



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

TJR  
Docket No: 3389-11  
12 May 2011

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

Subj: REVIEW NAVAL RECORD OF [REDACTED]

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

Encl: (1) DD Form 149 with attachments  
(2) Case Summary  
(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Marine Corps, filed enclosure (1) with this Board requesting that his naval record be corrected by removing all references to the nonjudicial punishment (NJP) imposed on 8 June 2007.

2. The Board, consisting of Messrs. Blanchard, Dunn, and Spain reviewed Petitioner's allegations of error and injustice on 10 May 2011 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. In addition, the Board considered the advisory opinion (AO) furnished by the Marine Corps Military Justice Branch, Judge Advocate Division (JAM2) dated 2 May 2011.

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. Enclosure (1) was filed in a timely manner.

c. Petitioner received NJP on 8 June 2007 for wrongful use of Dayquil an over-the-counter medication. The punishment imposed was restriction and extra duty for 30 days.

d. On 18 March 2011 Petitioner's current commanding officer and the commanding officer who imposed the NJP recommended that the it remain in the record. This recommendation further stated that the offense for which he received NJP should be corrected and/or changed to an Article 92 ("disobeying a lawful order") violation since the over-the-counter medication "Dayquil" is not a controlled substance, and it does not apply to "Article 112a, wrongful use, possession, etc. of a controlled substance" of the Uniform Code of Military Justice (UCMJ). However, the letter did not provide any legal authority for this recommendation.

e. An AO from JAM2 states, in part, that the NJP should be removed from the record because Petitioner should not have received it for using Dayquil as a violation of Article 112a. It further states that the offense of using Dayquil cannot be corrected/changed to an Article 92 offense, as recommended by his commanding officers, because he was never properly notified of an Article 92 offense nor offered the opportunity to refuse NJP and demand trial by court-martial for this offense.

#### CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the AO, the Board concludes that Petitioner's request warrants favorable action. In this regard, the Board concludes that since the offense for which he received NJP is invalid and that there is no legal authority to amend an incorrect charge, all references in his record regarding it should be removed or obliterated. In this regard, any and all documents, to include, but not limited to, the unit punishment book entry, administrative remarks entry, adverse proficiency and conduct marks, and administrative separation documentation, should be expunged from the record.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

#### RECOMMENDATION:

a. That Petitioner's naval record be corrected by totally obliterating or removing the 8 June 2007 NJP and all references thereto.

b. That any and all materials 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 materials be added to the record in the future.



c. 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. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)), 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.



BRIAN J. GEORGE  
Acting Recorder

ROBERT D. ZSALMAN  
Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER  
Executive Director