



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

HD:hd
Docket No: 08265-01
16 December 2002

CDE [REDACTED] ISN
[REDACTED]
[REDACTED]

Dear Commander [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 7 November 2002, and they deferred decision to get the remainder of the record of proceedings concerning your complaint under Article 138, Uniform Code of Military Justice (you provided only your complaint and the Deputy Assistant Secretary of the Navy (Personnel Programs) denial letter dated 14 September 2001). They completed their deliberations on 16 December 2002. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions furnished by the Navy Personnel Command dated 11 March, 28 August and 27 September 2002, copies of which are attached. The Board also considered your letters dated 28 October 2002 with enclosures and 18 November 2002, the remainder of the Article 138 proceedings, and the reporting senior's letter dated 13 October (sic (should be November)) 2002, a copy of which is attached.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion dated 28 August 2002.

The Board did not agree with the advisory opinion dated 11 March 2002, which recommended removing the contested fitness report. In this regard, the attached letter from the reporting senior convinced them that this opinion was incorrect in stating, in paragraph 2.c, that he "refused to comment" when you asked him to explain why he had marked you "Promotable," the third best promotion recommendation. They also noted that in the

immediately following report from the same reporting senior, for 1 September 2000 to 31 August 2001, you were marked "Must Promote," the second best.

Since the Board found no defect in your performance record, they had no basis to strike your failures of selection by the Fiscal Year 01 through 03 Line Captain Selection Boards.

In view of the above, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures



DEPARTMENT OF THE NAVY
CHIEF OF NAVAL PERSONNEL
WASHINGTON, D.C. 20370-5000

8265-01

IN REPLY REFER TO

11 March 2002

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS (BCNR)

Subj: BCNR PETITION ICO CDR STEPHEN [REDACTED] USN,
[REDACTED]

Ref: (a) BUPERSINST 1610.10

Encl: (1) BCNR PETITION PACKAGE DOCKET NO. 08265-01

1. Board for Correction of Naval Records (BCNR) requested PERS-00J opinion on the case of CDR [REDACTED] who has petitioned removal of performance report dated 99SEP01 to 00AUG31.

2. After review of enclosure (1), I have found the following:

- a. Performance counseling is required. As noted in Ref (a) "Performance counseling must be provided at the mid-point of the periodic report cycle, and when the report is signed...The objectives are to provide feedback to the member and to motivate and assist improvement." Ref (a) notes that "Counseling may actually be provided in an earlier or later month if that is more appropriate, but may not be omitted or unduly delayed."

Block 32 of the performance report for the period 99SEP01 to 00AUG31 is not signed. However, block 30 indicates counseling was performed. This is significant because [REDACTED] addressed this issue with the reporting senior about his plan to move him to MP or EP in block 42 based on the reporting senior's grading criteria. "If counseling was not performed for any other reason, enter NOT PERF, and provide a brief explanation in block 31."

- b. The failure of proper counseling as required in Ref (a) is also apparent where the member identified what he thought was an unfair performance report. The following actions were taken:

- (1) The member submitted a statement

11 2002

- (2) The member requested the senior member reconsider the performance report.
- (3) The member filed an Article 138.
- (4) The member exhausted all means available to receive relief prior to BCNR petition.
- (5) The member petitioned for a BCNR.

The most glaring detail that the member was not properly counseled is when the member attempted to reconcilliate his performance report with his reporting senior. Specifically, the member's request for insight as to the objective criteria used to determine block 42 of the performance report was declined. Though not required, this assessment is often given as a counseling tool and constructive criticism to help improve the subordinate's performance.

- c. The member had the expectation that his promotion recommendation in block 42 would be based solely on his performance. There are concrete examples of his outstanding performance throughout the reporting period. Overall his cumulative trait average rose from a 4.33 (reporting period 99FEB02 to 99AUG31) to a 4.50 (reporting period 99SEP01 to 00AUG31). In addition statements in block 41 such as "Ready for CAPT now" and "A respected technician and visionary who has set the course for 22 Commanding officers..." articulates his outstanding expertise as a Naval Security Group Commanding Officer. Also, the reporting senior made the statement in the performance report for the period dated 99FEB02 to 99AUG31: "If I had another MP it would go to CDR [REDACTED]. Finally, he was the COMNAVSECGRU nominee for the National Security Agency/Central Security Service Rowlett Trophy.

A review of the facts indicates that the CDR [REDACTED] performance demonstrated significant and outstanding accomplishments since his first performance report. I recognize the reporting senior has discretion based on his personal observation of an officer. However, it is reasonable to conclude that [REDACTED] had an expectation to receive a grade of (MP) based on his performance. [REDACTED] was proactive and sought further guidance and information as to why his recommendation remained at the Promotable level, but the reporting senior

refused to comment. Since the reporting senior did not objectively identify factors he used to determine his promotion recommendation, this suggests that his decision may not have been solely based on the performance of the member that was documented throughout his fitness report and provided as input by the member. This raises the concern of potential injustice in the performance report. There is no evidence of clear discrimination or racial bias, but there are concerns due to the fact that the grades and promotion recommendation do not match the writeup. Therefore, I recommend the complete removal of the performance report for the period dated 99SEP01 to 00AUG31.



Captain, U.S. Navy
Special Assistant for Minority
Affairs to the Chief of Naval
Personnel (Pers-00J)



DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
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1610
PERS-311
28 August 2002

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

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

Subj: CDR [REDACTED] USN 11 [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 September 1999 to 31 August 2000.

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 has not received the member's statement and the reporting senior's endorsement. Per reference (a), Annex S, paragraph S-8, the member has two years from the ending date of the report to submit a statement.

b. The report in question is a Periodic/Regular report. The member alleges his promotion recommendation he received was capricious, unjust and bias.

c. The member filed an Article 138, Complaint of Wrongs to support his contentions. The general court-martial convening authority, Commander Navy Personnel Command, concluded the member's complaint are without merit under JAGMAN Chapter III, and noted the member could petition the Board for Correction of Naval Records to remove or correct any record error.

d. In reviewing petitions that question the exercise of the reporting senior's evaluation responsibilities, we must determine if the reporting senior abused his/her discretionary authority. For us to recommend relief, the petitioner has to show that either there is no rational support for the reporting senior's action or that the reporting senior acted for an illegal or improper purpose. The petitioner must do more than just assert the improper exercise of discretion; he must provide evidence to support the claim. I do not believe Command [REDACTED] has done so. Nothing provided in the member's petition shows that the reporting senior acted for illegal or improper purposes or that the report lacked rational support.

e. The reporting senior is charged with commenting on the performance or characteristics of each member under his/her command. The contents and grades assigned on a fitness report are at the discretion of the reporting senior. The evaluation of a subordinate's performance and making recommendations concerning promotion and assignments are the responsibilities of the reporting senior. While the member may disagree with the reporting senior's evaluation, the reporting senior must make a judgment and rank the officers. In this case the reporting senior assigned the member a promotion recommendation of "Promotable". Such a ranking does not indicate a failing on Command [REDACTED] part, but rather the reporting senior assessment of his promotion potential compared to other officers being evaluated.

f. The member has provided several commendatory letters of support in his petition. While their comments add insight and reflect favorably on the member's performance, they do not show that the fitness report was in error.

g. Counseling of a member takes many forms. Whether the member was given written or oral counseling, or issued a Letter of Instruction (LOI) does not invalidate a fitness report.

h. The member does not prove the report to be unjust or in error.

3. We recommend the member's record remain unchanged.

[REDACTED]

Performance
Evaluation Branch



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

5420
PERS-80

27 SEP 2002

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

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

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN CASE OF
CDR [REDACTED], USN, [REDACTED] 10

Ref: (a) PERS-311 Response Memo, dtd 28AUG02
(b) SECNAVINST 1401.1B, Special Promotion Selection Board
guidance

Encl: (1) BCNR File 08265-01

1. We are returning enclosure (1) with the following observations and the recommendation that [REDACTED] requests to expunge a fitness report and to be afforded a Special Promotion Selection Board be disapproved.

2. Based on review of the references, enclosure, and the member's official record, we find the following:

(a) The references listed adequately address that it is the responsibility of the individual to demonstrate evidence that a violation of procedure or policy has caused the situation. CDR [REDACTED] fails to prove either, but only speculates that his position, as stated in his letter, must be accurate. In fact, since board deliberations are deemed secret due to the sensitivities involved, no speculation is appropriate. The board members deliberate and compare peers to choose the "best and fully qualified" individuals to assume the next higher rank. The FY-03 Active Line O-6 Promotion Selection Board did not come to the conclusion that he was among those to become a Captain. The competition for the rank of Captain is especially keen!

(b) [REDACTED] assertion that he has "exhausted all procedural means available" is not accurate. His letter to redress the fitness report in question has not been received by PERS-3, reference (a). Also, after review of his career path

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN CASE OF
CDP [REDACTED]

and official record, I suggest that expunging the fitrep, as he requests, would not necessarily improve his chances of selection.

(c) Nothing presented, or discovered during my review, meets the criteria, as delineated, in reference (b), justifying a Special Promotion Selection Board.

(d) Finally, his reference or concern about a possible bias and correlation to the selection board racial statistics, in paragraph 9 of enclosure (3) in his letter to the Secretary of the Navy, is taken out of context. The statistics indicate that minority selectees relatively approximate overall selection rate as compared to the demographics for population being considered.

3. In summary, this request has not provided sufficient facts to justify a change or removal of a fitrep. I concur with the response from PERS-311, and disagree with PERS-00J. My confidence and position is based on the selection board member integrity and overall process approval. [REDACTED]'s assertions must be based in fact, not speculation. If and until the official record change would occur, he does not qualify for consideration via a Special Selection Promotion board.

[REDACTED]

Director, Active and Reserve
Officer Progression Division
Progression Branch

To: [REDACTED] (CNR)

13 October 2002 (sic) November

Subj: Requested Comments

Ref: a) [REDACTED] Memo for the Record dated 11 Oct 00, subj. Request for Redress

b) Pers-00J Memo dated 11 Mar 02, subj. BNCR Petition ICO
[REDACTED]

1. Sir: You asked me to comment on the references.

a. Reference (a) states that I declined to share the "objective criteria" used in ranking CO's. Strictly speaking, this is correct. My recollection of the conversation is that I [REDACTED] took him to mean by objective data a "cookbook approach" to ranking, a description he did not challenge. I told him why such an approach struck me as inherently unfair. Commands differ in mission, size, and responsibility. For example some are tenants. Others stand alone and perform functions tenant commands do not. I explained that given the variables, e.g., quality of life, a lower retention rate at one command might actually indicate better performance than a higher rate at another and cited some examples. I concluded that in my view commanders had to take into account all the inputs received, consider their own observations and knowledge of the different commands, and apply their best professional judgment, not a cookbook, to determine ranking. In the course of the conversation, we did touch on several areas considered in ranking COs, such as retention, mission accomplishment, and customer feedback. As to the request that I change his promotion recommendation, I explained that his group was very competitive because we put our best officers in command and the governing directive limits the number of "MPs" and "EPs" a reporting senior can assign. I had used the allowed number of EPs and MPs, thought them merited, and saw no way to take one back in any case.

b. Reference (b) asserts [REDACTED] had every right to "expect" a higher promotion recommendation. I would agree that he had every right to want one and told him I thought it spoke well of him that he did. However, he was not the only officer with his grade average that did not to get an MP and I disagree that he had a right to expect one given the forced distribution required. Nor do I agree with the suggestion that his promotion recommendation may not have been based solely on performance. This appears to be founded on the perception that [REDACTED] was offered no insight into the ranking process. He was, albeit perhaps not the one he sought. Finally, I believe the grades and write up do match. His grades on the report were above my cumulative average as a reporting senior for Commanders and above the average for those in his peer group, which I told him [REDACTED]