



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

SMC

Docket No: 02021-99

12 August 1999

[REDACTED] USMC
[REDACTED]
[REDACTED]

Dear Staff Sergeant [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.

You requested removal of all reference to your special court-martial (SCM) of 4 April 1997, removal of documents relating to your relief for cause from recruiting duty, and restoration of your 8411 (recruiter) Military Occupational Specialty (MOS). Headquarters Marine Corps (HQMC) has removed all documents directly concerning the SCM, and they will remove references to the SCM from the documents concerning your relief for cause.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 12 August 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 HQMC, dated 24 May 1999, and the Marine Corps Recruiting Command, dated 12 July 1999, copies of which are attached. They also considered your letter dated 26 July 1999 with enclosures.

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 warranting removal of your relief for cause or restoration of your MOS. In this connection, the Board substantially concurred with the comments contained in the advisory opinions. Accordingly, your application for relief beyond that effected by HQMC 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:

1070

JAM3

24 MAY 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 [REDACTED]
USMC

1. We are asked to provide an opinion regarding Petitioner's request to remove from his records information related to his conviction by summary court-martial and reinstatement of his military occupational specialty (MOS) as a recruiter.
2. We recommend the requested relief be granted in part.
3. Background. Petitioner served as a canvassing recruiter assigned to Marine Corps Recruiting Station, Louisville, Kentucky. Petitioner was the subject of a preliminary inquiry which led to his summary court-martial conviction on 4 April 1997 for inappropriate contact with a member of the Delayed Entry Program, in violation of Article 92, Uniform Code of Military Justice. Petitioner was sentenced to forfeit \$1000.00 pay. The convening authority suspended all forfeitures in excess of \$250.00 pay. On appeal, the Judge Advocate General of the Navy set aside the finding of guilty and the sentence, and dismissed the charge because the convening authority had not created an adequate record of trial.
4. Analysis
 - a. Petitioner seeks removal from his records of all reference to his conviction by summary court-martial. This request should be granted. We recommend any records from the court-martial, as well as any performance evaluation¹ or personnel action that included reference to or relied on the summary court-martial conviction as a basis for the evaluation or action, be removed from Petitioner's official files.

¹ We would also observe that the summary court-martial conviction was discussed in Petitioner's performance evaluation for the period 970301 to 970424. Because Petitioner appealed his conviction, discussing it in a performance evaluation prior to a decision on appeal was inappropriate under paragraph 4006.7b of MCO 1610.7D.

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

b. We note, however, that the Judge Advocate General's decision to "set-aside" the findings of guilt and sentence in Petitioner's case does not amount to either an acquittal or a finding of innocence. Thus, although those records relying on or referencing the summary court-martial conviction should be removed, records discussing the *underlying facts* without reference to the court-martial need not be removed. For instance, designation of an MOS is a decision the Commandant of the Marine Corps makes in the exercise of his discretion. See paragraph 4d, MCO 1326.6C and paragraph 3105.3a, MCO 1000.6F, Assignment Classification, and Travel Systems Manual. Although Petitioner's conviction has been set aside, the *underlying facts* of Petitioner's inappropriate conduct remain, and it would be appropriate for a representative of the Commandant of the Marine Corps to review the underlying facts to ascertain if Petitioner's recruiting MOS should be voided.

c. Similarly, relieving a subordinate for cause is a decision left to the discretion of the commander. Again, although Petitioner's conviction was set aside, the underlying facts may nevertheless support Petitioner's relief for cause. Once Petitioner's record is cleansed of all references to his summary court-martial conviction, we conclude it would be appropriate for the Commandant of the Marine Corps to review the cleansed record to determine whether Petitioner should have been relieved based on his underlying conduct.

5. Conclusion. Accordingly, we recommend relief be granted to the extent of ordering the removal from Petitioner's records of all references to his conviction at summary court-martial and all performance evaluations or personnel actions relying upon the conviction. However, we recommend appropriate officials review the cleansed records to determine what personnel actions might be appropriate based on the underlying facts.

[REDACTED]

Acting Head
Military Justice Branch
Judge Advocate Division

2021-99



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

IN REPLY REFER TO
1070
A
12 Jul 99

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

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

Ref: (a) MMER ltr dtd 24 May 99
(b) Sr [REDACTED] CNR application w/enclosures

1. Returned. In response to reference (a), and after a careful review of Sergeant [REDACTED] request per reference (b), it is my recommendation that Sergeant [REDACTED] petition be denied.

2. Although Sergeant [REDACTED] court martial conviction was set aside due to an insufficient record of trial, it doesn't erase the fact that Sergeant [REDACTED] actions were investigated and substantiated, causing his Commanding Officer to relieve him for cause.

3. Sergeant [REDACTED] should not be now, nor in the future, allowed the assignment of the 8411 MOS.

[REDACTED]

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