



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

REC  
Docket No: 00336-10  
12 April 2010

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

Subj: REVIEW OF NAVAL OF RECORD [REDACTED]

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

Encl: (1) DD Form 149 with attachments  
(2) Case summary  
(3) OJAG (Code 20) memo dtd 29 Mar 10  
(4) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the United States Navy Reserve, filed enclosure (1) with this Board requesting, in effect, that the nonjudicial punishment (NJP) which occurred on 16 August 2005, be removed from his service record.

2. The Board, consisting of Ms. [REDACTED], Mr. [REDACTED], and Mr. [REDACTED] reviewed Petitioner's allegations of error and injustice on 7 April 2010 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, and enclosures (1) through (4).

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

- a. Enclosure (1) was filed in a timely manner.
- b. Petitioner enlisted in the Navy Reserve on 11 September 1989 and is still serving. He served until

16 August 2005 without disciplinary incident. However, on or about 1 May 2004, he violated a lawful general regulation by wrongfully failing to promptly notify his Commanding Officer of his arrest for an alcohol-related offense by civil authorities. This resulted in him receiving the contested NJP on 16 August 2005.

c. Enclosure (3) is an Advisory Opinion (AO) from the Office of the Judge Advocate General (OJAG), recommending that Petitioner's request be denied. The advisory states that he was found guilty at NJP for violating paragraph 8n of the Chief of Naval Operations Instruction (OPNAVINST 5350.4), which requires that a Sailor report any alcohol-related incidents to his chain of command. The AO notes that a recent court decision (United States v. Serianne, U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA 200900330)), found that this is unconstitutional as it violates an individual's Fifth Amendment right against self-incrimination. However, the advisory states that the court decision is not to be applied retroactively. The advisory concludes that since his NJP occurred more than four years ago, the court decision is not applicable to him.

#### CONCLUSION:

Upon review and consideration of all the evidence of record, and despite the unfavorable AO from OJAG, the Board concludes that Petitioner's request warrants favorable action. The Board finds that since paragraph 8n of OPNAVINST 5350.4 was found unconstitutional, the NMCCA decision should be applied retroactively.

Accordingly, the Board concludes that relief in the form of removing the NJP from his service record is warranted. In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

#### RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the NJP of 16 August 2005 from his service record.

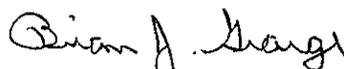
b. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed, or completely expunged from Petitioner's record

and that no such entries or material be added to the record in the future.

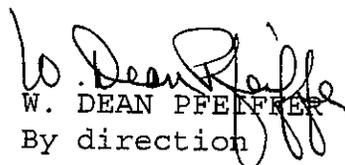
c. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

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

  
W. DEAN PFEIFFER  
By direction

Reviewed and approved:

*(See Attached Memo for the Record) pfw*

 4/16/10

Assistant General Counsel  
Manpower and Reserve Affairs)