



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

TRG

Docket No: 7414-07
14 November 2008

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 officer in the Navy Reserve, filed an application with this Board requesting that a nonjudicial punishment (NJP) be removed from his record and, in effect, that all subsequent adverse actions resulting from the NJP such as failures of selection and involuntary release from active duty be rectified.

2. The Board, consisting of Mr. [REDACTED], Mr. [REDACTED] and Mr. [REDACTED] reviewed Petitioner's allegations of error and injustice on 28 October 2008 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. Although it appears that Petitioner's application was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and consider the application on its merits.

c. Petitioner was honorably discharged from the Marine Corps on 6 February 1997 with six years of active duty. On 23 May 1997 he was commissioned in the Navy Reserve. He then served in an excellent manner for over four years and was promoted to lieutenant (LT; O-3). On 15 August 2001 he received NJP for violations of the Uniform Code of Military Justice, Article 80 (Attempted Fraternization)s and 133 (Conduct Unbecoming an Officer and Gentleman). The punishment imposed was a letter of reprimand. A subsequent board of inquiry unanimously voted to

retain him on active duty. On 31 January 2008 he was released from active duty because he had twice failed of selection to lieutenant commander (LCDR; O-4). At that time he was paid separation pay of \$116,719.57. The DD Form 214 shows that his total enlisted and commissioned active service was 16 years, 11 months and 25 days. A statement of service for reserve retirement has been obtained and shows that as of 23 August 2008 he will be credited with 18 years of qualifying service for reserve retirement purposes. Therefore, he is apparently in a position to qualify for reserve retirement.

d. On 10 March 2006, the Navy captain who imposed NJP on Petitioner wrote a letter to the Navy Personnel Command (NPC) setting it aside. He stated that Petitioner had accepted responsibility for his actions and had a great deal to offer the naval aviation community. Subsequently, NPC stated that no action could be taken on the set aside because only the officer currently serving as the commanding officer of the command which imposed the NJP or the commanding officer who currently has NJP authority over the individual may set it aside.

e. On 3 May 2006 another Navy captain wrote essentially the same letter to NPC setting aside the NJP. In its response NPC states, in part, as follows:

...authority to set aside shall normally be exercised only when the authority considering the case believes that, under all the circumstances, the punishment has resulted in a clear injustice. Normally this authority must be exercised with a four month period from the NJP.

...In this case, you have made no assertion that any injustice was committed during the due process of the NJP or the resulting punishment. In addition, this set aside action is for an NJP completed almost five years past. Neither of these deviations from the President's guidance was explained [in your letter]...

f. Petitioner states in his application that the accusations against him were false and ultimately withdrawn. He also contends that actions are being taken to expunge the erroneous information from the National Crime Information Center database.

g. Attached to enclosure (1) is an advisory opinion from the Deputy Assistant Judge Advocate General (DJAG), Criminal Law Division which states that Petitioner received NJP and a letter of reprimand for attempted fraternization and conduct unbecoming an officer. The advisory opinion concludes, in effect, that NPC

was not in compliance with the law and the set aside request should have been accepted by NPC. Therefore, it is recommended that the NJP be removed from Petitioner's record.

CONCLUSION:

Upon review and consideration of all the evidence of record and the recommendation contained in the DJAG advisory opinion, the Board concludes that Petitioner's request warrants favorable action. Further, the Board is aware of the favorable action taken by the Board in similar cases. Accordingly, the Board concludes that the NJP should be removed from Petitioner's record. With the removal of the NJP there is no basis for the related adverse fitness report and it should also be removed from Petitioner's record. Finally, all of Petitioner's failures of selection to lieutenant commander should be removed from his record. The Board notes that the NJP was properly in the record from 15 August 2001 until the date of the first set aside letter on 10 March 2006 and believes that the foregoing action provides sufficient relief and further action such as directing a special selection board is not warranted.

Since Petitioner's record will show that he has not failed of selection, there is no basis for the release from active duty on 31 January 2008 and the record should be corrected to show that he has been on active duty since that date.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the NJP of 15 August 2001 from his record.

b. That Petitioner's naval record be further corrected by removing all of his failures of selection to lieutenant Commander that have occurred since 15 August 2001.

c. That Petitioner's naval record be further corrected to show that he was not released from active duty on 31 January 2008 but continued to serve on active duty as a reserve officer.

d. That Petitioners' naval record be corrected by removing therefrom the following fitness report and related material:

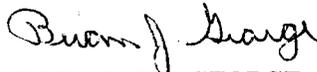
| Date of Report | Reporting Senior | Period of Report | |
|-----------------|---|------------------|-----------|
| | | From | To |
| 3 February 2002 |  | 1 Mar 01 | 31 Jan 02 |

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.

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 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