



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

BJG

Docket No: 1197-07
21 March 2008

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

Subj: [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) Counsel brief w/DD Form 149 dtd 20 Nov 06 w/atchs
(2) OJAG ltr dtd 1 Jun 07 w/encl
(3) OJAG ltr dtd 13 Feb 08 w/encl
(4) Counsel ltr dtd 21 Mar 07 w/encls
(5) Counsel ltr dtd 21 May 07 w/encls
(6) Counsel ltr dtd 29 Feb 08 w/encls
(7) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, that his naval record be corrected by reinstating him to the June 2004 Limited Duty Officer (LDO) Lieutenant All-Fully-Qualified-Officers List (AFQOL), removing all documentation of his removal from the June 2004 AFQOL, showing he was promoted to lieutenant with a date of rank and effective date of 1 September 2005, and showing he has not failed of selection to lieutenant.

2. The Board, consisting of Ms. Epstein and Messrs. Bowen and Washington, considered Petitioner's allegations of error and injustice on 17 March 2008, and pursuant to its regulations, determined that relief should be granted. 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 which were available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. On 4 April 2002, Petitioner and five other officers received nonjudicial punishment (NJP) for violation of the Uniform Code of Military Justice (UCMJ), Articles 133 (conduct unbecoming an officer) and 134 (conduct of a nature to bring discredit on the armed forces). The offense involved a conspiracy to use bags of cement to falsify weights of shipments in connection with do-it-yourself moves from supply school. All six officers received a letter of reprimand as punishment. One of the six retired before action was taken concerning his promotion to lieutenant. Two non-LDO officers were promoted without delay and without set asides of their NJP's. The Secretary of the Navy (SECNAV) had no opportunity to review their cases before they were promoted. SECNAV removed Petitioner and two other applicants to this Board, all three of whom are LDO's, from their respective AFQOL's.

d. Petitioner was promoted to lieutenant (junior grade) on 1 September 2003. No action was taken, in connection with his promotion to his current grade, because of the NJP awarded before the promotion was effected.

e. Petitioner was placed on the June 2004 LDO Lieutenant AFQOL. On 3 August 2005, his promotion to lieutenant was delayed on the basis of the NJP. On 15 September 2005, his NJP was set aside. The set aside was effected by a different officer from the one who had imposed it. However, the officer who had imposed it concurred that it should be set aside, because he said he had originally intended the NJP's as counseling. On 15 March 2006, the Commander, Navy Personnel Command (NPC) approved the extension of the promotion delay. The delay was not extended until after the expiration of the initial six-month period. On 26 July 2006, SECNAV removed Petitioner from the June 2004 AFQOL. He and the other two applicants were placed on the January 2007 AFQOL, and all have had their promotions delayed once again.

f. Petitioner and the other two applicants contend no financial gain was intended in connection their moves. They object to disparate treatment of the officers involved, arguing that drawing a distinction between LDO's and non-LDO's is not justifiable. They also contend they were promoted by operation of law, because their promotion delays were extended without any basis and, in the case of Petitioner only, because his delay was

not extended until after the expiration of the initial six-month period.

g. Enclosure (2) is the first of two advisory opinions from the Office of the Judge Advocate General (OJAG) concerning the three applicants' cases. This advisory opinion recommended reconsideration of the applicants' records, on the basis of the understanding that SECNAV had removed them from their AFQOL's without knowledge that two of the other officers involved in the same matter had been promoted, and in the belief that only one of the three applicants' NJP's had been set aside.

h. Enclosure (3) is the second advisory opinion from OJAG, which recommended denying relief. OJAG stated that additional documentation supported the conclusion that SECNAV knew two other officers had been promoted and that all three applicants' NJP's had been set aside. OJAG further stated that although SECNAV did not know the officers promoted were not LDO's, this was not a "relevant" or "important" fact, and his not having known it proves SECNAV did not attempt to distinguish between LDO's and non-LDO's. OJAG concluded the doctrine of administrative finality applies. Finally, OJAG noted that federal judicial authority had rejected the concept of promotion by operation of law.

i. In enclosure (4), counsel advised that each of the three applicants had been placed on the January 2007 LDO Lieutenant AFQOL, but their promotions were to be delayed again.

j. In enclosure (5), counsel further advised that each of the three applicants had received a letter dated 24 April 2007 from NPC informing them that their promotions to lieutenant were being delayed on the basis of their previous removal from their AFQOL's. Counsel argued that these delays were actually based on the NJP's that have been set aside.

k. Enclosure (6) is counsel's rebuttal to the second advisory opinion from OJAG. He disagreed with the assertion, in both advisory opinions, that the difference between LDO's and non-LDO's is significant for purposes of the applicants' cases. He concluded that the applicants' promotion delays were illegal because they were based on NJP's that have been set aside.

CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding enclosure (3), the Board finds an injustice warranting the requested relief.

The Board finds that SECNAV, having been confronted with the fact that two other officers involved in the same misconduct had been promoted, should have considered himself compelled, as a matter of equity, to promote the applicants as well. In this regard, the Board finds it most unfortunate that two of the officers had been promoted before SECNAV had been given a chance to act on any of the cases. The Board rejects completely the notion that the distinction between LDO's and non-LDO's could serve to legitimize the disparate treatment inherent in these cases. The Board does not condone or minimize the misconduct committed, but finds it was not serious enough to require removing the applicants from their AFQOL's. Finally, the Board notes the applicants were promoted to their current grade after they had received NJP, and before the NJP's had been set aside.

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

RECOMMENDATION:

- a. That Petitioner's naval record be corrected by reinstating him to the June 2004 LDO Lieutenant AFQOL.
- b. That Petitioner's record be corrected further by removing all documentation of his removal from the June 2004 AFQOL and placement on the January 2007 AFQOL.
- c. That Petitioner's record be corrected further to show he was promoted to lieutenant with a date of rank and effective date of 1 September 2005; and that his lineal precedence be adjusted accordingly.
- d. That Petitioner's record be corrected further to show he has not failed of selection to lieutenant.
- e. That any material or entries relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries 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.

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


JONATHAN S. RUSKIN
Acting Recorder

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


W. DEAN PFEIFFER

Reviewed and approved:

Donald C. Winter
Secretary of the Navy