



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

[REDACTED]
Docket No: 9148-17
JAN 09 2019

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
[REDACTED] USN, XXX-XX [REDACTED]

Ref: (a) 10 U.S.C. §1552
(b) BUPERSINST 1610.10D (EVALMAN)

Encl: (1) DD Form 149
(2) Fitness Report and Counseling Record for the reporting period 1Nov13-31Oct14
(3) Fitness Report and Counseling Record for the reporting period 1Nov14-9Mar15
(4) BCNR ltr JDR Docket No. 294-17 of 7Aug17

1. Pursuant to the provisions of reference (a), Petitioner, a commissioned officer in the Navy, filed enclosure (1) with this Board requesting his official military personnel file (OMPF) be corrected by removing a fitness report and counseling record ("contested FITREP"). Additionally, Petitioner requested removal of his failures of selection (FOS) incurred by the FY17, FY18, and FY19 Navy Active-Duty Commander Staff Corps Promotion Selection Boards.

2. The Board, consisting of [REDACTED] reviewed Petitioner's allegations of error and injustice on 20 December 2018, 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 the 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 available under existing law and regulations within the Department of the Navy.

b. Petitioner was issued enclosure (2), a FITREP for the reporting period 1 November 2013 to 31 October 2014, while stationed at the U.S. Naval Hospital, [REDACTED] and assigned as the Director for Administration. For this reporting period, Petitioner's Trait Average was 4.00, the Summary Group Average was 3.87. The Promotion Recommendation breakout for lieutenant commanders was two Promotable, two Must Promote, and one Early Promote (Petitioner). The Reporting Senior (RS) was Petitioner's Commanding Officer, [REDACTED]

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
[REDACTED] USN, XXX-XX-[REDACTED]

c. Petitioner asserts that during October 2014, he cautioned his leadership that a strategic planning offsite in which the Command contracted with a local area [REDACTED] hotel to host the offsite at a cost as well as paying travel expenses for a facilitator from Washington, DC were violations of Navy Medicine Continuing Resolution policy. Petitioner also cautioned his leadership of violations of civilian hiring practices after a Navy senior chief retiring from the Command was hired for a general schedule position. Petitioner asserts that within days of his reporting the violations, [REDACTED] reassigned him from his leadership position.

d. On 20 February 2015, Petitioner filed a MEDIG whistleblower reprisal complaint against [REDACTED] his Executive Officer (XO), and his former XO. The allegations were not substantiated, partially because it was determined that Petitioner had a record of poor performance prior to being relieved. Evidence of Petitioner's written and verbal counselings are documented in the MEDIG report as occurring in November 2014, and on 28, 30 January 2015, and on 3, 4 February 2015. Petitioner argued that the acts of reprisal began due to the friction caused by his previous warnings of alleged violations by his leadership. He asserts his performance was not substandard, as evidenced by his FITREP at enclosure (2).

e. On 9 March 2015, [REDACTED] was relieved of command due to loss of trust and confidence. His relief was unrelated to Petitioner's MEDIG whistleblower reprisal complaint.

f. As a result of [REDACTED] relief, the RS responsibility and authority was assumed by [REDACTED] the Commander, Navy Medicine [REDACTED]. As the Immediate Superior in Command (ISIC), [REDACTED] was responsible for issuing Petitioner's Detachment of Reporting Senior FITREP for the reporting period 1 November 2014 to 9 March 2015.

g. On 6 April 2015, Petitioner filed an Article 138, Uniform Code of Military Justice (UCMJ) Complaint of Wrongs, against [REDACTED]. The complaint was forwarded to [REDACTED] the first officer superior in the chain of command exercising general court-martial jurisdiction over [REDACTED]. [REDACTED] forwarded the complaint to the Commander, Navy Region [REDACTED] because, due to [REDACTED] testifying as a character witness at [REDACTED] Board of Inquiry (BOI), there was potential for the fairness of any review and action that might be taken to be questioned by the Petitioner.

h. On 28 April 2015, Petitioner received his FITREP for the reporting period 1 November 2014 to 9 March 2015 from [REDACTED]. Originally submitted, this FITREP included the sentence about Petitioner "[r]eassigned to Directorate of Healthcare Business as Special Assistant." The ISIC later submitted a FITREP letter-supplement to delete this sentence and to add "[h]ighly recommended for promotion." The supplemental letter was added to Petitioner's OMPF, and the original FITREP remained, as submitted, in Petitioner's OMPF. The BCNR later directed modification of the FITREP and removal of the supplemental letter from Petitioner's OMPF. See enclosures (3) and (4).

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
[REDACTED] USN, XXX-XX-[REDACTED]

i. Petitioner was eligible for and failed selection by the FY-17 through FY-19 Navy Active-Duty Commander Staff Corps Promotion Selection Boards. Petitioner contends that the contested FITREP was available for consideration by the boards. He asserts the FITREP made him less competitive than his peers and likely caused his FOSSs.

j. Petitioner claims he has additional information obtained through two Freedom of Information Act requests that justify the removal of the contested FITREP at enclosure (3). First, the ISIC relied on input from Petitioner's XO as a basis for observation. Petitioner argues that this is improper because the XO was the subject of Petitioner's MEDIG whistleblower reprisal complaint, and the XO was fully aware of the complaint when he provided input to the ISIC for Petitioner's contested FITREP. Second, Petitioner's ISIC, who was fully aware that Petitioner filed the MEDIG whistleblower reprisal complaint against [REDACTED] spoke as a character witness on behalf of [REDACTED]. Finally, although the ISIC claimed that he was not a personal friend of [REDACTED] he traveled from [REDACTED] to [REDACTED] to be the guest speaker at [REDACTED] retirement ceremony. For those reasons alone, Petitioner contends his ISIC could not have submitted a fair evaluation of him and therefore, the contested FITREP should be removed from his OMPF. Additionally, Petitioner contends that the contested FITREP, even with modifications previously made by the BCNR, does not comply with reference (b), and should have been rejected by the Navy Personnel Command (PERS-32). Specifically, the FITREP does not provide a basis for observation and the ISIC did not provide written notice when assuming RS authority.

CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting relief. In this regard, the Board was not convinced that the missing "basis for observation" and the ISIC's failure to provide written notice to the Petitioner when he assumed RS authority invalidates the report. The Board determined those reasons alone are not sufficient justification to remove the contested FITREP.

The Board determined, however, that it is unjust for the contested FITREP to remain in Petitioner's OMPF. In this regard, the Board noted that there is no evidence that Petitioner's ISIC acted for illegal or improper purposes. The Board also noted that for the preceding FITREP at enclosure (2), a year-long observation period, the Petitioner was the top-ranking lieutenant commander of five total, and the only "early promote" recommendation. Just four months later, after the Petitioner raised the issue of possible violations committed by his leadership, and after filing a MEDIG whistleblower reprisal complaint, Petitioner was removed from his position and dropped from his "early promote" position. The Board acknowledged that Petitioner's allegations of whistleblower reprisal were unsubstantiated, but determined that the ISIC should have recused himself from the responsibility of writing the contested FITREP for the same reason he recused himself from reviewing Petitioner's complaint of wrongs under Article 138, UCMJ. The ISIC, having never observed the Petitioner, admitted to relying on input from Petitioner's XO as a basis for observation, even though the XO was fully aware of the complaint the Petitioner filed against him. Further, the ISIC – who claimed he was not personal friends

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

[REDACTED] USN, XXX-XX [REDACTED]

with [REDACTED] – spoke as a character witness at the BOI on behalf of [REDACTED] and later flew across the country to act as the guest speaker at [REDACTED] retirement ceremony. The aggregate of these events calls into question the fairness of the contested FITREP remaining in Petitioner's OMPF. The Board concluded that the contested FITREP at enclosure (3) shall be removed from Petitioner's OMPF.

The Board determined that Petitioner was likely less competitive for promotion selection due to the contested FITREP, and its removal gives reason to grant his request to remove the FOSs he incurred by the FY-17 through FY-19 Navy Active-Duty Commander Staff Corps Promotion Selection Boards

RECOMMENDATION

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

Petitioner's record be corrected by removing enclosure (3), the Fitness Report and Counseling Record for the reporting period 1 November 2014 to 9 March 2015, from his OMPF.

Petitioner's record be corrected by removing his failures of selection incurred by the FY-17, FY-18, and FY-19 Navy Active-Duty Commander Staff Corps Promotion Selection Boards.

Petitioner's naval record be corrected so that he will be considered by the earliest possible selection board convened to consider officers of his category for promotion to Commander as an officer who has not failed of selection for promotion to that grade.

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 Regulation, 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.

[REDACTED]
Executive Director