



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

BAN
Docket No. 05064-09
19 October 2009

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

Subj: REVIEW OF NAVAL RECORD ICO [REDACTED]

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

Encl: (1) DD Form 149 w/attachments
(2) NAVPERS 1626/7 dtd 28 Apr 08 w/attachments
(3) NAVPERS 1616/26 dtd 8 May 08
(4) DFAS Form 702 dtd Jan 02
(5) USS BATAAN msg dtd R281111Z AUG 08
(6) BUPERSINST 1430 dtd 2 Nov 07
(7) USS BATAAN msg dtd R252013Z NOV 08
(8) NPC memo 1430 Ser 811/452 of 9 Jul 09
(9) NPC memo 1610 PERS-32 of 6 Aug 09
(10) NAVPERS 1616/26 dtd 25 Feb 09
(11) Service Record

1. Pursuant to the provisions of reference (a) Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected to show that he advanced to E-5/EM2 from the March 2008, Cycle 199, Navy-wide advancement exam.

2. The Board, consisting of Messrs. Pfeiffer, Zsalman, and George, reviewed Petitioner's allegations of error and injustice on 28 September 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. The Board also considered advisory opinions furnished by the Bureau of Navy Personnel attached as enclosures (8) and (9) that recommended no relief be granted.

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. In March 2008, Petitioner participated in the Navy-wide advancement exam Cycle 199, for E-5. Petitioner was selected for advancement with an effective date of 16 August 2008, enclosure (1). However, on 1 May 2008, before his actual date of advancement, Petitioner received a nonjudicial punishment (NJP) for Driving Under the Influence (DUI) of alcohol and failure to obey a lawful order, enclosure (2).

c. As a result of Petitioner's NJP, on 8 May 2008, he received a special evaluation that withdrew his recommendation for advancement. Petitioner elected not to submit a statement regarding the removal of his recommendation, enclosure (3). Although, Petitioner was aware that his advancement recommendation was being withdrawn, the USS BATAAN, LHD-5 (his command), failed to notify the Naval Personnel Command (NPC) or the Naval Education and Training Command (NETPDTC) [as required by the Bureau of Naval Personnel Instruction (BUPERSINST) 1430.16F] before his effective date of advancement, (the date he would start getting paid). Petitioner did not participate in the "frocking" ceremony because he was aware that his recommendation was withdrawn by his commanding officer. However, because the command failed to submit a message withdrawing his recommendation to NPC and NETPDTC, prior to his advancement date, the Petitioner started to receive E-5 pay effective 16 August 2008, enclosure (4).

d. When Petitioner began getting paid as an E-5, on 28 August 2008, the command sent a message to NPC and NETPDTC withdrawing EM2's advancement recommendation,¹ enclosure (5). Subsequently, the E-5 pay was stopped and he was paid again as an E-4.

e. BUPERSINST 1430.16F states, "Recommendation/advancement authority cannot be withheld or withdrawn on or after the effective date of advancement. Failure to comply with the required actions prior to the advancement date will result in the member retaining scheduled advancement", enclosure (6).

¹ To properly withhold his advancement, this message should have been sent prior to 16 August 2008, the effective date of advancement.

f. On 25 November 2008, (enclosure (7)), the USS BATAAN's commanding officer sent a message to NPC, via NETPDTC, "...to allow service-member [Petitioner] be advance to EM2 effective 16AUG08", due to the administrative error by the command by not withdrawing Petitioner's recommendation prior to his advancement date of 16 August 2008, enclosure (7).

g. Petitioner has now asked that he be retroactively advanced to 16 August 2008. In advisory opinions, enclosures (8) and (9), BUPERS recommended that no relief be granted. They reason that although the command erred in failing to withdrawn his advancement recommendation before the advancement date of 16 August 2008, his evaluation dated 15 December 2007 to 1 May 2008, effectively removed his advancement recommendation. The advancement recommendation was not restored until 25 February 2009, after the limiting date of 31 December 2008, enclosure (10). Note: BUPERSINST 1430.16F, the "CO/OIC recommendations is the most important advancement eligibility requirement" and "The most recent evaluation is the sole source of recommendation for advancement". Petitioner's most recent evaluation did not recommend Petitioner for advancement for the March 2008 exam cycle, enclosure (6).

CONCLUSION:

Upon review and consideration of all the evidence of the record, the Board concludes that Petitioner's request warrants favorable action. The Board finds that although Petitioner was notified, through a special evaluation, that his recommendation was being withdrawn due to his NJP, the command failed to notify NPC and NETPDTC before his effective date of advancement as required by the governing instruction. In addition, the Board believed that Petitioner had the support of his command when the commanding officer sent a message on 25 November 2008, to NPC via NETPDTC asking to advance Petitioner to E-5/EM2, effective 16 August 2008. Accordingly, the Board concludes that the record should be corrected to show that Petitioner was advanced to E-5/EM2 from the March 2008, Navy-wide advancement exam, with an effective date of 16 August 2008.

RECOMMENDATION:

That Petitioner's naval record be corrected, where appropriate, to show that:

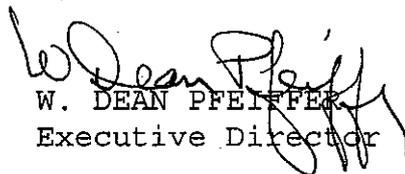
a. Petitioner was advanced to E-5/EM2 from the March 2008, Navy-wide advancement exam, with an effective date of 16 August 2008, and with a Time In Rate date of 1 July 2008.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that 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


WILLIAM J. HESS, III
Acting Recorder

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


W. DEAN PFEIFFER
Executive Director

Reviewed and approved:


Acting AGC (NARR)
10/27/09