



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

BJG
Docket No: 8411-11
19 September 2012

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

Subj: [REDACTED]
REVIEW OF NAVAL RECORD (RECONSIDERATION)

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

- Encl: (1) DD Form 149 dtd 25 Aug 10 w/attachments
(2) BCNR dec document (doc no: 9699-10) dtd 8 Jun 11
(3) Subject's req for recon ltr dtd 27 Jun 11
(4) BCNR recon deny ltr (doc no: 7404-11) dtd 14 Jul 11
(5) Subject's req for recon ltr dtd 24 Jul 11
w/attachments
(6) FBI record check req dtd 8 Aug 11 w/attachment
(7) Subject's ltr dtd 3 Mar 12 w/attachment
(8) HQMC JAM memo dtd 23 Jul 12 w/attachments
(9) Subject's ltr dtd 22 Aug 12
(10) 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 his naval record be corrected by showing that on 18 July 1986, he was issued an honorable characterization of service vice the other than honorable (OTH) discharge of record. By implication, he further requested that his reason and authority for discharge be changed from "Misconduct - Commission of a Serious Offense (COSO)" to "Secretarial Authority", and that his reenlistment code be changed from "RE-4" (Not Recommended for Retention) to "RE-1" (Recommended for Retention). His original request was denied by this Board on 7 June 2011 (enclosure (2)).

2. The Board, consisting of Messrs. Blanchard and Bourgeois and Ms. Siler, reconsidered Petitioner's allegations of error and injustice on 15 May 2012. These three members voted for relief, but decided that an advisory opinion should be obtained from the Headquarters Marine Corps (HQMC) Military Justice Branch, Judge Advocate Division (JAM) before a final decision would be made.

A new Board, consisting of Ms. Guill and Messrs. Marquez and McBride, again reconsidered his allegations of error and injustice on 18 September 2012 after the HQMC JAM advisory opinion was obtained. Pursuant to its regulations, this panel also voted for relief and 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 which were available under existing law and regulations within the Department of the Navy.

b. Although it appears that enclosure (1) 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 enlisted in the Marine Corps and entered active duty on 20 July 1983. He was not the subject of any disciplinary action, and his proficiency/conduct mark averages were 4.2/4.2, respectively (high enough for a fully honorable characterization of service). However, on 3 November 1984, he was arrested by civil authorities and charged with conspiracy to commit murder. He was then notified that his commanding officer was recommending him for administrative separation with an OTH characterization of service due to misconduct (COSO). He waived his right to an administrative discharge board (ADB). On 18 July 1986, he was issued an OTH characterization of service due to misconduct (COSO), and assigned an RE-4 reenlistment code. On 14 October 1988, he was found not guilty of conspiracy to commit murder by a superior court in California.

d. On 25 August 2010, Petitioner applied to this Board for an upgrade of his OTH discharge (enclosure (1)). He enclosed a copy of a Department of Veterans Affairs determination that for its purposes, his service was determined to have been honorable.

e. On 7 June 2011, this Board reviewed Petitioner's application and denied relief (enclosure (2)).

f. On 27 June 2011, Petitioner requested reconsideration of his case based on the not guilty finding of the civil court (enclosure (3)). However, he provided no evidence of the not guilty finding.

g. By letter dated 14 July 2011 (enclosure (4)), this Board again denied reconsideration of Petitioner's case based on his failure to provide evidence of his not guilty finding.

h. On 24 July 2011, Petitioner provided evidence of his not guilty finding (enclosure (5)).

i. On 8 August 2011, a member of this Board's staff requested a Federal Bureau of Investigation (FBI) criminal record check on Petitioner (enclosure (6)). The FBI check found no criminal convictions.

j. By letter dated 3 March 2012 (enclosure (7)), Petitioner provided more documentation that he has no criminal convictions.

k. The HQMC JAM has provided an advisory opinion dated 23 July 2012 (enclosure (8)), commenting to the effect that Petitioner's request has no merit. The advisory noted that he waived his right to an ADB. It also noted that the burden of proof for administrative separation is only by a preponderance of the evidence, not the higher criminal court burden of beyond a reasonable doubt.

l. By letter dated 22 August 2012 (enclosure (9)), Petitioner rebutted the advisory opinion. He stated that he was not able to prepare for an ADB and a civil trial simultaneously. He concluded that he was denied his right to due process because he was unable to present evidence of his innocence because it occurred after his separation.

CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding enclosure (8), the Board finds an error and injustice warranting approval of Petitioner's request. The Board notes that he waived his procedural right to an ADB, but that his acquittal occurred more than two years after his separation. The Board concludes that his administrative separation based on the conspiracy to commit murder charge for which he was ultimately found not guilty was in error and unjust. The Board also notes that he was not the subject of disciplinary action and his proficiency/conduct marks averages were high enough for an honorable characterization of service. The Board concludes that his OTH characterization of service should be upgraded to honorable, his reason from separation should be changed from "Misconduct - COSO" to "Secretarial Authority", and his reenlistment code should be changed from RE-

4 to RE-1. In view of the above, the Board directs the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that on 18 July 1986, he was issued an honorable characterization of service vice the OTH discharge of record.

b. That Petitioner's record be further corrected to show that he was discharged by reason of "Secretarial Authority" vice "Misconduct (COSO)" now of record.

c. That Petitioner's record be further corrected by changing his reenlistment code of RE-4 to RE-1.


d. 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 be added to the record in the future.

e. 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.

f. That the Department of Veterans Affairs be advised that he originally applied to this Board on 25 August 2010.

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.

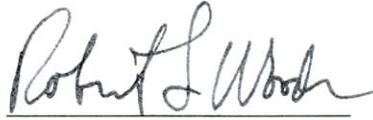
ROBERT D. ZSALMAN
Recorder


BRIAN J. GEORGE
Acting Recorder

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


W. DEAN PFEIFFER

Reviewed and approved:

 12/6/12

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