



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

WJH
Docket: 2682-10
28 Feb 2011

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

Subj: REVIEW OF NAVAL RECORD [REDACTED]

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

Encl: (1) DD Form 149 w/attachments
(2) NPC ltr 1430 Ser 811/296 of 24 May 2010
(3) NPC ltr 1430 Ser 811/607 of 18 Nov 2010
(4) Materials submitted by DONCAF
(5) Materials submitted by PSAB
(6) Correspondence with Command

1. Pursuant to the provisions of reference (a) Petitioner filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected to show that he advanced from pay grade E-3 to E-4 as a result of the Cycle 203 (March 2009) exam cycle.

2. The Board, consisting of Messrs. Pfeiffer, Zsalman, and George, reviewed Petitioner's allegations of error and injustice on 14 February 2011. After careful and conscientious consideration of the entire record, a majority of the Board found that the evidence submitted was sufficient to establish the existence of probable material injustice and determined that the corrective action indicated below should be taken on the available evidence of record. One member, voting in the minority, recommended that no corrective action be taken for reasons discussed below. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies. The Board also considered advisory opinions provided by the Navy Personnel Command, attached as enclosures (2) and (3) 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 May 2008, Petitioner was accused of an off-base sexual assault of a female Sailor. He was interviewed by a civilian county police officer [REDACTED]. [REDACTED], [REDACTED], observed the interview. The interview was tape recorded. [REDACTED] later reported that Petitioner [REDACTED] made a "verbal admission to sexual assault" during the interview. [REDACTED] disputes [REDACTED] claim.

c. In 29 Oct 2008, the civilian charges were "nolle prossed". The Navy took no action against Petitioner.

d. In March 2009, Petitioner participated in an advancement cycle. He achieved the requisite Final Multiple Score (FMS) for advancement and was scheduled to advance to E-4 in Sep 2009.

e. In June 2009, (7 months after the charges were "nolle processed"), the Central Adjudication Facility (DONCAF) issued a "Letter of Intent to Deny/Revoke Security Clearance," apparently based on [REDACTED] claim (as passed on to DONCAF from NCIS) that Petitioner [REDACTED] made an "admission to sexual assault" during the interview. Enclosure (3).

f. In July 2009, Petitioner advised DONCAF that the charges had been "nolle prossed." But that apparently did not alleviate DONCAF's concerns. On 17 Aug 2009, DONCAF revoked Petitioner clearance. His advancement was invalidated. Enclosure (4).

g. Petitioner appealed the revocation to the Personnel Security Appeals Board (PSAB). In Feb 2010, the PSAB found in favor of Petitioner and directed DONCAF to restore Petitioner's clearance. Enclosure (5).

h. In March 2010, Petitioner applied to this Board seeking to validate the results of the March 2009 advancement cycle retroactively.

i. By enclosures (2) and (3), PERS 811 recommends "no relief" be granted. PERS 811 reasons that Petitioner lost his security clearance while waiting to advance and it was not restored before the limiting date.

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, the majority of the Board, consisting of Messrs. Pfeiffer and Zsalman concludes that Petitioner's request warrants favorable action. The majority understood and carefully considered the comments made in enclosures (2) and (3). However, it found that the following factors militated in favor of relief. The civilian charges were "nolle prossed," no punitive or administrative action was taken by the US Navy, [REDACTED] maintains that Petitioner never made an admission against his own interests, DONCAF revoked the clearance well after the charges had been "nolle prossed," and Petitioner's command supports him. Also, because the requested advancement is from E-3 to E-4, granting the request is not overly-burdensome to the agency. For these reasons, the majority finds that, Petitioner's request should be granted favorable action.

RECOMMENDATION:

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

a. Petitioner was advanced to pay grade E4 on 16 September 2009 as a result of the Cycle 203 (March 2009) examination cycle with a TIR date of 1 July 2009.

MINORITY CONCLUSION:

The minority, Mr. George, finds insufficient evidence of an error or injustice that would warrant relief. In the minority's view, in light of the importance of scrupulously safeguarding national security information, DONCAF did not act unreasonably when they revoked Petitioner's clearance based on the information available to them. Petitioner is,

at least in part, responsible for the circumstances in which he found himself. Petitioner lost his security clearance while waiting to advance and it was not restored before the limiting date.

MINORITY RECOMMENDATION:

That the 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 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

The MAJORITY recommendation is reviewed and approved:


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3/8/11