



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON, D.C. 20370-5100

SMC
Docket No: 02931-98
6 April 1999

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

Subj: SSGT [REDACTED] ISMC [REDACTED]
REVIEW OF NAVAL RECORD

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

- Encl:
- (1) DD Form 149 dtd 19Mar98 w/attachments
 - (2) HQMC JAM4 memo dtd 23Jun98
 - (3) Mar Corps Recruiting Command memo dtd 6Jul98
 - (4) HQMC MMPR-2 memo dtd 9Jul98
 - (5) Subject's rebuttal dtd 27Oct98 w/encls
 - (6) HQMC JAM2 memo dtd 5Feb99
 - (7) Mar Corps Recruiting Command memo dtd 15Mar99
 - (8) HQMC MMPR-2 memo dtd 29Mar99
 - (9) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected by removing all derogatory material relating to his relief for cause (RFC) from recruiting duty (pertinent documents from his Official Military Personnel File (OMPF) at Tab A), and reinstating his secondary military occupational specialty (MOS) of 8411 (recruiter). He impliedly requested removing documentation of his nonjudicial punishment (NJP) of 27 January 1990 (service record page 12 ("Offenses and Punishments") from his OMPF at Tab B), which was set aside on 21 October 1998, and correcting his record to show his SDA (special duty assignment) pay was not terminated on 26 February 1990. Finally, he requested removal of his failures of selection by the 1996 and 1997 Gunnery Sergeant Selection Boards. After applying to this Board, he failed by the 1998 Gunnery Sergeant Selection Board as well. This Board did not consider his request to remove his failures to gunnery sergeant, as he has not exhausted the administrative remedy of remedial consideration for promotion. If he is successful before a remedial promotion board for 1996, all his failures will be removed administratively.

2. The Board, consisting of Messrs. Brezna, Kastner and Milner, reviewed Petitioner's allegations of error and injustice on 6 April 1999, 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. Except as indicated in paragraph (1) above, before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. As a result of Petitioner's RFC from recruiting duty, his 8411 secondary MOS was voided, and his SDA pay was terminated effective 26 February 1990.

c. Enclosures (2) through (4) are unfavorable advisory opinions from the Headquarters Marine Corps (HQMC) Military Law Branch, Judge Advocate Division; the Marine Corps Recruiting Command; and HQMC Enlisted Promotions, Promotion Branch received before Petitioner's commanding officer set aside the NJP.

d. Enclosure (5) is Petitioner's reply to the unfavorable advisory opinions at enclosures (2) through (4), including documentation showing the NJP was set aside.

e. The advisory opinion at enclosure (6), the second opinion from the HQMC Military Law Branch, Judge Advocate Division, has commented to the effect that Petitioner's request to remove documentation of the NJP has merit and warrants favorable action.

f. The advisory opinion at enclosure (7), the second opinion from the Marine Corps Recruiting Command, has commented to the effect that derogatory material should be removed from Petitioner's record, that he should retain his secondary MOS of 8411, and that he should be considered for remedial promotion to gunnery sergeant.

g. The advisory opinion at enclosure (8), the second opinion from HQMC Enlisted Promotions, Promotion Branch states that since the NJP has been set aside, Petitioner is eligible for remedial consideration for promotion to gunnery sergeant.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the contents of enclosures (6) through (8), the Board finds the existence of an injustice warranting removal of all documentation of Petitioner's NJP and RFC, as well as granting him remedial consideration for promotion to gunnery sergeant for 1996 and, if necessary, 1997 and 1998. They further find that removal of the RFC documentation dictates restoring his 8411 secondary MOS and his SDA pay, both of which were taken from him by reason of the RFC. In view of the above, the Board directs the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing all documentation of his NJP on 27 January 1990, to include the service record page 12 ("Offenses and Punishments") with entries dated 27 January and 5 February 1990 (S fiche, row C, frame 13).

b. That his naval record be corrected further by removing all documentation of his relief for cause, including the request for his relief dated 30 January 1990, the first endorsement dated 26 February 1990 on the request for his relief, and Petitioner's undated rebuttal (S fiche, row D, frames 12 through 14).

c. That Petitioner be afforded remedial consideration for promotion for the 1996 and, if necessary, 1997 and 1998 Gunnery Sergeant Selection Boards.

d. That his naval record be corrected further to show that his 8411 secondary MOS was never removed.

e. That his naval record be corrected further to show that his SDA pay was not terminated on 26 February 1990.

f. 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.

g. 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


JONATHAN S. RUSKIN
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 Regulations, 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

2931-98



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

IN REPLY REFER TO:
1070
JAM4

23 JUN 1998

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

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF STAFF SERGEANT ██████████
██████████ U.S. MARINE CORPS

Ref: (a) Manual for Courts-Martial, United States (1995
Edition), Part V

1. We are asked to provide an opinion regarding the appropriateness of derogatory material contained in Petitioner's OMPF. The entries pertain to Petitioner's NJP and subsequent relief from recruiting duty in January 1990. Petitioner now requests that BCNR removes these entries from his official military records.

2. We recommend relief be denied. Our analysis follows.

3. The filing deadline for a BCNR application is 3 years from the date Petitioner discovered the alleged error or injustice. All relevant events in this case took place in 1990. While BCNR may waive the filing deadline, Petitioner fails to offer adequate justification for such a waiver in this case. Accordingly, Petitioner's application may be denied as untimely.

4. Under the reference, the NJP authority may impose punishment when he believes the preponderance of the evidence establishes the accused committed the offense charged. Absent clear evidence of an abuse of discretion, the NJP authority's findings should remain undisturbed. Although Petitioner does not deny the events that led to his NJP, he essentially argues that his NJP was unjust because the recruiting violation that occurred was inadvertent, and he was merely following the advice of his SNCOIC who was also relieved for cause.

5. The NJP authority was required, by the reference, to consider and properly weigh all evidence presented at the NJP hearing. Petitioner offers no evidence to suggest that the question of his guilt was not objectively addressed, properly considered, and subsequently resolved by the commander prior to imposing punishment. Petitioner presents no information that tends to dispute the NJP entry or his relief for cause. I would note that Petitioner elected not to appeal the NJP.

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IN THE CASE OF STAFF SERGEANT [REDACTED]
[REDACTED] S. MARINE CORPS

6. Accordingly, we find that the NJP and relief for cause were neither unjust nor disproportionate to the offense committed, and we recommend relief be denied.

7. We defer to MMEA and MMPR regarding Petitioner's additional requests to have his secondary MOS reinstated, and his request that his failure of selection by the 1996 Gunnery Sergeant's Board be expunged from his military records.

[REDACTED]

Lieutenant Colonel
U.S. Marine Corps
Head, Military Law Branch
By direction of the
Commandant of the Marine Corps



UNITED STATES MARINE CORPS
MARINE CORPS RECRUITING COMMAND
2 NAVY ANNEX
WASHINGTON DC 20380-1775

IN REPLY REFER TO
1070
A
06 JUL 1998

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

Subj: ADVISORY OPINION IN THE CASE OF STAFF SERGEANT [REDACTED]
[REDACTED] USMC

Ref: (a) MMER r/s dtd 3 Jun 98

1. In response to the request for advisory opinion contained in the reference, Staff Sergeant [REDACTED] petition has been reviewed as well as his OMPF. I recommend that Staff Sergeant [REDACTED] request be disapproved.

2. The Recruiting Command has reviewed the relief for cause (RFC) and can find no evidence that it was incorrect or unjustified. Staff Sergeant [REDACTED] was found guilty at his non judicial punishment (NJP) and was subsequently relieved for cause. [REDACTED] reemphasizes the fact that Staff Sergeant [REDACTED] crossed one of those lines in recruiting that violated Marine Corps policy. Although Staff Sergeant [REDACTED] performance has been outstanding since his recruiting tour, this does not mitigate the facts that led to his RFC. Additionally, once a Marine is relieved for cause his secondary MOS of 8411 is voided. Only those Marines that successfully complete a tour on recruiting duty may retain this MOS which is not the case with Staff Sergeant [REDACTED]

3. Staff Sergeant [REDACTED] claims that his RFC and NJP were part of a vendetta against his NCOIC. This is an unsubstantiated allegation that cannot be verified and [REDACTED] does not broach this subject in his statement.

4. The Commandant of the Marine Corps removed Staff Sergeant [REDACTED] fitness report on 23 February 1994. The RFC is a distinct and separate administrative action from the fitness report and should be considered as such. Although his fitness report was found to be in error, the RFC was correct and justified in this case.

[REDACTED SIGNATURE]

Colonel, U.S. Marine Corps
Chief of Staff
Marine Corps Recruiting Command



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

IN REPLY REFER TO:
1400/3
MMPR-2
9 Jul 98

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

Subj: ADVISORY OPINION IN THE CASE OF STAFF [REDACTED]
[REDACTED] USMC

1. In the reference is Staff Sergeant [REDACTED] request for remedial consideration for promotion to the rank of gunnery sergeant. He feels that his relief from recruiting duty, that occurred in January 1990, caused him to fail selection to gunnery sergeant.
2. Staff Sergeant [REDACTED] is considered in the promotion zone in military occupational specialty (MOS) 1371 by the 1996 Gunnery Sergeant Selection Board and not selected. He was considered in the above zone in MOS 1371 by the 1997 and 1998 Gunnery Sergeant Selection Board and failed selection. The confidentiality of the selection board process precludes knowing the exact reason for his nonselection by the boards which reviewed his record of performance. It is most likely that he was not selected for promotion because he simply was not as competitive as his selected peers.
3. As Staff Sergeant [REDACTED] record has not changed, recommend his petition be denied.

[REDACTED]

[REDACTED]
Assistant Head, Enlisted Promotions
Promotion Branch
By direction of
the Commandant of the Marine Corps



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

IN REPLY REFER TO:

1070
JAM2
05 FEB 1999

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

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF STAFF SERGEANT [REDACTED]
U.S. MARINE CORPS

- Ref: (a) Article 15, UCMJ
- (b) Manual for Courts-Martial, United States (1998 ed.)
- (c) JAGINST 5800.7C (JAGMAN)
- (d) MCO P1100.72A

1. We are asked to provide an opinion on Petitioner's request for removal of the record of nonjudicial punishment (NJP) imposed on 27 January 1990.

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

3. Background

a. Petitioner received NJP under reference (a) on 27 January 1990 from the Commanding Officer, U.S. Marine Corps Recruiting Station, [REDACTED], Missouri for recruiter misconduct. Specifically, he was found guilty of disobeying Marine Corps Order P1100.72 and attempting a fraudulent enlistment in violation of Articles 92 and 80, UCMJ, respectively. He was awarded a suspended forfeiture of \$274.00 pay per month for one month. Petitioner did not appeal the NJP. On 21 October 1998, however, the Commanding Officer of 1st Combat Engineer Battalion set aside Petitioner's NJP in his authority as Petitioner's new commander.

b. The charges against Petitioner arose from his efforts to enlist [REDACTED], who was then on unsupervised probation as a result of a recent misdemeanor conviction. According to (now) Sergeant [REDACTED] 1 September 1998 statement, when he first told Petitioner that he was on probation, Petitioner replied that he was ineligible for enlistment. Sergeant [REDACTED] went on to say, however, that the trial judge had agreed to dismiss the charge if he enlisted in the Marine Corps, and if this was confirmed by the local recruiter. According to Petitioner, he believed that Sergeant [REDACTED] would become eligible for enlistment upon dismissal of the charge. Before actually processing the enlistment, however, Petitioner sought the direction of his

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U.S. MARINE CORPS

immediate superior, Gunnery Sergeant [REDACTED]. After Gunnery Sergeant [REDACTED] told him to process Sergeant [REDACTED], Petitioner tried to contact the trial judge to confirm that Sergeant Jones was enlisting. Petitioner also noted on the enlistment application that Sergeant [REDACTED] had been charged with a misdemeanor, believing that this would trigger a screening of his police record which would guarantee that the dismissed charge was not a disqualifier.

c. Although Petitioner had neither initiated contact with the trial judge nor negotiated for dismissal of the charge conditioned upon Sergeant [REDACTED] enlistment, Sergeant [REDACTED] provided a written statement suggesting this when questioned on the matter during his final interview. Sergeant [REDACTED] now retracts that statement, claiming that it was a product of confusion, coercion, and fear. This retraction is corroborated by Judge [REDACTED] in her 20 August 1998 affidavit. She notes that it was common practice for her to negotiate with prosecutors and accused for suspension of sentence or dismissal of charges on condition that the accused enlist in the Armed Forces, and that she would require confirmation from recruiting offices that an accused had applied. She would never negotiate with recruiters, however, and specifically denied doing so with Petitioner regarding Sergeant [REDACTED] case.

d. The NJP authority, (now) Lieutenant [REDACTED] writes in his 8 October 1998 statement that he recently discovered through independent inquiry that the allegation in Sergeant [REDACTED] letter was false and a product of coercion. He notes further that he found Petitioner guilty at the NJP based on this letter, and that he would have acquitted Petitioner of the charges had he known then what he knows now. In his letter of 15 January 1998, (then) Major [REDACTED] also refers to Gunnery Sergeant [REDACTED] "the most crooked Staff NCOIC in [his] command," noting that he was eventually relieved and court-martialed.

4. Analysis

a. Under paragraph 6.d. of reference (b) and section 0118b. of reference (c), subsequent ameliorative action on NJP may be taken within a reasonable period after imposition by the NJP authority who imposed the punishment, a successor in command, or a new commander in cases where a service member is subsequently transferred. Absent unusual circumstances, 4 months is considered a reasonable period. Petitioner provides no evidence of the extraordinary circumstances under which a delay of almost 9 years could be considered "reasonable." There is no statutory

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U.S. MARINE CORPS

bar, however, to setting aside an NJP so long after the fact. If, however, the BCNR declines to rely on the purported setting aside of the NJP as a basis for removing the record of NJP from Petitioner's record, the relief requested should nonetheless be granted on independent grounds.

b. As a matter of law, Petitioner should not have been found guilty of violating MCO P1100.72 because that order was not punitive in nature. In the interim since Petitioner's NJP, reference (d) has superseded MCO P1100.72; it did not change the pertinent portions of the predecessor order, however. The stated purpose of reference (d) as a whole is to promulgate policies and procedures for guidance of recruiting personnel. The purpose of the section that prohibits negotiating with criminal courts is to provide general policy and instructions governing personnel procurement.

c. Orders subject to enforcement through criminal prosecution must be punitive in nature. For an order to be punitive, it must contain mandatory terms, it must not depend on promulgation of regulations by subordinate authority for enforcement, and the punitive nature of the order must be clearly and unambiguously stated. Policy statements or guidelines are not enforceable as punitive regulations. The order in this case clearly failed to meet the criteria of a punitive order. It established policies and procedures only, and contained no statement that it was punitive in nature. Accordingly, any violation of the order was not properly punishable under the UCMJ.

d. Even if the order had been punitive and could therefore have been enforced through imposition of punishment, it is clear from the letters of Sergeant [REDACTED] and [REDACTED] that Petitioner did not violate the terms of the order. The order prohibited intervention in the criminal process on behalf of a recruit candidate. The decision to dismiss the charge against Sergeant [REDACTED] resulted from negotiation between Sergeant [REDACTED] the prosecutor, and the judge, and it preceded Petitioner's contact with Sergeant [REDACTED] and his subsequent attempt to communicate with the judge. Moreover, it seems clear that Petitioner's only purpose in trying to contact the judge was to confirm that Sergeant [REDACTED] applied for enlistment. It is apparent that Petitioner did not attempt to intervene in the criminal process, and that he was not party to the negotiations that led to the dismissal of the charge against Sergeant [REDACTED]

e. Petitioner should not have been found guilty of violating

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U.S. MARINE CORPS

Article 80, UCMJ, for attempting to fraudulently enlist Sergeant [REDACTED]. Unlike the offense of violating a general order, which does not require that an accused actually know he is violating an order, the offenses of fraudulent enlistment and attempted fraudulent enlistment require that Petitioner have specifically intended to enlist a person made ineligible by applicable regulations. Petitioner maintains that he thought dismissal of the charge would cure Sergeant [REDACTED] ineligibility. He also asserts that Gunnery Sergeant Rupp confirmed that belief when asked. Both of these assertions are corroborated by Sergeant [REDACTED] statement. Even if he was incorrect, if Petitioner honestly believed that Sergeant [REDACTED] was eligible for enlistment, then he had an affirmative defense to the charge. The fact that Petitioner sought and received the concurrence of his immediate superior bolsters his assertion that he honestly believed Sergeant [REDACTED] would become eligible upon dismissal of the misdemeanor charge.

5. Conclusion. Accordingly, for the reasons set forth above, we recommend the requested relief be granted.

[REDACTED]

Head, Military Law Branch
Judge Advocate Division



2931-98

UNITED STATES MARINE CORPS
MARINE CORPS RECRUITING COMMAND
3280 RUSSELL ROAD
QUANTICO, VA 22134-5103

IN REPLY REFER TO
1070
A
15 Mar 99

MEMORANDUM for the Executive Director, Board for Correction of Naval
Records

Subj: ADVISORY OPINION IN THE CASE OF STAFF SERGEANT [REDACTED]
[REDACTED] USMC

Ref: (a) SS [REDACTED] ltr 1400 dtd 8 Apr 98
(b) Head, SJA memo 1070 JAM2 of 5 Feb 99

1. In response to the request for advisory opinion in reference (a), I have reviewed all enclosures pertaining to SS [REDACTED] request for removal of derogatory material from his service record and Official Military Personnel File (OMPF).
2. It is the opinion of the Recruiting Command that derogatory material entered in SSgt [REDACTED] Naval record should be removed and that he retain the additional MOS of 8411 and be considered for remedial promotion to Gunnery Sergeant.
3. It is believed that the charges against SSgt [REDACTED] and subsequent nonjudicial punishment proceedings against him were unjustified and were motivated by a Commanding Officer who was not informed of all factual circumstances at the time of his decision to impose NJP. Additionally, per reference (b), I concur with the opinion of legal counsel that Staff Sergeant [REDACTED] in no way intentionally tried to intervene in the criminal process of now Sergeant [REDACTED]

[REDACTED]

Colonel, U. S. Marine Corps
Chief of Staff
Marine Corps Recruiting Command

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

2931-98

IN REPLY REFER TO:
1400/3
MMPR-2
29 Mar 99

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

Subj: ADVISORY OPINION IN THE CASE OF STAFF SERGEANT [REDACTED]
[REDACTED] USMC

- Ref: (a) BCNR MEMO of 9 Nov 98
(b) CO 1st CEB, CampPen ltr 5800 CO of 21 Oct 98
(c) MCRC Memo 1070 A of 15 Mar 99 to BCNR

1. Reference (a) is a request for an advisory opinion on whether the removal of all derogatory material related to the nonjudicial punishment (NJP) imposed on 27 January 1990, the removal of relief for cause information, and the reinstatement of Military Occupational Specialty (MOS) 8411, would make Staff Sergeant [REDACTED] eligible for remedial consideration for promotion to gunnery sergeant.

2. Per references (b) and (c), the NJP imposed on 27 January 1990 has been set aside and Staff Sergeant [REDACTED]'s secondary MOS of 8411 has been reinstated. Since the NJP has been set aside and Staff Sergeant [REDACTED]'s MOS 8411 has been reinstated, he is eligible for remedial consideration for promotion to gunnery sergeant. Requests of this nature must be submitted to the CMC (MMPR-2) directly. Recommend he resubmit a package for remedial consideration for promotion to gunnery sergeant.

[REDACTED]

Assistant Head, Enlisted Promotions
Promotion Branch
By direction of
the Commandant of the Marine Corps