



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

Docket No: 9339-08
29 September 2008

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
USNR, [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, a former Navy Reserve officer, filed an application with this Board requesting, in effect, that his record be corrected to show that he was not discharged on 28 February 2006 but continued to serve on active duty until he retired.

2. The Board, consisting of [REDACTED] and [REDACTED] reviewed Petitioner's allegations of error and injustice on 24 September 2008 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. Petitioner's application was submitted in a timely manner.

c. Petitioner enlisted in the Navy Reserve on 17 January 1989 and reported for extended active duty in the Training and Administration of the Navy Reserve (TAR) program on 24 April 1989 and served in a satisfactory manner for over 13 years. On 22 May 1996 he reported to the Navy and Marine Corps Reserve Center (NMCRC), [REDACTED] as a storekeeper second class (SK2; E-5) and remained stationed there for over six years. During this period, he attended [REDACTED] and subsequently graduated with a Bachelor of Science degree in Nursing. On 19 December 2002 he was honorably discharged to accept a commission as a Navy Nurse. At that time, he had completed 13 years, 7

months and 25 days of active service. At that time, he was still serving as an SK2.

d. On 20 December 2002 he was commissioned as an ensign in the Nurse Corps and was later promoted to lieutenant junior grade. Apparently he had difficulties adapting to the stresses as a Nurse in a busy hospital. Subsequently, his superiors found his performance of duty unsatisfactory and on 4 August 2005 recommended his discharge for unsatisfactory performance. On 6 January 2006 the Commander, Navy Personnel Command recommended that the Secretary of the Navy approve the discharge recommendation. The letter to the Secretary is attached to enclosure (1) and states, in part, as follows:

...[Petitioner] spent a year at an ambulatory procedure (low-stress) unit, where numerous clinical deficiencies were noted in his performance. After reassignment to a busy multi-service surgical ward, he continued to exhibit clinical deficiencies...The deficiencies included incomplete and inaccurate chart documentation, failing to give medication, starting IV's [intravenous injections] without gloves, and simultaneously giving contraindicated drugs (Morphine and Percocet) to a patient...In February 2005 [he] had four documented clinical deficiencies during one shift, including giving Morphine to the wrong patient. He was relieved of all nursing duties. A Clinical Competency Review report dated 25 February 2005 opined that after 22 months at the command, [he] clearly demonstrated his inability to provide safe nursing care and he possessed little insight into the magnitude of the problem...

On 13 January 2006, the Assistant Secretary of the Navy, Manpower and Reserve Affairs, approved the recommendation for a general discharge by reason of substandard performance. Petitioner received a general discharge on 28 February 2006. At that time, he had completed 17 years, 1 month and 2 days of active service.

e. Prior to his discharge, Petitioner requested a lateral transfer to be a Supply Corps officer so that he could continue on active duty to qualify for retirement. However, this request was not acted upon prior to his discharge.

f. Petitioner is represented by counsel who points out that his client is a native of the Philippine Islands and was 25 years old when he immigrated to the United States. He enlisted in the Navy in 1989 and was naturalized as a United States Citizen in 1994. Counsel points out that his enlisted service was excellent

with no disciplinary infractions. Further, he performed extremely well in his nursing program and passed the board to become a registered nurse on his first attempt. He also notes that at about the time of the events which resulted in Petitioner's untimely discharge his mother had died and his father had suffered a stroke. He also believes that there were errors made in his separation processing which made his discharge improper. Those errors are discussed below in the advisory opinions received in this case.

g. Attached to enclosure (1) are advisory opinions from the Navy Personnel Command (NPC) which concluded that there was sufficient documentation to substantiate his substandard performance of duty and that a general discharge was appropriate. Since he was being administratively separated NPC also concluded that it was appropriate to defer his request for a lateral transfer to the Supply Corps. The advisory further concluded that an adverse fitness report was properly filed in the record.

h. Also attached to enclosure (1) is an advisory opinion from the Deputy Assistant Judge Advocate General (DJAG) (Administrative Law) which addresses all of Petitioner's contentions. Although most were found to be without merit, it was noted that his discharge should have been characterized as honorable, that he had a right to appear before the competency review board, and was improperly denied this right. Concerning Petitioner's contention that his separation after 17 years of service was grossly unfair and unjust, the advisory opinion concluded that his separation was lawful, however, his case merited equitable consideration. Concerning the equity issue, the advisory opinion states in part as follows:

...Though his separation must stand, petitioner is nonetheless deserving of relief. He served 17 years before being involuntarily discharged. He committed no misconduct. His fault was exclusively performance related; he was not well-suited to clinical nursing. For this, a relatively short period of poor performance, he was fined \$500,000 (lost retirement). These events occurred during a time when he was experiencing serious difficulties in his personal life. And he did not get the due process he should have, the right to appear before a Nursing Clinical Competency Review Panel. Though it is not clear that he could have said, or presented witnesses who would say, anything that would have salvaged his nursing career, he had the right to try. In sum, the result seems disproportionate in light of the circumstances...

The advisory opinion concludes "For these reasons, relief is

warranted, the nature of which is left to the discretion of BCNR."

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. It is clear to the Board that in retrospect it was probably an error to commission an individual still in the service as a petty officer second class after more than 13 years of relatively low stress duty. Given the facts of the case and comments contained in the advisory opinion from the DJAG, the Board considers that relief would be appropriate. In this regard it is clear that individuals discharged for unsatisfactory performance are not entitled to separation pay and his performance was clearly unsatisfactory. Therefore, the only possible relief is to restore him to active duty which is clearly inappropriate given his unsatisfactory performance or to correct the record to show that he qualified for retirement. Given the circumstances, the Board concludes that the record should be corrected to show that he retired from the Navy. In reaching this decision, the Board is aware that any retroactive payments would be offset by civilian earnings.

Therefore, the Board concludes that Petitioner's record should be corrected to show that he was not discharged on 28 February 2006 but continued to serve on active duty until he retired with 20 years of active service with an honorable characterization of service. This date is estimated to be 1 February 2009 but the actual date will be as determined by NPC.

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 this case.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not discharged with a general characterization of service on 28 February 2006 but continued to serve until he transferred to the Retired List at the earliest possible date. The additional service should be charged to the extent possible to his leave account.

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.


Recorder


Acting Recorder

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

Reviewed and approved:


Assistant General Counsel
(Manpower and Reserve Affairs)