



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

SMS
Docket No: 6710-08
23 September 2008

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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

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

1. Pursuant to the provisions of reference (a), Petitioner, a member of the Navy Reserve, applied to this Board (BCNR) requesting the record be corrected to show that he was not discharged on 30 September 2005, but continued to serve on active duty and was authorized duty under instruction in the nurse anesthesia program that he is currently enrolled in with a completion date of May 2009.

2. The Board, consisting of Mr. [REDACTED], Mr. [REDACTED], and Mr. [REDACTED] reviewed Petitioner's allegations of error and injustice on 3 September 2008, and pursuant to its regulations, determined that the partial 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 filed in a timely manner.

c. On 10 December 1996, Petitioner was appointed an ensign in the Navy Reserve after completion of the Naval Reserve Officer Training Corps (NROTC) Nursing Program and after almost ten years of prior enlisted active service in the Navy. During the period 12 April 1997 to 3 July 2001, he consistently received performance evaluations for his duties as a nurse that rated him as meeting or being above standards and he subsequently accepted a permanent appointment as a lieutenant in the Navy Reserve and continued to serve on active duty.

d. On 7 August 2001, Petitioner entered the Navy Nurse Corps Anesthesia Program at Georgetown University (GU) and acknowledged the Naval School of Health Science's (NSHS) honor code as well as the GU honor code. During April 2002, GU's Program Director received an anonymous letter alleging a cheating ring that included Petitioner, another Navy officer, and two civilians. GU initiated an investigation into seven allegations of violations of academic integrity and he retained civilian counsel.

e. On 28 June 2002, the Chief of Naval Operations directed the permanent appointment of Petitioner in the Regular Navy as a Nurse Corps Officer, but there is no evidence in the record to show that an officer appointment and oath of office was executed.

f. On 1 August 2002, Petitioner completed Phase I of the Nurse Anesthesia Program at GU and reported to NSHS, Portsmouth, Virginia to complete Phase II. On 14 November 2003, GU dismissed Petitioner from the program after finding him guilty of four of seven allegations as indicated below:

(1) GU concluded that his level of infringement of academic integrity standards was minor regarding distribution of a computer disk containing unauthorized material in which he admitted unknowingly doing so and then informing the class not to use.

(2) GU concluded that evidence substantially supported the allegation that he cheated on a pharmacology paper.

(3) GU found that the evidence substantiated the allegation that he cheated on a pharmacology midterm blackboard exam.

(4) GU found that the evidence created a strong likelihood that he violated academic integrity by sharing unauthorized material with another student.

g. Petitioner continued to serve as a nurse at the Naval Medical Center in Portsmouth, Virginia and subsequently appealed GU's decision, but his appeal was denied by GU based upon lack of additional evidence and no errors of procedure.

h. On 2 June 2004, Petitioner received a performance evaluation for his performance of duties as a staff nurse at the Navy Medical Center in Portsmouth, which stated in essence that he provided advanced education and training of medical department personnel and extensive nursing care to patients as a member of the Recovery Room Team. The evaluation rated his performance as meeting standards and promotable.

i. On 29 June 2004, a Judge Advocate General (JAG) investigation concluded that the primary source of the investigation came from documentation provided by GU and that many witnesses' statements were similar, but individual events did not speak directly to the

allegations and left much to inference. The JAG investigation opined that GU adhered to its policy and procedures; any one incident involving the questionable behavior could be discounted as coincidence; and the overwhelming circumstantial evidence indicated that Petitioner violated the NSHS Code of Honor and GU academic integrity policy. The investigating officer concluded by recommending a Board of Inquiry (BOI) to show cause, Article 15, Letter of Reprimand, and offered Petitioner an opportunity to resign his commission.

j. On 8 July 2004, Petitioner was charged with conduct unbecoming an officer by wrongful and dishonorable receipt of unauthorized test information and distribution of that information to other students, and willful and wrongful violation of the NSHS Honor Code and GU policy on academic integrity.

k. On 27 September 2004, the Navy Personnel Command notified Petitioner that the Commandant of Naval District Washington was requested to convene a BOI requiring him to show cause for retention in the naval service due to misconduct and substandard performance of duty, and if separated the least favorable characterization of service could be an other than honorable. On 14 October 2004, Petitioner was detailed a military defense counsel in Norfolk, Virginia, and on 15 October 2004, he elected to have his case heard by a BOI. During January 2005, he was assigned a replacement military defense counsel located at the Washington Navy Yard and they subsequently spoke on the phone on two occasions.

l. On 31 January 2005, Petitioner received a performance evaluation for his performance of duties as a nurse at the Navy Medical Center in Portsmouth, which stated that he was a highly qualified professional nurse who performed his duties in an effective and competent manner in which he planned, directed, and executed nursing care in the Post Anesthesia Care Unit. The evaluation consistently rated his performance as above standards and recommended promotion.

m. On 14 February 2005, Petitioner's military defense counsel requested a continuance of his BOI on the basis that he received untimely government disclosure of evidence on 10 February 2005, as well as the government counsel's intention to call a new witness. His military defense counsel further stated that neither he nor the civilian defense counsel had the opportunity to speak with the government witness or review the recent government disclosure. The government counsel recommended disapproval of the request for continuance on the basis that Petitioner's military defense counsel was assigned in December 2004, the civilian counsel should have been familiar with all of the developments and issues, and the military defense counsel received all documents from the recorder as soon as possible. On 17 February 2005, the Commandant of Naval District Washington denied the request for continuance and issued a BOI member appointment letter, which directed the BOI to convene the next day.

n. On 18 February 2005, the BOI convened at the Washington Navy Yard with Petitioner's military and civilian defense counsel present. The transcript of the BOI shows that his counsel requested a continuance, which was denied by the President of the BOI. The BOI audiotapes reveal that his military defense counsel requested a continuance due to his lack of preparation time, specifically, he stated that he was assigned as Petitioner's counsel during January 2005, did not meet with him until the morning of the BOI, and the government counsel provided the defense counsel with discovery on 10 February 2005. The BOI audiotapes further reveal that the government counsel stated that the military defense counsel was assigned during December 2004, but the defense counsel stated that was incorrect and the Commandant of the Naval District Washington was provided incorrect information by the government counsel. The BOI audiotapes reveal that proceedings were directed to continue after a 30 minute break and both the government and civilian defense counsel focused on the bases for show cause throughout the remainder of the proceedings. The BOI report of findings and recommendations worksheet shows that the BOI found him guilty of misconduct due to commission of a serious offense due to failure to obey a lawful order, misconduct due to conduct unbecoming an officer, and two instances of substandard performance of duty. Page 2 of the BOI findings worksheet provided two options regarding separation, which states, in part, as follows:

...that the [Petitioner] be separated from the naval service on the basis of [cite basis]

or

...that none of the reasons specified are supported by sufficient evidence presented to warrant separation for cause and the case is, therefore, closed.

(1) The worksheet shows that the BOI unanimously voted that he be separated from the naval service due to violations of Article 92 and 133, with an honorable characterization of service.

(2) The BOI audiotapes reveal that the members were not advised by the recorder, government counsel or defense counsels during preliminary matters, or during opening or closing statements that they had the option to recommend retention if misconduct were found. The BOI audiotapes also reveal that the president of the BOI read the findings and recommendations just as the members voted and there was no questioning or argument regarding an option to retain him if misconduct were found.

o. On 3 March 2005, a member of the BOI submitted a statement to Petitioner's defense counsel in which he stated in essence that it was likely that the BOI would have recommended retention if they knew that was an option. On 9 May 2007, another member of the BOI

submitted a statement upon request by BCNR in which he stated in essence that he did not know that retention was an option and if the BOI's option had been made clear to him, he believes that he would have voted to keep him in the service, and would have also recommended probation. On 21 May 2007, the senior member of the BOI submitted a statement upon request by BCNR and stated in essence that she did not recall knowing that a member could be retained on active duty even after being found guilty of such misconduct. She further stated that she did not believe that she was clear on that and did not think the members of the BOI were given that option and if their option to retain him had been made clear to her, she would not have supported that option.

p. On 17 March 2005, the Navy Personnel Command responded to a congressional inquiry regarding the BOI's recommendation, which stated in essence that recourse may be available regarding the BOI process and the final decision concerning any perceived errors by the BOI and whether its decision should be overturned rests with the Commandant of the Naval District Washington.

q. On 18 May 2005, Petitioner's civilian defense counsel submitted a rebuttal and letter of deficiency to the Commandant of the Naval District Washington, which states in part, as follows:

... a memorandum for the Record prepared by [BOI member], clearly demonstrates, the members of [Petitioner's] BOI did not properly understand that they had the option of recommending that [Petitioner] be retained in the naval service despite their findings that he had been guilty of certain misconduct and substandard performance...and that had the members understood that such an option was available, "it is likely the Board would have voted" to recommend retention...

Necessary and proper continuance requests in connection with [Petitioner's] BOI were erroneously denied...A continuance was necessary for several reasons. First, [Petitioner's] permanent duty station and the location of his initial detailed defense counsel and fourteen character witnesses. Secondly, because [his current detailed defense counsel] had been recently detailed to this complex case and had not met with [Petitioner], he was unprepared and so stated. Thirdly, [Petitioner] did not receive notice of the hearing from his Commanding Officer...Lastly, discovery was seriously lacking. A week prior to the BOI, part of the discovery was provided, but to [current detailed defense counsel] only, not to civilian defense counsel. On the morning of the board [BOI], defense counsels

learned, for the first time of the written evidence the Recorder intended to submit and received the remainder of the discovery...

...The decorum of [Petitioner's] BOI was chaotic and violated principles of fairness and justice... an expert government witness who had no personal knowledge of the facts of the case, was allowed to make a statement that he had complete trust in Georgetown's report. Also, without being qualified as an expert witness...an assistant to the Recorder, was allowed to testify to the accuracy and software intricacies of a "Copy Catch" computer program during her examination of another witness; after defense objection, the Board members continued to ask her questions about how the program worked. Time and again, the Presiding Officer trampled the rights of [Petitioner] while protecting [the assistant to the Recorder], a law student, from the objections of defense counsel...

...To remedy the substantial deficiencies that occurred at [Petitioner's] BOI, he...respectfully requests that you either suspend the recommendation for separation or refer the case to a new BOI.

r. On 3 June 2005, a BOI was convened for the fellow Navy officer dismissed from GU due to his involvement in the same incident. His BOI found no misconduct and unanimously recommended retention as provided by their report of findings and recommendations worksheet. Page 2 of this BOI report of findings and recommendations worksheet provided two options regarding separation, which states, in part, as follows:

...that he be separated from the naval service on the basis of [cite basis]

or

...that none of the reasons specified are supported by sufficient evidence presented to warrant separation for cause and the case is, therefore, closed. (The Board may make this recommendation where the Board has found that one or more bases for separation was/were supported by a preponderance of the evidence, but finds that separation is not warranted.)

s. On 6 June 2005, the President of the BOI submitted the BOI record of proceedings to the Commander of the Navy Personnel Command via the Commandant of the Naval District Washington, the convening

authority who disapproved the military defense counsel's request for continuance. On 15 June 2005, the Commandant of the Naval District Washington endorsed the BOI record of proceedings, in part, as follows:

...I disagree with the recommendation of the Board of Inquiry to separate [Petitioner] with an honorable discharge. I am very discouraged by this case, as [Petitioner] has been done a disservice by his counsel. The root problem of lack of preparation by the respondent's counsel, despite over a year of civilian counsel involvement in the case, has been disguised and renamed in order to provide excuses to delay or derail this case. Even the arguments of [defense counsel's rebuttal and letter of deficiency] evade the point that had the attorneys exercised more care in representing [Petitioner], raising appropriate concerns in a timely manner to the proper authorities and discussing relevant issues at the board [BOI], the outcome may well have been different. As Convening Authority, I must not only maintain good order and discipline, but also ensure justice for our military members. I do not believe that the outcome of this case promotes Navy interests...

...In short, while I agree with (and am bound by) the Board's finding that [Petitioner] committed misconduct, I do not agree that the misconduct warrants the separation of a member with well over 16 years of service who was selected to a highly competitive program, and is still a viable part of the Navy Nurse Corp [sic]. [Report of Findings and Recommendations of the Board of the fellow Navy officer] partially documents the companion case, in which the Board of Inquiry returned a finding of no misconduct. [Petitioner's] misconduct is not sufficient to warrant separation. I recommend that [Petitioner] be retained in Naval Service and the case closed.

t. On 24 August 2005, the Commander of the Navy Personnel Command submitted a decision letter to the Secretary of the Navy with the BOI findings of 6 June 2005, recommending separation of Petitioner with an honorable discharge due to unacceptable conduct. On 26 August 2005, the Secretary of the Navy approved the recommendation. On 30 September 2005, he was so discharged.

u. In his application, Petitioner's current counsel states in essence that Petitioner did not have effective assistance of counsel, as evidenced by his military defense counsel's request for continuance at the beginning of the BOI and the Commandant of the

Naval District Washington's letter which stated that the root problem was the lack of preparation of counsel. His counsel further states that the BOI instructions did not include the option to find him guilty of misconduct and still retain him, even though a BOI for another officer allegedly involved in the same conduct had that option and was retained. His counsel concluded that these two mistakes have cost Petitioner his career in the Navy and the Navy lost an outstanding nurse.

v. On 11 June 2008, the Director of the Gannon University School of Anesthesia submitted a letter to BCNR in which he stated that Petitioner is a senior student in good academic standing with a grade point average of 3.687 and is expected to graduate on 9 May 2009.

w. Attached to enclosure (1) is a BCNR letter to the Commander, Navy Personnel Command (Code O0J), that requested comments and recommendation on the following issues:

(1) Does it appear that the convening authority acted improperly in refusing the request for an extension of time submitted by Petitioner's counsel and, if so, was Petitioner prejudiced by this denial?

(2) Should corrective action be taken given the ambiguity of the findings and recommendations worksheet; and the comments of two BOI members [enclosures] to the effect that they were unaware of their option to find that Petitioner had committed misconduct but close the case and, had they been aware of this option, would have exercised it?

x. Attached to enclosure (1) is an advisory opinion from the Navy Personnel Command (Code-00J), which states, in part, as follows:

...I recommend denial of [Petitioner's request] and opine that no relief is warranted...

...The Convening Authority acted properly in denying the continuance request of 14 February 2005. [Petitioner] had had the same civilian counsel regarding the same offenses for 13 months prior to the BOI. Respondents must have a minimum of 30 days notice, their retention of civilian counsel cannot cause undue delay of the proceedings, and [Petitioner] could have requested his original military counsel via an Individual Military Counsel (IMC) request had he desired to do so for continuity of military representation.

...The Findings Worksheet used by the BOI mirrors the language in the instruction and

is not ambiguous. If retention despite a finding of guilt was an outcome desired by [Petitioner], his counsel had the opportunity to argue for that. If the BOI members had been confused, they could have sought clarification during the BOI. [A BOI member's] statement was considered by the entire chain of command through SECNAV [Secretary of the Navy] and rejected as a basis to retain [Petitioner]. The statements of [President of BOI] and [BOI member] two years after the fact are dulled by time and memory. Even upon consideration of these statements, one officer is clear that she would have recommended separation and the other two "believe" or "think it likely" that they would have recommended retention. None of the members is [sic] adamant that they would have recommended separation. Due to the length and otherwise high quality of service by [Petitioner], this was undoubtedly a tough case for the members and they may have regretted their decisions made on 18 February 2005...

y. Attached to enclosure (1) is a rebuttal to the advisory opinion from Petitioner's current counsel, which states, in part, as follows:

...The BOI for [a fellow Navy officer] is specifically relevant to the BOI for [Petitioner]. Except for the addition of the study aid which was inadvertently distributed by [Petitioner] to his class, the evidence of both BOI's was the same. The main difference between the two is that [a fellow Navy officer] had adequate time to prepare for the BOI with his counsel while [Petitioner] was only given three weeks to prepare with his counsel for the same hearing. [Petitioner's] counsel did ask for a continuance of the board [sic] to allow him adequate time to prepare for the case, that request was denied...

...The Report of Findings worksheet which was given to [Petitioner's] board [sic] did not include a section which gave them the option of recommending that [Petitioner] be retained in the Naval Service even if misconduct had been found...It was the duty of his military counsel...to point out these discrepancies to the Board so that [Petitioner] had every possible advantage. This was not done in [Petitioner's] case...Obviously from their later statements, they did not realize the option to find [Petitioner] guilty of misconduct yet retain him on active duty was available...

...To summarize, [Petitioner] was not afforded the opportunity to adequately prepare for the BOI with counsel although his counsel did request a continuance which was denied. Regardless of what the instruction governing BOI's states, [Petitioner's military defense counsel] who was appointed to [Petitioner's] case was not located in his geographical area, making it difficult to prepare for trial [and]...first contacted [Petitioner] a mere 3 weeks in advance of the BOI, giving them little time to prepare...Two of the three members of his BOI have indicated that if offered the chance to retain [Petitioner] on active duty it is likely they would have done so...[Petitioner's] counsel's failure to argue for retention despite a finding of guilt was just further evidence of the inadequacy of counsel...

z. Regulations governing involuntary separation of officers state that officers may be processed for separation for cause when substandard performance of duty and misconduct is evidenced by one or more specified reasons. Regulations further state that the respondent has the right to request reasonable additional time to prepare his case for a BOI, specifically, in addition to 30 days prior to the BOI, he may for good cause, petition the convening authority for a continuance prior to convening of the BOI and once convened, the senior member of the BOI may rule on such a request or refer the request for continuance to the convening authority.

aa. Regulations and title 10 of the U.S.C, section 1182 and 14903, state that a BOI shall give a fair and impartial hearing for an officer required to show cause for retention. Regulations state that the BOI will make a determination by majority vote a finding on each of the specified reasons for separation. Regulations further state that the BOI will make a recommendation for separation from the naval service for the specific reasons provided by the regulations, specifically, the policy governing separation for cause or make a recommendation that none of the reasons specified are supported by sufficient evidence presented to warrant separation for cause. Regarding the latter recommendation, regulations authorize a BOI to make this recommendation when the BOI has found that one or more of the bases for separation were supported by a preponderance of the evidence, but finds that separation is not warranted.

bb. According to title 10 U.S.C., section 6323, an officer of the Navy or the Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least ten years was service as a commissioned officer, may in the discretion of the President, be retired on the first day of any month. The Uniform Retirement Date Act, 5 U.S.C. 8301, requires that the effective date of any retirement be the first day of the month.

CONCLUSION:

Upon review and consideration of all the evidence of record, BCNR concludes that Petitioner's request warrants partial relief. Specifically, the Board finds that sufficient evidence exists to require Petitioner to show cause for retention, however, it also finds that Petitioner did not receive a fair hearing, specifically, his BOI was prejudiced by the convening authority's denial for continuance and BOI members were not aware that they could recommend retention if misconduct were found. In this regard, regulations authorize granting a respondent, for good cause, a continuance of reasonable additional time, in addition to 30 days prior to convening of a BOI. BCNR finds the convening authority's decision to deny a continuance of the BOI was based on factually inaccurate information provided by the government counsel. Furthermore, BOI audiotapes reveal that the military defense counsel requested another continuance when the BOI convened and justified his request by stating that he was not prepared due to being assigned as counsel during January 2005, and receiving discovery on 10 February 2005. Even so, the senior member of the BOI denied the request for continuance, which resulted in Petitioner's reliance on a civilian counsel who represented him during GU proceedings and had also just received the recent government discovery. The BOI audiotapes reveal that the members were not advised by the recorder, government counsel or defense counsels during preliminary matters, or during opening or closing statements that they had the option to recommend retention if misconduct were found. The BOI audiotapes also reveal that the president of the BOI read the findings and recommendations just as they voted and there was no questioning or argument regarding an option to retain him. Additionally, the BOI findings and recommendation worksheet was ambiguous, since it did not clearly state the option to recommend retention if misconduct were found, which is authorized by regulations. Given the statements provided by the BOI members, BCNR finds that none of them were aware that they had the option to recommend retention if misconduct were found, and two of the three BOI members' statements show that they would have likely recommended retention. Moreover, the BOI findings and recommendation worksheet of the other Navy officer involved in the same incident and was retained, clearly indicate an option for the BOI to recommend retention if misconduct were found. Finally, BCNR considers the Commandant of the Naval District Washington's endorsement of 15 June 2005, who recommended retention despite the BOI findings of misconduct. BCNR believes that the Commandant's recommendation should have had greater bearing in this case. BCNR also takes into account Petitioner's overall service record that included more than 18 years and five months of active service and found that the Navy Nurse Corps' continued trust in his professional competence was demonstrated by allowing him to continue to perform duties as a nurse until he was discharged. It therefore concludes that Petitioner should not have been discharged, but should have been retained and continued on active duty until he voluntarily requested

and was authorized retirement when he completed 20 years of active service. Because of the requirements of the Uniform Retirement Date Act, the date of retirement will be effective the first day of the month. In view of the above, the Board recommends the following limited corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not discharged, but continued on active duty until he voluntarily requested and was authorized retirement when he completed 20 years of active service, at which time he was honorably retired.


b. 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.

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

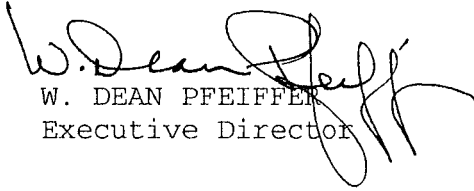
d. That no further relief is recommended.

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.

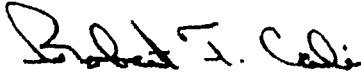
ROBERT D. ZSALMAN
Recorder


BRIAN J. GEORGE
Acting Recorder

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


W. DEAN PFEIFFER
Executive Director

Reviewed and approved:


9-26-08

Robert T. Cali
Assistant General Counsel
(Manpower and Reserve Affairs)