



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

[REDACTED]  
Docket No: 3923-16  
JUL 06 2017

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

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

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 with attachments  
(2) CO, NHB Report and Disposition of Offense(s) (NAVPERS 1626/7) dtd 5 Jan 16  
(3) Evaluation Report and Counseling Record 11 April 2014 to 15 March 2015 with  
Evaluation Report Letter-Supplement dtd 19 May 15  
(4) Evaluation Report and Counseling Record 16 March 2015 to 5 July 2015  
(5) NPC memo 1610 PERS-32 dtd 5 Dec 16  
(6) NPC memo 1160 Ser 813/033 dtd 28 Mar 17

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Navy Reserve, filed enclosure (1) with this Board requesting that his Evaluation Report and Counseling Record ("Eval") for the periods 11 April 2014 to 15 March 2015 and 16 March 2015 to 5 July 2015 be removed from his official military personnel file (OMPF) and replaced with supplemental evaluations. In addition, he requested that his reentry code "RE-4" (ineligible for reenlistment) be changed to "RE-1" (eligible for reenlistment). Enclosures (1) through (6) apply.

2. The Board, consisting of [REDACTED] reviewed Petitioner's allegations of error and injustice on 30 June 2017, and pursuant to its regulations, determined that the partial 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. In addition, the Board considered the advisory opinions (AO) provided in enclosures (5) and (6).

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.

b. Enclosure (1) was filed in a timely manner. Regarding his request for a personal appearance, the Board determined that a personal appearance with or without counsel will not

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materially add to their understanding of the issue(s) involved. Therefore, the Board determined that a personal appearance was not necessary and considered his case based on the evidence of record.

c. On 5 January 2015, Petitioner was charged with violation of the Uniform Code of Military Justice (UCMJ) Article 92 (failure to obey a lawful written order) for alleged sexual harassment (enclosure (2)). Petitioner refused nonjudicial punishment (NJP) and demanded trial by court-martial. Petitioner asserts that instead of being tried by court-martial, he went before a disciplinary review board (DRB). There are no documents regarding a DRB in his OMPF or submitted by Petitioner. Petitioner has maintained his innocence regarding charges of sexual harassment and contends that the incident was due to a "cultural misunderstanding." Petitioner contends that he merely said "good bye" typical of his country of origin and was not mindful that the alleged victim would be offended or consider his actions hostile.

d. Petitioner was issued an adverse Eval for the reporting period 11 April 2014 to 15 March 2015 (enclosure (3)). The adversity of the Eval was due to an Administrative Remarks (Page 13) retention warning he received for violation of Article 92 and subsequent removal from his duty billet. Two performance traits in the adverse Eval are marked 1.0 (below standards), and the promotion recommendation is marked "Significant Problems." Petitioner refused to sign the Eval and did not write a rebuttal statement. Petitioner was also issued a Page 13, dated 15 March 2015, due to his recommendation for advancement to HM1 being withdrawn. The Page 13 is not in his OMPF, but was provided with Petitioner's application. On 19 May 2015, his reporting senior (RS) submitted an evaluation report letter-supplement to change Block 43 (comments on performance) of his adverse Eval by removing the sentence "Awarded Page 13 Administrative Remarks for UCMJ Article 92, Failure to Obey a Direct Order or Regulation; Substantiated case of Sexual Harassment." He received a successive Eval for the reporting period 16 March 2015 to 5 July 2015 (enclosure (4)). The two performance traits marked 1.0 from his preceding Eval improved to 3.0 (meets standards) and the promotion recommendation improved to "Promotable." Petitioner provided evidence that he made several attempts to resolve his opposition to the adverse Eval by filing two Inspector General (IG) complaints and an Article 138 complaint of wrong. The IG complaints were dismissed due to the issue being outside the scope of the IGs' responsibilities.

e. On 5 July 2015, Petitioner was issued an RE-4 reentry code upon his release from active duty (RELADU) and transfer to the Navy Reserve. Subsequent to Petitioner's RELADU, an investigation was initiated surrounding allegations of a hostile work environment and sexual harassment in the Directorate of Dental Services (DDS). Petitioner provided a redacted copy of the report of investigation to substantiate his contention of a corrupt chain of command (enclosure (1)). The investigating officer recommended, in part, that administrative and/or punitive action be taken against senior leadership of the DDS in accordance with the findings and opinions of the investigation.

f. The AOs in enclosures (5) and (6) recommend Petitioner's request be denied. In this regard, PERS-32 opined, in part, that his RS used her discretion to document findings of violation of the UCMJ in his Eval ending on 15 March 2015, and that the Eval is a valid report.

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Although PERS-32 acknowledged that the Page 13 is not in Petitioner's OMPF, there is no comment regarding the evaluation report letter-supplement documenting the RS's decision to remove from the Eval her comment regarding the Page 13 and his violation of Article 92 of the UCMJ. PERS-813 opined that Petitioner received marks of 1.0 in two performance traits in an adverse Eval that was issued within one year of his expiration of active obligated service (EAOS), thus justifying the assigned reentry code of RE-4.

#### MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, the majority, [REDACTED] concluded that Petitioner's request warrants partial relief. The majority determined that Petitioner's removal from his duty billet and low performance trait marks warranted an adverse Eval, but the single alleged incident, which did not result in a retention warning Page 13 entry, NJP or court-martial, does not warrant an RE-4 reentry code. The majority understood that the two performance trait marks of 1.0 justify the issuance of an RE-4 reentry code, but determined that an exception to policy is warranted in this case. Thus, Petitioner's reentry code shall be changed to RE-1; however, the Evals do not warrant removal. In this regard, the Board determined that changing the reentry code provides relief without substituting their judgment for that of his RS. Further, the majority concluded that keeping the record intact would allow recruiting personnel to consider Petitioner's entire record of service and determine whether he meets the standards for reentry, should he so desire.

#### MAJORITY RECOMMENDATION:

To invoke an exception to policy regarding Petitioner's two 1.0 performance trait marks and change his reentry code from RE-4 to RE-1.

That no further action be granted.

#### MINORITY CONCLUSION:

In reaching his conclusion, the minority member, [REDACTED] concurred with the AOs. Specifically, that the Evals should remain in Petitioner's record and the reentry code remain RE-4. The minority member noted that Petitioner's RS used her discretionary authority to document his behavior that resulted in removal from his duty billet and an adverse Eval. Further, Petitioner's RE-4 reentry code is justified by two 1.0 performance trait marks in his Eval and is in accordance with Navy policy.

#### MINORITY RECOMMENDATION:

That Petitioner's request be denied.

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[REDACTED]

5. 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.

[REDACTED]

Recorder

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

[REDACTED]

Executive Director

Majority Reviewed    Approved/Disapprove: [REDACTED] 9/4/17

Minority Reviewed    Approved/Disapprove: [REDACTED] 9/11/17



DEPARTMENT OF THE NAVY  
OFFICE OF THE ASSISTANT SECRETARY  
(MANPOWER AND RESERVE AFFAIRS)  
1000 NAVY PENTAGON  
WASHINGTON, D.C. 20350-1000

September 11, 2017

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION  
OF NAVAL RECORDS

Subj: BCNR PETITION OF [REDACTED] USNR

The subject petition was forwarded to me pursuant to the provisions of SECNAVINST 5420.193, Section 6.e.(1)(b), because the Board's recommendation is not unanimous and the Secretary has delegated authority to me to render decisions in such cases. Pursuant to this authority, the recommendation of the majority of a Board panel to approve PO2 Larafaibort relief is modified.

I have considered this case under the provisions of 10 U.S.C. § 1552 and concur with the majority of the panel that [REDACTED] re-entry code be changed from RE-4 (ineligible for reenlistment) to RE-1 (eligible for reenlistment). I also agree with the majority of the panel that the two Evaluation Reports remain in his Official Military Personnel File (OMPF) subject to the following: That the Evaluation Report Letter-Supplement, dated May 19, 2015, be modified by removing under paragraph 2 the line, "Block 35, 36: Substantiated case of Sexual Harassment." I direct that this line be removed because the alleged sexual harassment, [REDACTED] kissing colleague [REDACTED] on the cheek, while inappropriate, does not satisfy the definition of sexual harassment because this single instance was not "so severe or pervasive that a reasonable person would perceive ... the work environment as hostile or offensive." SECNAVINST 5300.26D, "DON Policy on Sexual Harassment," Encl. (1), para. 3.c., dated January 3, 2006.

For these reasons, I modify the majority's recommendation for relief by adding to it the removal of the line, "Block 35, 36: Substantiated case of Sexual Harassment," from Evaluation Report Letter-Supplement, dated May 19, 2015.

[REDACTED]  
Assistant General Counsel  
(Manpower and Reserve Affairs)