



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

TRG
Docket No: 2929-00
8 November 2001

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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

Encl: (1) Case Summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Navy filed an application with this Board requesting that his record be corrected by removing the nonjudicial punishment (NJP) of 23 April 1997 from his record, and/or reinstatement to DK1 (E-6) with his original time in rate (TIR), He also requests a special selection board for chief petty officer.

2. The Board, consisting of Mr. Pfeiffer, Mr. Zsalman and Ms. Hare, reviewed Petitioner's allegations of error and injustice on 30 October 2001 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. Although it appears that Petitioner's application was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner reenlisted in the Navy on 16 April 1992 after about nine years of prior active service, and subsequently extended that enlistment for 16 months. The record shows that he had served in an excellent manner during his prior service.

d. On 9 November 1996 Petitioner reported aboard the USS ARLEIGH BURKE (DDG 51). On 21 April 1997, the combat systems officer completed an inquiry into charges preferred against

Petitioner, and concluded that he had been disrespectful and had communicated a threat to the disbursing officer. The inquiry report indicates that two master chiefs believed that Petitioner had made a threat towards the disbursing officer, and a chief petty officer and a petty officer first class stated that Petitioner was disrespectful towards the disbursing officer. On 23 April 1997 he received NJP for disrespect towards a superior commissioned officer and communicating a threat. The punishment imposed was a reduction in rate from DK1 to DK2 (E-5).

e. In the performance evaluation for the period 16 November 1995 to 23 April 1997 (ending date later changed to 16 June 1997 to coincide with the date of his detachment) he was assigned adverse marks of 1.0 in the categories of equal opportunity, military bearing/character, teamwork and leadership. The comments state, in part, as follows:

... During this reporting period (he) has displayed a pattern of confrontational behavior and difficulty dealing with anger that has precluded his effectiveness as a leading petty officer and distracts from his ability to be effective in leadership positions.

f. On 23 April 1997 in connection with the NJP proceedings, Petitioner filed an equal opportunity complaint alleging a pattern of abuse by the disbursing officer and contending that he was only disciplined because the command was attempting to cover up disbursing irregularities. In the complaint, Petitioner stated that he could not get along with the disbursing officer who was constantly belittling his efforts and making insensitive comments concerning his Hispanic heritage.

g. In his endorsement to Petitioner's complaint, the commanding officer (CO) stated that an outside auditor had found no significant disbursing irregularities. The CO also noted that there were no witnesses that could corroborate any abusive or discriminatory behavior against Petitioner. The CO points out that Petitioner had a stellar record prior to reporting, but early in his career he had difficulty dealing with authority and had exhibited confrontational behavior. Since there was no evidence to support any of Petitioner's contentions, the CO recommended that the equal opportunity complaint be closed. Subsequently, the squadron commander and the Commander, Naval Surface Forces Atlantic found the allegations of discrimination to be unsubstantiated. Later, the Navy Inspector General declined to review the case.

g. Since the NJP, Petitioner has reenlisted and has served in an excellent manner. On 25 July 2000 he reported aboard the USS GONZALEZ (DDG 66). The performance evaluation for the period

26 July to 15 March 2001 is excellent and the comments state, in part, as follows:

Recognized as Supply Department Sailor of the Year and a runner-up for GONZALEZ Sailor of the Year for his accomplishments perseverance and devotion. ...

On 7 May 2001, Petitioner was awarded the Military Outstanding Volunteer Service Medal.

h. Petitioner has informed the examiner assigned to his case that he will complete 20 years of active service in 2003 and will be forced to retire as a DK2 because the advancement opportunities in the DK rating are very poor and his request for restoration to DK1 has been denied. He believes, in effect, that the injustice in this case is compounded because the reduction in rate will result in reduced earnings for the rest of his life.

i. The Board is aware that the Military Personnel Manual (MILPERSMAN) Article 1430-020 allows for special consideration for restoration in rate on a case-by-case basis by the Chief of Naval Personnel. However, the article states that requests from individuals who have been convicted of multiple offenses under the UCMJ will not receive favorable consideration. Further, a request for restoration must be submitted within a window of 12 to 36 months from the imposition of NJP. Advancements under this article are effective on the 16th of the month and the TIR is either 1 January or 1 July as appropriate.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants partial favorable action. Concerning the NJP, the evidence shows that he was disrespectful and had communicated a threat. Therefore, the Board concludes that the commanding officer did not abuse his discretion when he imposed NJP and, given the circumstances, the punishment was not too severe. Consequently, the NJP and related performance evaluation should remain in the record.

However, the Board notes Petitioner's excellent record both before and after the NJP, the isolated nature of the offenses, and the apparent personality conflict with the disbursing officer. The Board believes that although the reduction in rate was proper at the time, the probability that he will be forced to retire in pay grade E-5 makes continuation of the reduction in rate too severe. The Board reaches this conclusion even though his previous request for restoration under the provisions of

MILPERSMAN 1430-020 was denied apparently because he committed multiple offenses, and he is now outside the 12-36 month window. Therefore, the Board concludes that Petitioner should be restored to DK1 effective the 16th of the month following approval of this recommendation. The TIR should be 1 July 2001.

The Board further concludes that this report of Proceedings should be filed in Petitioner's naval record so that all future reviewers will understand the circumstances of his advancement to DK1.

RECOMMENDATION:


a. That Petitioner's naval record be corrected to show that he was restored to DK1 on the 16th of the month following approval of this recommendation with the appropriate TIR.

b. That the remainder of his requests be denied.

c. That this Report of Proceedings be filed in Petitioner's naval record.

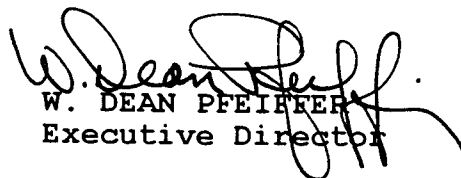
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
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 Regulations, 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.



W. DEAN PFEIFFER
Executive Director