



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

[REDACTED]
Docket No. 3662-22
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) Title 10 U.S.C. § 1552
(b) Manual for Courts-Martial (2019 Ed.)
(c) BUPERINST 1610.10E (EVALMAN)
(d) BUPERSINST 1430.16G (Advancement Manual for Enlisted Personnel of the U.S. Navy and U.S. Navy Reserve)

Encl: (1) DD Form 149 w/enclosures
(2) CO, [REDACTED] ltr 5355 Ser SS/0785, 30 Aug 21
(3) CO, [REDACTED] ltr 5355 Ser SS/0796, 1 Sep 21
(4) Report and Disposition of Offense(s) (NAVPERS 1626/7), 2 Sep 21
(5) Accused's Notification and Election of Rights, 13 Sep 21
(6) Evaluation Report and Counseling Record, 15 Nov 21 to 16 Nov 21
(7) CO, [REDACTED] ltr 1910 LGL, 10 Mar 22
(8) Summarized Record of Proceedings of an Administrative Board, 17 Feb 22
(9) Advisory Opinion by Navy Personnel Command (PERS-32), 24 Jun 22
(10) Advisory Opinion by Enlisted Career Progression Branch (PERS-803), 25 Jul 22

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 that his naval record be corrected by removing the Evaluation Report and Counseling Record (Eval) for the reporting period 15 November 2021 to 16 November 2021, and advancement to E-7 based upon his fiscal year (FY) 2022 selection.

2. The Board reviewed Petitioner's allegations of error and injustice on 20 September 2022, 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, 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, found as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulation within the Department of the Navy, with exception to his request for advancement to E-7, as noted below in the Board's conclusion.

b. On 17 August 2021, Petitioner tested positive for 11-nor-9-carboxy-delta-9-tetrahydrocannabinol (THC9), a urinary metabolite of marijuana, at 100ng/mL, and a confirmatory analysis was conducted on 24 August 2021. Retest of Petitioner's urine sample was reconfirmed positive for THC9 at 72 ng/mL. Enclosures (2) and (3).

c. On 2 September 2021, Petitioner was notified that his Commanding Officer (CO) was considering imposing nonjudicial punishment (NJP) for alleged violation of the Uniform Code of Military Justice (UCMJ), Article 112a (wrongful use, possession, etc., of a controlled substance) based on the 24 August 2021 drug testing results. Petitioner was advised of his procedural rights in accordance with reference (b). Petitioner elected, in part, to consult civilian counsel and demanded trial by court-martial. However, the Convening Authority (CA) did not accept the case for court-martial. Enclosures (4) and (5).

d. In view of the foregoing, Petitioner was issued a Special/Regular Eval for the reporting period 15 November 2021 to 16 November 2021. Petitioner was marked 1.0 for the performance trait 'Military Bearing/Character' and his reporting senior (RS) noted in Block 43 that Petitioner's CO withdrew his recommendation for Petitioner's advancement to E-7, cycle 250, noting that Petitioner tested positive for THC during a random urinalysis test and that he is awaiting an administrative separation board (ASB). Enclosure (6).

e. On 7 October 2021, Petitioner was notified of intended administrative separation processing, and he elected a hearing before an ASB. The ASB convened and adjourned on 10 February 2022. During ASB proceedings, Petitioner's father gave a sworn testimony, and explained that Petitioner was visiting him, ran out of vape juice, Petitioner's father recommended that Petitioner use his vape juice that he had in his bedroom. Petitioner's father also explained that Petitioner uses fruity flavors and the only vape juice fruity flavors he had were "THC and CBD." During Petitioner's statement, he acknowledged knowing that his father used THC, but noted, however, his father "does not do it in front of me" and it is usually in "joint form." The ASB found by a vote of 2-1 that a preponderance of the evidence does not support a basis for separation by reason of Misconduct – Drug Abuse. In addition, by a vote of 2-1 the ASB recommended Petitioner's retention in the Navy. Enclosures (7) and (8).

f. In his application at enclosure (1), Petitioner contends that he did not knowingly ingest any illegal substance of his own free will and that his CO removed his recommendation for Petitioner's advancement without due process and before Petitioner could prove his innocence at the ASB. Moreover, Petitioner's request to restore his advancement was not processed by his CO following the recommendation for retention by the ASB. Petitioner also argues that failing a urinalysis test does not prove a service member's guilt, it simply detects a possible illegal substance in a service member's body. Petitioner argues that he was cleared of all charges by the ASB.

g. Navy Personnel Command (PERS-32) provided an advisory opinion (AO) for the Board's consideration recommending the contested Eval remain unchanged. The AO noted that, pursuant to reference (c), general commenting on misconduct may be included whenever the facts are clearly established to the RS's satisfaction and that a special Eval is allowed to withdraw an advancement recommendation. In this case, the AO determined that the RS issued the special

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Eval to remove Petitioner's advancement recommendation due to confirmed illegal drug use as evidenced by positive urinalysis test results. The AO also noted that the ASB recommended Petitioner's retention in the Navy, and determined that the ASB's recommendation does not invalidate the adverse Eval. Enclosure (9).

h. Navy Enlisted Career Progression Branch (PERS-803) provided an AO for the Board's consideration recommending Petitioner's request be denied. The AO noted that Petitioner's advancement was withdrawn on 5 January 2022, and in accordance with reference (d), COs may withdraw a recommendation for advancement at any time prior to the advancement effective date if the member is determined to no longer qualify for advancement. Enclosure (10).

CONCLUSION

Upon careful review and consideration of all the evidence of record, the Board found that there was insufficient evidence that Petitioner was denied his due process rights. However, the Board found the existence of an injustice warranting partial corrective action as follows.

The Board noted Petitioner's statement and ASB transcript and found Petitioner's argument that he did not willingly ingest marijuana convincing. The Board also noted that Petitioner refused NJP and was willing to face trial by court martial instead. The Board was somewhat persuaded by Petitioner's willingness to stand by his argument of innocence and fight the allegations at court martial to prove that he did not willingly or knowingly ingest THC. In consideration of the totality of the evidence, Petitioner's official record, and years of naval service, the Board was convinced that Petitioner did not willingly or knowingly ingest THC. The Board thus determined that Petitioner's contested Eval should be removed from his official military personnel file.

Concerning Petitioner's request for advancement to E-7 from his FY 2022 selection, the Board noted that pursuant to reference (d), the Chief of Navy Personnel (CHNAVPERS) is the sole authority for the advancement of personnel to paygrades E-7 through E-9 and the sole authority for the removal of enlisted personnel selected for advancement to E-7 through E-9 from a selection board list. The Board determined that Petitioner must first exhaust his administrative remedies by submitting a request to CHNAVPERS to restore his selection for advancement.

RECOMMENDATION

In view of the above, the Board recommends the following corrective action.

Petitioner's naval record be corrected by removing enclosure (6), his Evaluation Report and Counseling Record for the reporting period 15 Nov 21 to 16 Nov 21.

That no further changes be made to Petitioner's naval record.

That a copy of this report of proceedings be filed in Petitioner's naval record.

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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.

11/3/2022

[REDACTED]

Executive Director

From: Assistant General Counsel (Manpower and Reserve Affairs)

Reviewed and Approved Petitioner's Request (Grant Relief: Remove the Eval for the reporting period 15 November 2021 to 16 November 2021 and Petitioner be advanced to E-7)

Reviewed and Approved Board's Recommendation (Partial Relief: Remove Eval for reporting period 15 November 2021 to 16 November 2021)

Reviewed and Approved both Advisory Opinion Recommendations (Deny Relief)

11/21/2022

[REDACTED]

Assistant General Counsel (M&RA)

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