



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

TAL
Docket No: 488-14
16 April 2014

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 with attachments
(3) OLC (PERS-00J) ltr dtd 16 Mar 14
(4) 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 that his record be corrected by removing derogatory material regarding charges referred to a special court-martial (SPCM). This request includes the removal of an enlisted performance evaluation for the period from 14 September 2012 to 19 June 2013. Petitioner further requested that he be reinstated to paygrade E-7.

2. The Board, consisting of Messrs. Ivins, Lippolis, and Zsalman, reviewed Petitioner's allegations of error and injustice on 2 April 2014 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. In addition, the Board considered the advisory opinion (AO) provided by the Navy Personnel Command, Office of Legal Counsel (PERS 00J) dated 16 March 2014, a copy of which is attached to enclosure (2).

~~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. On 12 May 2013 Petitioner was found at home in an incoherent state with empty bottles of prescribed medication, Cymbalta and Tramadol, found near him. He was admitted to a civilian hospital and administered a urinalysis which tested positive for the wrongful use of Phencyclidine (PCP). The following day he was transferred to Walter Reed National Military Medical Center (WRNMC) and administered both a blood and urine test, both of which were negative for the wrongful use of PCP.

d. On 19 June 2013, upon Petitioner's transfer to Naval District Washington due to pending disciplinary and legal actions, he was issued an adverse performance evaluation for the period from 14 September 2012 to 19 June 2013.

e. On 11 July 2013, Petitioner was charged with being in an unauthorized absence (UA) status and wrongful use of controlled substances. Subsequently, these charges were referred for trial by SPCM.

f. On 9 August 2013 Petitioner was issued and subsequently signed an administrative remarks (Page 13) entry which stated that his recommendation for advancement to paygrade E-7 was being withdrawn due to a pending investigation regarding the foregoing charges.

g. On 4 October 2013 the referred charges of UA and wrongful use of controlled substances were withdrawn due to the discovery of new and exculpatory evidence, in part, from Petitioner's physician at WRNMC. In this regard, the physician stated that the dosage increase and interaction between Petitioner's prescriptions of Cymbalta and Tramadol caused a medical condition called Serotonin Syndrome. The physician further stated that because of this interaction between the medicines the initial urinalysis was not reliable and could cause a false positive for the wrongful use of PCP.

h. After a review of the foregoing investigative results and exculpatory evidence, on 12 December 2013, a letter was submitted in support of reinstating Petitioner's advancement to paygrade E-7.

i. In an advisory opinion (AO) from the Office of Legal Counsel (PERS 00J) dated 16 March 2014, it was recommended that relief be granted since the charges of UA and wrongful use of a controlled substance were not dismissed due to a technicality and there was no evidence that Petitioner had any culpability in the matter. The AO stated, in part, as follows:

...This does not appear to be a situation in which criminal charges were dismissed based on a technicality or could not be proved beyond a reasonable doubt, but may have been substantiated at some lesser forum. All of the medical evidence supports that [Petitioner] did not use PCP, but, rather, the combination of prescription medications caused a false positive. In addition, the increased dosage [he] was prescribed immediately prior to not reporting to work appears to have been the proximate cause of his UA. There is no evidence that [he] had any culpability in these matters. In addition to the charges having been dropped, he received a letter of support from the authority who had previously issued the Page 13.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the AO, the Board finds the existence of an error and injustice warranting corrective action. In this regard, the Board concludes that the performance evaluation for the period from 14 September 2012 to 19 June 2013 and the page 13 entry signed on 15 August 2013 should be removed from the record since there was no evidence that Petitioner had wrongfully used PCP and these charges were dropped/dismissed. Further, Petitioner should be reinstated to paygrade E-7 since his removal was based solely on the now dismissed charges.

In view of the above, the Board directs the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the performance evaluation for the period from 14 September 2012 to 19 June 2013 and the page 13 entry signed on 15 August 2013.

b. That Petitioner's naval record be corrected by removing any and all related material referencing charges of UA and wrongful use of controlled substances during the period from 12 May to 12 December 2013.

c. That Petitioner's naval record be corrected by reflecting that he was advanced to paygrade E-7 on his original date of rank, and that all rights and privileges thereto were restored.

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.

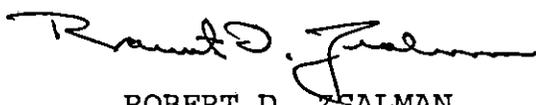
e. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

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