



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

HD
Docket No. NR4797-13
27 March 2014

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

Subj: CDR [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 dtd 30 Apr 13 w/attachments
(2) PERS-32 memo dtd 23 Aug 13

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected by removing the fitness report for 1 May 2011 to 30 April 2012 and the extension letter dated 28 June 2012, extending the period of this report to 28 June 2012 (copies at Tab A). Petitioner also requested removing the concurrent report for 4 November 2011 to 30 April 2012, but this report is not in his record. Finally, Petitioner impliedly requested removing his failure of selection by the Fiscal Year 14 Line Captain Selection Board, so as to be considered by the selection board next convened to consider officers of his category for promotion to captain as an officer who has not failed of selection for promotion to that grade.

2. The Board, consisting of Messrs. Genteman, Spooner and Swarens, reviewed Petitioner's allegations of error and injustice on 27 March 2014, 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 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. Enclosure (1) was filed in a timely manner.

c. Petitioner contends that the contested fitness report, dated 21 June 2012, was unwarranted and submitted in reprisal for his protected communication, a Naval Inspector General complaint received on 12 December 2011, the report of which was dated 10 February 2012 (documentation at enclosure (4) to Petitioner's application). Correspondence at enclosure (5) to Petitioner's application shows the Department of Defense Inspector General (DODIG) investigation of his "Whistleblower" complaint concluded that the report at issue was the result of a sexual harassment investigation that was substantiated against him, rather than reprisal. He disputes the finding that it was substantiated.

d. The fitness report at issue contains nothing derogatory, but it is a declining report. A copy of the preceding report from the same reporting senior, for 6 September 2010 to 30 April 2011, is at Tab B. In the contested report, Petitioner was marked down in five areas. Specifically, blocks 34 ("Command or Organizational Climate/Equal Opportunity") and 35 ("Military Bearing/Character") were marked down from "4.0" (second best of five possible marks) to "3.0" (third best); blocks 36 ("Teamwork") and 38 ("Leadership") from "5.0" (best) to "4.0"; and block 42 ("Promotion Recommendation - Individual") from "Early Promote" (best) to "Must Promote" (second best). The lowered promotion recommendation mark was the result of forced distribution (another officer received the only "Early Promote" mark authorized in a peer group of two). Bureau of Naval Personnel Instruction 1610.10C, enclosure (2), paragraph 13-9h says "If the decline in performance is based on performance [rather than forced distribution limits on promotion recommendations], comments should explain the decline." Block 41 ("Comments on Performance") of the report at issue includes no such explanation. Petitioner marked the block indicating that he intended to submit a statement, but no statement appears in his record.

e. The reporting senior gave Petitioner a nonpunitive letter of caution dated 1 September 2011 (copy at enclosure (3) to Petitioner's application). By letters of 28 November and 15 December 2011, he requested Petitioner's detachment for cause (DFC), but the Commander, Navy Personnel Command (NPC) letter of 20 June 2012 (copy at enclosure (1) to Petitioner's application) disapproved the DFC. Petitioner was also the subject of admiral's mast, but it resulted in no nonjudicial punishment. Petitioner requests that the contested fitness report and extension letter be removed to comply with the Commander, NPC letter of 20 June 2012. This letter advised the reporting senior that the DFC had been disapproved, and it

directed that Petitioner's fitness report not label his departure as a DFC and further directed that the request for DFC not be filed in his official personnel record.

f. In support of his application, Petitioner submitted numerous statements commending his performance, together with a favorable Performance Information Memorandum (PIM) and an end of tour award package.

g. In enclosure (2), the NPC office with cognizance over the subject matter of Petitioner's case has commented to the effect his request should be denied, noting that the fitness report in question makes no reference to the disapproved DFC.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board finds that Petitioner's request should be denied.

The Board substantially concurs with enclosure (2) in finding that the contested fitness report and extension letter should stand. In this connection, the Board finds they are in compliance with the Commander, NPC letter of 20 June 2012, and it is unable to find they were in reprisal for Petitioner's protected communication. The supporting statements, PIM and end of tour award package did not persuade the Board that Petitioner should have received a more favorable fitness report. Finally, the Board finds it a harmless error that the reporting senior did not provide comments explaining the decline in marks from the previous report he had submitted. In this regard, the Board particularly notes the finding of the DODIG that the contested fitness report was the result of a sexual harassment investigation that was substantiated against Petitioner. The Board finds it was to Petitioner's benefit that the reporting senior did not mention this.

Since the Board found insufficient basis to correct Petitioner's fitness report record, it had no grounds to recommend removing his failure of selection for promotion.

In view of the above, the recommendation of the Board is as follows:

RECOMMENDATION:

- a. That Petitioner's request 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
JONATHAN S. RUSKIN
Acting Recorder

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

Robert D. Zsalmán
ROBERT D. ZSALMAN
Acting Executive Director

Reviewed and approved:

Robert L. Woods 5/30/14

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