



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

HD:hd  
Docket No. 08771-08  
9 February 2009

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 8 Aug 08 w/attachments  
(2) PERS-834 memo dtd 24 Nov 08  
(3) PERS-311 memo dtd 12 Dec 08  
(4) Subject's ltr dtd 20 Jan 09 w/enclosure  
(5) 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 2007 to 16 May 2008 and all related material, a copy of which is at Tab A.

2. The Board, consisting of Messrs. Grover, Lippolis and McBride, reviewed Petitioner's allegations of error and injustice on 5 February 2009, 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. Petitioner contends the contested fitness report should be removed because block 41 ("Comments on Performance") contains an improper reference to a pending detachment for cause (DFC),

and it improperly refers to a charge that did not result in disciplinary action. He also alleges, contrary to block 30 of the report, which reflects he had mid-term counseling on 15 May 2008, that he actually received no mid-term counseling.

c. In correspondence attached as enclosure (2), the Navy Personnel Command (NPC) office having cognizance over officer performance commented to the effect that the block 41 comment "\*\*\*AWAITING FINAL AUTHORIZATION TO DETACH FOR CAUSE.\*\*\*" should be removed, but that the report at issue, as so modified, should stand.

d. In enclosure (3), the NPC office with cognizance over performance evaluations also recommended removing the reference to a pending DFC, but added a recommendation to remove from block 41 "CHARGED WITH CONDUCT UNBECOMING OF AN OFFICER AND A GENTLEMAN. MEMBER DECLINED CO'S [commanding officer's] NJP [nonjudicial punishment]." The basis for the latter recommendation was the determination that this was an improper reference to an ongoing investigation and pending charges not yet concluded. Paragraph 2.e of enclosure (3) noted that mid-term counseling may be provided in an earlier or later month, if that would be more appropriate, but may not be omitted; it stated that 23 May 2008 was the normal mid-point of the periodic cycle; and it stated that "the date the member signed the report [23 May 2008] is [Petitioner's] counseling date."

e. In enclosure (4), Petitioner submitted the report of his board of inquiry, which found he did not commit conduct unbecoming of an officer and a gentleman.

f. Bureau of Naval Personnel Instruction 1610.10A, enclosure (2), paragraph 19-5, says mid-term "Counseling may actually be provided in an earlier or later month if that is more appropriate, but may not be omitted or unduly delayed."

#### CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the contents of enclosures (2) and (3), the Board finds an error warranting partial relief, specifically, removing from block 41 "\*\*\*AWAITING FINAL AUTHORIZATION TO DETACH FOR CAUSE.\*\*\*" The Board agrees with enclosure (2) in concluding there was no ongoing investigation and no charges pending against Petitioner when the contested fitness report was submitted, so it does not accept the recommendation, in enclosure (3), to remove additional verbiage.

The Board finds it was permissible to refer to a charge that did not result in disciplinary action, when Petitioner had declined NJP for that charge, and the reporting senior was satisfied that he had committed the offense charged.

The Board notes that paragraph 2.e of enclosure (3) was incorrect in stating the normal mid-point of Petitioner's periodic cycle was 23 May 2008, as the actual mid-point for periodic reports starting on 1 November 2007 is 30 April 2008. The Board finds that 15 May 2008, the date on which the report at issue states mid-term counseling was conducted, was only two weeks after the normal mid-term counseling month, and therefore Petitioner's mid-term counseling was not unduly delayed. The Board further disagrees with the statement, in the same paragraph of enclosure (3), that the date Petitioner signed the report was his counseling date. The Board is unable to find Petitioner did not receive mid-term counseling on 15 May 2008, as the report in question states he did, noting that counseling takes many forms, so the recipient may not recognize it as such when it is provided. In any event, the Board finds that even if Petitioner were correct that mid-term counseling was not conducted, this would not justify removing the contested report.

Finally, the board of inquiry finding that Petitioner did not commit conduct unbecoming of an officer and a gentleman does not persuade the Board that the reporting senior was incorrect in citing that misconduct and marking Petitioner down accordingly.

In view of the above, the Board directs the following limited corrective action:

RECOMMENDATION:

a. That Petitioner's fitness report for 1 November 2007 to 16 May 2008, dated 15 May 2008 and signed by Commander [REDACTED] be modified by deleting, from the beginning of the block 41 narrative, the following: "\*\*\*AWAITING FINAL AUTHORIZATION TO DETACH FOR CAUSE.\*\*\*"

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 the remainder of Petitioner's request be denied.

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  
Acting Recorder

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 Regulations, 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.

  
W. DEAN PFEIFFER  
Executive Director