



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

TRG
Docket No: 5582-01
16 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 to show that the reduction in rate, imposed at the 17 March 1997 nonjudicial punishment (NJP) was suspended.

2. The Board, consisting of Mr. Pfeiffer, Mr. Taylor and Mr. Novello, reviewed Petitioner's allegations of error and injustice on 6 November 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 8 December 1995 for 4 years. On 17 March 1997, while serving on board the USS MICHIGAN (SSBN 727) he received NJP for two instances of disobedience and making a false official statement. The punishment imposed was a reduction in rate from MM1 (E-6) to MM2 (E-5). The performance evaluation for the period 16 November 1996 to 17 March 1997 is adverse, with an individual trait average of 1.71, and he was not recommended for retention or advancement.

d. On 25 June 1997 Petitioner reported aboard the USS FLORIDA (SSBN 728) (BLUE). In a 9 September 1998 letter to the officer in charge of the personnel support activity, the commanding officer stated as follows:

..Per references (a) and (b) (JAGINST 5800.8C and the Manual for Courts-Martial), (NJP) awarded on 17 March 1997 is hereby changed and subject member is restored to Machinist's Mate First Class (MM1) effective 15 July 1998.

After review, it was determined that the commanding officer's recommendation could not be implemented because he did not have the power to restore Petitioner to MM1. On 22 October 1998 the commanding officer endorsed Petitioner's letter of 15 October 1998 and recommended that the Bureau of Naval Personnel restore him to MM1 effective 15 July 1998. On 29 January 1999 Petitioner was informed by the Navy Personnel Command that he had been restored to MM1, effective 16 February 1999, under the provisions of the Military Personnel Manual (MILPERSMAN) Article 1430-020 because of his subsequent excellent performance of duty. With this date of advancement, the time in rate (TIR) date is 1 January 1999. However, the advancement has no effect on the NJP or the original reduction in rate. Since this action was taken, Petitioner has reenlisted and continues to serve in an excellent manner.

e. The Navy Advancement Manual (BUPERSINST 1430.16D) states that when a punishment imposed at NJP is "set aside", such action means that the punishment never occurred. Since the only punishment imposed at the NJP was the reduction in rate, an action setting aside the reduction would leave no punishment remaining. The Board is aware that if no punishment is imposed, the NJP is a nullity and it must be removed from the record. Additionally, if an NJP punishment is mitigated to a lesser punishment or suspended, the original TIR is reinstated, but the NJP remains in the record. Concerning suspension of a punishment, the Manual for Courts-Martial states, in part, as follows:

.... An executed punishment of reduction or forfeiture of pay may be suspended only within a period of 4 months after the date of execution.

Since the NJP occurred about 18 months prior to the action to restore him to MM1, a suspension of the reduction in rate was not allowed by the regulations at the time of the restoration. In those cases where a reduction is suspended within four months the individual's record reflects his original effective date and he retains his original TIR.

f. Petitioner initially applied to the Board in 2000 requesting his original effective date and TIR for MM1. In that application, he contended that the commanding officer's intent was to set aside the punishment awarded at the 17 March 1997 NJP and, in effect, that his 9 September 1999 letter which used the words "changed" and "restored" was poorly worded. He further contended that it does not make any difference if the action taken by the commanding officer mitigates the punishment or sets it aside, because either action would restore his original TIR of 1 July 1992 and make him eligible to compete for advancement to chief petty officer.

g. The Board considered and denied Petitioner's case in May 2001. At that time, the Board concluded that since no other provision of the regulations fit the circumstances, he was properly restored to MM1 under the provisions of MILPERSMAN Article 1430-020 and a correction to his record to establish an earlier effective date of advancement and TIR was not warranted.

h. Subsequently, Petitioner requested reconsideration of his case. The commanding officer who attempted to restore him to MM1 in 1998 has now submitted a letter stating that it was his intent to suspend the punishment based on Petitioner's outstanding performance. He states that the previous commanding officer of the FLORIDA was relieved and he did not assume command until August 1997. Further, he needed a period of observation before recommending favorable action. He continues to believe that the reduction in rate should be suspended. In addition, the Commander Submarine Group 9 has favorably endorsed Petitioner's request for reconsideration, recommending that Petitioner be assigned his original time in rate.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action. The Board notes that Petitioner's transfer to a new command prevented the commanding officer from suspending the punishment within the four month period authorized by the regulations. Given his continuing outstanding performance and the favorable recommendations of the commanding officer and the group commander the Board concludes that the record should now be corrected to show that the reduction in rate imposed at the 17 March 1977 NJP was suspended at that time. With this correction, Petitioner will be restored to his original effective date of advancement and his original TIR.

The Board further concludes that this Report of Proceedings should be filed in Petitioner's naval record so that all future

reviewers will understand why he has been returned to his original effective date and TIR.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that the reduction in rate to MM2 imposed at the 17 March 1997 was suspended for a period of six months and he was never reduced in rate.

b. 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