



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

HD:hd
Docket No: 08668-00
10 August 2001

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

Subj: LCDR [REDACTED], JR., USNR, [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 dtd 13 Dec 00 w/attachments
(2) PERS-311 memo dtd 21 Mar 01
(3) PERS-86 memo dtd 2 Apr 01
(4) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected by removing or correcting the fitness report for 1 October 1996 to 12 April 1997, a copy of which is at Tab A. He also impliedly requested removal of his failure of selection for promotion before the Fiscal Year (FY) 01 Naval Reserve Commander Line Selection Board. After Petitioner applied to this Board, he failed by the FY 02 Naval Reserve Commander Line Selection Board. It is presumed he also desires removal of this failure of selection.

2. The Board, consisting of Messrs. Bishop, Morgan and Shy, reviewed Petitioner's allegations of error and injustice on 9 August 2001, 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 available under existing law and regulations within the Department of the Navy.

b. In correspondence attached as enclosure (2), the Navy Personnel Command (NPC) office having cognizance over fitness report matters has recommended approving Petitioner's request to remove the contested fitness report. In enclosure (3), the NPC office having cognizance over Naval Reserve officer promotions has commented to the effect that his implied request to remove his FY 01 failure of selection for promotion should be approved as well.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting removal of the contested fitness report and both of Petitioner's failures of selection for promotion. They concur with enclosures (2) and (3) in finding that the contested fitness report and his FY 01 failure should be expunged. Since the contested report was in his record for the FY 02 promotion board, and his failure by that board must be removed to restore him to the status he enjoyed before the FY 01 board as not having failed of selection, the Board finds his FY 02 failure should be removed as well. In view of the above, the Board directs the following corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing therefrom the following fitness report and related material:

Date of Report	Reporting Senior	Period From	of	Report To
97Apr12	[REDACTED] USNR	96Oct01		97Apr12

b. That there be inserted in Petitioner's naval record a memorandum in place of the removed report containing appropriate identifying data concerning the report; that the memorandum state that the report 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 report.

c. That Petitioner's record be corrected further by removing his failures of selection before the FY 01 and 02 Naval Reserve Commander Line Selection Boards.

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 or material 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. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) 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. 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.

Robert D. Zsalmán
FOR W. DEAN PFEIFFER
Executive Director



DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

1610
PERS-311
21 March 2001

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

Via: PERS/BCNR Coordinator (PERS-00ZCB)

Subj: LCDR [REDACTED] JR., USN [REDACTED]

Ref: (a) BUPERSINST 1610.10 EVAL Manual

Encl: (1) BCNR File

1. Enclosure (1) is returned. The member requests the removal of his fitness report for the period 1 October 1996 to 12 April 1997.

2. Based on our review of the material provided, we find the following:

a. A review of the member's headquarters record revealed the report in question to be on file. It is signed by the member acknowledging the contents of the report and his right to submit a statement. The member indicated he did desire to submit a statement. PERS-311 never received the member's statement and reporting senior's endorsement.

b. The report in question is a Detachment of Reporting Senior/Regular report. The member alleges the report is unjust due to pending civil actions, which was not completed until 10 July 1998.

c. We cannot administratively make the changes requested by the member. Only the reporting senior who signed the original report can submit supplementary material for file in the member's record.

d. Evaluating a subordinate performance and making recommendations concerning promotions and assignments are the responsibilities of the reporting senior. These duties are accomplished in the fitness report. In reviewing petitions that question the exercise of the evaluation responsibilities, we must determine if the reporting senior abused his/her discretionary authority. We must see if there is any rational basis to support the reporting senior's decision, and whether and whether the reporting senior actions were the result of improper motive. However, we must start from the position that the reporting senior exercised his/her discretion properly. Therefore, for us to recommend relief, the petitioner has to demonstrate that the reporting senior did not properly exercise his/her authority. In other words, the petitioner must

do more than just assert the improper exercise of discretion, he must provide reasonable evidence to support the claim. I believe Lieutenant Commander [REDACTED] done so.

e. Per reference (a), comments on civil proceedings are not to be referred to until the trial court concludes it. The member has provided a copy of the court order stating that all charges filed against petitioner be expunged from the police and court records.

f. In view of the above, we believe the comments in the fitness report in question to be inappropriate.

g. Failure of selection or enhancement of career opportunities alone is not sufficient reasons to correct or remove a fitness report.

h. The member proves the report to be unjust or in error.

3. We recommend removal of the report in question as we cannot determine the member's performance trait mark or promotion recommendation the member would have received.

[REDACTED]

Head, Performance
Evaluation Branch

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DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
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5420
PERS-86
02 APR 2001

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Via: Assistant for BCNR Matters (PERS-00ZCB)

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN THE CASE OF
LCDR [REDACTED] USN [REDACTED]

Encl: (1) BCNR File 08668-00 w/Service Record

1. We are returning enclosure (1) with the recommendation that Lieutenant Commander [REDACTED]'s petition is granted.
2. We concur with the PERS-311 findings that the FITREP in question contained statements that were inappropriate, and should be removed from his official record.

[REDACTED]

Director, Reserve Officer
Promotions, Appointments, and
Enlisted Advancement Division