



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

HD:hd
Docket No. 02276-08
29 July 2008

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

Subj: [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 dtd 27 Feb 08 w/attachments
(2) OPNAV N134 memo dtd 5 May 08
(3) PERS-311 memo dtd 8 May 08
(4) PERS-00J memo dtd 27 May 08
(5) Counsel's undtd ltr w/attachments
(6) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected by removing the fitness report for 1 November 2004 to 1 April 2005, a copy of which is at Tab A.

2. The Board, consisting of Messrs. Butherus, J. Hicks and Ivins, reviewed Petitioner's allegations of error and injustice on 24 July 2008, 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.

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. The contested fitness report, submitted on the occasion of Petitioner's detachment from the Defense Attaché Office (DAO), Zagreb, Croatia, was the second of two reports he received at the same station from the same reporting senior, the Defense Attaché who was an Army colonel. The preceding report, for 7 July to 31 October 2004, a copy of which is at Tab B, was entirely favorable, with a block 42 ("Promotion Recommendation") mark of "Early Promote" (best of five possible marks). All the observed marks were "5.0" (best of five possible) or "4.0" (second best), including a "4.0" in block 33 ("Professional Expertise: Professional knowledge, proficiency, and qualifications"). The contested report, for a period of five months, had narrative remarks (block 41) that were almost entirely derogatory. The block 42 mark was "Promotable" (third best). Four of the six observed marks were "3.0" (third best); and one, block 33, was "2.0" (second lowest). In both reports, Petitioner was marked by himself, with no ranking against peers.

d. Petitioner alleges that on 10 December 2004, the reporting senior assaulted his wife, and that the reporting senior then told Petitioner that if Petitioner reported the incident, he would ruin Petitioner's career. Petitioner's wife's statement is at Tab M to his counsel's brief. Petitioner further alleges that he received the contested report in reprisal for having reported the incident to the command (Defense Intelligence Agency (DIA)). He says he reported it to them immediately after the incident with his wife.

e. At Tab G to Petitioner's counsel's brief is a letter dated 6 May 2005 from DIA to Congressman Wolf, stating that on learning of Petitioner's concerns initially raised in December 2004, DIA began an investigation in January 2005 that "revealed the presence of morale issues" at the DAO. Specifically concerning the contested fitness report, DIA stated the following:

[Petitioner's] final fitness report from his superior officer, Colonel S---, reflects the CDR [Commander]'s performance throughout the entire rating cycle. The report states that [Petitioner] is a talented naval officer, but was unable to adapt well to the full responsibilities of an attaché. At the beginning of the rating period, Col S--- counseled [Petitioner] to focus his efforts more on report production. Despite Col S---'s repeated attempts to mentor [Petitioner] and help him improve his performance, he did not adequately meet specific expectations. DIA/DH

[Directorate for Human Intelligence] management conducted an independent verification that [Petitioner] was not performing at required levels and actively supervised the preparation of this fitness report.

f. Petitioner provided substantial evidence indicating that he was an outstanding naval officer, and that the reporting senior was widely held in low regard.

g. In enclosure (2), OPNAV N134, the Navy's equal opportunity office, commented to the effect that Petitioner's request should be granted. Although they stated no apparent equal opportunity issue was discerned, "There is compelling evidence and documentation that contested FITREP [fitness report] was unwarranted. Comments from personal email exchanges, in particular, clearly indicate an atmosphere of hostility directed against [Petitioner] (who exercised considerable restraint in light of alleged aggression toward his wife)."

h. In enclosure (3), PERS-311, the Navy Personnel Command (NPC) fitness report office, commented to the effect that notwithstanding the N134 opinion, Petitioner does not prove the contested report to be unjust or in error, so his record should remain unchanged.

i. In enclosure (4), PERS-00J, the NPC legal office, commented to the effect "there is no discernable error with the offending fitness report," but if this Board finds probable material injustice with retaining the report in Petitioner's record, it would not be legally objectionable for the Board "to exercise its broad equitable power to correct the injustice."

j. In enclosure (5), Petitioner's counsel expressed agreement with the N134 opinion and described the opinions of PERS-311 and PERS-00J as "neutral." He stated that a December 2007 charge sheet alleging the reporting senior had committed assault "went unanswered by DIA until he retired."

CONCLUSION:

Upon review and consideration of all the evidence of record, especially in light of the contents of enclosure (2), and notwithstanding enclosure (3), the Board finds an injustice warranting the requested relief. Although the Board agrees with the conclusion, in enclosure (4), that the contested fitness report reflects no "discernable error," the Board is

nevertheless convinced it is an unjust appraisal that warrants removal. In addition to concurring with enclosure (2), the Board particularly notes that the report at issue, covering a period of only five months, was dramatically less favorable than the preceding report at the same station from the same reporting senior. While the marks, which are not adverse, did not have to be justified, the Board seriously questions the reduction, in block 33, from "4.0" to "2.0," which suggests, without explanation, that Petitioner's knowledge, proficiency and qualifications somehow drastically dropped. In view of the above, the Board recommends the following corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing therefrom the following fitness report and related material:

Date of Report	Reporting Senior	Period of Report	
		From	To
1 Apr 05	[REDACTED]	1 Nov 04	1 Apr 05

b. That there be inserted in Petitioner's naval record a memorandum in place of the removed report containing appropriate identifying data concerning the report; that the memorandum state that the report has been removed by order of the Secretary of the Navy in accordance with the provisions of federal law and may not be made available to selection boards and other reviewing authorities; and that such boards may not conjecture or draw any inference as to the nature of the report.

c. 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.

d. 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.

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

Reviewed and approved:

Robert T. Celi
8-1-08