



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

TAL
Docket No: 8352-12
1 November 2012

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

Subj: REVIEW NAVAL RECORD OF [REDACTED]

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

Encl: (1) DD Form 149 with attachments
(2) Case summary
(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Navy, filed enclosure (1) with this Board requesting the removal of all adverse material from his Official Military Personnel File (OMPF) regarding a nonjudicial punishment (NJP) dated 20 October 2010. He also requested restoration of his rank of EOD1 (paygrade E-6).

2. The Board, consisting of Mr. Zsalman, Mr. Exnicios and Ms. Guill, reviewed Petitioner's allegations of error and injustice on 24 October 2012 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. Enclosure (1) was filed in a timely manner.

c. Petitioner enlisted in the Navy and served without disciplinary incident until 22 August 2010, when he was pulled over for improper lane usage by the city police in Escondido,

California. He then failed a field sobriety test. He was arrested and released on 22 August 2010 on his own recognizance with a court date set for 7 October 2010. He states he notified his chain of command of the arrest according to the requirement under Operational Navy Instruction (OPNAVINST) 5350.4D NAVY ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL. He also provided his command with a copy of the police report and blood alcohol content (BAC) documentation.

d. On 20 October 2010, Petitioner received NJP for drunken or reckless operation of vehicle. The punishment imposed was reduction in rate from paygrade E-6 to E-5. He was advised of his right to appeal the punishment and chose not to.

e. On 6 September 2011, during a training session the executive officer recommended that if any command members had been involved with self reporting charges, they should consult a Judge Advocate General (JAG). Petitioner did consult a JAG and was advised he had a good case ripe for an appeal in spite to the five day limitation on NJP appeals. On 6 December 2011, he submitted an appeal to his commanding officer. On 7 February 2012, the commanding officer responded in part that the request exceeded the permitted NJP appeal timeframe allowed and therefore he would not endorse and forward it up the chain of command.

f. On 25 April 2012, Petitioner submitted a request to have the NJP set aside citing the *U.S. v. Serianne* (USCAAF, 4 MAY 2010) decision. On 1 August 2012, the commanding officer denied Petitioner's request to set aside the NJP, stating in part that, his decision to award it for the incident was based on his admitted arrest and the voluntary statement given to the command after he waived his right to remain silent.

g. *U.S. v. Serianne* ruled that any self reporting requirement of any misconduct is in violation of the fifth amendment's protection against self incrimination.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of *U.S. v. Serianne*, the Board concludes that there is an error and injustice, so Petitioner's request warrants favorable action in the form of relief. The Board particularly notes that there is no longer a requirement to self report misconduct.

After careful and conscientious consideration of the entire record, the Board concludes that Petitioner's NJP of 20 October 2010 should be removed from his naval record.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by totally obliterating or removing the 20 October 2010 NJP along with all associated documentation relating to it and that all property, privileges and rights affected by it be restored. Specifically, his paygrade of E-6 should be restored with his original date of rank and effective date.

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. 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


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.


ROBERT D. ZSALMAN
Acting Executive Director