



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

█
Docket No: 67-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF █, USNR,
█

Ref: (a) 10 U.S.C. § 1552
(b) Uniform Code of Military Justice (UCMJ)
(c) BCNR Docket No. 2331-16, 4 May 17
(d) BCNR Docket No. 10124-18, 3 May 19
(e) BCNR Docket No. 3952-20, 20 May 21
(f) BUPERSINST 1610.10C

Encl: (1) DD Form 149 w/enclosures
(2) Punitive Letter of Reprimand, 8 Jul 13
(3) Fitness Report for the reporting period 1 Feb 13 to 19 Jul 13
(4) Appeal of Nonjudicial Punishment, 17 Jul 13
(5) █ 5812 Ser 00/283 letter, 18 Jul 13
(6) █ 5812 Ser 001/117 letter, 18 Oct 13
(7) █ memo, 24 Feb 14
(8) █ 5812 Ser 001/162 letter, 1 Apr 14
(9) █ memo, 27 Mar 14
(10) █ 1610 letter, 4 Jun 14
(11) Revised Fitness Report for the reporting period 1 Feb 13 to 19 Jul 13
(12) PERS-32 Advisory Opinion, 23 Nov 16
(13) █ 5800 Ser 00/0144 letter, 10 Sep 18
(14) █ 5800 letter, 16 Sep 18
(15) DD Form 214, 13 Feb 20

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting removal of the cover letter to the supplemental fitness report and counseling record for the reporting period 1 February 2013 to 19 July 2013.

2. The Board reviewed Petitioner's allegations of error and injustice on 23 June 2022 and, pursuant to its regulations, determined the corrective action indicated below should be taken. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's 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:

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[REDACTED]

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. On 8 July 2013, Commanding Officer (CO), [REDACTED] imposed nonjudicial punishment (NJP) on Petitioner for violation of reference (b), Articles 92 and 133 for failing to obey an order or regulation and conduct unbecoming an officer and a gentleman. Petitioner was awarded a punitive letter of reprimand (PLOR). See enclosure (2).

c. Petitioner was issued an adverse Detachment of Reporting Senior (RS) Fitness Report for the reporting period 1 February 2013 to 19 July 2013. In block 41, the RS justified the 1.0 marks in blocks 34, 35, and 38 by stating: "Relieved of trial counsel duties because of inability to adhere to Navy core values and failure to drink responsibly at command social event. His inappropriate conduct towards a summer intern negatively impacted the command climate and recruiting efforts. This alcohol related incident is the reason for an adverse report." Petitioner also received a "Significant Problems" promotion recommendation. See enclosure (3).

d. By memorandum of 17 July 2013, Petitioner appealed the NJP to Commander, Naval Legal Service Command (CNLSC), contending the NJP and resulting PLOR were both unjust and disproportionate. See enclosure (4).

e. By endorsement of 18 July 2013, CO, [REDACTED] recommended denial of Petitioner's NJP appeal. See enclosure (5).

f. By memorandum of 18 October 2013, CNLSC determined the evidence supporting the alleged violation of Article 92 of reference (b) was insufficient and set aside the NJP as it related to that offense. Due to CNLSC's belief Petitioner had rehabilitative potential, the Commander suspended the imposition of the PLOR for a period of six months. Further, CNLSC stated that, at the end of the suspension period, he would set aside the NJP under the following conditions: 1) Completion of DEOMI training; 2) Administration of command-wide training on sexual harassment and responsible use of alcohol; 3) No violations of Petitioner's aftercare plan; and 4) No violations of any punitive article of reference (b). See enclosure (6).

g. On 24 February 2014, Petitioner reported completion of CNLSC's required actions. As a result, on 1 April 2014, CNLSC set aside the NJP imposed on 8 July 2013. CNLSC further directed CO, [REDACTED] "remove the non-judicial punishment and punitive letter of remand from all files and destroy all copies." See enclosures (7) and (8).

h. By memorandum of 27 March 2014, Petitioner requested CO, RLSO MIDLANT change blocks 34, 35, 38, 41, 42, and 45 of the fitness report for the reporting period 1 February 2013 to 19 July 2013. On 4 June 2014, CO, [REDACTED] submitted a supplemental Fitness Report cover letter and a revised Fitness Report for the reporting period 1 February 2013 to 19 July 2013 to Commander, Navy Personnel Command (PERS-32). See enclosures (9), (10), and (11).

i. References (c) through (e) reflect Petitioner's requests for correction of his naval record. On 4 May 2017, the Board substantially relied on the Advisory Opinion at enclosure (12) and

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concluded Petitioner's request to remove the contested fitness report was not warranted. See reference (c).

j. In his 2018 request for reconsideration, Petitioner submitted enclosures (13) and (14), letters from the NJP set-aside authority and the RS, both expressing their intention, at the time, that Petitioner's original fitness report be completely removed. Specifically, the Vice Admiral (VADM) stated that his intention as the appellate authority in this case was that all records related to the NJP would be removed from Petitioner's record entirely, to include the original fitness report. The VADM further stated that inclusion of the original fitness report unfairly impacts Petitioner's career progression and unjustly detracts from his service records. In the RS's letter at enclosure (14), the RS explained that her intention in submitting the substitute fitness report was to replace, in its entirety, the original fitness report in order to follow both the stated intentions and spirit of the NJP set aside. The RS further stated Petitioner warrants a "clean slate." Despite these letters submitted by the VADM and the RS/CO, [REDACTED] the Board again significantly concurred with the initial AO at enclosure (12), and determined it was not error to include both the contested fitness report and the supplemental fitness report. The Board further determined that "continued inclusion of the contested documents in [his] Official Military Personnel File (OMPF) is not an injustice because the supplemental cover letter fully explains the circumstances leading to the new fitness report." See reference (d).

k. On 29 February 2020, Petitioner was involuntarily separated after two failures of selection by the Active O-4 Staff Promotion Selection Boards in Fiscal Year (FY) 2019 and FY 2020. See enclosure (15).

l. Petitioner's 2020 request for consideration at reference (e), in which he specifically requested removal of the cover letter at enclosure (10), was denied by the Board which explained that reference (f) only prohibits reference to NJP proceedings that do not result in a finding of guilty or award of punishment in the fitness report comment block.

m. In his fourth attempt to correct his record, Petitioner submitted enclosure (1), Petitioner contends the following:

(1) The Board's unjustly relied on the original PERS-32 AO which is simply the personal opinion, unsupported by law or regulation, of one employee at PERS without reference to any underlying evidence of regulation that purports to permit what has occurred.

(2) The Board erred by failing to request a supplemental AO and/or PERS-32 failed to seek legal advice in issuing the original AO.

(3) The Board either ignored or chose to give little-to-no-weight to the VADM and the RS's letters of support.

(4) The issue before the Board is not whether Petitioner engaged in any particular conduct but whether it is appropriate to reference, in his record, a NJP that is not final and was overturned on appeal.

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[REDACTED]

(5) The Board has an opportunity to exercise the full scope of its authority as empowered by Congress. With its previous decisions, the Board implies that its authority is limited solely to a determination of whether or not there was compliance with reference (f). Petitioner further contends the Board's job must be greater than simply determining whether or not a particular procedure was complied with and, if not, then directing relief.

See enclosure (1).

n. By memorandum dated 23 November 2016, Navy Personnel Command (PERS 32) provided an AO for the Board's consideration of reference (c). This AO recommended no further action be taken by the Board because the error had already been corrected supplementary by the RS. In making this recommendation, the AO provided the following analysis:

(1) Reference (f) states the letter-supplement is preferred. "Supplemental material does not replace the original report on the member's OMPF nor does it change the information on the member's Performance Summary Record; it only supplements the original report."

(2) The RS properly prepared and submitted a Letter-Supplement and revised fitness report.

See enclosure (12).

CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting corrective action. The Board, noting references (c) through (e), determined the previous Boards did not appropriately consider the legal issue of whether it was error or injustice to introduce into Petitioner's record, through the cover letter at enclosure (10), the discussion of Petitioner's NJP that was properly set aside. The Board concluded the previous Boards appeared to solely rely on the AO at enclosure (12) and strictly review the petitions through the procedural lens of reference (f).

This Board, relying on the support letters from the NJP Appeal Authority and the RS at enclosures (13) and (14) and noting the legal issue created by discussing a NJP that had been set aside, determined an exception to policy was warranted. The Board concluded it was error and injustice for the cover letter to remain in Petitioner's record. Further, having determined the cover letter at enclosure (10) should be removed, the Board concluded it was error and injustice for the original fitness report at enclosure (3) to remain in Petitioner's record.

RECOMMENDATION

In view of the above, the Board recommends that the following corrective action be taken on Petitioner's naval record:

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[REDACTED]

Petitioner's naval record be corrected by removing enclosure (3), the original fitness report for the reporting period 1 February 2013 to 19 July 2013, and enclosure (10), the cover letter submitted with the revised fitness report. The revised fitness report for the same reporting period shall remain in Petitioner's OMPF, in place of the original, contested fitness report.

That no further changes be made to 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.

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

7/20/2022

[REDACTED]

From: Assistant General Counsel (Manpower and Reserve Affairs)

Reviewed and Approved Board Recommendation (Grant Relief)

Reviewed and Approved Advisory Opinion Recommendation (Deny Relief)

9/9/2022

[REDACTED]