



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

JSR
Docket No: 5169-09
4 June 2009

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

Subj: [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 dtd 6 Jan 09 w/attachments
(2) HQMC MMER/PERB memo dtd 7 May 09
(3) Subject's e-mail dtd 1 Jun 09 less attachments
(4) 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 her naval record be corrected by removing the fitness report for 10 October 2007 to 30 March 2008, a copy of which is at Tab A.

2. The Board, consisting of Mses. [REDACTED] and [REDACTED], reviewed Petitioner's allegations of error and injustice on 4 June 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 which were available under existing law and regulations within the Department of the Navy.

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

c. On 14 March 2008, Petitioner had an exchange with his reporting senior (RS), during which Petitioner threatened to file a request mast against him. On the same date, Petitioner

did file a request mast against him, complaining of his micro-management. On 16 March 2008, an investigation of the incident of 14 March 2008 was initiated by Petitioner's reviewing officer (RO). On 28 March 2008, the investigation was completed. On 30 March 2008, Petitioner was relieved of his duties as a platoon commander. On 17 July 2008, the RS submitted the contested adverse fitness report, documenting Petitioner's relief for having been insolent and unprofessional. This was a combat fitness report for active duty in Iraq. Both the RO and the third sighting officer concurred with the report.

d. Petitioner alleges that the report at issue was in reprisal for his request mast. He also feels the officer with whom he had the exchange in question could not have evaluated him objectively and, therefore, should not have been permitted to act as his RS. Finally, he contends that officer did not fulfill his responsibilities as an RS and a supervisor.

e. The RO acknowledges, in paragraph 9 of his addendum page, that the timing of Petitioner's request mast and that of the RS's allegations against him "may lead some to surmise that the allegations are a reprisal against [Petitioner] for requesting mast." However, he concluded "The evidence presented in this case paints a clear picture of insolent and rude behavior on the part of [Petitioner]." In paragraph 11, he states that the RS, "over the course of the past (4) weeks, has allowed [Petitioner] to act in an increasingly hostile and disrespectful manner to a superior officer." and that "He has not corrected in a forceful, directive manner the deficiencies in behavior that [Petitioner] has exhibited in the past." The RO notes that the RS has been "a staunch supporter of [Petitioner], stating in his last counseling that [Petitioner] 'is 'an exceptional officer.'" The RO further notes that the RO "allowed a dispute between himself and [Petitioner] to be witnessed by the junior enlisted Marines on several occasions without correction."

f. The third sighting officer's addendum page points out that the investigation found no substantiation for most of the allegations against Petitioner "and in fact chastised both he and his reporting senior for their unprofessional conduct."

g. Petitioner provided supporting statements from five Marines, a lieutenant colonel (unsigned), two majors, and two sergeants.

h. Enclosure (2), the report of the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) in Petitioner's case, concluded that his request should be denied. The PERB was not persuaded that the RS had failed to fulfill his responsibilities or that he had acted in reprisal against Petitioner. The PERB found the third sighting officer's adjudication an "accurate and appropriate summary of the case."

i. In enclosure (3), Petitioner objects that the investigation was conducted without transparency; that he was not permitted to make a statement, upon seeking legal advice, so the investigation was done "without [his] side of the story"; that he was never given a copy of the investigation; and that he was not informed on the day of his relief what he had done to warrant it. He says "The RS was discovered to have made false and contradictory statements regarding the allegations against [him]."

CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding enclosure (2), the Board finds an injustice warranting removal of the contested fitness report. While the Board does not excuse Petitioner's behavior toward the RS, the Board considers the report at issue to represent an overreaction to it. The Board particularly notes the evidence that the RS effectively condoned such behavior in the past, and that the investigation criticized both Petitioner and the RS. Finally, the Board agrees with Petitioner that under the circumstances, the officer who submitted the contested report probably should not have been permitted to act as Petitioner's RS. In view of the above, the Board recommends the following corrective action:

RECOMMENDATION:

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

Date of Report	Reporting Senior	Period of Report	
		From	To
17 Jul 08	[REDACTED]	10 Oct 07	30 Mar 08

b. That there be inserted in his naval record a memorandum in place of the removed report, containing appropriate identifying data concerning the report; that such 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 the magnetic tape maintained by HQMC be corrected accordingly.

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.

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.

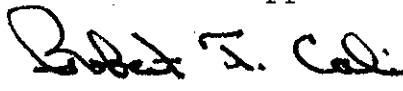
ROBERT D. ZSALMAN
Recorder


JONATHAN S. RUSKIN
Acting Recorder

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


W. DEAN PFEIFFER

Reviewed and approved:


7-9-09