



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

BAN
Docket: 09826-10
19 April 2011

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

Subj: REVIEW OF NAVAL RECORD [REDACTED]

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

Encl: (1) DD Form 149 w/attachments
(2) Navy Personnel Command (NPC) memo 1430 PERS 843 of 2 Nov 10
(3) Supplemental ltr from [REDACTED] to BCNR of 7 Jan 11
(4) United States Marine Corps Preliminary Inquiry into Allegations of Misconduct and Dereliction of Duty memo 5810 SJA of 27 May 09
(5) Corrected Copy of NAVPERS 1616/27 signed by the Reporting Senior on 1 Jun 09

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 to show that he advanced as a result of the FY 2010 HMCM/E-8 advancement cycle.

2. The Board, consisting of Messrs. Pfeiffer, Zsalman, and Exnicios, reviewed Petitioner's allegations of error and injustice on 7 February 2011 and, pursuant to its regulations, determined that the partial 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. The Board also considered an advisory opinion from the Navy Personnel Command (NPC) recommending that no relief be granted. See 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. In 2007 and 2008, Petitioner was assigned to the 3D Marine Aircraft Wing (3d MAW). He was scheduled to receive a fitness report for the reporting period ending on 15 September 2008. The fitness report was not completed on time.

c. Petitioner was deployed with the 3D MAW FWD, in Operation Iraqi Freedom (OIF) from July 2008 to February 2009. The FY-2010 E-8 Selection Board was scheduled to meet in March-April 2009. In an effort to ensure the fitness report was completed and submitted in time to be considered by the selection board, Petitioner contacted his Command Master Chief (CMC) on multiple occasions.

d. Petitioner claims that the CMC failed to fully respond to his repeated requests and only offered verbal assurances that the fitness report would be submitted by the command directly to the selection board.

e. Under the regulations governing advancements, which may be found in BUPERS 1430.16F, candidates are afforded the opportunity to communicate with the selection board, in advance, as necessary, by submitting a "selection board package." Petitioner submitted a "package" but did not include a statement indicating that his evaluation was not in his record. Petitioner alleges that his CMC [REDACTED] had directed him not to.¹

f. Petitioner's selection board package was due to the Naval Personnel Command by 30 January 2009. He submitted his HMCS/E-8 selection board package on 30

¹ Petitioner's Senior Enlisted Leader [REDACTED] supports his claim by submitting a statement which states, [REDACTED] informed [REDACTED] that there was no need to contact the FY 2010, E-8 Board #235 about his delinquent evaluation or to mention anything about it in his package. CMC [REDACTED] stated the evaluation would be submitted to the Board prior to the Board convening in April 2009." See enclosure (3).

January 2009, (deadline), without the required fitness report.²

g. In February 2009, Petitioner returned from overseas to his parent command in CONUS. Petitioner stated that he and other members of the chief petty officer (CPO) mess who were also missing fitness reports made additional attempts to resolve the problem with no success.³

h. In April-May 2009, a preliminary inquiry was conducted into allegations that the CMC had abused his authority by intimidating subordinates and had been derelict by failing to process multiple fitness reports. The abuse of authority allegations were not substantiated. However, the dereliction allegations were substantiated, although the investigating officer "could not determine any malicious intent." See enclosure (4).

i. The selection board convened on 20 April 2009. Petitioner's fitness report had not been received by the selection board.⁴ Petitioner was passed over for advancement to HMCS/E-8.

j. In June 2009, Petitioner's fitness report from 16 June 2008 to 15 September 2008, was finally completed and signed. See enclosure (5). Thereafter, Petitioner submitted a request to NPC for a remedial consideration based on the missing fitness report.

k. NPC denied the request for a remedial board stating, essentially, that a missing fitness report is not

² The fitness report was a Non-Observed and covered the period from 08Jun16 to 08Sep15.

³ There were allegations by the CPO mess that the CMC had failed in his duties to timely submit fitness reports and evaluations of 59 personnel within the command.

⁴ There is some evidence that the CMC forwarded a fitness report directly to the selection board on 20 April 2010, however that report was not accepted by the selection board or reviewed as part of their deliberations. Moreover, the fitness report that the CMC sent was later determined to be defective and perhaps fraudulent. Additionally, the reporting senior denied ever signing the fitness report submitted directly to the selection board. The issues surrounding the fitness report that was sent directly to the selection board have not been fully resolved. However, because that report was not seen by the selection board, a resolution is not necessary for the consideration of this application. See enclosure (5).

a sufficient justification to convene a special selection board.

l. Petitioner was selected for advancement at the next selection board. The FY-2011 Active E-8 selection board convened in March-April 2010. The FY 2011 selection board considered the fitness report that was missing the prior year. Petitioner was selected for advancement, frocked on 16 July 2010, and was advanced on 16 January 2011.

m. In September 2010, Petitioner filed an application with this Board requesting that his advancement be backdated to the FY-2010 E-8 advancement cycle. He contends that, but for the missing fitness report, he would have been advanced by the earlier selection board.

n. By enclosure (2), NPC has recommended that no relief be granted stating Petitioner's record was evaluated by the correct panel in the correct competitive category with no improperly or fraudulently submitted information. NPC stated that his failure to submit documentation to the selection board for advancement consideration regarding the missing evaluation should not be a basis to backdate an advancement.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial favorable action. The FY-2010 selection board did not have the benefit of a fitness report for the period 16 June 2008 to 15 September 2008 when it considered, and passed over, Petitioner for advancement. In the Board's view, Petitioner made reasonable efforts, in the months leading up to the FY-2010 selection board, to obtain the report. The selection board's inability to review the report was primarily the fault of the CMC and not that of Petitioner.

The record is clear that, one year later, the FY-2011 selection board *did* have the benefit of reviewing the fitness report when it considered, and *selected* Petitioner for advancement. Whether Petitioner would have been selected by the FY-2010 selection board if it would have had the fitness report can never be known for certain.

The Board understands that advancement to E-8 in the Navy is highly competitive. There are a very limited number of promotion vacancies. Selection boards are tasked to determine the most qualified candidates. To do so, they consider the whole person by assessing a candidate's overall performance, experience, and knowledge. A wide variety of performance factors must be considered including technical knowledge, military proficiency, performance of duty, conduct, education, physical fitness, time in service time in grade, awards, decorations, and the like. One missing fitness report may or may not make a difference.

The Board also noted that, in this case, the missing report was non-observed. Nevertheless, there is no way to know for certain whether Petitioner would have been selected by the FY-2010 selection board if it would have had the missing fitness report; therefore, the only way to approximate whether Petitioner would have advanced from the FY-2010 cycle is to grant him a remedial selection board.

The Board agreed with the comments contained in enclosure (2) that a retroactive advancement is not automatically warranted in such circumstances. However, in the Board's view, a special selection board should be convened for the purpose of determining whether Petitioner would likely have advanced from the FY-2010 selection board.⁵ And, in the Board's view, the special selection Board should take into account all of the factors including those that weigh in favor of advancement, such as his overall performance, deployment experience, and knowledge as well as factors that weigh against selection such as keen competition, the competitive nature of the E-8 advancements, the "non-observed" nature of the report, and the limited number of promotion vacancies that were available. Accordingly, the Board concludes that Petitioner should be afforded remedial consideration for advancement to HMCS/E-8 for the FY-10 promotion cycle.

⁵ The Board understands that their determination necessarily places a weighty administrative burden upon the NPC to assemble Petitioner's record, convene a qualified remedial selection board, and make an honest and impartial evaluation of whether Petitioner would have been advanced if his full record had been before the FY-2010 selection board. However, in the Board's view, the burden is outweighed by the injustice that has been suffered by Petitioner in this case.

RECOMMENDATION:

That Petitioner's naval record be corrected, where appropriate, to show that:

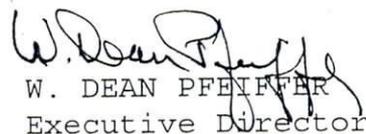
- a. Petitioner shall receive remedial consideration for promotion to HMCS/E-8 from the fiscal year 2010 Selection Board.
- b. Such remedial consideration shall include consideration of the fitness report covering the period 16 June 2008 to 15 September 2008, signed by the Reporting Senior dated 1 June 2009.
- c. That a copy of the Report of Proceedings, be filed in the Petitioner's naval record.

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 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.

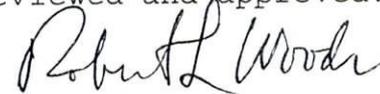
ROBERT D. ZSALMAN
Recorder


WILLIAM J. HESS, III
Acting Recorder

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


W. DEAN PFEIFFER
Executive Director

Reviewed and approved:


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6/9/11