



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

Docket No: 3368-08
3 June 2009

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
[REDACTED]

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

Encl: (1) Case Summary
(2) US Dis Ct for DC (Civil Action No. 06-2219 (RBW) dtd
3 Apr 08
(3) HQMC JAM2 memo dtd 25 Sep 08
(4) OJAC memo dtd 20 May 09
(5) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner's case was remanded to the Board for further consideration by the United States District Court for the District of Columbia. He originally requested to be retired in the grade of lieutenant colonel (ltcol, paygrade O-5) vice major (maj, paygrade O-4) on 1 September 2002.

2. The Board, consisting of Mr. [REDACTED], Mr. [REDACTED] and Mr. [REDACTED] reviewed Petitioner's allegations of error and injustice on 27 May 2009 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, then a ltcol, received nonjudicial punishment (NJP) on 29 December 2000 for possession and lying about the possession of unregistered firearms, multiple charges of physically abusing his step children and disobedience of an order not to have any contact with his wife. He pled guilty to these offenses as part of an agreement not to refer the charges to a court-martial. The punishment imposed was a punitive letter of reprimand and forfeitures of pay.

c. Subsequently, Petitioner was directed to show cause for

retention in the Marine Corps at a Board of Inquiry (BOI). The BOI convened on 27 June 2001 to determine if he should be involuntarily retired and whether he should be retired at his then current grade of ltcol or a lesser grade. The BOI unanimously recommended that he be involuntarily retired in the grade of ltcol. In his endorsement, the Deputy Commandant for Manpower and Reserve Affairs noted that Petitioner had a 1996 NJP for a confrontation with Air Force Military Police in Italy. Subsequently, the Assistant Secretary of the Navy (SECNAV) directed involuntary retirement in the grade maj. He was retired on 1 September 2002 in the grade of maj.

d. Subsequently, this Board considered the NJP and retirement issues in two separate cases and each was denied in large part based on unfavorable advisory opinions from Headquarters Marine Corps.

e. On 3 April 2009, the United States District Court for the District of Columbia ruled that the Board had erred when it relied upon a legal opinion that concluded that the BOI's consideration of misconduct more than five years old was proper as long as it was not the sole basis for it's decision (enclosure (2)). The judge remanded the case to the Board stating, in part, as follows:

...The BCNR [The Board for Correction of Naval Records] concluded (wrongly) that the BOI committed no error whatsoever in issuing its recommendation of separation. It has not had the opportunity to determine whether the error identified by the Court in his memorandum opinion warrants the removal of the plaintiff's involuntary retirement and grade reduction altogether. Ultimately, the Court may or may not find the BCNR's decision in this regard to have met the minimal procedural requirements necessary for affirmance, but it would be remiss to deny the BCNR the opportunity to make that determination in the first instance. The Court will therefore remand this case to the BCNR for further consideration as to whether the plaintiff's applications [sic] for correction of his military records should be granted in light of the Court's analysis in this memorandum opinion...

f. On 25 September 2008, the Headquarters Marine Corps, Military Law Branch provided an advisory opinion in this case (enclosure (3)). The opinion recommended that the Board reassess the retirement grade decision made previously and consider restoring Petitioner to the retired grade of ltcol from the effective date of his original retirement, 1 September 2002. It was further recommended that the Board contact the Office of the

Judge Advocate General (OJAG), U.S. Navy, for its additional guidance on the interpretation of the Court's opinion and suggested courses of action. It was noted that OJAG represented SECNAV in the litigation that resulted in this decision.

g. In an opinion dated 20 May 2009 (enclosure (4)), OJAG points out that since Petitioner submitted a voluntary request for retirement prior to the 29 December 2000 NJP and given the fact that the BOI and his chain of command all concurred that he should retire in the grade of ltcol, there is a basis for retirement at that grade. The advisory opinion concludes as follows:

...Correction of the record by returning [Petitioner] to active duty will impose significant financial and administrative costs, and delay resolution of this nine-year-old administrative proceeding. Upon return to active duty, [Petitioner] would receive substantial back-pay that, in this office's opinion, would be unjustified and undeserved. Such a resolution is therefore not a viable option. In light of the Court's Opinion [sic], [Petitioner's] previous voluntary application for retirement, and he and his counsel's acknowledgement that SECNAV retains choice of voluntary separation, correction of [Petitioner's] record to reflect a voluntary retirement at the grade of Lieutenant Colonel [sic] as of 1 September 2000 [sic] will satisfy all parties and should end this litigation...

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. Given the comments in the order of the U. S. District Court and the advisory opinions from JAM2 and OJAG, the Board now concludes that his record should be corrected to show that Petitioner voluntarily retired on 1 September 2002 in the grade of ltcol vice the involuntary discharge in the grade of maj now of record.

The Board further concludes that this Report of Proceedings should be filed in Petitioner's naval record so that all future reviewers will understand the reason's for the corrections to his record.

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

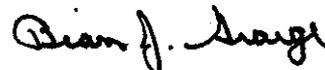
RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that on 1 September 2002 he voluntarily retired from the Marine Corps in the grade of ltcol vice the involuntary retirement in the grade of maj now of record.

b. That this Report of Proceedings be filed in 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.

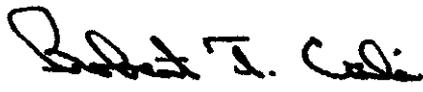
ROBERT D. ZSALMAN
Recorder


BRIAN J. GEORGE
Acting Recorder

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


W. DEAN PFEIFFER

Reviewed and approved:


7-13-09

ROBERT T. CALI
Assistant General Counsel
(Manpower and Reserve Affairs)