



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

TRG
Docket No: 8394-01
11 September 2002

[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 10 September 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, dated 9 April 2002, 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

JAM2A

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

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

Encl: (1) Copy of Preliminary Investigation
(2) E-mail of [REDACTED] Operations Officer,
Company B, Marine Security Battalion
(3) Excerpts from CoO P5000.1D and BnO P1050.1F

1. We are asked to provide an opinion on Petitioner's request to restore his rank to Corporal/paygrade E-4, with the same date of rank that he had prior to his nonjudicial punishment (NJP) on 9 February 2001. Enclosures (1) and (2) are copies of the preliminary inquiry and excerpts of applicable company and battalion orders on vehicle ownership, respectively.

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

3. Background

a. Petitioner served as an administration clerk with Company B, Marine Security Guard (MSG) Battalion, American Embassy, Nicosia, Cyprus, from 14 April 2000 to 2 March 2001. During this tour, [REDACTED], Petitioner's staff noncommissioned officer, gave Petitioner an order that he was not to buy an automobile. [REDACTED] and Sergeant Baker overheard [REDACTED] order to Petitioner. Additionally, at several individual and group counseling sessions, GySgt Braddy informed Petitioner that he was not authorized to buy an automobile.

b. Company B policy prohibited clerks from owning, buying, renting, or shipping a vehicle. On 18 January 2001, Petitioner leased an automobile. The company policy supplemented Company Order P5000.1D of 30 July 1996, para. 1005, which stated, "Renting/Leasing of Motor Vehicles. Discussed in BnO 1050.3_." ¹ BnO 1050.3F of 24 May 1994, left to company commanders

¹ The Company Order was updated on 25 May 2001, and now incorporates language on renting and leasing vehicles found in BnO 1050.3F. See enclosure (3).

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF [REDACTED]
507 02 8658 USMC

discretion the decision to permit Marines to buy, rent, or lease vehicles.

c. On 9 February 2001, Petitioner accepted NJP for violating Article 92, Uniform Code of Military Justice (UCMJ), for willfully disobeying GySgt Braddy's order not to purchase an automobile. His commanding officer (Lieutenant Colonel) awarded reduction to lance corporal (LCPL), paygrade E-3, forfeiture of \$250.00 pay per month for 2 months, and restriction for 14 days. Forfeiture of pay was suspended for 1 month.

d. Petitioner appealed to his battalion commander requesting that his grade be restored. On 21 February 2001, the battalion commander denied Petitioner's appeal. The battalion commander stated in his denial that the punishment Petitioner received was consistent with punishments imposed on others for similar offenses.

4. Analysis. Petitioner claims his punishment was unjust because he was never ordered not to buy a vehicle; even if he was given such an order, he did not violate the order since he did not buy the car, rather he leased it; and finally, even if he was in the wrong, Petitioner believes his offense did not warrant reduction to LCpl and removal from MSG battalion. Petitioner's arguments are without merit.

a. Lawfulness of order.² An order to perform a military duty or act is presumed to be lawful, and a subordinate disobeys such an order at his own peril.³ Manual for Courts-Martial (MCM), Part IV, para. 14c(2)(a)(i), (2000 ed.). Military duty includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly

² As stated more fully below, and realizing that Petitioner was subject to NJP and not tried by a court-martial, we point out that under long-standing military law, an accused has the burden at a court-martial to establish that an order given to him by competent authority was not a lawful order. Additionally, in order to obtain relief on appeal, a service member convicted of violating a lawful order has the burden of proving that the order was not a lawful order. Petitioner does not provide any evidence that the order at issue was not a lawful order. Nevertheless, we will herein state the grounds that establish the lawfulness of GySgt Braddy's order to Petitioner not to purchase a vehicle.

³ Additionally, the burden is on the individual challenging the lawfulness of an order to establish illegality, unless the order is "palpably illegal on its face." See *United States v. Micheal G. New*, 55 M.J. 95, 108 (CAAF 2001).

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

connected with the maintenance of good order in the service." MCM, Part IV, para. 14c(2)(a)(iii). Conversation with MSG personnel reveals that the military purpose of the order is to safeguard the usefulness of MSG Marines serving in Nicosia, Cyprus. Conversation with MSG personnel also reveals that driving in Cyprus is very dangerous and the cost of car insurance is exorbitant. Preventing clerks from purchasing vehicles serves to safeguard the usefulness of MSG personnel by keeping them off the road as the driver of their own private vehicles. Preventing clerks from purchasing vehicles also serves to maintain the usefulness of military members of the command by helping to prevent the clerks from financially overextending themselves as the ban on car purchases obviates the necessity of purchasing the exorbitant insurance. Thus, more broadly stated, limiting ownership and control of personal vehicles of Marines on embassy duty protects both the individual and the United States from potential negative consequences associated with use and ownership of vehicles. GySgt Braddy's order to Petitioner that he was not to buy a vehicle directly supported the company commander's policy prohibiting clerks owning or renting vehicles while in Nicosia, Cyprus. Office Hours Summary, page 1. Furthermore, a commander's decision to regulate vehicle ownership and control in a foreign country is directly connected with the maintenance of good order. Petitioner, a corporal at the time of the offense, had a duty to obey [REDACTED] lawful order.

b. Petitioner's knowledge that he could not buy a car. Petitioner's claim that he was never told he could not buy a vehicle is not supported by the evidence.⁴ At the NJP hearing, both [REDACTED] and [REDACTED] informed the company commander that they heard [REDACTED] give Petitioner the order.⁵ Additionally, [REDACTED] stated that not only did he hear the same order, [REDACTED] told Petitioner on several occasions that he was not allowed to buy a vehicle. Petitioner attempts to bolster his claim based unfounded statement that no written orders existed on the topic of buying or renting a vehicle. Enclosure (2) is Company B, Operations Officer's

⁴ Regarding Petitioner's truthfulness, [REDACTED] comments on a 31 December 2000 counseling sheet (enclosure (7) to enclosure (1)) are noteworthy. [REDACTED] wrote he "alters the truth quite a bit," and when Petitioner does something wrong he replies, "he didn't know" which according to [REDACTED] was not the truth.

⁵ Additionally, the statements of [REDACTED] k and [REDACTED] which further elaborate discussions involving Petitioner and [REDACTED] which [REDACTED] and [REDACTED] were involved.

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

synopsis of the restrictions governing buying or renting vehicles while attached by Company B. Also, contrary to Petitioner's claim, enclosure (3) clearly shows that written orders did exist to regulate his ability to purchase or rent a vehicle while attached to Company B.

c. Buying v. leasing. Petitioner claims that since he leased a vehicle, he did not violate [REDACTED] order prohibiting him from buying a vehicle. Petitioner failed to raise this issue at the NJP proceeding. Moreover, particularly noteworthy is the absence of Petitioner's "I leased the car" defense in his three and a half page handwritten statement he provided to [REDACTED] for the preliminary inquiry. Enclosure (10) to enclosure (1). Petitioner knew full well that there was no real difference between "buying" and "leasing" a vehicle for the purpose of complying with [REDACTED] order. In response to the company commander's question as to why he didn't ask anyone or tell anyone when he bought the car, Petitioner responded, "I am a grown man and I don't need to ask permission from anyone to buy a car." Office Hours Summary, page 2. Contrary to this statement, enclosures (2) and (3) make clear that Petitioner did need permission to buy a car. Whether Petitioner purchased or leased the vehicle has no impact on the lawfulness of the order given or the legality of the NJP hearing.⁶

d. Reduction in rank. Petitioner claims that the punishment he received did not fit the offense. Petitioner offers no evidence to support his claim, however, we believe the record fully supports the punishment awarded. First, Petitioner's punishment was far less than the company commander was authorized to impose.⁷ Second, before deciding what punishment, if any, to award, a company commander routinely considers the nature of the offense, the record of the servicemember, the needs of good order and discipline, and the

⁶As supported by the NJP hearing record, Petitioner accepted NJP with full knowledge that he had the absolute right to refuse NJP and instead demand trial by court-martial. Moreover, Petitioner accepted NJP after consulting a lawyer. Office Hours Accused's Notification and Election of Rights, page 2. He neither raised this particular issue at his NJP nor in his NJP appeal. If Petitioner believed he did not violate [REDACTED] order his recourse was to refuse NJP and ask for a court-martial. He did not.

⁷The maximum punishment Petitioner could have received includes: reduction to LCpl/paygrade E-3, forfeiture of 1/2 pay per month for 2 months, restriction for 60 days. MCM, Part V, para. 5, (2000 ed.)

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

effect on the servicemember and his record.⁸ Finally, notwithstanding the fact that the company commander was conducting NJP on a noncommissioned officer, he awarded less than the maximum punishment and on his own volition suspended all imposed forfeitures. This is significant considering Petitioner had a track record of past misconduct that the company commander likely took into consideration before imposing Petitioner's punishment.⁹ Finally, Petitioner's battalion commander, as the NJP appeal authority, denied Petitioner's appeal to restore his rank citing, in part, that the punishment was consistent with past instances of similar misconduct.¹⁰

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

[REDACTED]
Head, Military Law Branch
Judge Advocate Division

⁸ MCM, Part V, para. 1(d)(1).

⁹ Petitioner's service record book contains two NJP's and three derogatory counseling entries.

¹⁰ Petitioner's battalion commander found that his claims that he was lied to and that there was written order on buying a car were "not supported in any whatsoever." Final Action on Appeal letter of 21 February 2001.