



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

BJG
Docket No: 7874-09
16 December 2009

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

Subj: [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 dtd 10 Jul 09 w/attachments
(2) PERS-32 memo dtd 13 Aug 09
(3) PERS-OOJ memo dtd 1 Sep 09
(4) PERS-834 memo dtd 17 Sep 09 w/encls
(5) PERS-80 memo dtd 20 Oct 09
(6) PERS-802 e-mail dtd 8 Dec 09
(7) Counsel ltr dtd 4 Dec 09

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, that his naval record be corrected by removing the fitness reports for 2 February 2001 to 31 January 2002 and 1 February 2002 to 31 January 2003, copies of which are at Tabs A and B, respectively. He further requested promotion to lieutenant commander, pursuant to his selection by the Fiscal Year (FY) 2003 Staff Lieutenant Commander Selection Board, with a date of rank and effective date of 1 February 2003, and correction of his naval record to reflect his retirement on 1 October 2003 was in the grade of lieutenant commander, pay grade O-4, rather than lieutenant, pay grade O-3.

2. The Board, consisting of Messrs. Garst, Leeman and Mann, reviewed allegations of error and injustice on 10 December 2009, and pursuant to its regulations, determined that limited relief should be granted. 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. Petitioner exhausted all administrative remedies which were available under existing law and regulations within the Department of the Navy.

b. On 31 January 2002, Petitioner was convicted by a general court-martial (GCM) of conspiracy to make a false statement, conduct unbecoming an officer and false swearing in violation of Articles 81, 133 and 134 of the Uniform Code of Military Justice (UCMJ). He was acquitted of conspiracy to commit indecent acts and sodomy, an orders violation and indecent acts in violation of Articles 81, 92, 120, 125 and 134. The charges stemmed from an incident in 2001. On the evening in question, at the home of Lieutenant H---, Petitioner and Lieutenants H--- and W--- allegedly committed various sexual acts against the will of a junior enlisted female, YNSN (pay grade E-3) A---. The next day, she reported that she had been raped and otherwise sexually assaulted by Petitioner and the other two officers. The Naval Criminal Investigative Service found three used condoms in an outdoor garbage can at Lieutenant H---'s home. The condoms were examined by the United States Army Criminal Investigative Laboratory and it was determined that Petitioner's and the victim's deoxyribonucleic acid (DNA) was on one of them. Petitioner was sentenced to forfeit \$500.00 pay per month for two months and to be reprimanded. The convening authority approved the conviction and sentence on 13 December 2002, when the conviction became final.

c. Although Petitioner was convicted during the period of the contested fitness report for 2 February 2001 to 31 January 2002, this report contains nothing derogatory, presumably because the conviction was not finalized until after the reporting period. The other contested report, for 1 February 2002 to 31 January 2003, during which the convening authority acted, documents Petitioner's conviction by GCM.

d. Petitioner was selected by the Fiscal Year (FY) 2003 Staff Lieutenant Commander Selection Board, convened on 29 April 2002. In February 2003, Petitioner was notified of the determination that there was sufficient evidence to require him to show cause for his retention in the naval service. In May 2003, a board of inquiry decided he should be retained, notwithstanding his GCM conviction. In June 2003, he submitted a request for retirement. This request was approved, and he was retired in the grade of lieutenant effective 1 October 2003. He asserts his retirement was not truly voluntary, as he maintains he was counseled he had no option but to retire, having survived a board of inquiry and having been convicted by a GCM.

e. On 13 December 2004, as the result of a review under Article 69(a) of the UCMJ, Petitioner's conviction of false swearing was set aside.

f. On 4 June 2009, as the result of a review under Article 73 of the UCMJ, Petitioner's entire GCM conviction was set aside (Appendix/Exhibit B to counsel's brief at enclosure (1)). The conviction of conduct unbecoming an officer was set aside because retesting of the DNA evidence that had been found at the scene excluded Petitioner as a possible source. The conviction of conspiracy to make a false statement was set aside because the findings did not establish which statements provided the basis for the conviction. The "Background" section at page 2 of the review summarizes the facts of the case.

g. Petitioner, through counsel, contends he should be granted the requested relief because his GCM conviction has been set aside. His affidavit at Appendix/Exhibit C to counsel's brief at enclosure (1) does not address the facts of what transpired at the home of Lieutenant H--- on the evening in question.

h. In enclosure (2), the Navy Personnel Command (NPC) office with cognizance over performance evaluation has commented to the effect that both contested fitness reports should stand.

i. In enclosure (3), the NPC Office of Legal Counsel has stated that while this Board does not have the authority to promote Petitioner to lieutenant commander, his promotion is "warranted." This advisory opinion incorrectly stated that Petitioner had been removed from the FY 2003 Staff Lieutenant Commander Promotion List. It further incorrectly stated that his retirement, which he did not request until June 2003, was the reason he was ineligible to be considered by the FY 2004 Staff Lieutenant Commander Selection Board, convened on 28 April 2003. Finally, it incorrectly indicated that Petitioner requested "redaction" of only one fitness report, his report of 31 January 2002, and recommended removing that report. This is understood to be a recommendation to remove the report for 1 February 2002 to 31 January 2003, which documents the conviction that has been set aside. This advisory opinion correctly noted that Petitioner's retirement in the grade of lieutenant commander required service in that grade for a minimum of six months.

j. In enclosure (4), the NPC Officer Performance and Separations Branch has commented to the effect that Petitioner's request to remove the fitness report for 1 February 2002 to 31 January 2003 should be approved, but the remaining contested report should stand. This advisory opinion stated that after Petitioner had been selected by the FY 2003 Staff Lieutenant Commander Selection Board, his name was withheld from the message promulgating the results of the promotion board. An enclosure to this advisory opinion is the letter to Petitioner advising him that his name had been withheld from the message because of his GCM conviction, that he could make a statement or provide additional information he wanted considered, and that no final decision had been made regarding his nomination for promotion. This advisory opinion noted that Petitioner's promotion to lieutenant commander required approval by the Secretary of Defense on behalf of the President and Senate confirmation, neither of which had been received before he became ineligible for promotion by reason of his retirement; and that his retirement was voluntary, because he submitted his request for retirement after the conclusion of the board of inquiry and before the determination of his promotion nomination. This advisory opinion incorrectly stated Petitioner would not have had sufficient time in grade to retire as a lieutenant commander. Had he been promoted with a date of rank and effective date of 1 February 2003, as he requests, his retirement effective 1 October 2003 would have given him eight months of service in grade, well beyond the six months required.

k. In enclosure (5), the NPC Officer Career Progression Branch has commented to the effect that the fitness report for 1 February 2002 to 31 January 2003 should be removed, that Petitioner's promotion to lieutenant commander cannot be granted as his nomination has not been approved or confirmed, and that Petitioner voluntarily retired. This advisory opinion incorrectly stated that Petitioner would not have had sufficient time in grade to retire as a lieutenant commander, because he retired in June of 2003. While he requested retirement in June 2003, his retirement was not effective until 1 October 2003.

l. Enclosure (6) verifies that 1 February 2003 is the date of rank and effective date Petitioner would have been assigned, had he been promoted pursuant to his selection by the FY 2003 Staff Lieutenant Commander Selection Board.

m. In enclosure (7), Petitioner's counsel agreed with the recommendations to remove the fitness report for 1 February 2002 to 31 January 2003; and he argued that the report for 2

February 2001 to 31 January 2002 should be removed as well, since it shows lowered performance as a result of the ongoing court-martial process. He also insisted that Petitioner's retirement was not voluntary, as he had been counseled he had no option other than retirement. Counsel erroneously stated that Petitioner had been removed from the lieutenant commander promotion list (as did Petitioner in his affidavit).

CONCLUSION:

Upon review and consideration of all the evidence of record, notwithstanding enclosure (2) and especially in light of enclosures (3), (4) and (5), the Board finds the existence of an injustice warranting limited corrective action, specifically, removal of the fitness report for 1 February 2002 to 31 January 2003, as it documents the GCM that has been set aside, and removal of all other references to that conviction.

The Board is unable to find the contested fitness report for 2 February 2001 to 31 January 2002 was influenced in any way by Petitioner's GCM conviction.

The Board does not recommend favorable action regarding Petitioner's request for promotion to lieutenant commander and retirement in that grade. In this regard, the Board finds Petitioner did voluntarily request the retirement that has made him ineligible for promotion. Further, the Board finds that the information in the "Background" section of the Article 73 review at Appendix/Exhibit B to counsel's brief at enclosure (1) calls into question his fitness for promotion, particularly his judgment, without regard for the offenses of which he was charged at his GCM.

In view of the above, the Board directs the following limited corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the following fitness report and related material:

Date of Report	Reporting Senior	Period of Report	
		From	To
26 Jan 03	 USN	1 Feb 02	31 Jan 03

b. That there be inserted in his record a memorandum in place of the removed report, containing identifying data concerning the report; that such 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.

c. That his record be corrected further by removing all other documentation of or reference to his general court-martial conviction of 31 January 2002.

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.

f. That the remainder of Petitioner's request be denied.

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 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

Jonathan S. Ruskin
JONATHAN S. RUSKIN
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
W. DEAN PFEIFFER
Executive Director