



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

HD:hd
Docket No. 09639-07
17 July 2008

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

Subj: [REDACTED]
REVIEW OF NAVAL RECORD (RECONSIDERATION)

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

Encl: (1) DD Form 149 dtd 22 May 07 w/enclosures and
Subject's ltr dtd 27 Sep 07
(2) BCNR ltr HD:hd Docket No. 04858-07
dtd 4 Oct 07 w/enclosures
(3) Subject's ltr dtd 19 Oct 07 w/enclosures
(4) OPNAV N134 memo dtd 14 Jan 08
(5) PERS-311 memo dtd 16 Jan 08
(6) PERS-80 memo dtd 25 Jan 08
(7) 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 the applicable naval record be corrected by removing the fitness report for 12 September 2003 to 8 June 2004, a copy of which is at Tab A; removing her failures of selection by the Fiscal Year (FY) 06, 07 and 08 Line Captain Selection Boards; and granting her a special selection board for the FY 06 Line Captain Selection Board. Enclosure (2) shows her request was denied on 4 October 2007. By enclosure (3), she provided additional documentation and requested that her case be reconsidered, after obtaining an advisory opinion from the Navy's equal employment opportunity (EEO) office. She requested the same relief, with the addition of a request to remove her failure of selection by the FY 09 Line Captain Selection Board.

2. The Board, consisting of Ms. Wilcher and Messrs. Bowen and Dunn, reviewed Petitioner's allegations of error and injustice on 10 July 2008. Pursuant to the Board's regulations, the majority, Ms. Wilcher and Mr. Dunn, determined that the corrective action indicated below should be taken on the available evidence of record. The minority, Mr. Bowen,

recommended that Petitioner's request be denied. 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. The contested fitness report documents Petitioner's performance as commanding officer (CO) of Navy Recruiting District (NRD) Nashville. The report is entirely favorable, except blocks 42 and 43 ("Promotion Recommendation") show she was marked "Must Promote" (second best of five possible marks), while her peer, the CO of NRD Ohio, was marked "Early Promote" (highest). The reporting senior was authorized to mark only one of the two officers "Early Promote." In her endorsement on Petitioner's statement to the report, she said "My ranking of [Petitioner] as a Must Promote is a positive reflection of her performance...Both [Petitioner and her peer] have continued to have outstanding performance and I would choose them both for promotion to Captain and Major Command."

d. Petitioner alleges that she was marked below her peer because that officer and the reporting senior were white, while she is black. With enclosure (3), she provided documentation including the "FY04 New Contract Summary," showing that during October 2003 through June 2004, she averaged 105 percent of her goal, while her peer averaged only 102 percent.

e. In enclosure (4), the Chief of Naval Operations EEO office commented to the effect that Petitioner "has provided several letters, e-mail messages, statistics and certificates to support her petition" but this documentation "does not indicate discrimination."

f. In enclosure (5), the Navy Personnel Command (NPC) office responsible for fitness reports commented to the effect Petitioner has not proven the contested report to be in error or unjust.


g. In enclosure (6), the NPC office responsible for officer promotions has commented to the effect that since the fitness report in question is valid, Petitioner's request for a special selection board has no merit.

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding enclosures (4), (5) and (6), the majority finds an injustice warranting full relief. The documentation Petitioner provided at enclosure (3), especially the statistics, convinces the majority that Petitioner might well have deserved to be ranked above, rather than below, her peer in the contested fitness report. Accordingly, the majority finds this report should be removed. The majority is satisfied this report harmed Petitioner's chances before the FY 06 through FY 09 promotion boards, so all her failures of selection should be removed and she should have a special selection board for FY 06 and, if necessary, for FY 07 through FY 09 as well. In view of the above, the majority recommends the following corrective action:

MAJORITY RECOMMENDATION:

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

| Date of Report | Reporting Senior | Period of Report | |
|----------------|---|------------------|--------|
| | | From | To |
| 7Jun04 |  USN | 12Sep03 | 8Jun04 |

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 so that she will be considered by the earliest possible selection board convened to consider officers of her category for promotion to captain as an officer who has not failed of selection for promotion to that grade.

d. That Petitioner be granted a special selection board for the FY 06 Line Captain Selection Board and, if necessary, for FY 07 through FY 09 as well.

e. 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.

f. That any material directed to be removed from Petitioner's naval record be returned to this 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.

MINORITY CONCLUSION:

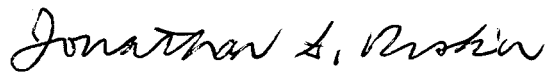
The minority finds the documentation Petitioner provided at enclosure (3), including the statistics, insufficient to question the fairness of her ranking below her peer. In this regard, the minority particularly notes that such statistics are only one factor that enters into the reporting senior's ranking decision. Further, the minority does not consider the three-percent difference, between Petitioner and her peer, for the pertinent period to be statistically significant. In view of the above, the recommendation of the minority is as follows:

MINORITY RECOMMENDATION:

a. That Petitioner's application be denied.

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
Acting Recorder

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


W. DEAN PFEIFFER

MAJORITY REPORT

Recommendations a, b, c, e and f reviewed and approved;
recommendation d reviewed and approval recommended:

Consideration by a special selection board for the FY 06 Line
Captain Selection Board and, if necessary, for FY 07 through FY
09 as well is approved:

Donald C. Winter
Secretary of the Navy

MINORITY REPORT

Reviewed and approved:

Robert J. Cali

7-25-08