



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

CRS
Docket No: 5085-08
28 October 2009

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy
Subj: FORMER [REDACTED] REVIEW OF
NAVAL RECORD
Ref: (a) Title 10 U.S.C. 1552
Encl: (1) DD Form 149
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner filed an application with this Board requesting that his naval record be corrected by removing therefrom the report of nonjudicial punishment (NJP) dated 30 October 2006 and all related documents, and reinstating him on active duty.

2. The Board, consisting of Ms [REDACTED] Mr. [REDACTED] and Mr. [REDACTED] reviewed Petitioner's allegations of error and injustice on 21 October 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 was commissioned as an ensign on 14 May 2004 upon his graduation from the Virginia Military Institute (VMI):

c. Petitioner received NJP on 30 October 2006 for failing to obey a lawful general order or regulation, to wit OPNAV Instruction 5370.2B, by engaging in an unduly familiar relationship that did not respect differences in grade or rank or the staff-student relationship with Electrician's Mate Chief [REDACTED] an enlisted person and Petitioner's instructor. The punishment consisted of a punitive letter of reprimand, which was issued on 31 October 2006. Petitioner did not appeal the punishment or the finding that he had committed the charged offense.

d. The report of the command investigation upon which the

charged violation was based is not contained in the available records; however, Petitioner submitted a copy of a written statement made by [REDACTED] in which she related that Petitioner had approached her after a class and told her he was going to ask a question involving "a bet". She told Petitioner that if he was going to "ask me something stupid, not to ask". Petitioner then stated that he had two tickets to the Red Sox game. [REDACTED] pointed to her wedding ring and told Petitioner to get away from her. A lieutenant approached her and asked what had happened. She replied that Petitioner had just asked her out, and told the lieutenant that he needed to "take care of" his junior officers. [REDACTED] also related that on a previous occasion he said to her "we are going to Wisconsin together", to which she replied "if we go, I'll probably bring my husband", and that during a class discussion, Petitioner described a woman officer as "hot".

e. On 9 November 2006, in a report to the Commander, Navy Personnel Command, Petitioner's commanding officer recommended that Petitioner not be required to show cause for retention in the Navy. In a forwarding endorsement, the Commander, Naval Personnel Development Center, also recommended that Petitioner not be required to show cause for retention.

f. On 15 February 2007 the Commander, Navy Personnel Command, advised Petitioner that the Show Cause Authority had determined, after reviewing the record of NJP of "28 September 2006", that there was "sufficient evidence of record to separate" him from the naval service. He also advised Petitioner that he was indebted to the U.S. Government in the amount of \$49,559.49 due to his "having received advanced educational assistance to attend the United States Naval Academy". Petitioner was discharged by reason of misconduct (other) on 30 June 2007 with a discharge under honorable conditions.

g. Petitioner contends, in effect, that he did not violate the provisions of OPNAV Instruction 5370.2B because there was no personal and/or unduly familiar relationship between himself and [REDACTED] that he would not have been charged with fraternization if [REDACTED] had been a male; and that his conduct did not call into question his objectivity as a [REDACTED] superior. He also contends that his case was confused with that of another officer, as he had received NJP on 30 October rather than 28 September 2006 and attended VMI rather than the Naval Academy. He believes that as the personal statement and other documents he submitted in rebuttal to the notification of his proposed separation are not filed in his record, as is required by applicable regulations, it is clear that the Secretary of the Navy had not considered those documents prior to directing that he be discharged.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants partial relief.

The Board finds that Petitioner did not demand trial by court-martial or appeal the nonjudicial punishment that was imposed on him. Although the Board is unaware of the specific violation of OPNAVINST 5370.2B he committed, the actions described by EMC [REDACTED] standing alone, are sufficient to establish that a violation of that instruction occurred, i.e., he "asked out" a female enlisted member. While it is unlikely that he would have received NJP had [REDACTED] been a male, asking her out is significantly different from offering to share tickets with a male petty officer with whom there was no appearance and/or expectation of pursuing a possible romantic relationship, as there was with [REDACTED]. In addition, [REDACTED] initial response to Petitioner, that he not do anything stupid, and her later admonition to a lieutenant that he needed take care of his junior officers, although perhaps warranted, were disrespectful. Her comments were prompted by conduct that was clearly prejudicial to the good order and discipline of the service and unbecoming an officer, in violation of Articles 134 and 133 of the Uniform Code of Military Justice, respectively.

Although it appears that the separation notification was prepared using the "cut and paste" method, the Board was not persuaded that Petitioner's case was confused with that of another officer or that the Secretary did not fairly and impartially consider his case. The fact that the documents Petitioner submitted in rebuttal to the separation action are not filed in his naval record is insufficient to establish that those documents were not reviewed by the Secretary. In addition, as Petitioner did not submit copies of the documents for the Board's review and consideration, it cannot determine whether or not material error would have occurred had the documents not been forwarded to the Secretary.

Notwithstanding the foregoing, the Board concludes that Petitioner's actions did not warrant his separation from the Navy by reason of misconduct with a general discharge. Accordingly, it finds the existence of an injustice and recommends the following corrective action.

RECOMMENDATION:

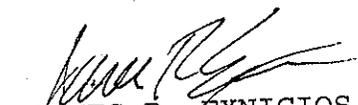
- a. That Petitioner's naval record be corrected to show that he was discharged from the Navy on 30 June 2007 by reason of

unqualified resignation, with an honorable discharge, vice by reason of misconduct with a general discharge.

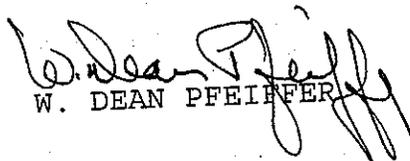
b. That no further relief be granted.

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


JAMES R. EXNICIOS
Acting Recorder

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


W. DEAN PFEIFFER

Reviewed and approved:


Acting AGC (MARA)
11-5-09