



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

██████████
Docket No. 6617-21
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER ██████████ ■
██████████, USN, XXX-XX-██████████

Ref: (a) 10 U.S.C. § 1552
(b) 10 U.S.C. § 1176
(c) DODI 1332.14, Enlisted Administrative Separations, 27 January 2014
(d) SECNAVINST 1920.6C, Administrative Separation of Officers, 15 December 2005
(e) DODI 1332.29, Involuntary Separation Pay (Non-Disability), 3 March 2017
(f) OPNAVINST 1900.4, Separation Pay for Involuntary Separation from Active Duty, 19 February 2019

Encl: (1) DD Form 149 w/enclosures
(2) BCNR Memo ██████████ Docket No: 4819-18, subj: Review of Naval Record of [Petitioner], 18 February 2020
(3) Complaint in the case of [Petitioner] v. *The United States of America*, in the United States Court of Federal Claims, Case No. ██████████-██████████, filed ██████████
(4) Order in the case of [Petitioner] v. *The United States of America*, in the United States Court of Federal Claims, No. ██████████-██████████, filed ██████████
(5) DD Form 214 (19961227 – 20150531)
(6) NAVPERS 1626/7, Report and Disposition of Offense(s), 6 May 2014
(7) Petitioner's Memo, subj: Appeal of Non-Judicial Punishment ICO [Petitioner], 21 May 2014
(8) Naval Air Force Atlantic CO Memo 5812 Ser N01L/154, subj: Appeal of Nonjudicial Punishment, 6 June 2014
(9) USS ██████████ ██████████ CO Memo 1621 Ser 00, subj: Punitive Letter of Reprimand, 16 June 2014
(10) Petitioner's Memo, subj: Response to Letter of Reprimand ICO [Petitioner], 30 June 2014
(11) USS ██████████ ██████████ CO Memo 1611 Ser 00/287, subj: Detachment for Cause (DFC) ICO [Petitioner], 9 July 2014
(12) Petitioner's Memo, subj: Response to Detachment for Cause ICO [Petitioner], 18 July 2014
(13) NPC CO Memo 1420 Ser 833/1672, subj: Fiscal Year 2015 Active Duty Navy Lieutenant (LDO) All-Fully-Qualified Officers List, 12 August 2014
(14) NPC CO Memo 1611 PERS-00/566, subj: Detachment for Cause ICO [Petitioner], 3 October 2014
(15) Petitioner's Memo, subj: Response to Withheld Nomination for Promotion ICO [Petitioner], 13 October 2014

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- (16) NPC CO Memo 1920 Ser 834/867, subj: Notification of Reversion to Enlisted Status, 17 October 2014
- (17) Petitioner's Memo, subj: Response to Reversion to Enlisted Status ICO [Petitioner], 31 October 2014
- (18) NPC CO Memo 1920 PERS-00/048, subj: Reversion to Enlisted Status and Denial of Reenlistment ICO [Petitioner], 26 January 2015
- (19) Petitioner's Memo, subj: Request for Redress, 3 June 2015
- (20) DD Form 214 (20150601 – 20150623)
- (21) OJAG Code 20 Memo 5420 Ser 13/4BC0813.21, subj: Advisory Opinion in the case of [Petitioner], 14 December 2021

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records, hereinafter referred to as the Board, requesting that the Board take whatever action it deems fit to remedy his improper removal from active duty in violation of reference (b).¹ Except for that part pertaining to the removal of Petitioner's NJP and its resulting PLOR from Petitioner's record, this request was denied in Docket No. 4819-18.² See enclosure (2).

2. On 16 June 2021, Petitioner filed suit in the U.S. Court of Federal Claims (COFC) alleging wrongful discharge from the Navy. See enclosure (3). On 19 October 2021, the COFC remanded this case to the Board for reconsideration of its decision in Docket No. 4819-18 on motion by the government. See enclosure (4).

3. The Board reconsidered its decision in Docket No. 4819-18 pursuant to the Order of the COFC at enclosure (4) and the regulations governing Board procedures on 25 January 2022, and determined that the corrective action indicated below should be taken on Petitioner's naval record. Documentary material considered by the Board consisted of the enclosures; relevant portions of Petitioner's naval records, which were included within the case file for Docket No. 4819-18; and applicable statutes, regulations and policies.

4. The Board, having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, finds as follows:

¹ Petitioner suggested the following possible remedies: (1) Setting aside Petitioner's reversion to his permanent enlisted grade and his subsequent discharge; (2) Reinstating Petitioner to active duty until he reaches retirement eligibility; (3) Retroactively promoting Petitioner to the grade of lieutenant (LT)/O-3 off of the Fiscal Year 2015 (FY15) promotion list from which he was removed; and (4) Removing from Petitioner's record his Detachment for Cause (DFC) and all associated documents, and his nonjudicial punishment (NJP) and its resulting Punitive Letter of Reprimand (PLOR), or, in the alternative (5) reflecting his entitlement to involuntary separation pay in his permanent enlisted grade.

² The Board voted to deny all requested relief in Docket No. 4819-18, but the NJP and PLOR were ultimately removed from Petitioner's naval record pursuant to the recommendation of the Executive Director of the Board. This recommendation for relief was based upon the Executive Director's determination that the "vessel exception" to Article 15, Uniform Code of Military Justice (UCMJ), was inappropriately applied in Petitioner's case to deny him the right to demand trial by court-martial.

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a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner enlisted in the Navy and began a period of active duty service on 27 December 1996. See enclosure (5).

c. On 1 January 2011, Petitioner received a temporary commission as a Limited Duty Officer (LDO). His permanent grade at the time was E-7.³ On 1 January 2013, Petitioner was promoted to Lieutenant Junior Grade (LTJG/O-2), while his permanent enlisted grade was advanced to E-8.

d. On 15 May 2014, Petitioner received NJP for assault consummated by battery in violation of Article 128, UCMJ, and conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ.⁴⁵ His punishment consisted of a punitive letter of reprimand (PLOR). See enclosure (6).

e. By memorandum dated 21 May 2014, Petitioner appealed his NJP based upon the sufficiency of the evidence to establish the underlying misconduct for which he was found guilty. He asserted that the findings were based upon Petitioner's exercise of his right to remain silent, and alleged that the officer who imposed NJP refused to ask his accuser a list of questions that he provided which reportedly would have highlighted inconsistencies in her previous interviews. He also alleged that the officer imposing NJP relied only upon the unsworn and uncorroborated testimony of his accuser, despite the testimony of multiple witnesses of his accuser's character for untruthfulness and other evidence of her unreliability and motivation to lie. Petitioner also challenged the quality and thoroughness of the investigation upon which his NJP was based. See enclosure (7).

f. By memorandum dated 6 June 2014, Petitioner's appeal of his NJP was denied. See enclosure (8).

g. By memorandum dated 16 June 2014, Petitioner's commander issued the PLOR awarded during Petitioner's NJP. This PLOR revealed that the charge of assault consummated by battery in violation of Article 128, UCMJ, was supported by a DNA test which confirmed that Petitioner's saliva was found on his alleged victim's face. See enclosure (9).

³ Petitioner had been promoted to E-7 effect 16 September 2009.

⁴ Petitioner was found not guilty at NJP of abusive sexual contact in violation of Article 120, UCMJ; communicating a threat in violation of Article 134, UCMJ; and fraternization in violation of Article 134, UCMJ. These charges arose from an allegation that Petitioner sexually assaulted an enlisted female Sailor. Specifically, it was alleged that Petitioner grabbed the enlisted Sailor by the blouse and bit the right side of her face. It was also alleged that he bent the Sailor over and rubbed his genitalia against her buttocks. When this Sailor reportedly tried to get Petitioner to stop by stating that she was pregnant, he allegedly pushed her into a chair near his desk, waved a sledge hammer in front of her face in a threatening manner, took a pair of pliers and shoved them toward her pelvic area, and stated that he was going to cut out the baby.

⁵ These charges were originally preferred to court-martial, but those charges were withdrawn after the alleged victim declined to participate in the prosecution.

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h. By memorandum dated 30 June 2014, Petitioner submitted a response to the PLOR discussed in paragraph 3f above, in which he made the same contentions that he had made in his NJP appeal. See enclosure (10).

i. By memorandum dated 9 July 2014, Petitioner's commander requested that Petitioner be DFC from the USS [REDACTED] by reason of misconduct and loss of confidence. Specifically, this request alleged that Petitioner committed misconduct by biting a female enlisted Sailor in his secluded office behind a closed door, and that Petitioner's DNA was discovered in a sample taken from the bite mark. It further noted that Petitioner has continued to stand by his denials despite being presented with evidence that his teeth left impressions consistent with a bite on the Sailor's face. See enclosure (11).

j. By memorandum dated 18 July 2014, Petitioner responded to the request that he be DFC from the USS [REDACTED]. While continuing to assert his innocence and the sufficiency of the evidence, he also argued that DFC was not appropriate or necessary since he already had orders transferring him off of the ship. See enclosure (12).

k. By memorandum dated 12 August 2014, Petitioner was notified that he was recommended for promotion by the FY15 Active Duty Navy Lieutenant (LDO) All-Fully-Qualified Officers List (AFQOL), but that the Secretary of the Navy had withheld his nomination pending review of his qualifications in light of his NJP. See enclosure (13).

l. By memorandum dated 3 October 2014, Petitioner's DFC from the USS [REDACTED] for misconduct was approved. See enclosure (14).

m. By memorandum dated 13 October 2014, Petitioner submitted a response to the withholding of his nomination for promotion. In this response, he again asserted his innocence of the charges and challenged the sufficiency of the evidence, explaining that his saliva was found on the alleged victim's cheek because her cheek made accidental contact with his mouth when he was trying to exit his office after she assaulted him. See enclosure (15).

n. By memorandum dated 17 October 2014, Petitioner was notified that action had been initiated to revert him to his previous enlisted status and to deny his reenlistment based upon misconduct and substandard performance of duty. See enclosure (16).

o. By memorandum dated 31 October 2014, Petitioner responded to the notice that action was initiated to revert him to his previous enlisted status and to deny his reenlistment. In this response, Petitioner continued to maintain his innocence and provided a detailed history of the events leading up to what he described as the false allegation against him. See enclosure (17).

p. By memorandum dated 26 January 2015, the Commander, Navy Personnel Command (NPC), recommended to the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) that Petitioner be reverted to his permanent enlisted status and denied reenlistment. See enclosure (18).

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q. On 6 February 2015, the ASN (M&RA) approved the recommendation that Petitioner be reverted to his permanent enlisted status and denied reenlistment. See enclosure (18).

r. Effective 1 June 2015, Petitioner's temporary commission was revoked and he was reverted back to his permanent enlisted grade of E-8. See enclosure (5).

s. By memorandum dated 3 June 2015, Petitioner requested redress of a grievance from his command. Specifically, he noted that action had been taken to separate him from the Navy, without notice, effective 15 April 2015. As a result, he had not received pay since that date, despite reporting for duty each day during that period. He requested to be permitted to remain on active duty until eligibility for retirement, noting that he qualified for sanctuary protection under reference (b). See enclosure (19).

t. On 23 June 2015, Petitioner was honorably discharged from the Navy in the grade of E-8 by reason of Secretarial Authority. At the time of his discharge, Petitioner had 18 years, four months, and 23 days of active service. See enclosure (20).

u. On 29 March 2018, Petitioner applied for appropriate relief from the Board, asserting that he did not commit the misconduct for which he was reverted and denied reenlistment and that the Navy improperly removed him from active duty in violation of reference (b). Specifically, Petitioner, through counsel, asserted that it was an error for the ASN (M&RA) to revert Petitioner to his permanent enlisted status and to deny him reenlistment because the NPC recommendation upon which this action was based erroneously stated that he had only 17 years of service as of 1 January 2015, which is significant in that Petitioner's 18 years of service would entitle him to sanctuary protection under reference (b). He also asserted error in that he was improperly denied the right to demand trial by court-martial in lieu of NJP pursuant to the "vessel exception" to Article 15, UCMJ, since the ship was in drydock undergoing an extensive overhaul. Finally, Petitioner asserted that it was an error to find Petitioner guilty at his NJP hearing, which rendered all subsequent adverse actions also erroneous. See enclosure (1).

v. On 15 October 2019, the Board determined that no corrective action should be taken on Petitioner's naval record. This decision was based in significant part upon an advisory opinion (AO) provided by NPC, which found no errors warranting relief. During the post-board review process, the Executive Director of the Board disagreed with the Board's conclusion that there was no error in the application of the "vessel exception" of Article 15, UCMJ, to deny Petitioner the right to demand trial by court-martial and forwarded the decision to the Assistant General Counsel (Manpower and Reserve Affairs) (AGC (M&RA)) with the recommendation that the Board's decision be overturned in this regard. On 18 February 2020, the AGC (M&RA) approved the Executive Director's decision and directed the removal of Petitioner's NJP and PLOR from his naval record. Pursuant to the Board's findings, however, no other relief was granted. See enclosure (2).

w. On 16 June 2021, Petitioner filed suit in the COFC alleging wrongful discharge from the U.S. Navy. Specifically, Petitioner alleged that he was improperly discharged in violation of the sanctuary protections of reference (b) since he had more than 18 years of service. See enclosure (3).

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x. On 8 October 2021, the government filed a motion with the COFC to voluntarily remand Petitioner's case to the Board for reconsideration.⁶ On 19 October 2021, the COFC remanded Petitioner's case to the Board for "reconsideration of [Petitioner's] claims related to his discharge, and any further administrative actions consistent with that reconsideration." See enclosure (4).

y. By memorandum dated 14 December 2021, the Administrative Law Division of the Office of the Judge Advocate General (Code 13) provided an AO to the Board regarding the applicability of the "safe-haven" provision of reference (b) to Petitioner's case. This AO found that the "safe-haven" provision of reference (b) presumably applied in Petitioner's case based upon the fact that he had over 18 years of active service at the time of his discharge and Petitioner was not discharged under any other provision of law which would negate the application of this provision. According, the AO concluded that Petitioner's discharge, which was intended to be based upon misconduct and/or unsatisfactory performance, was not consistent with references (c) and (d) since he was denied due process. The AO further concluded that Petitioner would be entitled to separation pay pursuant to references (e) and (f) if his separation stands. Finally, the AO found that Petitioner was properly reverted to E-8 pursuant to reference (d), and that the previous removal of his NJP and the associated punishment had no impact upon his DFC and subsequent reversion proceedings. See enclosure (21).

z. Reference (b) provides that a regular enlisted member whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged is within two years of qualifying for transfer to the Fleet Reserve, shall be retained on active duty until the member is qualified for transfer to the Fleet Reserve, unless the member is sooner retired or discharged under any other provision of law.

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board found sufficient evidence of a material error warranting the relief indicated below.

The Board found no error or injustice in Petitioner's reversion to his permanent enlisted status. As discussed in enclosure (21), the process of reverting a temporary LDO to their permanent enlisted status is governed by 10 U.S.C. § 8146 and reference (d). Petitioner's reversion was in compliance with reference (d). Further, the previous removal from Petitioner's naval record of his NJP does not invalid his reversion, as it was based upon the underlying misconduct of that NJP. The Board is not an investigative body. In the absence of evidence to the contrary, it relies upon the presumption of regularity to establish that naval authorities properly performed their functions. In this case, the presumption that naval authorities evaluated the evidence and reached a reasonable conclusion based on that evidence was not overcome by Petitioner. To the contrary, the fact that Petitioner was found not guilty at the NJP proceedings of the most serious charges against him strongly suggests that the evidence was carefully evaluated and weighed. The Board recognizes that Petitioner has consistently maintained his innocence with regard to the

⁶ This motion was made with the support and at the request of the Board based in part upon its assessment of the AO upon which the decision in Docket No. 4819-18 was based.

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allegations against him. However, despite his denials, there clearly was evidence upon which a reasonable person could conclude that he assaulted his accuser. The Board makes no conclusions in this regard, except that there was no error or injustice in the actions taken by naval officials in taking action upon that evidence. Accordingly, Petitioner was properly reverted back to his permanent enlisted status in the grade of E-8 effective 1 June 2015.

The Board did, however, find an error in Petitioner's discharge due to the expiration of his term of enlistment consequential to the ASN (M&RA)'s decision to revert him to his permanent enlisted grade and to deny him the opportunity to reenlist. While the Board found no error in the decision to deny Petitioner the opportunity to reenlist after he was reverted to his permanent enlisted status, reference (b) negated Petitioner's need to reenlist to attain the 20 years of active service to qualify for transfer to the Fleet Reserve if his discharge date was within two years of that date. At the time of Petitioner's discharge, he had more than 18 years of active service. Accordingly, Petitioner should not have been discharged after his reversion to his permanent enlisted status absent processing for discharge under any other provision of law.

RECOMMENDATION:

In view of the above, the Board recommends that the following corrective action be taken on Petitioner's naval record:

That Petitioner's naval record be corrected to reflect that he was not discharged on 23 June 2015, but rather that he continued to serve on active duty in the grade of E-8 until he was discharged for transfer to the Fleet Reserve on 31 December 2016 and that he was transferred to the Fleet Reserve effective 1 January 2017.

That Petitioner be issued a new DD Form 214 reflecting his adjusted discharge and active duty service dates, consistent with the recommendation immediately above, and that Petitioner's narrative reason for separation (and all associated entries) be changed to reflect "Transfer to the Fleet Reserve." Petitioner's reentry code should also be changed to one consistent with this recommendation.

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. This includes, but is not limited to, all information systems or database entries that reference or discuss the expunged material.

That the Defense Finance and Accounting Service complete an audit of Petitioner's records and make payment of any money that Petitioner may be entitled to.

That a copy of this record of proceedings be added to Petitioner's naval record.

That no further corrections be made to 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 titled matter.

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

3/18/2022

X [REDACTED]

[REDACTED]
Executive Director

ACTING ASSISTANT SECRETARY OF THE NAVY (MANPOWER AND RESERVE AFFAIRS) DECISION:

Board Recommendation Approved (Grant relief as reflected in the recommendation above)

Board Recommendation Disapproved (Deny Relief – I do not agree with the Board’s findings and/or recommendation for the following reason(s): _____

[REDACTED] 4/11/2022
[REDACTED]
Acting Assistant Secretary of the Navy
(Manpower and Reserve Affairs)