMJ, respectively. Petitioner was awarded a reduction in rank to private. Petitioner did not appeal.

h. On 6 June 1987, Petitioner received notice that administrative separations proceedings against him were going to be initiated. On 30 July 1987, Petitioner's administrative separation board recommended that he be administratively separated under Other Than Honorable Conditions due to misconduct, minor disciplinary infractions. On 12 August 1987, Petitioner was administratively separated with an Other Than Honorable Conditions characterization of service by reason of misconduct, minor disciplinary infractions.

4. Analysis

a. The record does not support Petitioner's claim that his page 11 entries, NJPs, and administrative separation were

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF [REDACTED]

motivated by racial prejudice. Given that a presumption of regularity attaches to official records, the burden is on the Petitioner to provide evidence substantiating his claim. Although the transcript of Petitioner's administrative discharge board includes testimony from two sergeants who both stated that a gunnery sergeant in Petitioner's command "did not like black Marines," the gunnery sergeant in question did not impose the NJP's, authorize the page 11 entries, or initiate the administrative separations proceedings at issue. Petitioner provides no evidence that the actions of his commanding officer or the separation authority were motivated by racial prejudice or for any other improper purpose.

b. Petitioner's claim that four of his NJP's were unlawful because he was denied the opportunity to consult with an attorney is without merit. Petitioner's SRB contains page 11 and page 12 entries indicating that he was afforded the opportunity to consult with an attorney prior to each of the NJP's at issue. Petitioner provides no evidence that these entries are erroneous. Moreover, service members are not entitled to consult with counsel before imposition of NJP. Although the opportunity to consult with counsel is a prerequisite for the admission of NJP records as sentencing evidence at a subsequent court-martial, it is not a prerequisite to the imposition of NJP itself. Accordingly, Petitioner is not entitled to any relief based on his assertion that he did not consult with an attorney prior to NJP.

c. Petitioner's claim that his NJP on 30 June 1987 never occurred is without merit. As previously noted, a presumption of regularity attaches to official records, and the burden is on the Petitioner to provide evidence that the NJP did not occur. Petitioner fails to provide any such evidence.

d. Petitioner's claim that he had refused his 30 June 1987 NJP and requested trial by court martial is without merit and would not provide any grounds for relief. Petitioner's SRB contains a page 12 entry, dated 29 June 1987, that he asserts memorializes his refusal of NJP, where he struck out and initialed the words "do not" in the sentence "I (do) (do not) choose to exercise that right." A review of the page 12 entry reveals, however, that Petitioner also crossed out the word "do" in the same sentence. Even if this ambiguity were interpreted as an initial refusal of NJP, Petitioner's subsequent acceptance

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF [REDACTED]

of NJP and his failure to appeal the NJP would nullify his present claim.

e. Petitioner's claims that he was denied access to an attorney and received inadequate representation at his administrative separation board are without merit. Although the exact nature of Petitioner's complaint is unclear, it appears to stem from the denial of his attorney's request for additional time to prepare for the board. While the senior member of Petitioner's administrative separation board did, in fact, deny the attorney's request for a continuance, that fact alone does not establish that Petitioner received inadequate representation or was otherwise prejudiced by the denial. Indeed, Petitioner fails to proffer any prejudice, however speculative.

f. Petitioner claims that his administrative separation board improperly considered an NJP from a prior enlistment. This claim is without merit. Although misconduct from a prior enlistment may not be considered on the issue of characterization of service, it may be considered for the purpose of determining whether separation is appropriate. Finally, Petitioner's citations to legal precedent in Oklahoma and to the United States Sentencing Guidelines are irrelevant. Petitioner's administrative separation board was not a criminal trial in either U.S. district court or in an Oklahoma state court.

5. Conclusion. For the reasons noted, we recommend that Petitioner's request for relief be denied.

[REDACTED]
Assistant Head, Military Law Branch
Judge Advocate Division