



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

TJR

Docket No: 4848-98

19 May 1999

[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 18 May 1999. 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 opinions furnished by Headquarters, Marine Corps, copies of which are attached.

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 regard, the Board substantially concurred with the comments contained in the advisory opinions.

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

Enclosures



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

IN REPLY REFER TO:

1400/3  
MMPR-2  
3 Sep 98

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

Subj: ADVISORY OPINION IN THE CASE OF [REDACTED]

Ref: (a) JAM2 MEMO 1070 of 26 AUG 98 to BCNR  
(b) MCO P1400.32 A

1. [REDACTED], a retired Marine, has requested the removal of his 27 August 1953 special court-martial (SCM) conviction and to be promoted to the rank of sergeant major. He believes the conviction was unfair and that he would have been promoted to sergeant major had he not received the SCM. According to reference (a), his request for removal of the SCM was denied. Since [REDACTED] records have not changed no further action can be taken. Recommend Gunnery Sergeant Breaux' request be denied.

*Richard B. Fitzwater*

RICHARD B. FITZWATER  
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  
26 AUG 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 [REDACTED]  
[REDACTED] U.S. MARINE CORPS (RET.)

1. We are asked to provide an opinion regarding Petitioner's claim that his 27 August 1953 special court-martial conviction was unfair. Petitioner claims that but for this conviction, he would have been promoted to sergeant major.

2. From the available records, we conclude that Petitioner's special court-martial was not unfair and should not be removed from his record. We defer as to whether Petitioner should have been promoted to sergeant major. Our analysis follows.

3. Background

a. Petitioner served on active duty from 1941 to 1945 and from 1949 to 1967, when he retired as a gunnery sergeant. Petitioner saw combat in Tinian and Saipan. Petitioner received the Silver Star and Purple Heart for combat action in Korea.

b. On 2 August 1953 in Korea, Petitioner's company commander ordered him to put his squad to work. Petitioner refused the order and was placed under apprehension. He was subsequently charged before a special court-martial with willfully disobeying a superior commissioned officer in violation of Article 90, Uniform Code of Military Justice (UCMJ). On 27 August 1953, contrary to his pleas, Petitioner was convicted and sentenced to be reduced to private first class and to forfeit \$75.00 pay per month for six months. The convening authority, Commanding Officer, 2d Battalion, 1st Marine Regiment, approved the sentence on 8 September 1953. On 21 September 1953, the supervisory authority, Commanding General, 1st Marine Division, approved only so much of the sentence as extended to reduction to private first class and forfeiture of \$75.00 pay per month for three months.

4. Analysis

a. Under 10 U.S.C. 1552(b), no correction may be made to a servicemember's record unless he files a request for correction within 3 years of discovering the error or injustice.

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

Petitioner does not adequately explain why he waited 45 years to file this request for correction. It should be denied as untimely.

b. As to the merits, Petitioner claims that his special court-martial was unfair. He asserts that it was his understanding that his squad would have the day off. Petitioner does not contest the fact that the company gunnery sergeant ordered his squad to work, and that Petitioner refused to obey the order. Nor does Petitioner dispute that he refused to obey the company commander's direct order to put his squad to work. Petitioner asserts that both the company gunnery sergeant and the company commander harbored bias and animosity toward him which resulted in the "get to work" order being issued. He claims this bias and animosity ultimately led to Petitioner's referral to a special court-martial.

c. Petitioner's arguments have no legal merit. Whatever their motivation, Petitioner's company commander and company gunnery sergeant issued a lawful order which Petitioner disobeyed at his peril. Petitioner's disobedience is aggravated by the fact that it took place in a combat zone and appears to have occurred in front of other Marines. Those facts, coupled with Petitioner's prior disciplinary record (described below), make appropriate a referral of the matter to a special court-martial.

d. It is also important to note that Petitioner's battalion commander, not his company commander or company gunnery sergeant, referred his charge to a special court-martial and approved the sentence. Petitioner's division commander also reviewed the case and reduced the sentence. Petitioner has not alleged that these officers harbored bias or animosity towards him and we find no such evidence in the available records. Nor does Petitioner claim that these officers abused their discretion in referring the matter to a special court-martial or in approving the sentence. Indeed, we find no abuse of discretion by either the battalion or division commander.

e. According to the Defense Finance and Accounting Service, a private first class with over eight years of service was paid \$117.00 per month in 1953. Petitioner's approved forfeiture of \$75.00 pay per month for three months was within the lawful limits of two-thirds pay per month for six months. We conclude, therefore, that Petitioner's sentence was lawful. We would also note that Petitioner's sentence was far below the jurisdictional

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

limits of the special court-martial; Petitioner could have been sentenced to as much as six months confinement, reduction to private, forfeitures of two-thirds pay per month for six months, and a bad conduct discharge.

f. We defer as to whether Petitioner would have been promoted to sergeant major but for this special court-martial conviction. We would observe, however, that Petitioner was the subject of other disciplinary proceedings. On 1 July 1943 and again on 29 January 1944, Petitioner was the subject of punishment by order of his commanding officer for being absent from duty without leave.<sup>1</sup> On 28 December 1950, Petitioner was found guilty before a deck court of being absent from duty without leave.<sup>2</sup> Petitioner's absence resulted in his missing the sailing of the ship to which he was attached. On 18 June 1951, Petitioner pleaded guilty before a summary court-martial to being disorderly in uniform in a public place, to disobeying a lawful order from a superior petty officer, and to use of disrespectful language toward a superior petty officer.

5. Conclusion. We conclude that Petitioner's special court-martial did not result in an error or injustice and should not be removed from his record. Accordingly, we recommend relief be denied.

*M. W. Fisher, Jr.*

M. W. FISHER, JR.  
Lieutenant Colonel  
U.S. Marine Corps  
Head, Military Law Branch  
Judge Advocate Division  
By direction of the  
Commandant of the Marine Corps

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<sup>1</sup> This punishment was authorized under Articles 25 and 26, Articles for the Government of the Navy. See paragraphs 101 and 102, Naval Courts and Boards (1923).

<sup>2</sup> Deck courts were convened under Article 64, Articles for the Government of the Navy, to adjudicate minor charges against enlisted personnel and could impose no more than twenty days confinement or forfeiture of pay. See paragraph 141, Naval Courts and Boards (1923).