



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

█
Docket No. 8467-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF █, USN, XXX-XX-█

Ref: (a) Title 10 U.S.C. § 1552
(b) JAGINST 1212.2B

Encl: (1) DD Form 149 w/attachments
(2) CO, Region Legal Service Office █ ltr 5800 Ser █ of 17 Sep 20
(3) CDR, Navy Region █ email 5211 of 31 Mar 22
(4) CDR, NPC (PERS-834) ltr 1920 Ser 834/402 of 15 Jul 22
(5) █ dated 26 Jul 22
(6) Post board review document undated
(7) Office of Legal Counsel (BUPERS-00J) ltr of 25 Jan 23
(8) █, ltr of 13 Feb 23

1. Pursuant to the provisions of the reference, Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting to remove the 17 September 2020 and 31 March 2022 request for records and all show cause documents. Petitioner also request the removal of the hold on his Career Status Board (CSB) application and an opportunity to comment on any adverse material.

2. The Board, consisting of █, █, and █, reviewed Petitioner's allegations of error and injustice on 28 February 2023 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, finds as follows:

a. Before applying to this Board, the Board determined that Petitioner has not exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner was the subject of an investigation into allegations that he violated Uniform Code of Military Justice (UCMJ) Articles 120c (indecent exposure) and 133 (conduct unbecoming an officer and a gentleman). Court martial charges against Petitioner were preferred

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and ultimately dismissed. Petitioner was subsequently required to show cause for retention and on 13 May 2022, Petitioner's Board of Inquiry (BOI) unanimously found that the preponderance of evidence did not support a basis for separation.

c. On 17 September 2020, the Commanding Officer, [REDACTED] submitted a request to the Commander, Navy Personnel Command (CDR, NPC) (PERS 313D) for a copy of Petitioner's official record. The request noted that Petitioner is involved in an ongoing investigation either as a witness, investigator, or in some other capacity and the investigation has the potential to lead to court-martial. Enclosure (2).

d. On 31 March 2022, the Commander, [REDACTED] submitted a request to CDR, NPC (PERS-313D) for a copy of Petitioner's official record. The request indicated that the information would be used in a BOI proceeding. Enclosure (3).

e. On 15 July 2022, the CDR, NPC (PERS-834) notified Petitioner that the BOI retained him for naval service and this determination does not preclude or limit the use of the information and opinions in future administrative or other proceedings. Enclosure (4).

f. On 26 July 2022, Petitioner submitted an application for the Calendar Year 2022 Fall CSB. Enclosure (5).

g. In undated correspondence, Petitioner was notified that due to a post-board review of all recommended officers for adverse information, Petitioner's recommendation for selection for Career Status is withheld pending adjudication or resolution of the matter. Enclosure (6).

h. In his application, Petitioner contends that his BOI convened and found that a preponderance of the evidence did not support the allegations of misconduct or substandard performance. Petitioner argued that maintaining the information related to the BOI proceeding in his record could negatively impact his potential for promotion. Petitioner noted that the Board previously granted relief when concluding that derogatory material (to include records requests and disclosures) in a different Petitioner's record was in error or unjust. Enclosure (1).

i. On 25 January 2023, the Navy Office of Legal Counsel (BUPERS 00J) furnished an advisory opinion (AO) for the Boards consideration recommending partial corrective action. The AO noted that pursuant to MILPERSMAN 1070-020 the request for records dated 17 September 2020 was properly filed in the record and is not adverse. The AO also noted that the 17 September 2020 request was for access related to a court martial and does not indicate that Petitioner was a target. The AO determined that Petitioner failed to overcome the burden that there was a material error or injustice as to the court-martial request for his record, as there is no derogatory information in that request. Although the court martial charges were dismissed, it was "without prejudice" meaning these charges in theory could be reinstated, these documents serve a legitimate and appropriate purpose without prejudicial effect on Petitioner. The AO recommended that the 17 September 2020 request for records be retained.

The AO noted that the 31 March 2022 request for records states that the record will be used in preparation for a BOI and did not directly infer charges nor alleges misconduct. The AO also noted that the BOI found by a vote of 3-0 that the alleged misconduct and substandard

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performance of duty was unsubstantiated, Petitioner was issued a Status in the Navy letter, and this letter was not included in his record. The AO explained that there is no Navy policy stating that if a respondent wins a BOI that the request for his record will also be removed. However, the removal of documents based on the argument that the BOI process is completed with no finding of misconduct was previously determined by the Board to qualify for removal as a matter of injustice. Therefore, the AO concluded the 31 March 2022 request for records may be removed.

The AO also identified that the 17 September 2020 request for records is erroneously placed in Field Code (FC) 44, which is an enlisted record code instead of FC 19 for officers. The AO explained that this is an administrative correction and has no prejudicial effect because FC 19 and FC 44 serve the same purpose. The AO noted that FC 19 and FC 44 records cannot be presented to a selection board and would not have an adverse effect on Petitioner. Enclosure (7).

j. In response to the AO, Petitioner argued that the AO did not address the fact that some unspecified adverse information is the reason his selection for career status has been withheld. Enclosure (8).

CONCLUSION

Upon careful review and consideration of all the evidence of record, the Board found the existence of an error warranting partial corrective action.

The Board substantially concurred with the AO. In this regard, the Board noted that the 17 September 2020 request for records does not indicate that Petitioner was the target of the investigation. The Board also noted that Petitioner cited Docket No. 8910-17 as precedence for his argument, that decision, however, was focused on removing the report of misconduct, all associated show cause-related documents, and a FC 17 specifically. Thus, the Board determined that the requests for records are appropriate and legitimate matters of record, the requests are not adverse or derogatory in nature, and Petitioner is not prejudiced by the presence of the documents in his record. The Board also determined that the 17 September 2020 request for records should be retained.

Notwithstanding, the Board noted that the 31 March 2022 request for records specifically indicates that the request is for a BOI proceeding. The Board acknowledged that while there is no requirement to remove the 13 March 2022 request for records, they found that Petitioner's argument of injustice had merit and determined that it should be removed.

Concerning the placement of Petitioner's 17 September 2020 request for records, the Board determined that the document should be placed in FC 19 instead of FC 44.

Concerning Petitioner's requests to remove the hold from his CSB application, the Board determined that Petitioner has not exhausted his administrative remedies. The Board noted that according to reference (b), the purpose of the CSB is to determine eligibility for continued service on active duty and Phase I of Navy Judge Advocate Continuation Pay. Judge Advocates who apply but are not selected by the CSB at the first board for which they are eligible may

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apply to the next consecutive board. The Board determined that the proceedings of a CSB is not within the Boards purview. Even if the Board had the authority to act on Petitioner's request, the Board found no evidence that Petitioner's CSB application has been adjudicated by the Navy and Petitioner will have the opportunity to reapply for CSB if his application is denied.

RECOMMENDATION

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

Petitioner's naval record be corrected by correcting removing enclosure (3).

Petitioner's naval record be corrected by placing enclosure (2) in FC 19 instead of FC 44.

No other corrections 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. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)), and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

3/11/2023

[REDACTED]

Executive Director

Signed by: [REDACTED]