



DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
701 S. COURTHOUSE ROAD, SUITE 1001  
ARLINGTON, VA 22204-2490

TAL  
Docket No: 5066-11  
10 February 2012

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) HQMC MMER/PERB memo dtd 11 Nov 11  
(3) Case summary  
(4) HQMC JAM1 memo dtd 28 Jul 11  
(5) Subject's naval record (CD)

1. Pursuant to the provisions of reference (a), Petitioner, a member of the Marine Corps, filed enclosure (1) with this Board requesting the removal of all adverse material from his Official Military Personnel File (OMPF) regarding a nonjudicial punishment (NJP) dated 2 September 2010 and to be reinstated to paygrade E-5. He also requested that the adverse fitness report for 15 May to 2 September 2010 be removed from his record. As explained in enclosure (2) the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board has directed its removal.

2. The Board, consisting of Mr. Genteman, Mr. Green and Mr. Storz, reviewed Petitioner's allegations of error and injustice on 2 February 2012 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.

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 enlisted in the Marine Corps on 23 May 2005 and is currently serving on active duty.

d. Petitioner received NJP on 2 September 2012, for one instance of wrongful use of Oxycodone, a controlled substance. Petitioner denied that he had wrongfully used Oxycodone. He claimed that he had a valid prescription for Percocet and used it shortly before the urinalysis. The Percocet was prescribed to relieve the pain he was suffering from a broken bone in his foot. The punishment imposed was reduction in paygrade to E-4 from E-5, and forfeiture of \$1,099 pay per month for two months. The forfeiture was suspended. He did not appeal the NJP but did request that his commanding officer to set it aside due to his innocence.

e. He was notified that he was to be processed for administrative separation for drug abuse. He requested a hearing before an administrative discharge board (ADB). Petitioner's defense counsel also requested that the commanding officer set aside the NJP due to innocence. The commanding officer denied the request. On 6 April 2011 the ADB heard the case. Petitioner submitted a letter from a physician's assistant at the Department of Orthopedic Surgery, confirming that he had a broken bone in his foot and that he had been prescribed Percocet for pain to use as needed. The ADB found that the government had failed to prove wrongful use of a controlled substance and recommended retention.

f. An advisory opinion (AO) from the Military Law Branch of HQMC (enclosure (4)) recommends that Petitioner's request to remove his NJP be granted. In this regard the AO states, in part, as follows: that the use of a controlled substance properly prescribed is not a crime. The AO notes that it is clear that Petitioner's commanding officer did not properly investigate this matter, because if he had the medical directions to the Petitioner would have been provided to him prior to imposing NJP.

The AO recommends that his request to remove all documentation regarding the 2 September 2010 NJP from his OMFP be granted.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of enclosure (4), the Board concludes that Petitioner's request warrants favorable action.



RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the NJP dated 2 September 2010 and reinstate paygrade him to E-5.

b. That any material 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 material be added to the record in the future.

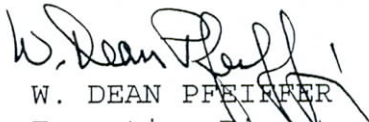
c. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

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.

ROBERT D. ZSALMAN  
Recorder

  
BRIAN J. GEORGE  
Acting 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