



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

BJG
Docket No: 4169-01
23 April 2002

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

You requested removal of your nonjudicial punishment (NJP) of 4 December 1997, removal of your performance evaluation reports for 16 March 1997 to 15 March 1998 and 16 March 1998 to 15 March 1999, and advancement to pay grade E-6 from the March 1998 advancement cycle.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 18 April 2002. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions furnished by the Navy Personnel Command dated 20 November 2001 and 22 January 2002, copies of which are attached. They also considered your counsel's letters dated 25 June 2001 with enclosures, 25 July 2001 with enclosure, and 23 March 2002.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board found that your NJP should stand. They were unable to accept your defense of "physical impossibility," as you have not established that you could not have returned on time, had you prepared for the entirely foreseeable possibility that your Military Airlift Command (MAC) flight might be cancelled. They did not consider it objectionable that your command denied your request for extension of leave.

The Board concluded that the performance evaluation report for 16 March 1997 to 15 March 1998 should stand as well. For the reasons stated above, they found it unobjectionable that this report cited the contested NJP. They were unable to find you were not insubordinate. In this regard, they particularly noted that the statement at enclosure (3) to your application indicates "In the beginning of the misunderstanding, I wasn't really listening or paying attention to what was going on." If you are correct that the junior officer to whom you were allegedly insubordinate "yelled" at you without any consequences, this would not make it improper for the report in question to address your own conduct toward that officer.

In finding that the contested report for 16 March 1998 to 15 March 1999 should stand, the Board particularly noted that the marks assigned were not adverse, so the narrative did not have to include specific justification for the marks. They were not convinced that the sole purpose of this report was to deny you a chance to be tested for advancement.

Finally, the Board found no basis to advance you. In this connection, they noted that your NJP would have been sufficient basis for your command not to allow you to compete for advancement, without the contested adverse performance evaluation report for 16 March 1997 to 15 March 1998. Further, they found insufficient basis to remove any of the contested matters from your record.

In view of the above, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures

Copy to:
Gary R. Myers, Esq.



DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

4169-C1

1610
PERS-311
20 November 2001

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Via: PERS/BCNR Coordinator (PERS-00ZCB)

Subj: [REDACTED]

Ref: (a) BUPERSINST 1610.10 EVAL Manual
(b) Commanding Officer, SEAL Team FIVE ltr 1610 N1 of 9 April 1998
(c) Commanding Officer, SEAL Team, FIVE ltr 1610 N1 of 10 March 1999

Encl: (1) BCNR File

1. Enclosure (1) is returned. The member requests the removal of his original performance evaluation for the periods 16 March 1997 to 15 March 1998 and 16 March 1998 to 15 March 1999.

2. Based on our review of the material provided, we find the following:

a. A review of the member's headquarters record revealed the reports in question to be on file. Both reports are signed by the member acknowledging the contents of each and his right to submit a statement. The member indicated he did not desire to submit a statement on the evaluation for the period 16 March 1997 to 15 March 1998. The member indicated he did desire to submit a statement on the performance evaluation for the period 16 March 1998 to 15 March 1999. The member's statement and reporting senior's endorsement is reflected in his digitized record.

b. The reports in question are Periodic/Regular reports.

c. In reviewing petitions that question the exercise of the reporting senior's evaluation responsibilities, we must determine if the reporting senior abused his/her discretionary authority. For us to recommend relief, the petitioner has to show that either there is no rational support for the reporting senior's action or that the reporting senior acted for an illegal or improper purpose. The petitioner must do more than just assert the improper exercise of discretion, he must provided evidence to support the claim. I do not believe Petty Officer [REDACTED] has done so. Nothing provided in the petition indicates that the reporting senior acted for illegal or improper purpose or that the report lacked rational support.

d. The performance trait grades and comments on performance reflect the reporting senior's perception of the subordinate's performance and may be influenced by incidents that occurred during the period of the report. It is perfectly acceptable for the reporting senior to evaluate a member's performance by taking into accounts facts that have been established through reliable evidence to the reporting senior's satisfaction. In this case, the reporting senior makes it clear in references (b) and (c) and his endorsement to the member's statement his reason for submitting the reports as they did. The evaluations in question are procedurally correct.

e. Counseling of a member takes many forms. Whether the member was given written or oral counseling, Issued a Letter of Instruction (LOI), does not invalidate the performance evaluation.

f. The member does not prove the report to be unjust or in error.

3. We recommend the member's record remain unchanged.



Performance
Evaluation Branch



DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

1430
Ser 811
22 Jan 02

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS (BCNR)

Via: Assistant for BCNR Matters (PERS-00XCB)

Subj: COMMENTS AND RECOMMENDATIONS IN THE CASE OF
[REDACTED] USN [REDACTED]

Ref: (a) BUPERSINST 1430.16E

Encl: (1) BCNR file #04169-01

1. Based on policy and guidelines established in reference (a), enclosure (1) is returned recommending disapproval.
2. Petty Officer [REDACTED] has requested removal of two evaluations and a Commanding Officer's Non-Judicial Punishment from his record. He has requested advancement to IT1 based on the removal of these documents.
3. PERS-311 has provided a memorandum of 20 November 2001, recommending the evaluations remain in the record as they are not illegal or improper. The same rationale must be accorded the Commanding Officer's Non-judicial punishment. Since there are no changes to the record, no relief can be recommended regarding this petition.

[REDACTED]
By direction