



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

HD:hd
Docket No. 03982-12
16 August 2012

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
(b) Title 10 U.S.C. 1558

Encl: (1) DD Form 149 dtd 28 Mar 12 w/attachments
and Subject's e-mails dtd 15 Aug 12 and
16 Aug 12 w/attachment
(2) PERS-32 memo dtd 11 May 12
(3) PERS-833 memo dtd 20 Jun 12
(4) Subject's ltr dtd 30 Jul 12 w/enclosures
(5) PERS-803 e-mail dtd 16 Aug 12

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 enlisted performance evaluation report for 16 September 2010 to 31 March 2011, a copy of which is at Tab A. In his original application, he also requested that the action of the Fiscal Year (FY) 12 Enlisted Retention Board (ERB), selecting him not to be retained, be overturned. He has since amended his application to request a special board, under reference (b), for the FY 12 ERB, to consider him for retention on the basis of a corrected record that does not include the contested performance evaluation report. Finally, he requested special selection board consideration for the active duty and reserve pay grade E-8 (FCCS) selection boards he missed as a result of his selection by the ERB not to be retained. The Board did not consider the last request, as a special board determination that Petitioner should have been retained will enable him to apply to the Navy Personnel Command (NPC) for special selection board consideration pursuant to Bureau of Naval Personnel Instruction 1430.16F (Advancement Manual), Enclosure (1), Chapter 1, paragraph 102.d. He was originally scheduled to be discharged on 1 September 2012, but he chose to affiliate with the Navy Reserve on 1 June 2012 to facilitate his obtaining a civilian job. In his e-mail dated 15 August 2012 at enclosure (1), he

confirmed that he would be willing to give up that job to return to active duty.

2. The Board, consisting of Messrs. W. Hicks, Spooner and Swarens, reviewed Petitioner's allegations of error and injustice on 16 August 2012, 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 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. Except as indicated in paragraph 1 above, 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. In enclosure (2), PERS-32, the NPC office with cognizance over Navy performance evaluations, has commented to the effect that the contested adverse performance evaluation report should be removed or that the reporting senior's Immediate Superior in Command (ISIC) should prepare a replacement report.

d. In enclosure (3), PERS-833, the NPC office with cognizance over ERB matters commented to the effect that Petitioner's original request to overturn the ERB action should be denied, as the ERB "was to reduce over manning in ratings projected to over 103% manned in FY 12"; and since ERB proceedings are confidential, "no determination can be made concerning factors leading to [Petitioner's] selection."

e. In enclosure (4), Petitioner amended his application as indicated in paragraph 1 above. He noted that the ERB precept included the following: "2. Selection Standard. The board shall recommend for retention the fully qualified sailors determined to be the best qualified, with potential for further naval service, applying both performance indicators and the quotas assigned." He maintained that in light of this guidance, the adverse contested report would have been a factor in the ERB decision not to retain him.

f. The ERB for members of Petitioner's grade convened on 26 September 2011, after the performance evaluation report at issue had been filed in his record on 18 April 2011.

g. Petitioner acknowledges that in 2009 and 2010, he was diagnosed with anxiety/panic disorder and that he has been under treatment for this since 2009. Enclosure (5) shows the ERB did not consider medical records.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of enclosure (2), the Board finds an injustice warranting removal of the contested performance evaluation report and Petitioner's consideration by a special board under reference (b) for the FY 12 ERB, to consider him for retention on the basis of a corrected record that does not include the contested performance evaluation report. The Board agrees with Petitioner that this report would have been a factor in the ERB decision not to retain him. In view of enclosure (5), the Board finds that Petitioner's diagnosed medical condition was not a factor in that decision. The Board does not consider itself qualified to act as the special board. 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 enlisted performance evaluation report and related material:

Date of Report	Reporting Senior	Period of Report	
		From	To
31Mar11		16Sep10	31Mar11

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 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 appropriate corrections be made to the magnetic tape or microfilm maintained by NPC.

d. That a special board be convened under reference (b) for the FY 12 ERB, to consider Petitioner for retention on the basis of a corrected record that does not include the performance evaluation

report to be removed in accordance with recommendation a above; and that the Board not be designated as the special board.

e. 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.

f. 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:



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(MANPOWER AND RESERVE AFFAIRS)
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

ACTION MEMO

September 6, 2012

FOR: SECRETARY OF THE NAVY

UNSECNAV H/S

FROM: Assistant Secretary of the Navy (Manpower and Reserve Affairs)

JMC 05 SEP 12

SUBJECT: Board for Correction of Naval Records Recommendation
[REDACTED]

Ref: (a) Title 10 U.S.C. 1552
(b) Title 10 U.S.C. 1558

Encl: Board for Correction of Naval Records Recommendation and Case File
[REDACTED]

BLUF: Request approval of the recommendation of the Board for Correction of Naval Records (BCNR) to correct his Naval record by removing the enlisted performance evaluation report for 16 September 2010 to 31 March 2011 and to convene a Special Board to consider whether a 2011 Enlisted Retention Board (ERB) improperly selected
[REDACTED]

BACKGROUND

- [REDACTED] Petitioner), pursuant to reference (a), petitioned BCNR to correct his Naval record by removing the enlisted performance evaluation report for 16 September 2010 to 31 March 2011, a copy of which is at Encl, Tab A. In his original application, he also requested that the action of the Fiscal Year (FY) 12 Enlisted Retention Board (ERB), selecting him not to be retained, be overturned. Subsequently, he amended his application to request a special board, under reference (b), for the FY 12 ERB, to consider him for retention on the basis of a corrected record that does not include the contested performance evaluation report. Finally, he requested special selection board consideration for the active duty and reserve pay grade E-8 (FCCS) selection boards he missed as a result of his selection by the ERB not to be retained. The Board did not consider the last request, as a special board determination that Petitioner should have been retained will enable him to apply to the Navy Personnel Command (NPC) for special selection board consideration pursuant to Bureau of Naval Personnel Instruction 1430.16F (Advancement Manual), Enclosure (1), Chapter 1, paragraph 102.d. He was originally scheduled to be discharged on 1 September 2012, but he chose to affiliate with the Navy Reserve on 1 June 2012 to facilitate his obtaining a civilian job. In his

e-mail dated 15 August 2012, he confirmed that he would be willing to give up that job to return to active duty. Encl at encl 2. The BCNR recommends that Petitioner's record be corrected to remove the contested enlisted performance evaluation report for 16 September 2010 to 31 March 2011 and that he be granted a Special Board pursuant to reference b to review the decision of the Fiscal Year (FY) 12 Enlisted Retention Board (ERB).

- While serving aboard the USS Jarrett (Spring 2009 – Spring 2011), Petitioner received a series of excellent performance evaluations from the same reporting senior. In each he received an average of 4.57 out of 5 on his 7 performance traits, superlative narrative reviews, and recommendations for "Early Promote," the highest promotion recommendation available. Encl at encl 1. In early 2011, he purportedly had an anxiety/panic attack onboard while the ship was in-port for liberty at Puerto Quetzal, Guatemala, during which he broke three dinner plates and a brass spillguard (which he later replaced/ repaired). The CO was aware that he was being treated by medical personnel for anxiety. The CO placed him on report for these damages and he was told that he would be offered non-judicial punishment under Article 15, UCMJ. Although these proceeding were initiated, they were subsequently abandoned by the CO. Subsequently, upon his departure from the USS Jarrett in March 2011, he received the contested performance evaluation from the same reporting senior who prepared the evaluations described above. In this evaluation, he was downgraded in 6 of the 7 performance traits, with an average score of 3.29 out of 5 (down from an average of 4.57 out of 5), his promotion recommendation was downgraded by 2 marks to "Promotable" vice "Early Promote." Finally, his narrative was substantially less complementary, including the comment "capable chief petty officer with potential, his performance during this reporting period was punctuated with 'high swells' and uncharacteristically 'low troughs.'" In September 2011, Petitioner's record, with this evaluation on top, was reviewed by the 2011 ERB, which selected him not to be retained.
- The BCNR sought an advisory opinion regarding the contested performance evaluation from PERS-32, the NPC office with cognizance over Navy performance evaluations. They commented to the effect that because the reporting senior failed to properly document the reasons for his ratings that the contested adverse performance evaluation report should be removed or that the reporting senior's Immediate Superior in Command (ISIC) should prepare a replacement report. Encl at encl 2. The BCNR agrees with and echoes this recommendation to remove the report.
- The BCNR also sought an advisory opinion regarding the ERB decision from PERS-833, the NPC office with cognizance over ERB matters. They commented to the effect that Petitioner's original request to overturn the ERB action should be denied, as the ERB "was to reduce over manning in ratings projected to over 103% manned in FY 12"; and since ERB proceedings are confidential, "no determination can be made

concerning factors leading to [Petitioner's] selection." Encl at encl 3. The BCNR disagrees with this advisory opinion because the record evidence supports the Petitioner assertion that this performance evaluation report would have been a factor in the ERB decision not to retain him. As such, they recommend that the only appropriate remedy is to permit his record, without the contested performance evaluation, to be reviewed by a Special Board pursuant to reference b.

- If you approve this course of action, the Chief of Naval Personnel will remove the contested performance evaluation from Petitioner's record and prepare a package for your signature to convene and instruct a Special Board pursuant to reference b.

RECOMMENDATION: That SECNAV approve the recommendation of the BCNR to correct his Naval record by removing the enlisted performance evaluation report for 16 September 2010 to 31 March 2011 and to convene a Special Board to consider whether a 2011 Enlisted Retention Board (ERB) improperly selected [REDACTED]

Approved:  Disapproved: _____
OCT - 4 2012
COORDINATION: None

ATTACHMENTS:
As stated