



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

CRS  
Docket No: 8054-01  
16 June 2002

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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

Encl: (1) Case Summary  
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Marine Corps, applied to this Board requesting, in effect, that his naval record be corrected by restoring him to the rank of sergeant (SGT; E-5).

2. The Board, consisting of Messrs. Rothlein, Caron, and Agresti, reviewed Petitioner's allegations of error and injustice on 12 June 2002 and, pursuant to its regulations, determined that corrective action 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. Petitioner's application to the Board was filed in a timely manner.

c. On 13 October 1999 Petitioner enlisted in the Marine Corps Reserve after more than eight years of prior active service with the Marine Corps. He then remained on active duty in support of a reserve unit. The record reflects that until the incident at issue, Petitioner served well and without disciplinary infractions.

d. Petitioner was arrested and confined by civil authorities on 24 March 2001 for domestic violence upon an enlisted female Marine with whom he was living. Upon being confined, he called his command and was informed by a staff sergeant (SSGT; E-6) that

he was to be placed on leave. In a statement submitted with Petitioner's application, the SSGT stated that leave was authorized by a master gunnery sergeant (MGYSGT; E-8). Petitioner was released from confinement on 29 March 2001.

e. On 11 April 2001 Petitioner was convicted by civil authorities of domestic violence. The court sentenced him to three years probation and a fine of \$300. The conditions of the probation were 14 days of supervised public service, participation in 10 weeks of various meetings and enrollment in a domestic violence prevention program. Additionally, Petitioner was ordered to have "no contact" with his victim.

f. On 2 June 2001 the commanding officer (CO) imposed nonjudicial punishment (NJP) on Petitioner for unauthorized absence (UA) from 25 to 29 March 2001. The punishment imposed consisted of a reduction in rank from SGT to corporal (CPL; E-4).

g. On 7 June 2001 Petitioner appealed the NJP. He argued that he was being used as an example and the punishment was unjust. In this regard, he noted that the SSGT and MGYSGT had said that he was going to be "run on leave" for the period he was confined by civil authorities. Accordingly, he did not immediately bail himself out of jail. He stated he was innocent of the charge. Further, he stated that many Marines at the command were unauthorized absentees on a weekly basis, but none received NJP.

h. On 2 July 2001 Petitioner's appeal was denied. In doing so, the appeal authority stated that the evidence showed that Petitioner was in the hands of civil authorities and, therefore, he was an unauthorized absentee. Lastly, the appeal authority stated that at no point did he expect a noncommissioned officer (NCO) to be an unauthorized absentee.

i. In his application, Petitioner contends that it was unfair to impose NJP for the four day period of UA because "I could have bailed myself out and would have if I knew I was going to be charged..." He points out the statement of the SSGT to the effect that he would be placed on leave and states that this individual was unavailable during the NJP process.

j. An advisory opinion from the Staff Judge Advocate (SJA) to the Commandant of the Marine Corps, dated 18 April 2002, recommends that relief be denied. The SJA states that in the situation at issue, the absence may be excused as unavoidable only if it is clearly established that the arrest and detention was not caused by the misconduct of the Marine. The opinion further states that it is irrelevant whether or not Petitioner was granted leave after he was confined, because clearly he was absent from his unit without authority for at least that period of time. Since the CO was not authorized to subsequently excuse the absence, the NJP for UA was entirely appropriate. Finally,

the SJA notes that only CO's are authorized to grant leave and liberty, and not staff NCO's (SNCO's) such as the SSGT and MGYSGT.

k. In Petitioner's first rebuttal to the advisory opinion, he states that "integrity is the question here. Two of my SNCO's told me they were going to run me on leave...I however was never run on leave." Further, he says that a sergeant in the office that wrote the advisory opinion told him that he had been "railroaded". Concerning the authority to grant leave, Petitioner states that the MGYSGT was the direct representative of his CO, and he has even seen CPLs sign leave papers at his command.

l. In Petitioner's second rebuttal, he again points out that he was confined on a Saturday and could have made bail in order to be at work on Monday. He also submits a recent leave authorization that was signed by a SSGT, and not by the CO. Lastly, he states that he was not authorized to go beyond the MGYSGT in the chain of command without requesting mast.

#### MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, a majority of the Board, consisting of Messrs. Rothlein and Agresti, concludes that Petitioner's request warrants favorable action, specifically, removal of the NJP from the record.

The majority has several reasons for concluding that the NJP should be removed. First, the majority believes that, contrary to the statement in the advisory opinion, either the SSGT or the MGYSGT may well have had the authority to grant Petitioner leave. While the governing directive may reserve this authority to the CO, it would not appear that there is any prohibition against delegating the authority to a lower level, such as the MGYSGT.

However, even if neither the MGYSGT or the SSGT had actual authority to grant Petitioner leave, it appears that they held themselves out as being so authorized, and Petitioner believed them. The majority believes that Petitioner's reliance, even though incorrect, was not unreasonable under the circumstances. Accordingly, even if it was technically proper to deem Petitioner UA and punish him at NJP, such action was unfair and should not be permitted to stand.

Finally, the majority believes that the adverse action in this case was influenced by Petitioner's underlying misconduct of domestic abuse, and the command took the harshest action they could against Petitioner. In this regard, the majority in no way condones Petitioner's domestic violence. However, his civil conviction for this incident is not the subject of his

application, and references to that conviction will remain in the record regardless of the outcome of this case.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing all references to the NJP of 2 June 2001, including but not limited to any entry on the Offenses and Punishments page (page 12).

b. That the record be further corrected to show that Petitioner was never reduced in rank from SGT to CPL.

c. 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.

d. 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.

MINORITY CONCLUSION:

The minority member of the Board, Mr. Caron, agrees with the majority that corrective action is warranted, but believes such action should be limited to granting Petitioner's request to restore him to the rank of SGT.

Mr. Caron cannot go along with the recommendation of the majority to remove the NJP because he agrees with the advisory opinion that Petitioner was, in fact, UA from 25 to 29 March 2001. Accordingly, he cannot fault the CO for imposing the NJP. However, the minority member does believe that the representations made to Petitioner to the effect that he would be granted leave constitute a mitigating factor in the case. Taking this factor into account, along with Petitioner's many years of unblemished service, the minority believes that an unsuspended reduction was unduly harsh punishment. Accordingly, the minority concludes that the record should be corrected to show that the reduction in rank imposed at the NJP was suspended for six months.

MINORITY RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that at the NJP of 2 June 2001, the reduction from SGT to CPL was suspended for a period of six months.

b. That the record be further corrected to show that Petitioner was never reduced in rank from SGT to CPL.

c. 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.

d. 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.

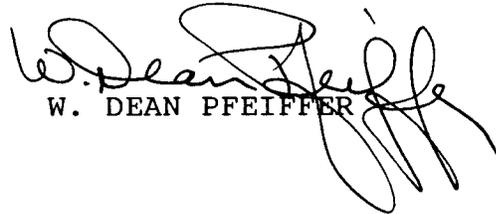
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder



ALAN E. GOLDSMITH  
Acting Recorder

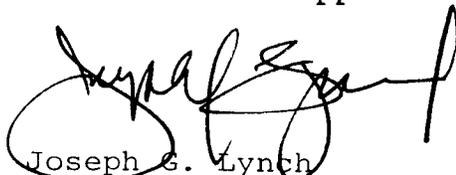
5. The foregoing action of the Board is submitted for your review and action.



W. DEAN PFEIFFER

MAJORITY REPORT:  
Reviewed and approved:

MINORITY REPORT:      SEP 10 2002  
Reviewed and approved:



Joseph G. Lynch  
Assistant General Counsel  
(Manpower and Reserve Affairs)