



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

TJR
Docket No: 10738-12
9 February 2015

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

Subj: REVIEW NAVAL RECORD OF [REDACTED] USN,
XXX-XX [REDACTED]

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

Encl: (1) DD Form 149 with attachments
(2) Case summary with attachments
(3) Petitioner's naval record (excerpts)

1. Pursuant to the provisions of reference (a), Petitioner, a former officer of the Navy, filed enclosure (1) with this Board requesting that his naval record be corrected by removing any and all derogatory material referencing the imposition of nonjudicial punishment (NJP) on 3 December 2009, for conduct unbecoming an officer and a gentleman, issuance of a Punitive Letter of Reprimand dated 10 December 2009, the proceedings of a Board of Inquiry (BOI) dated 16 November 2010, and administrative separation documentation of June 2011. This request includes, but is not limited to any and all other references surrounding the circumstances of the NJP and BOI as reflected in his Official Military Personnel File (OMPF). Petitioner further requests reinstatement in the Navy with back pay and allowances. Enclosures (2) and (3) apply.

2. The Board, consisting of [REDACTED] and [REDACTED], reviewed Petitioner's allegations of error and injustice on 27 January 2015, 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. In addition, the board considered the advisory opinion (AO) furnished by the Deputy Assistant Judge Advocate General (DA-JAG) (Administrative Law) dated 25 March 2014, a copy of which is attached to enclosure (2).

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

c. In October 2009, Petitioner was the subject of an investigation regarding allegations of unduly familiar relationships and engaging in unprofessional conversations and physical interactions with subordinate members. As a result, he was relieved of his duties pending disciplinary action. At this same time he was granted a period of leave.

d. In November 2009, Petitioner was notified of pending imposition of NJP. On 2 December 2009, after consulting with civilian counsel, Petitioner revoked the foregoing notification and refused NJP because he was on "transfer leave and his ship was alongside pier in Norfolk, VA," and that he/his counsel was not afforded an opportunity to review trial documents. He stated that if he were ordered to attend the NJP hearing over his objection to do so, he would refuse the orders and would not make any statements since he was not properly notified of his rights. Petitioner and/or his counsel further stated, in part, that the imposition of the NJP was unlawful because of the lack of impartiality of the investigating officer, undue command influence from his chain-of-command, failure to allow the submission of witnesses' statements, and denial to demand trial by court-martial. In response to the foregoing, the executive officer advised Petitioner that he did not have a right to refuse NJP, he was still attached to the ship, and that his failure to appear for the imposition of NJP would constitute a failure to obey a lawful order violation. Petitioner was also advised that he did have the right to make a statement at the NJP proceedings.

e. Petitioner received NJP on 3 December 2009, for conduct unbecoming an officer and a gentlemen and to the disgrace of the Officer Corps of the U. S. Navy by engaging in a series of unprofessional conversations and physical interactions with subordinate members of the Armed Forces. The punishment imposed was a Punitive Letter of Reprimand which Petitioner acknowledged receipt of on 11 December 2009.

f. On 16 November 2010, a BOI convened, but without a Surface Warfare Officer (SWO) or Unrestricted Line Officer (ULO) board member, which was representative of Petitioner's competitive category. Nonetheless, the BOI determined that because of

Petitioner's misconduct, substandard performance of duty, and failure to conform to prescribed standards of military department, he was not recommended for retention in the Navy. Subsequently, Petitioner was administratively processed for separation. Upon completion of review by separation authorities, the discharge authority directed an honorable discharge by reason of misconduct due to minor infractions, and on 30 June 2011, Petitioner was so discharged.

g. An advisory opinion received from the Deputy Assistant Judge Advocate General (Administrative Law) states in part, that the errors, specifically, imposition of NJP and the improper convening of the BOI, if substantiated, cannot be considered as harmless because they were based on lack of impartiality of the investigating officer, unlawful command influence, improper disclosure by the investigating officer of witness statements to other witnesses, failure to receive impartial flag review of the NJP, failure to demand trial by court-martial; improperly convened BOI, deliberation by BOI members prior to hearing all evidence, improper ex parte communication, failure to provide notice of allegations considered by the BOI, and additional mitigating evidence of performance. As such, the Board's determination for corrective action would be to remove all records of the NJP and the BOI.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action. In this regard, the Board substantially concurs with the comments contained in the advisory opinion and concludes that the documentation which resulted in the imposition of the NJP and the convening of the BOI was based, in part, on unlawful command influence and improprieties with the BOI's composition, and as such should be removed from the record. The Board also concludes that any and all documentation referencing the NJP and BOI should be removed from the record. However, the investigation that formed the basis for the NJP and BOI may remain in his military record. The Board determined that the investigating officer was impartial and qualified to conduct the investigation.

In light of the foregoing, the Board further concludes that Petitioner's discharge of 30 June 2011, should be set aside, and that he be reinstated in the Navy and restored all back pay and allowances affected by virtue of the discharge.

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In view of the foregoing, the Board finds the existence of an error and injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing and/or totally obliterating the NJP imposed on 3 December 2009, as well as all references thereto, and that all rights, privileges, and property affected by virtue of the NJP be restored.

b. That Petitioner's naval record be corrected by removing and/or totally obliterating the BOI documentation dated 16 November 2009, and all references thereto.

c. That Petitioner's discharge of 30 June 2011, be set aside and the record corrected to reflect continuous service; and that he be reinstated in the Navy on active duty accordingly. Further, all references regarding the discharge shall be removed or totally obliterated from his record.

d. That any and all materials 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 materials be added to the record in the future.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c), 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.



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Recorder

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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 Regulation, 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.



ROBERT J. O'NEILL
Executive Director