



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

TRG
Docket No: 4591-00
15 October 2001

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) Title 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 Navy, filed enclosure (1) with this Board requesting that his record be corrected, in effect, by removing the nonjudicial punishment (NJP) of 17 December 1998 and related performance evaluations from his record.

2. The Board, consisting of Mr. Harrison, Mr. Geisler and Mr. Rothlein, reviewed Petitioner's allegations of error and injustice on 25 September 2001 and, pursuant to its regulations, determined that the 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. Petitioner's application was filed in a timely manner.

c. Petitioner enlisted in the Navy on 8 August 1994 for four years. He was released from active duty on 24 August 1997 to enter an officer training program. He reenlisted in the Navy for six years on 22 January 1998 for the purpose of being accepted into the enlisted commissioning program. When this occurred he was assigned to the University of New Mexico as a full time student.

d. Subsequently, an investigation was initiated to determine the circumstances surrounding the theft of a University of New Mexico parking pass by Petitioner. The investigating officer (IO) noted that Petitioner had failed to comply with parking regulations as evidenced by 20 citations, with fines

totaling \$200, and his car had been "booted". The IO also noted that Petitioner had made no effort to find the rightful owner of the parking pass, and had lied when questioned about it. He recommended that the commanding officer of the Naval Reserve Officer Training Corps (NROTC) unit impose NJP for the offense. The record shows that Petitioner received NJP on 13 October 1998. The Uniform Code of Military Justice (UCMJ) charges and specifications are as follows:

UCMJ Article 121: Wrongfully obtained and withheld property (the parking pass) of another Officer Candidate with intent to temporarily deprive him of its use.

UCMJ Article 133: Used Conduct unbecoming an officer and a gentleman by lying to command members in an attempt to explain his unlawful appropriation.

The punishment imposed was an oral reprimand, forfeiture of \$50 per month for two months and a suspended reduction in rate from HM3 (E-4) to HN (E-3).

e. On 29 December 1998, Petitioner was placed on six months probation based on the recommendation of a performance review board held on 17 December 1998. He was warned that any further lapse in character/officer qualities, or failure to comply with the terms of probation would result in disenrollment. On 12 March 1999 the probation was vacated because of his failure to change his duty status with the Department of Veterans Affairs, which would have resulted in a monetary loss of educational benefits. Petitioner was terminated from the commissioning program and was made available for orders.

f. In the performance evaluation for the period 22 January 1998 to 31 January 1999, Petitioner was assigned an adverse mark of 1.0 in the category of military bearing/character, and the NJP is mentioned in the comments section of the evaluation. However, he was recommended for promotion and retention in the Navy. In the next performance evaluation, for the period ending 30 July 1999, he was again assigned a mark of 1.0 in military bearing/character. The comments section states that he was being dropped from the Enlisted commissioning Program due to character issue violations and was being made available for assignment. In this evaluation, the promotion recommendation was "progressing", and he was recommended for retention.

g. Attached to enclosure (1) is an advisory opinion from the Head, Performance Evaluation Branch, Navy Personnel Command (NAVPERSCOM). The advisory opinion notes that the marks and comments in the performance evaluations were in accordance with

regulations, and Petitioner has not submitted any evidence to show that the commanding officer abused his discretion. However, the advisory opinion points out that the regulations do not allow for a favorable promotion recommendation if any trait grade is 1.0. Accordingly, the evaluations were being sent to the reporting senior for correction. NAVPERSCOM therefore, recommends that both performance evaluations be removed from the member's record, and that they be replaced with the corrected evaluations when received.

h. The NAVPERSCOM advisory opinion incorrectly assumes that Petitioner received a promotable recommendation on both evaluations. This is incorrect since the second evaluation was not marked "promotable" but only "progressing". However, in accordance with applicable directives, this was incorrect since a recommendation of "progressing" may not be made after an individual has already been deemed "promotable".

i. In his application, Petitioner states that he found the parking pass in his box at the NROTC unit and made an error in judgment when he began using the parking pass several weeks later. However, he denies any intent to steal the parking pass. He also contends that he was told that the charge under Article 133, UCMJ would be dropped because he was not a commissioned officer. He further states, in part, as follows:

... I believe that had I been at any other command in the Navy, my actions would have caused me to receive an oral reprimand, but not be charged with a crime that I did not commit: one that would follow me throughout my career and cause me many problems along the way. I believe the charges were extreme and unjust. The investigative procedures followed were molded to fit a pre determined outcome. The extremely severe and unjust actions of the Command were not warranted in this type of training environment, where mistakes are allowed to be made, especially in judgment, as long as the person realizes them and learns from them.

j. Attached to enclosure (1) is a letter to the Board, dated 7 December 2000, from the Commanding Officer, NROTC Unit, University of New Mexico which states, in part, as follows:

... Article 15 proceedings were conducted by my predecessor in command. (Petitioner's) contention that the charges imposed for violating UCMJ Article 133 were dismissed due to his not being a commissioned officer and therefore could not be held to those standards of conduct has been verified by personal contact with the officer who conducted the proceedings.

k. Attached to enclosure (1) is an additional statement from Petitioner. He points out that he is continuing to serve in an excellent manner as an HM3, has graduated with a degree in psychology, and is progressing in a masters program. He still desires to be an officer in the Navy.

1. UCMJ Article 133 applies only to an accused who is a "commissioned officer, cadet or midshipman." As previously noted Petitioner was serving in an enlisted status as an HM3, at the time of the offenses.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants partial favorable action. In view of the language of UCMJ Article 133 and the recommendation made by the commanding officer, the Board concludes that the NJP entry in the service record should be modified by deleting the charge under Article 133, UCMJ, conduct unbecoming an officer and a gentleman. However, the Board believes that the investigation supports the charge under Article 121, UCMJ and particularly notes Petitioner's many parking citations may have given him an incentive to use the parking pass. The Board concludes that the commanding officer did not abuse his discretion when he imposed NJP for the Article 121, UCMJ offense.

The Board believes that the NJP and the subsequent incident which resulted in the termination of his probation were sufficient to support the 1.0 marks in military bearing/character and the performance evaluations should not be removed from the record. The Board notes the technical errors in the promotion recommendation, but declines to remove the evaluations since the corrected evaluations have not been submitted and there is no guarantee that such evaluations will ever be filed.

Concerning the punishment imposed, the Board notes that since the reduction in rate was suspended, Petitioner only received forfeitures of pay totaling \$100. Therefore, the Board concludes that the punishment imposed was not too severe.

RECOMMENDATION:

- a. That Petitioner's naval record be corrected by deleting from the NJP imposed on 17 December 1998, the charge under Article 133, UCMJ, conduct unbecoming an officer and a gentleman.
- b. That no further relief be granted.

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 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.

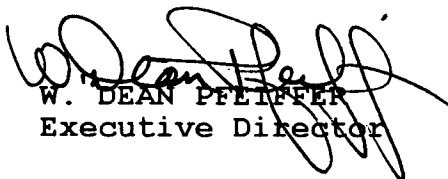
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. 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