



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

SMS  
Docket No: 9413-08  
2 October 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  
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the United States Navy, applied to this Board requesting to remove the nonjudicial punishment (NJP) that he had on 26 March 2007, and the evaluation and counseling record from 16 November 2006 to 25 March 2007.

2. The Board, consisting of Ms. [REDACTED], Mr. [REDACTED] and Mr. [REDACTED] reviewed Petitioner's allegations of error and injustice on 1 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. On 21 October 2005, Petitioner reenlisted in the Navy at age 33 after four prior periods of honorable service, during which he was promoted to pay grade E-6, awarded two Navy and Marine Corps Navy Achievement Medal's (NMCAM), a Navy Commendation Medal (NCM), selected as Sailor of the Quarter, consistently received exemplary performance evaluations, and had no disciplinary actions.

c. During October 2006, Petitioner reported to a reserve unit which subsequently deployed to Kuwait. On 26 March 2007, he had NJP for failure to go to his appointed place of duty, in the time of war willfully disobey the same, and disrespect to a chief petty officer. Punishment included a reduction in rank, 45 days of restriction and extra duty, and forfeitures of pay, which were suspended for a period of 45 days. On 14 May 2007, he received an adverse performance evaluation for the period 16 November 2006 to 25 March 2007, and was then transferred to another unit.

d. In his application, Petitioner states in essence that he had NJP due to reprisal pursuant to title 10 of the United States Code (U.S.C.), section 1034, which is substantiated by an investigation conducted by the United States Fleet Forces Command Inspector General (USFF IG), concurred with by the Naval IG, and Department of Defense (DoD) IG. He further states that he has lost the opportunity to compete for chief petty officer selection twice as a result of this substantial reprisal and now faces high year tenure.

e. Attached to enclosure (1) is a letter from Petitioner to Congressman ██████ in which he states in essence that while deployed to Kuwait from October 2006 to May 2007, he was maliciously charged with offenses as reprisal for reporting possible wrong doing by his Leading Chief Petty Officer (LCPO). He further states that he reported to his superior that the LCPO was fraternizing with a co-worker, and after it appeared that no action was taken, he reported the inappropriate relationship again. Four days later he was counseled by the LCPO, the Command Master Chief, and was subsequently charged with offenses by the same LCPO, Master Chief, and superior to which he reported his concerns. He further states that he was then taken to two disciplinary review boards, accused of all sorts of misconduct, belittled, had his good name destroyed, and subsequently had NJP where the LCPO, Command Master Chief, and his superior all made untruthful statements about him and how he conducted his military duties. He further states that he was reduced in rank which prevented him from being considered for promotion to pay grade E-7. He concludes that this type of behavior does not describe his career and does not reflect the type of sailor that he is.

f. Attached to enclosure (1) is a letter from the Department of the Navy, Naval IG to Congressman ██████, regarding Petitioner's allegations of reprisal for making protected communications of alleged fraternization to his superiors and

for contacting the Command Managed Equal Opportunity (CMEO) officer, which states, in part, as follows:

...The Commander, [USFF IG], conducted an investigation of [Petitioner's] reprisal allegations pursuant to the provisions of the "Military Whistleblower Protection Act," Title 10, [U.S.C., section] 1034... [we] referred the matter to the [DoDIG] for an oversight review required by the statute. The DoDIG subsequently advised that they concurred with the findings of both this office and the USFF IG.

...The investigation concluded a member of [Petitioner's] previous command reprised against him by directing the reconvening of a Disciplinary Review Board to review its recommendation not to refer charges against [Petitioner] to Captain's mast, where he could be awarded [NJP]. As a result of this substantiated reprisal, [Petitioner] went to Captain's mast, where he was awarded a reduction in pay-grade [sic] from E-6 to E-5. On the matter of the mast, the investigation did not substantiate that the Commanding Officer ...who actually held mast violated [title] 10 [U.S.C., section] 1034. Rather, the investigation found that the CO acted in good faith based on the information provided at that time. Notwithstanding this conclusion, the investigation correctly noted that mast would not have occurred absent the prior violation of [title] 10 [U.S.C., section] 1034. As a result the decision to reduce [Petitioner] in pay-grade [sic] should be reviewed...

...The investigation also examined whether [Petitioner's] adverse performance evaluation dated May 11, 2007 constituted a violation of [title] 10 [U.S.C., section] 1034. The investigation noted that issuance of such performance evaluations is required by Navy instruction whenever an enlisted member is reduced in pay-grade at mast... the investigation concluded that because

the adverse performance evaluation was a direct consequence of a substantiated act of reprisal, the question of the legitimacy of this evaluation as part of [Petitioner's] military record similarly should be reviewed...

...The investigation further concluded that the decision by the lower level office to transfer [Petitioner] to another assignment following mast and the issuance of the unfavorable performance evaluation also constituted a violation of [title] 10 U.S.C. [section] 1034...

g. According to title 10 of the U.S.C., section 1034, no person may take an unfavorable personnel action as a reprisal against a member of the armed forces for making a complaint or reports a violation of law or regulation to any person or organization designated pursuant to regulations or other established administrative procedures for such communication.

#### CONCLUSION:

Upon review and consideration of all evidence of record, the Board concludes that Petitioner's request warrants relief. Specifically, the Board finds that the NJP was a result of reprisal from members within his command pursuant to the provisions of the "Military Whistleblower Act," title 10 of the U.S.C., section 1034. In this regard, the USFF IG's investigation concluded that a member of his command reprised against him by directing the reconvening of a Disciplinary Review Board to review its recommendation not to refer charges against him, which resulted in NJP on 26 March 2007. The Board finds that the scenario of events that led to the NJP occurred within about a three month period of time and believes that he would not have had NJP if he had never reported the suspected fraternization of his LCPO and co-worker. Furthermore, the Board finds that he received an exemplary performance evaluation after he transferred from the unit where the incident occurred and further finds that the offenses for which he had NJP were not indicative of his overall service record. Specifically, at the time, he had completed more than 16 years of active service with no disciplinary actions, continually received exemplary performance evaluations, attained pay grade E-6, was awarded two NMCAM's, and a NCM, and was selected as Sailor of the Quarter. Therefore, the Board concludes that the NJP and performance evaluation ending 25 March 2007, should be removed.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the NJP dated 26 March 2007, and the punishment imposed.

b. That Petitioner's naval record be corrected by removing therefrom the following performance evaluation and related material:

Date of Report	Reporting Senior	Period of Report	
		From	To
14May07		16Nov06	25Mar07

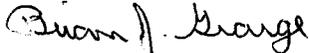
c. That there be inserted in Petitioner's naval record a memorandum in place of the removed performance evaluation containing appropriate identifying data concerning the report; that the memorandum state that the report has been removed by order of the Secretary of the Navy in accordance with the provisions 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.

d. 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.

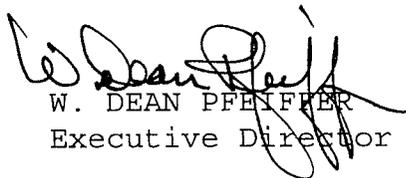
e. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

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 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.

  
W. DEAN PFEIFFER  
Executive Director