



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

JSR  
Docket No. 06189-11  
22 September 2011

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

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

Subj: [REDACTED]  
REVIEW OF NAVAL RECORD

Encl: (1) DD Form 149 dtd 20 May 11 w/attachments  
(2) HQMC JAR4 memo dtd 16 Aug 11  
(3) Counsel's ltr dtd 8 Sep 11  
(4) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, that the applicable naval record be corrected to show he was retired in the grade of major (pay grade O-4), rather than captain (pay grade O-3). A copy of documentation on file in Petitioner's record about his request for voluntary retirement in lieu of processing for administrative show cause proceedings, which includes correspondence concerning the Secretary of the Navy (SECNAV) decision of 12 March 2009 to retire him as a captain, is at Tab A. Petitioner further requested that the separation code of RNC1 ("acts of unacceptable conduct (i.e., moral and/or professional dereliction not otherwise listed herein") shown in block 26 of his DD Form 214 ("Certificate of Release or Discharge from Active Duty") (copy at Tab B) be changed so as not to reflect "professional/moral dereliction."

2. The Board, consisting of Messrs. Chapman, W. Hicks and Swarens, reviewed Petitioner's allegations of error and injustice on 22 September 2011. Pursuant to the Board's regulations, the majority of the Board, Messrs. Chapman and W. Hicks, determined that the corrective action indicated below should be taken on the available evidence of record. The minority of the Board, Mr. Swarens, voted to deny relief. 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 which were available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. On 28 July 2008, Petitioner received nonjudicial punishment for violations of the Uniform Code of Military Justice, Articles 134 (adultery) and 92 (use of a Government computer to communicate with the person with whom he allegedly committed adultery).

d. In enclosure (2), the Headquarters Marine Corps Judge Advocate Division commented to the effect that the separation code should stand, as it was correctly assigned, but that there is sufficient evidence to find the reduction of Petitioner's retired grade from major to captain was unjust. That office concluded that the reduction effected by SECNAV in this case was inconsistent with the SECNAV action in other similar cases, noting that neither the Deputy Commandant of the Marine Corps for Manpower and Reserve Affairs (DC M&RA) nor SECNAV indicated what factors caused them not to concur with the recommendation of Petitioner's chain of command that he be retired as a major, or what caused them to distinguish his case from those in which SECNAV had not retired the officers in a grade below that held on active duty [the DC M&RA stated Petitioner's "conduct and judgment fell far below that expected of a Marine officer of his grade and experience"]. That office acknowledged "There is no 'bright line' rule for when an officer should be allowed to retire at his current rank vice a lower grade" and that SECNAV "makes a discretionary determination based on the particular facts and circumstances of each case."

e. In enclosure (3), Petitioner's counsel concurred with the advisory opinion as it related to Petitioner's retired grade, but did not address the separation code.

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the contents of enclosure (2), the majority of the Board finds the existence of an injustice warranting the following limited corrective action:

MAJORITY RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that SECNAV did not approve the recommendation of the DC M&RA that Petitioner be retired in the grade of captain, but rather directed his retirement in the grade of major.

b. That any material or entries inconsistent with or relating to the recommendation of the majority of the Board 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.

c. That any material directed to be removed from Petitioner's naval record be returned to this 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.

d. That the remainder of Petitioner's request be denied.

MINORITY CONCLUSION:

The minority of the Board finds that Petitioner's request should be denied in its entirety. Notwithstanding enclosure (2), the minority finds Petitioner's retired grade should not be changed. Regarding inconsistency with other cases, the minority notes the acknowledgment, in enclosure (2), that each case is unique and must be decided on its own facts and circumstances. Further, the minority finds the basis for the retired grade decision in Petitioner's case was adequately articulated. The minority agrees with the majority in concluding that the separation code should not be changed. In view of the above, the recommendation of the minority is as follows:

MINORITY RECOMMENDATION:

a. That Petitioner's request be denied.

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

*Jonathan S. Ruskin*  
JONATHAN S. RUSKIN  
Acting Recorder

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

*W. Dean Pfeiffer*  
W. DEAN PFEIFFER

MAJORITY REPORT

Reviewed and approved:

*Ray Helms* NOV 28 2011

MINORITY REPORT

Reviewed and approved:

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