



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

JMP
Docket No: 4948-18
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER JAMES D. MUHAMMAD
XXX XX [REDACTED] USMC

Ref: (a) 10 U.S.C. § 1552
(b) MARADMIN 308/01
(c) MARADMIN 502/02
(d) U.S. District Court for the District of Columbia order of 22 Dec 03
(e) U.S. District Court for the District of Columbia order of 27 Oct 04
(f) U.S. District Court for the District of Columbia order of 6 Apr 05
(g) USD(P&R) memo, "Implementation of Resumption of the Anthrax Vaccine Immunization Program (AVIP) Under Emergency Use Authorization (EUA)," of 29 April 2005
(h) U.S. Court of Appeals for the District of Columbia Circuit opinion of 9 Feb 06
(i) SECDEF memo, "Anthrax Vaccine Immunization Program," of 12 October 2006
(j) USD(P&R) memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations," of 25 July 2018

Encl: (1) DD Form 149 w/attachments

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted Marine, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting the following relief and corrections to his record:

a. Investigate an administrative error that amounted to unjust delay in Petitioner's career progression and graduation from Officer Candidate School (OCS) and administratively award Petitioner the grade of O-1E.

b. Upgrade Petitioner's bad-conduct discharge (BCD) to honorable characterization of service.

c. Update Petitioner's reentry code to RE-1.

d. Restore Petitioner's paygrade to E-5 and update all applicable documents.

e. Update the following errors on Petitioner's Certificate of Release or Discharge from Active Duty (DD Form 214):

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- 1) Block 11 to include missing Military Occupational Specialty (MOS) [REDACTED]
 - 2) Block 12a to correct date of entry as 19991129.
 - 3) Block 15a to properly record "yes."
 - 4) Blocks 24, 25, 26, and 28 consistent with request to upgrade Petitioner's characterization of service and reentry code.
 - 5) Redact block 29 to remove "time lost" dates.
 - 6) Adjust Petitioner's date of discharge to match date of approval of his application.
- f. Expunge Petitioner's DNA data from all databases.
- g. Provide a newly updated fitness report to reflect Petitioner's exemplary performance above grade, training, and education.
- h. Administratively recall Petitioner to active duty for one day to award him a Navy Achievement Medal (NAM) for sustained exemplary performance.
- i. Forward a favorable letter to the Department of Veterans Affairs (VA) that warrants equitable tolling for use of GI Bill and Marine Corps College Fund as annotated on service contract.
- j. Determine that, had it not been for matters pertaining to his anthrax vaccine refusal, Petitioner would have participated in a deployment with the Marine Expeditionary Brigade to Kuwait and then Iraq, and been meritoriously promoted to the grade of staff sergeant.
- k. Locate all documentation that would ultimately be found as a result of a Freedom of Information Act (FOIA) request or other extraordinary requests and investigate the Meritorious Commissioning Program (MCP) selection board results. Return a finding that Petitioner was originally selected for the program and would have graduated and been commissioned as an O-1E in the naval aviation program.
2. The Board, consisting of Ms. Ruffin, Mr. Lind, and Mr. Rosen, reviewed Petitioner's allegations of error and injustice on 19 September 2019 and, pursuant to its regulations, determined the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval service 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 regulation within the Department of the Navy.

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b. Although enclosure (1) was not filed in a timely manner, it is in the interest of justice to review the application on its merits.

c. Petitioner enlisted in the Marine Corps on 30 December 1999. On 12 December 2002, he was formally counseled after refusing to take the anthrax vaccination. He was again formally counseled on 13 December 2002 after refusing to take the anthrax vaccination after being briefed by qualified medical personnel and personally counseled by the company commander. On 9 April 2003, Petitioner was convicted by special court-martial (SPCM) for willfully disobeying a lawful command from a superior commissioned officer for refusing to take the anthrax vaccine. The SPCM adjudged a bad-conduct discharge (BCD), reduction in rank, and confinement. The BCD was subsequently approved at all levels of review, and on 20 March 2007, Petitioner was discharged.

d. The following information provides details regarding the evolution of the anthrax vaccination policy in federal court and within the Department of Defense:

1) In June 2001, reference (b) announced the temporary removal of authorization to administer the anthrax vaccine.

2) In September 2002, reference (c) ordered a threat-based resumption of the Anthrax Vaccination Immunization program (AVIP), which allowed for immediate resumption to individuals attached to priority groups.

3) On 22 December 2003, reference (d) granted a motion for a preliminary injunction, enjoining the Secretary of Defense (SECDEF) from inoculating Service members without their consent.

4) On 27 October 2004, reference (e) rendered the involuntary anthrax vaccination program, as applied to all persons, illegal absent consent or a presidential waiver.

5) On 6 April 2005, reference (f) modified the injunction by adding "this injunction, however, shall not preclude defendants from administering the anthrax vaccine absorbed (AVA), on a voluntary basis, pursuant to the terms of a lawful emergency use authorization."

6) On 29 April 2005, reference (g) required all members be informed that

you may refuse anthrax vaccination under the emergency use and you will not be punished. No disciplinary action or adverse personnel action will be taken. You will not be processed for separation, and you will still be deployable. There will be no penalty or loss of entitlement for refusing anthrax vaccine.

7) In its order of 19 December 2005, the Food and Drug Administration (FDA) classified the AVA as safe and effective and not misbranded.

8) In February 2006, reference (h) remanded the case of *Doe v. Rumsfeld* to district court after the FDA classification was completed because the appeal was moot.

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9) On 12 October 2006, reference (i) announced the resumption of the mandatory anthrax vaccine immunization program.

e. Petitioner contends clemency is warranted pursuant to reference (j). Specifically, Petitioner contends that:

1) His request is consistent with the intent of reference (j).

2) He has demonstrated personal sacrifices and achievements consistent with overall policy, and the punishment levied was excessive and offered little or no rehabilitative opportunity. Further, Petitioner has taken personal initiative to atone for what he claims was considered, at the time, to be an infraction, and he has “overpaid to the degree of an imbalance of justice.”

3) His overall record reflects that his characterization of service was “not only honorable but exemplary, marred by a sole event” that culminated in a BCD awarded at SPCM that “imbalances adjudication compared to other individuals with many or felonious infractions.”

4) The timing of his SPCM would have produced a different result after the conclusion of *Doe v. Rumsfeld* in the federal courts. Reference (j) specifies, “Changes in policy, whereby a service member under the same circumstances today would reasonably be expected to receive a more favorable outcome than the applicant received, may be grounds for relief.”

5) The uniformity and unfair disparities in his punishment warrant relief.

6) His misconduct was “non-violent.”

7) He has clearly demonstrated a redemptive value to society.

8) At the time of his refusal to take the vaccine, [REDACTED] Petitioner’s awareness that the AVA package insert contained cautions regarding [REDACTED] provided additional reasons for his refusal.

9) Since his SPCM more than 16 years ago, Petitioner’s post-service conduct has been exemplary, and he continues to improve his standing in society. Specifically, he contends that he has “led a productive and successful life, reaching many of my goals.” He has married, parented three children, and purchased a home. Petitioner owns and operates a successful small company with three full-time, one part-time, and three surge employees. He serves as a volunteer board member and board chair for a private school in his community. He is an active member in two motorcycle riding clubs and club founder and founding president of a third riding club. Petitioner also coaches his eldest children in motorcycle road racing and, along with his family, actively participates in Taekwondo, earning his black belt. He also is a certified USA Taekwondo nationally ranked referee. Petitioner has also successfully received his private pilot certificate and is active in his local aviation community. Additionally, Petitioner is an active, trained spiritual counselor.

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10) Petitioner's character and reputation have been established by numerous letters of recommendation and signed statements. (He submitted 12 advocacy letters in support of his request for relief.)

11) Petitioner's career was "sidelined" due to refusal to take the anthrax vaccine. He was unjustly and improperly removed from consideration for selection to the MCP.

12) Petitioner was originally designated MOS [REDACTED]. The Marine Corps depreciated the 4000 series occupation code in favor of [REDACTED] OCC, and Petitioner was later designated [REDACTED]

13) Petitioner is eligible for the GI Bill as recorded on his enlistment contract and fulfilled during his period of service by contribution of \$100 per month for 12 consecutive months.

14) Petitioner qualifies for a second Good Conduct Medal because his qualifying time for issuance began the day after his SPCM, 10 April 2003, and ended on the date of closure by the court, 21 February 2007.

15) But for the controversy around the AVIP, Petitioner "very likely would have" continued with his military career through retirement eligibility.

16) Petitioner's treatment was unjust and the most severe of any other Service member who refused the vaccine due to "disparities in treatment which ranged from no adverse action, verbal reprimands, letters of reprimand, Article 15 and courts-martial."

17) Lenient judgment should be applied in granting redaction of time lost on DD 214.

18) Refusal to submit to anthrax vaccination should not be considered a "qualifying military offense," and Petitioner's DNA sample should therefore be expunged from all databases.

19) Because Petitioner's "successful completion of a BCNR request qualifies as a meritorious event in service member's career that warrants an award," Petitioner should be awarded a Navy Achievement Medal.

20) Petitioner should be awarded meritorious promotion to staff sergeant "commensurate with other members of [REDACTED] Battalion that deployed" because he was unjustly removed from the deployment roster due to his anthrax refusal.

21) Petitioner "would likely have been commissioned" as an O-1E, but, "due to intra-unit miscommunication" his commander's recommendation was rescinded through an "unofficial channel." Specifically, Petitioner contends the MCP selection board results were delayed while another candidate was selected in his place. He further contends that "subsequently, the unit matter was cleared up with a finding that he had zero culpability for the incident in question." Petitioner contends that, by the time he received the clarification via

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request mast procedures, it was too late to petition Headquarters, Marine Corps to attend OCS because the class had convened.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial relief.

The Board, applying the guidelines of reference (j) and specifically noting the federal court's decisions regarding the anthrax vaccine, corresponding Department of Defense guidance, and adjudication of similar misconduct in other Service members' cases, determined that Petitioner's request warrants clemency in the form of an upgraded characterization of service, a change to his reentry code to reflect a recommendation for reenlistment, and restoration of his last grade of E-5. The Board also determined that, in the interest of justice, Petitioner's "time lost" on block 29 of his DD Form 214 should be changed to remove the "time lost" due to confinement awarded by the SPCM. The Board, however, noting that there was no error or injustice in Petitioner's discharge date, and that clemency does not warrant adjustment of his discharge date, denied his request to adjust his date of discharge to match the date of this Board's final action.

The Board carefully reviewed Petitioner's application, weighed all potentially mitigating factors, and considered each of Petitioner's contentions and all post-service statements and documentation. Because the Board is not an investigatory body, it denied Petitioner's requests to "investigate an administrative error," "locate all documentation that would ultimately be found as a result of any FOIA or other extraordinary requests," and "investigate the MCP selection board results." The Board also determined that there was insufficient evidence of an error or injustice warranting Petitioner's promotion to O-1E.

The Board further determined that its favorable decision to grant clemency in the form of an upgraded characterization of service did not warrant a "newly updated fitness report" or "administrative recall to active duty for one day for award of a Navy Achievement Medal". Further, the Board determined that its decision did not warrant a purely speculative determination that "but for" his refusal of the anthrax vaccine, Petitioner would have been meritoriously promoted, and denied his request to be administratively promoted to staff sergeant.

The Board, noting it does not have the authority to expunge DNA data, denied Petitioner's request to expunge his DNA data from databases. Because Petitioner was convicted of a "qualifying military offense"—defined by section 1565(e)(1) of Title 10, U.S. Code, as "[a]ny offense under the Uniform Code of Military Justice for which a sentence of confinement for more than one year may be imposed"—the law required collection of a sample of his DNA to be furnished to the Secretary of Defense for analysis, the results of which were required to be furnished to the FBI for inclusion in the CODIS database. 10 U.S.C. § 1565(b); DoD Instr 5505.14, encl. (4). Even if Petitioner had not been convicted of a qualifying military offense, his request for expungement should have been directed to the Clerk of Court of the Navy and Marine Corps Court of Criminal Appeals. *See* DoD Instr 5505.14, encl. (4), ¶6a.

The Board determined that Petitioner's request for a "favorable letter forwarded to the VA" specifically addressing "equitable tolling for use of GI Bill and Marine Corps College Fund"

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would be granted only to the extent of the Board's obligation to provide confirmation of when Petitioner's application was received.

Lastly, the Board noted the following requests fell under the purview of Headquarters Marine Corps and declined to recommend action:

- 1) Issuance of second Good Conduct Medal,
- 2) Addition of MOS [REDACTED] to block 11 of DD Form 214,
- 3) Correction of block 12a of DD Form 214, and
- 4) Update of block 15a to "yes" on DD Form 214.

RECOMMENDATION:

In view of the above, the Board directs the following corrective action:

Petitioner be issued a new DD Form 214 indicating the characterization of service as "honorable," narrative reason for separation as "secretarial authority," separation code as "JFF1," separation authority as "MARCORSEPMAN 6421," and reentry code as "RE-1J." The "time lost" annotated on his previously issued DD Form 214 should be removed from the new DD Form 214.

Petitioner's record be corrected by restoring him to the grade of E-5 as if he had not been reduced in grade at SPCM.

The Defense Finance and Accounting Service (DFAS) will complete an audit of Petitioner's records and make payment of any money Petitioner may potentially be entitled to as a result of his restoration to the grade of E-5.

Headquarters Marine Corps should review the following relief requested by Petitioner in light of this Board's recommended action:

- 1) Issuance of second Good Conduct Medal,
- 2) Addition of MOS [REDACTED] to block 11 of DD Form 214,
- 3) Correction of block 12a of DD Form 214, and
- 4) Update of block 15a to "yes" on DD Form 214.

That a copy of this report of proceedings be filed in Petitioner's naval record.

That, upon request, the Department of Veterans Affairs be informed that Petitioner's application was received by the Board on 14 June 2018.

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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.

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.

10/30/2019

X 

ELIZABETH A. HILL
Executive Director

Signed by: HILL.ELIZABETH.ANNE.1106915438



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

JMP

Docket No: 4948-18

Ref: Signature Date

MR [REDACTED]
[REDACTED] AVE NW STE 700
WASHINGTON DC 20036

Dear Mr. [REDACTED]

This is in reference to your interest, as counsel, in the case of your client, Mr. James. D. Muhammad, a former enlisted member of the United States Marine Corps., in reference to his application for correction of his naval record pursuant to Title 10, United States Code, Section 1552.

Regarding the request for a personal appearance, the Board determined that a personal appearance with or without counsel will not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered the case based on the evidence of record.

The final decision in his case is set forth in the Board's report of proceedings, a copy of which is enclosed. The approved changes to his naval record will be made by the Commandant of the Marine Corps (CMC)(Code MMRP), Headquarters, United States Marine Corps, 2008 Elliot Road, Quantico, VA 22134-5030. Please wait at least 180 days from the date of this letter before contacting CMC about the status of your case.

After CMC makes these changes, the Defense Finance and Accounting Service (DFAS) will make payment of any money that he may be entitled.

Questions concerning money paid and/or the manner of computation should be directed to DFAS, not the Board. Please do not contact DFAS until at least 90 days from the receipt of this letter. If he has not received payment after 90 days, he may contact DFAS via mail at DFAS-IN, 8899 East 56th Street, Department 3300 (Attn: COR/Claims), Indianapolis, IN 46249-3300 or call commercial 1-866-912-6488 to inquire about the status of his pay. Also, he should immediately notify DFAS of any change in his mailing address.

Lastly, he is entitled to have the Board reconsider its decision upon submission of new matters, which will require him to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records.

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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,

10/30/2019

X 

ELIZABETH A. HILL

Executive Director

Signed by: HILL.ELIZABETH.ANNE.1106915438

Enclosure:



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

JMP
Docket No: 4948-18
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records
To: Commandant of the Marine Corps

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER JAMES D. MUHAMMAD
XXX XX [REDACTED] USMC

Ref: (a) 10 U.S.C. § 1552

Encl: (1) Copy of approved Report of Proceedings w/o attachments
(2) Copy of letter to Subject

1. In accordance with the reference, the Board for Correction of Naval Records has reviewed allegations of error and injustice in Subject's naval record.
2. The designated representative of the Assistant Secretary of the Navy for Manpower and Reserve Affairs has reviewed the proceedings of the Board and approved the recommendation for corrective action as set forth in enclosure (1).
3. Regulations approved by the Secretary of the Navy require that Subject's naval record be corrected, where appropriate, in accordance with the approved recommendation of the Board.
4. It is requested that this Board be furnished a copy of any correspondence relating to the approved recommendation.

10/30/2019

X 

ELIZABETH A. HILL
Executive Director
Signed by: HILL.ELIZABETH.ANNE.1106915438



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
MANPOWER MANAGEMENT RECORDS AND PERFORMANCE BRANCH
2008 ELLIOT ROAD
QUANTICO, VA 22134-5030

1070
MMRP-13/MOD
31 Jan 20

Mr. James D. Muhammad
[REDACTED]
[REDACTED]

Dear Mr. Muhammad:

Per the decision rendered by the Board for Correction of Naval Records letter of October 30, 2019, enclosed is your new DD Form 214 and Honorable Discharge Certificate.

Sincerely,

A handwritten signature in blue ink, appearing to read "F. W. MAMEA", is written over the typed name.

F. W. MAMEA
Human Resources Assistant
Modifications Unit MMRP-13
Manpower Management Records and
Performance Branch
By direction of the Commandant of the Marine Corps

Enclosures: 1. DD Form 214 (Member 1, 3 and 4)
2. Honorable Discharge Certificate

Honorable Discharge



from the Armed Forces of the United States of America

This is to certify that

SERGEANT JAMES DAVID MUHAMMAD

was Honorably Discharged from the

United States Army Corps

on the ____²⁰TH day of _____ March 2007 _____ This certificate is awarded

as a testimonial of Honest and Faithful Service

P. J. Ferraro

P. J. FERRARO, COL, USMC (RET.)



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2008 ELLIOT ROAD
QUANTICO VIRGINIA 22134-5103

IN REPLY REFER TO:
1650
MMMA-3A
22 Jan 20

Mr. James D. Muhammad
[REDACTED]

Dear Mr. Muhammad:

This responds to your inquiry concerning your eligibility for a second Marine Corps Good Conduct Medal for your service in the U.S. Marine Corps.

This is written verification that you are entitled to a second Marine Corps Good Conduct Medal for service during the period December 30, 2002 to December 29, 2005. The Marine Corps Good Conduct Medal with Certificate and one bronze star is forwarded as the enclosure.

The Manpower Management Records Research and Reconstruction Section (MMRP-10), 2008 Elliot Road, Quantico, Virginia 22134, will forward a correction of your DD-214 to you under separate correspondence. Any further correspondence relating to this correction should be addressed to that Branch. Their telephone number is (800) 268-3710.

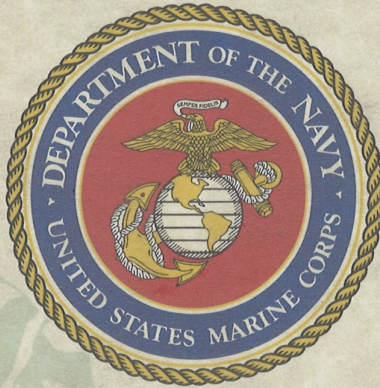
A copy of this letter will be filed in your official military records.

Sincerely,

B. J. HILL
Head, Policy and Verification Section
Military Awards Branch, (MMMA-3)
Manpower Management Division
By direction of the
Commandant of the Marine Corps

Encl: (1) One bronze star for the Marine Corps Good Conduct Medal
w/Certificate

United States Marine Corps



GOOD CONDUCT MEDAL

The Commandant of the Marine Corps takes great pleasure in awarding the Good Conduct Medal to:

SERGEANT JAMES D. MUHAMMAD, USMC
SECOND AWARD

*For Service as set forth on the following
CITATION:*

*Throughout the period **DECEMBER 30, 2002** to **DECEMBER 29, 2005**, you distinguished yourself through your exemplary personal and professional conduct. This award is testament to your selfless service and faithful adherence to the Corps' high standards. You have honored your obligations, displayed the courage of your convictions, and exhibited the highest degree of commitment. Your dedication and integrity reveal the depth of your character and are in keeping with the finest traditions of the United States Marine Corps.*

Given under my hand on behalf of the Commandant of the Marine Corps this
22ND day of **JANUARY 2020**

B. J. Hill

B. J. HILL

Military Awards Branch
Manpower Management Division
By direction of the
Commandant of the Marine Corps