



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

CES  
Docket No: 2169-21  
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN,  
[REDACTED]

Ref: (a) 10 U.S.C. §1552  
(b) MILPERSMAN 1611-010  
(c) COMNAVPERSCOM ltr 1920 Ser 834/741 of 9 Jan 18  
(d) MILPERSMAN 1070-170

Encl: (1) DD Form 149 w/enclosures  
(2) CO, [REDACTED] ltr of 11 Jul 17  
(3) Petitioner's ltr of 4 Aug 17  
(4) CO, [REDACTED] FIRST ENDORSEMENT of 9 Aug 17  
(5) CMDR, [REDACTED] SECOND ENDORSEMENT of 17 Aug 17  
(6) DCNP ltr 1611 BUPERS-00B/755 of 20 Dec 17  
(7) Fitness Report and Counseling Record of 24 Apr 17 to 6 Jul 17  
(8) Petitioner's ltr of 8 Nov 17  
(9) Fitness Report Letter Supplement 1610 [SSN] of 31 May 18  
(10) Board of Inquiry Report  
(11) COMNAVPERSCOM ltr 1920 Ser 834/111 of 31 May 18  
(12) Advisory Opinion by NPC-PERS-32 of 22 Nov 21

1. Pursuant to reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that his naval record be corrected by removing all documents pertaining to his Detachment for Cause (DFC) and Board of Inquiry (BOI) from his official military personnel file (OMPF). He implicitly requested removal and replacement of his fitness report and counseling record for the reporting period 24 April 2017 to 6 July 2017, as well as the 31 May 2018 letter supplement. Enclosures (7) and (9).

2. The Board reviewed Petitioner's allegations of error and injustice on 15 February 2022, and, pursuant to its regulations, determined that no corrective action should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of his naval service 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.

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[REDACTED]

b. Petitioner submitted a urine sample on 31 May 2017 that tested positive for cocaine, a schedule II controlled substance. After an investigation into his suspected drug use, Petitioner was notified on 27 June 2017 of his Commanding Officer's (CO) intent to charge Petitioner with violation of Article 112a of the Uniform Code of Military Justice (UCMJ), and to take him to Captain's Mast. Petitioner subsequently invoked his right to refuse non-judicial punishment (NJP) and demanded trial by court-martial in lieu of NJP. Based on consultation with legal counsel, the facts and the circumstances did not warrant adjudication at court-martial. Pursuant to reference (b), Petitioner's CO submitted a Report of Misconduct (ROM), recommending Petitioner be required to show cause before a board of inquiry (BOI) for retention in the naval service, and that he be detached for cause. Enclosure (2).

c. In response to the ROM, Petitioner argues that he did not violate Article 112a UCMJ by knowingly or wrongfully using cocaine, and that he does not use drugs of any type. He also asserts that he has not had a positive test result in over 15 years of service. Petitioner further asserts that the test may have been positive due to either ingestion without knowledge or intent, or due to an error in the testing process. Petitioner also expressed his desire to continue his service in the Navy, and not be detached for cause or be required to show cause before a BOI. Enclosure (3).

d. On 9 August 2017, Petitioner's CO forwarded the Petitioner's rebuttal to the endorsement chain. On 17 August 2017, the Commander, Expeditionary Strike [REDACTED] concurred with the recommendation of Petitioner's DFC and he be required to show cause for retention. Enclosures (4) and (5), respectively.

e. On 20 December 2017, the Deputy Chief of Naval Personnel approved the request for Petitioner's DFC due to misconduct. Enclosure (6).

f. Petitioner's reporting senior (RS) issued him an adverse fitness report and counseling record for the reporting period 24 April 2017 to 6 July 2017, enclosure (7). Petitioner received two "Below Standards" markings for Block 34 and 35 performance traits, and a "Significant Problems" promotion recommendation. Block 41 (Comments on Performance) of the report stated "[Petitioner's] sample provided for command urinalysis tested positive for the presence of Cocaine/Cocaine metabolites, schedule II controlled substance." Petitioner submitted enclosure (8) in rebuttal to the fitness report, asserting that "the 'Significant Problems' ranking is not warranted as [his] case has not been adjudicated and due process has not been extended to [him] as an accused." Petitioner also contested the two adverse performance trait markings.

g. On 31 May 2018, Petitioner's RS submitted a Fitness Report Letter Supplement that made numerous corrections to the original fitness report. The Letter Supplement modified the adverse nature of the fitness report, to include upgraded performance traits in Blocks 34 and 35 to "Meets Standards" and an upgraded promotion recommendation to "Promotable." The RS also removed the original comments in Block 41, noting that the adverse nature of the report was an assumption of misconduct, and that Petitioner was found to have not committed the alleged misconduct. Enclosure (9).

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[REDACTED]

h. Per reference (c), the Commander, Navy Personnel Command (PERS-834) notified Petitioner he was required to show cause for retention in the naval service. Petitioner specifically requested his naval record be corrected by removing this letter from his OMPF. However, this letter was not inserted into his OMPF.

i. The BOI found that the preponderance of the evidence did not support misconduct—unlawful drug involvement: wrongful use of cocaine or substandard performance—failure to conform to prescribed standards of military deportment. The BOI determined that none of the reasons specified were supported by sufficient evidence presented to warrant separation for cause. Enclosure (10).

j. On 31 May 2018, the Commander, Navy Personnel Command (PERS-834) informed Petitioner that he had been retained in the naval service, and that the adverse matters would be filed into his OMPF. Petitioner was also notified that he may submit a statement in response to the adverse material inserted into his OMPF, in accordance with reference (d). Enclosure (11).

k. Petitioner contends in his application that inclusion of the adverse matters in his OMPF is unjust as the DFC process was initiated, concluded, and unjustly documented before due process was carried out. He argues that supporting documentation shows that he did not commit any misconduct and the unjust documents were preemptive and ultimately disproved. Petitioner also asserts that due process concluded that separation for cause is not warranted, and that corrections were administratively made to his fitness report that was also unjust and submitted prior to completion of due process. However, the above mentioned documents cannot be rectified and omitted from the record with other means of Navy correction processes.

l. Enclosure (12), an advisory opinion (AO) furnished by Navy Personnel Command (PERS-32) recommended granting Petitioner's request to remove the fitness report and Letter Supplement. The AO notes that submission of a Letter Supplement does not remove the original fitness report from the record and "keeping the adverse report on file is an injustice." PERS-32 determined the petition has merit due to the RS's admission that the assumption of misconduct never occurred but reflects in the fitness report.

#### MAJORITY CONCLUSION

Upon review and consideration of all the evidence of record, the Majority of the Board determined there was no error or injustice. The Majority noted that Deputy Chief of Naval Personnel did review and approve the DFC request on 20 December 2017. The Majority also noted that the evidence provided did not prove by a preponderance of evidence that the positive result with Petitioner's drug test was in error. The Majority also determine that the adverse matters were inserted into Petitioner's OMPF in accordance with reference (c). The Majority thus concluded that Petitioner's record contains no error or injustice and the requested relief is not warranted.

#### MAJORITY RECOMMENDATION

In view of the above, the Board Majority recommends no corrective action be taken.

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[REDACTED]

#### MINORITY CONCLUSION

Upon review and consideration of all the evidence of record, the Minority member determined the existence of error and injustice warranting relief. The Minority member noted that Petitioner remained onboard the command after the BOI, was issued subsequent fitness reports from the command, and was retained in the naval service. The Minority member also noted that the contested fitness report was issued before Petitioner's case had been adjudicated. In addition, the Minority member noted a determination was made that there was not enough evidence to warrant a court-martial and a BOI determined that the evidence provided did not support a finding of misconduct, drug use. Finally, the Minority member noted the command wanted to revise the fitness report by removing the adverse performance traits, the adverse comment in Block 41 and by upgrading the promotion recommendation to Promotable. The Minority member determined that leaving the fitness report and Letter Supplement would be unjust and further opined that leaving documentation in Petitioner's record of the DFC, that did not occur, would be erroneous and unjust. The Minority member thus concluded that Petitioner's record shall be corrected by removing the fitness report of 24 April 2017 to 6 July 2017, the Letter Supplement of 31 May 2018, as well as all documentation referencing the DFC and BOI.

#### MINORITY RECOMMENDATION

In view of the above, the Board Minority recommends the following corrective action:

Petitioner's naval record be corrected by removing enclosures (2) and (3), the 11 July 2017 Report of Misconduct and Petitioner's 4 August 2017 rebuttal to the Report of Misconduct

Petitioner's naval record be corrected by removing enclosures (4) and (5), the 9 August 2017 First Endorsement and the 17 August 2017 Second Endorsement of the Report of Misconduct.

Petitioner's naval record be corrected by removing enclosure (6), the 20 December 2017 Deputy Chief of Naval Personnel approval of Petitioner's DFC.

Petitioner's naval record be corrected by removing enclosures (7) through (9), his Fitness Report and Counseling Record for the reporting period of 24 April 2017 to 6 July 2017, as well as his 8 November 2017 statement in response, and the Fitness Report Letter Supplement of 31 May 2018. Petitioner's RS for this Fitness Report and Counseling Record shall submit for inclusion in Petitioner's OMPF a corrected version of the report that reflects the modifications made on the 31 May 2018 Fitness Report Letter Supplement.

Petitioner's naval record be corrected by removing enclosure (10), the Board of Inquiry Report.

Petitioner's naval record be corrected by removing enclosure (11), the Commander, Navy Personnel Command Status in the U.S. Navy letter of 31 May 2018.

No further action will be taken to Petitioner's naval record.

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[REDACTED]

EXECUTIVE DIRECTOR'S CONCLUSION

This case is being forwarded based on the Executive Director concurring with the Board Minority's recommendation and corrective action.

EXECUTIVE DIRECTOR'S RECOMMENDATION

In view of the above, the Executive Director concurs with the Board Minority's corrective action.

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

3/22/2022

[REDACTED]

Executive Director

From: Assistant General Counsel (Manpower and Reserve Affairs)

Reviewed and Approved Board Majority Recommendation (Deny Relief)

Reviewed and Approved Board Minority Recommendation (Grant Relief)

Reviewed and Approved Advisory Opinion Recommendation (Grant Partial Relief—Remove Fitness Report and Counseling Record, Petitioner's Rebuttal, and Fitness Report Supplemental Letter, and replace with a memorandum)

3/30/2022

[REDACTED]

Assistant General Counsel (M&RA)

[REDACTED]