



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

SMW

Docket No: 5812-07

13 May 2008

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 and advisory opinions
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former member of the Navy Reserve applied to this Board requesting removal and replacement of two fitness reports, that he be provided a fitness report for a missing period, a change to the reason for separation, removal of erroneous accusations, and an honorable discharge vice the general discharge that was issued on 2 August 2005.

2. The Board, consisting of Mr. [REDACTED] Mr. [REDACTED] and Mr. [REDACTED] reviewed Petitioner's allegations of error and injustice on 7 May 2008, and pursuant to its regulations, determined that the partial 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. On 1 October 2003, Petitioner affiliated with a drilling reserve unit.

d. Petitioner requested active duty for training (ADT) orders to attend a conference in Hawaii during the period 24 to 29 February 2004, and executed the travel orders. He also requested ADT orders during the period 16 to 21 April 2004, to attend training at Camp Lejeune. However, after arriving at Camp Lejeune, he chose not to attend training and remained in the area until his return flight. On 6 May 2004, while residing in Europe, he requested transfer to the inactive reserve due to personal reasons, but his request was denied.

e. An adverse periodic detachment of reporting senior regular fitness report was submitted with an ending date of 31 October 2004. Another fitness report ending 30 September 2004, that did not have Petitioner's signature, was also submitted. A copy of these reports are at Tabs A and B.

f. An investigation was subsequently initiated by the Criminal Investigation Division (CID) regarding alleged travel fraud. On 15 November 2004, CID concluded the investigation, which indicated that Petitioner committed fraud by submitting false claims.

g. On 22 February 2005, Petitioner's commanding officer requested that he show cause for retention and be administratively separated under other than honorable (OTH) conditions by reason of unsatisfactory drill participation in the Navy Reserve. Petitioner was subsequently transferred to the inactive reserve due to his inability to maintain satisfactory drill attendance.

h. On 17 May 2005, the separation authority notified Petitioner of administrative show cause proceedings by reason of misconduct, specifically, unauthorized absence, failure to obey a lawful order, making false official statements, fraud, and conduct unbecoming an officer, and by reason of substandard performance of duty due to failure to demonstrate acceptable qualities of leadership required of an officer of his grade and failure to conform to prescribed standards of military deportment. In connection with this processing, he acknowledged that the least favorable characterization of service would be under OTH conditions and that he could submit a qualified resignation in lieu of administrative separation. On 24 June 2005, he submitted his qualified resignation, and in doing so acknowledged that if accepted he would receive a general discharge. He subsequently submitted his acknowledgement of rights in which he waived the right to a Board of Inquiry (BOI). The Assistant Secretary of the Navy

accepted his qualified resignation and directed a general discharge by reason of misconduct. On 2 August 2005, he was so discharged.

i. In his application, Petitioner states in essence that his discharge is inequitable because his former unit sought retribution for his open participation in an investigation and that he does not feel that he received thorough counsel. He further states that his personnel record was excellent before this incident, and unprofessional and unjustified actions taken against him resulted in the subsequent discharge from the reserves.

j. Attached to enclosure (1) is an advisory opinion from the Navy Personnel Command (NPC) Fitness Report Branch (PERS-311), regarding the removal of Petitioner's fitness report for the periods of 12 January to 31 October 2004, and 6 June to 30 September 2004, replacement with unbiased reports, and providing a fitness report for a missing period, which states, in part, as follows:

...The first fitness report in question is an adverse Periodic/Detachment of Reporting Senior/Regular report ending 31 October 2004. [Petitioner] alleges the fitness report is based on erroneous accusations and should be replaced by a [sic] unbiased report.

...A review of [Petitioner's] headquarters record revealed the report in question to be on file. It was signed by the reporting senior on 9 September 2004, but was annotated "Certified Copy Provided" in block 46, Signature of Individual Evaluated. Per [Bureau of Personnel Instructions (BUPERS) 1610.10] an adverse report must be signed by the member or the report be annotated "Member refused to Sign" in block 46.

...Fitness report was returned to the reporting senior on 27 February 2005 and a signed or properly annotated report has never been received from the reporting senior or [Petitioner] to correct the error found on [Petitioner's] report.

...the uncorrected report in question was accepted as originally submitted to [Petitioner's] record, attached with an [sic] NAVPERS [Navy Personnel] 1616/23

(Memo) over 9 months after the report had been issued to [Petitioner].

...Selection Boards are briefed that reports, which have been rejected and returned for correction, are accepted with a memorandum action after 90 days when no response has been received.

...the second fitness report in question is a Non-Observed/Regular report ending 30 September 2004. The fitness report was accepted erroneously to [Petitioner's] record as a Periodic report but it does not end on a Periodic date per [BUPERSINST 1610.10].

...the fitness report should have been considered an adverse report. In view of the comments in block 41 "Comments on Performance", we recommend the fitness report for the period ending 30 September 2004 be removed and the fitness report ending 31 October 2004 be the fitness report of record.

...[Petitioner] has a missing fitness report period from 1 September 2003 through 11 January 2004. [Petitioner] may submit a Statement in Lieu of Missing Report, per [BUPERSINST 1610.10].

k. Attached to enclosure (1) is an advisory opinion from the NPC Officer Performance and Separations Section (PERS-834B), regarding Petitioner's resignation from the Navy Reserve, which states, in part, as follows:

...[Petitioner's] Commanding Officer, 4th Medical Battalion submitted [a recommendation for show cause for retention and administrative separation]. The show cause authority reviewed the request and found sufficient evidence to require [Petitioner] to show cause for retention in the navy [sic].

...[Petitioner] chose not to go before a board of inquiry (BOI), but tendered a qualified resignation and statement.

...[Petitioner's] current request does not include new evidence which would support

changing the characterization or the separation program designator code...

1. Regulations authorize administrative separation of members by reason of unsatisfactory drill participation. Regulations also authorize the show cause authority to require members to show cause for retention in the Navy who are found to have committed misconduct that if prosecuted under the Uniform Code of Military Justice, could be punished by confinement of six months or more. Regulations further allow such members to tender a qualified resignation request in lieu of BOI proceedings.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial relief. Specifically, the Board substantially concurs with the comments contained in the advisory opinion provided by PERS-311. In this regard, the fitness report for the period ending 30 September 2004, should be removed and the fitness report ending 31 October 2004, should be the fitness report of record. Petitioner may submit a Statement in Lieu of Missing Report for the period from 1 September 2003 through 11 January 2004. Furthermore, the Board substantially concurs with the comments contained in the advisory opinion provided by PERS-834B, regarding his resignation that resulted in a general discharge by reason of misconduct. Finally, the Board finds no evidence of inadequate counsel. Therefore, the Board concludes that his fitness report for the period ending 30 September 2004, be removed from his naval record and that no further relief be granted.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing therefrom the following fitness report and related material:

Date of Report	Reporting Senior	Period of Report	
		From	To
18 Mar 05		6 Jun 04	30 Sep 04

b. That there be inserted in Petitioner's naval record a memorandum in place of the removed report containing appropriate identifying data concerning the report; that the memorandum state that the report has been removed by the order of the Secretary of the Navy in accordance with the provisions of federal law and may not be made available to selection boards and other reviewing authorities; and that such boards may not conjecture or draw any inference as to the nature of the report.

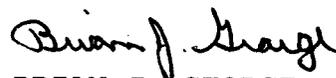
c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

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.

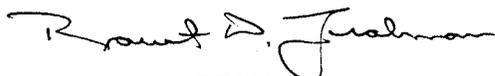
e. That no further relief be granted.

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


BRIAN J. GEORGE
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 Regulation, 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.


For W. DEAN PFEIFFER
Executive Director