



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JSR

Docket No: 11686-09

7 January 2010

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

Encl: (1) DD Form 149 dtd 10 Apr 09 w/attachments
(2) HQMC MMR/PERB memo dtd 5 Nov 09
(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, that his naval record be corrected by removing the fitness reports for 21 October 2005 to 10 January 2006 and 11 January to 23 May 2006, copies of which are at Tabs A and B, respectively.

2. The Board, consisting of [REDACTED] and [REDACTED] reviewed Petitioner's allegations of error and injustice on 7 January 2010, 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, 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, Petitioner exhausted all administrative remedies which were available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. Both contested fitness reports are adverse, and both had the same reporting senior (RS), reviewing officer (RO) and third sighting officer. The report ending 10 January 2006 documents

Petitioner's nonjudicial punishment (NJP) of 10 January 2006 for disobeying an order to perform his duties as a recruiter, and the report ending 23 May 2006 documents his relief for cause from recruiting duty. Section I (RS "Directed and Additional Comments") of the report ending 10 January 2006 says that Petitioner "literally arrived on recruiting duty and quit within one month." and that "He gave up on himself when the challenges of recruiting duty came to light." Section K.4 (RO comments) says that despite efforts to motivate him, he "chose not to respond" and that he "is a disgrace." Section I of the report ending 23 May 2006 says he "Does not display the will, desire nor drive expected of a SNCO [staff noncommissioned officer]."

d. In enclosure (1), Petitioner provided documentation showing that he was diagnosed with major depressive disorder and anxiety disorder on 27 January 2006 and consequently placed on limited duty from 27 January to 27 March 2006. His rebuttal of 20 February 2006 in response to the report ending 10 January 2006 states that before the NJP, he "had begun thoughts of suicide because of family and work stressors"; that in early January 2006, he was taken by ambulance to the emergency room with a "major anxiety attack/depression" and treated with medication; and that "there has always been an underlying deep depression/anxiety prior to coming on Recruiting [sic]." In section K.4 of the same report, the RO replies as follows:

His comments regarding anxiety attacks, depression and medication are correct, but again, only serve as examples of his adverse performance overall. A staff noncommissioned officer who cannot handle, in fact thrive, in a demanding environment should not be a SNCO, should not be promoted, reenlisted or allowed anywhere near junior Marines.

e. Enclosure (2), the report of the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) in Petitioner's case, concluded that his request should be denied. Regarding the matter of Petitioner's medical issues, the PERB merely stated that "The command recognized the petitioner's medical issues that interfered with his performance of duty, and maintained the position that the petitioner 'quit' and refused to put forth the effort to be successful at recruiting." The PERB further stated that Petitioner "does not provide any factual evidence to disprove the recorded adversities."

CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding enclosure (2), the Board finds an injustice warranting removal of both contested fitness reports. The Board finds both reports were unduly harsh and insufficiently sensitive to the adverse effect Petitioner's diagnosed medical problems had on his ability to function as a recruiter. Specifically regarding the report ending 23 May 2006, the Board does not disagree with his having been relieved of recruiter duty, but does take issue with relieving him for cause, a highly stigmatizing action. 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 fitness reports and related material:

Dates of Reports	Reporting Senior	Periods of Reports	
		From	To
15 Feb 06	[REDACTED]	21 Oct 05	10 Jan 06
2 Feb 07	"	11 Jan 06	23 May 06

b. That there be inserted in his naval record ONE memorandum in place of both removed reports, containing appropriate identifying data; that such memorandum state that the portion of Petitioner's fitness report record for 21 October 2005 to 23 May 2006 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 removed material.

c. That the magnetic tape maintained by HQMC be corrected accordingly.

d. 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 be added to the record in the future.

e. 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
JONATHAN S. RUSKIN
Acting Recorder

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

W. Dean Pfeiffer
W. DEAN PFEIFFER

Reviewed and approved:

Robert L. Woods 1/27/00

Assistant General Counsel
(Manpower and Reserve Affairs)