



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

BJG
Docket No: 24-99
5 August 1999

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

Subj: CWO-2 [REDACTED] USMC (RE [REDACTED])
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 dtd 3 Dec 98 w/attachments
(2) HQMC MMSB-13 memo dtd 23 Feb 99
(3) HQMC MMPR memo dtd 16 Apr 99
(4) HQMC MPO-40 memo dtd 3 Mar 99
(5) 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 his naval record be corrected by removing documentation of his general court-martial (GCM) conviction on 10 July 1996. As indicated in enclosure (2), the Headquarters Marine Corps (HQMC) Records Correspondence Section, Personnel Management Support Branch (MMSB-13) has directed removal of this documentation pursuant to the action of the United States Navy-Marine Corps Court of Criminal Appeals on 21 November 1997. Petitioner further requested promotion to chief warrant officer-3 (CWO-3) effective 1 October 1996. The Board did not consider this request, since Petitioner was removed from the FY 1997 CWO-3 selection list by the President, and this Board does not have authority to overturn his actions. Petitioner also requested restoration of his lost annual leave balance from Fiscal Year (FY) 1992 and 1993. He further requested removal of his fitness reports beginning in August 1996. The Board did not consider this request, since the last fitness report appearing in his Official Military Personnel File (OMPF) ends 10 May 1995. Finally, by implication, he requested removal of his deemed failure of selection by the FY 1997 CWO-3 Selection Board and his failure by the FY 1999 CWO-3 Selection Board. By reason of his failures of selection for promotion, he was involuntarily retired on 1 May 1999. After the Board had considered Petitioner's case, and after his retirement had been effected, he confirmed it was his desire that his involuntary retirement be set aside, and that he be reinstated retroactively to active duty.

2. The Board, consisting of Mr. Neuschafer and Meses. Nofziger and Wiley, reviewed Petitioner's allegations of error and injustice on 28 April 1999, and pursuant to its regulations, determined that the limited 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. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. In correspondence attached as enclosure (3), the HQMC Promotion Branch (MMPR) has commented to the effect that Petitioner's implied request to remove his failures of selection has merit and warrants favorable action, since the GCM documentation was not removed until after he had failed by the FY 1999 CWO-3 Selection Board. Without this failure of selection, Petitioner would not have been deemed to have failed by the FY 1997 CWO-3 Selection Board.

c. It is unclear why Petitioner's OMPF reflects no fitness reports for the period between 10 May 1995 and his retirement on 1 May 1999. The record reflects no information indicating the absence of fitness reports for this period was in any way Petitioner's fault.

d. In correspondence attached as enclosure (4), the HQMC Manpower Policy Branch (MPO-40), the office having cognizance over the subject matter of Petitioner's request to restore his lost leave balance from FY 1992 and 1993, has commented to the effect that this request should be denied.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the contents of enclosures (3) and (4), the Board finds the existence of an injustice warranting limited relief.

The Board agrees with MMPR in concluding that both Petitioner's deemed and actual failures of selection for promotion should be removed. Removing the failures of selection removes the basis for Petitioner's involuntary retirement, so the Board finds action to effect his retirement should be set aside.

The Board considers that the unexplained absence of fitness reports from Petitioner's record since 10 May 1995 could harm his chances for future career advancement. Accordingly, they find that a curative memorandum should be placed in his record, with language to the effect that the gap in his fitness report record should not be held against him.

The Board agrees with the advisory opinion from MPO-40 in concluding that Petitioner's lost leave balance from FY 1992 and 1993 should not be restored.

In view of the above, the Board recommends the following limited corrective action.

RECOMMENDATION:

a. That Petitioner's record be corrected so that he will be considered by the next selection board convened to consider officers of his category for promotion to CWO-3 as an officer who has not failed of selection for promotion to that grade.

b. That any involuntary retirement or other action based in any way on Petitioner's deemed failure of selection by the FY 1997 CWO-3 Selection Board and his failure of selection by the FY 1999 CWO-3 Selection Board be cancelled and, if necessary, that related documentation be removed from his record. [Since his involuntary retirement on 1 May 1999 by reason of his failures of selection was effected after the Board had considered Petitioner's case, this recommendation requires correcting his record to show he was not involuntarily retired on 1 May 1999, but served continuously after that date; and that he be reinstated to active duty accordingly.]

c. That there be inserted in Petitioner's naval record, at an appropriate location, a memorandum containing relevant identifying data and including the following language:

Since the gap in Subject officer's fitness report record beginning 11 May 1995 was due to no fault of his own, it is directed that he not be penalized in any way by reason of this gap.

e. 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.

f. 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.

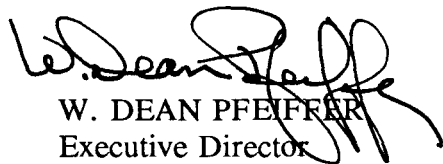
g. That Petitioner's request for restoration of his lost leave balance for FY 1992 and 1993 be denied.

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
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