



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

BJG
Docket No: 7954-99
6 February 2002

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

Subj: LCD [REDACTED], MC, US [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Forms 149 dtd 15 Dec 99, 26 Feb 00,
and 28 Apr 00, each w/attachments
(2) PERS-311 memo dtd 5 Apr 00
(3) PERS-4415 memo dtd 26 Apr 00 w/encls
(4) PERS-311 memo dtd 27 Sep 00
(5) PERS-06L1 memo dtd 7 Jun 01
(6) Dept of Psych, NMC, Portsmouth, VA ltr dtd 30 Oct 01
(7) Subject's naval record

1. Pursuant to 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 the fitness reports for 20 February to 13 October 1999 and 14 October 1999 to 7 January 2000, copies of which are in enclosure (1) at Tabs A and B, and the mental health evaluation dated 21 July 1999, a copy of which is in enclosure (1) at Tab C. He also requested removal of the Performance Appraisal Report for 25 September 1998 to 6 January 2000, the Quality Assurance Investigation for 16 to 18 August 1999, and the plan for supervision dated 8 February 2000. These requests were not considered, as these documents are not part of his official military personnel record. Finally, he requested a specific reassignment. This request was not considered either, as he has been reassigned as he requested.

2. The Board, consisting of Messrs. Chapman and Morgan and Ms. LeBlanc, reviewed Petitioner's allegations of error and injustice on 1 February 2002, and pursuant to its regulations, determined that the limited 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) Performance Evaluation Branch (PERS-311), the office having cognizance over fitness report matters, has commented to the effect that Petitioner's request to remove his fitness report for 20 February to 13 October 1999 should be denied.

c. In correspondence attached as enclosure (3), the NPC Medical Department Officer Distribution Branch (PERS-4415) has commented to the effect that Petitioner has been reassigned as he requested, and has recommended that the remainder of his request be denied.

d. In correspondence attached as enclosure (4), PERS-311 has commented to the effect that Petitioner's request to remove his fitness report for 14 October 1999 to 7 January 2000 should be denied.

e. In correspondence attached as enclosure (5), the NPC Office of Legal Counsel (PERS-06L1) has commented to the effect that Petitioner's request to remove the contested fitness reports should be denied.

f. In correspondence attached as enclosure (6), the Department of Psychiatry, Naval Medical Center (NMC), Portsmouth, Virginia, has commented to the effect that Petitioner's request to remove his mental health evaluation has merit and warrants favorable action.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the advisory opinion from the Department of Psychiatry, NMC, Portsmouth, Virginia at enclosure (6), the Board finds the existence of an injustice warranting limited relief, specifically, removal of the contested mental health evaluation. They also agree with the advisory opinions at enclosures (2) and (4) from PERS-311 and the opinion at enclosure (5) from PERS-06L1 in concluding that the contested fitness reports should stand. They are unable to find these reports were based on the mental health evaluation, as opposed to other sources of information. In view of the above, the Board directs the following limited corrective action:

RECOMMENDATION:

a. That Petitioner's naval record, to include his medical record, be corrected by removing therefrom the mental health evaluation dated 21 July 1999.

b. 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.

c. 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.

d. That the remainder of Petitioner's request be denied.

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.



JONATHAN S. RUSKIN
Acting Recorder

ROBERT D. ZSALMAN
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.


W. DEAN PFEIFFER
Executive Director



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

1610
PERS-311
5 April 2000

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

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

Subj: E [REDACTED] 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 original fitness reports for the period 20 February 1999 to 13 October 1999 and 14 October 1999 to 7 January 2000, and a copy of the signed statement which accompanied him to the mental health evaluation on 21 July 1999.

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

a. A review of the member's headquarters record revealed the fitness report for the period 20 February 1999 to 13 October 1999 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. The member's statement and endorsement are properly reflected in his digitized record. The fitness report for the period 14 October 1999 to 7 January 2000 was received, however, it was rejected and we are in the process of returning to the reporting senior for correction. The member provided a copy with his petition; however, due to the markings in block-41 we will not file it. The member has two years from the ending date of the report to submit a statement.

b. The member alleges the fitness reports were based on unsubstantiated allegations and theory. Evaluation of a member's performance and making recommendations concerning promotion and assignments is the responsibility of the reporting senior. 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 determine if there is any rational basis to support the reporting senior's decision, and whether the reporting senior's action were the results of improper motive. Therefore, for us to recommend relief, the petitioner has to demonstrate that the reporting senior did not properly exercise his/her authority and the petitioner must show that there is no rational support for the reporting senior's actions 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. I do not believe Lieutenant [REDACTED] done so. In addition Lieutenant

[redacted] submitted extensive documentation about the report. While the information he presents paints a different picture of his performance, it does not prove the fitness reports are in error. A fitness report is an opinion document that reflects the reporting senior's evaluation of the officer's performance. In this case, the reporting senior determined that the petitioner did not perform at the level expected. In addition, the special fitness report for the period 20 February 1999 to 13 October 1999 mark of 1.0 in Military Bearing and the promotion recommendation of "Significant Problems" is required by OPNAVINST 6110.1E due to two consecutive PRT failures. The reports were properly submitted, the petitioner elected to submit a statement, and the reporting senior confirmed her evaluation in the endorsement. The documents are on file in Lieutenant [redacted] record.

- c. A fitness report does not have to be consistent with previous or subsequent reports. Each fitness report represents the judgment of the reporting senior during a particular reporting period.
- d. Enhancement of chances for promotion is not sufficient reason to remove a fitness report.
- e. The member does not prove the report to be unjust or in error.

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

[redacted signature]

Head, Performance
Evaluation Branch



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

7954-99

1610
PERS-4415
26 Apr 2000

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

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

Subj: [REDACTED], MC, US [REDACTED]

Ref: (a) PERS-00ZCB MEMORANDUM 5420 PERS-00ZCB dated 17 April 2000

Encl: (1) BCNR File
(2) [REDACTED] request dated 7 October 1999
(3) CO NavHosp Cherry Point endorsement 1000 Ser 09/0977 dated 15 Oct 99

1. Enclosure (1) is returned with comments as requested by reference (a). Enclosures (2) and (3) are provided as substantiating documentation.
2. [REDACTED] is a Naval Officer in the Medical Corps who is Board Certified in Anesthesiology. He has been assigned to National Naval Medical Center (NNMC), Bethesda, Maryland since reporting there on 13 January 2000. His immediate past command was Naval Hospital, Cherry Point, North Carolina, where he served from 24 September 1998 until 13 January 2000.
3. In enclosure (2), [REDACTED] requested that he be reassigned from Naval Hospital, Cherry Point, North Carolina to NNMC, Bethesda, Maryland "...due to the need for exposure to a greater variety and volume of cases as well as increased professional stimulation...."
4. In enclosure (3), the Commanding Officer, Naval Hospital, Cherry Point, North Carolina forwarded [REDACTED] request "...most strongly recommending reassignment..." and indicated that her Command would "...accept a six month gap in replacement..." She went on to say that although "...LT [REDACTED] is highly skilled in the technical aspects of anesthesia and management of anesthetized patients..." he "...had demonstrated significant difficulty in managing interpersonal relationships..." She also indicated [REDACTED] ignores oversight from his Department Head and Directorate..." and that he was "...not suited for a small isolated duty station or leadership position..." Having consulted with the Commanding Officer and in light of her support of his request for reassignment, [REDACTED] issued permanent change of station orders to Bethesda. Owing to the circumstances outlined above, reassignment to a teaching hospital [REDACTED] choice with a high-volume surgical case load which affords [REDACTED] benefit of exposure and mentorship of more senior leadership with a greater depth of knowledge and breadth of experience, was considered to be in the mutual best interest of the Navy and [REDACTED]. We recommend that member's request be denied.

[REDACTED]
Head, Medical Department Officer
Distribution Branch (PERS-4415)

Memorandum

7 October 1999

From : [REDACTED] WIC, US [REDACTED]

To : Chief, BUPERS

Via : Commanding Office [REDACTED] Hospital, Cherry Point, NC

Subj : Duty Assignment

Due to the need for exposure to a greater variety and volume of cases as well as increased professional stimulation, I respectfully request transfer to Bethesda Naval Hospital where I can perform my official Navy duties as an anesthesiologist.

[REDACTED]

[REDACTED] SN

Enclosure (2)

7954-99



Handwritten initials

DEPARTMENT OF THE NAVY

NAVAL HOSPITAL
PSC Box 8023
CHERRY POINT, NORTH CAROLINA 28533-0023

IN REPLY REFER TO:
1000
Ser 09/0977
15 Oct 99

FIRST ENDORSEMENT [REDACTED] MC, USN [REDACTED]
2100 Memo of 7 Oct 99

From: Commanding Officer, Naval Hospital, Cherry Point
To: Chief Bureau of Naval Personnel (P4415)

Subj: DUTY ASSIGNMENT

Ref: (a) PHONCON of 27 September, [REDACTED] EUPERS/CAPT
Bold NAVHOSP CHPT

1. Forwarded, most strongly recommending reassignment. This Command will accept a six month gap in replacement.
2. Lieutenant [REDACTED] is clearly skilled in the technical aspects of anesthesia and management of the anesthetized patient. He lacks the ability to show compassion for the emotional well being of his patients and has required frequent reminding to control post-operative pain and nausea. At this small, isolated Command where Lieutenant [REDACTED] works with fewer cases than in a structured residency, he had demonstrated significant difficulty in managing interpersonal relationships. Dismissed staff as intellectually inferior and rarely allows support staff to help with his patients.
3. Devoted to his work, Lieutenant [REDACTED] has assumed extra duties to help with the clinical load. However, he is socially isolated and uses the military hierarchy and structure to maintain a certain distance between himself and others, at times to the detriment of the Command. His constant indifference and resistance to co-workers has negatively impacted the entire operating room staff. He is rigid and stubborn, insisting that things be done his way and often demonstrates little tolerance to deviation from his standard. He ignores oversight from his Department Head and Directorate.
4. Lieutenant [REDACTED] failed two consecutive PRTs due to 27 percent body fat. He is compliant with the Command directed Remedial Program, but has shown no progress in reducing his weight. Medical special pay and promotion to Lieutenant Commander are held pending compliance with PRT standards.

Subj: DUTY ASSIGNMENT

5. Lieutena [redacted] is not suited for a small isolated duty station or leadership position. He is temporarily assigned to NNMC Bethesda pending funded permanent change of station orders.

6. I can be reached [redacted] or email jabold@chp10.med.navy.mil.

[redacted]

Copy to:

[redacted]
BU [redacted] OMMC

File



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

1610
PERS-311
27 September 2000

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

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

Subj: LC [REDACTED], 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 14 October 1999 to 7 January 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, however, PERS-311 has not received the member's statement and the reporting senior's endorsement.

b. The report in question is a Detachment of Individual/Regular report. The member alleges the fitness report was unjust and not verifiable.

c. The fitness report appears to be procedurally correct. The reporting senior may use inputs from a variety of sources in developing a fitness report. Per reference (a), comments on events which may have effected the command or the member's performance, and which are established to the reporting senior's satisfaction are appropriate if desired by the reporting senior. The contents of the report (marks, comments, and promotion recommendation) represent the reporting senior's appraisal authority for a specific period of time.

d. Regarding the fitness report for the period 20 February 1999 to 13 October 1999. We have reconsidered Lieutenant Command [REDACTED] position based on the new material presented. Our comments of 5 April 2000 remain valid. We again recommend denial of the member's request to remove the fitness report.

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

5800
Ser 06L1/ 067

7 Jun 01

From: Assistant Legal Counsel (PERS-06L1)
To: Special Assistant Congressional Liaison Office (PERS-00ZC)

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN CASE OF
LT [REDACTED], MC [REDACTED]

Ref: (a) NAVPERSCOM(PERS-00Z) memo 5420 PERS-00ZCB of 30 Oct 00
(b) NAVPERSCOM(PERS-311) memo 1610 PERS-311 of 27 Sep 00
(c) NAVPERSCOM(PERS-311) memo 1610 PERS-311 of 5 Apr 00
(d) BUPERSINST 1610.10
(e) SECNAVINST 7220.75C

Encl: (1) BCNR File 07954-99

1. Enclosure (1) is returned, and the following information is provided in response to reference (a).
2. The member's BCNR petition requests that his Fitness Report for the period of 20 February 1999 to 13 October 1999 be removed from his permanent record. The evidence contained in the file does not establish that the Fitness Report is unjust or otherwise improper, and I recommend no relief be granted. I concur with the conclusions stated in references (b) and (c).
3. Citing reference (d), the member argues that the submission of the special fitness report was improper. He argues that the justification given by the commanding officer is not a sufficient basis for a special report. Block 41 of the subject fitness report states "This special FITREP is being submitted due to a decline in performance." A commanding officer has significant discretion to write and submit a special report. In accordance with Annex D of reference (d), a commanding officer may submit a special report when he or she believes declining performance should be officially documented before the next periodic report.
4. The member's argument that the special report is unjust seems to be based on his allegation that the commanding officer used the special report as punishment. This allegation is without merit. The member is correct in that Annex D of reference (d) states that special reports should not be used as punishment. This means that a special fitness report should not be used as a substitute for a more appropriate action. If a member's conduct warrants a detachment for cause or discipline under the UCMJ, then the commanding officer should pursue those channels, and the member's performance will be documented through those processes. If the commanding officer believes such severe measures are not

appropriate, but that the performance still needs to be documented, a special fitness report is appropriate.

5. Based on all the evidence, it is reasonable to conclude that the commanding officer believed the member's conduct did not warrant punishment, but did warrant official documentation. To further illustrate why the member's argument is untenable, follow it through to its logical conclusion. In order to argue that the special report is improper, the member would also have to argue that he should have been punished under the UCMJ. The member, of course, has not made that argument.

6. The member alleges that not only was the special fitness report improper, but that the date of its submission is improper. The discussion in the preceding paragraph regarding the writing of a special fitness report applies equally to the date of its submission. The commanding officer has a high degree of discretion both as to whether to submit a special report at all, and if so, when to submit it. In this case, the timing seems to be appropriately related to the completion of a local command investigation, and the start of a period of Temporary Additional Duty (TAD). As discussed above, it appears that the commanding officer, after reviewing all the information, determined that punitive action was not necessary or desirable, but that the member's performance should be documented at that point in time. Simply because the commanding officer could have taken a more severe action does not mean that the special fitness report was improper. It is the inherent role of the commanding officer to make these sort of judgment calls.

7. The member next argues that then content of the fitness report is inappropriate. References (b) and (c) provide a thorough discussion of this issue. It is noted that Annex N of reference (d) states that a fitness report should not quote from a medical report. However, underlying facts and opinions, if known to or held by the reporting senior, may be included. The fact that the same facts and opinions are also included in the medical report does not prevent their use in a fitness report. A reporting senior should not refer to the fact that a medical report was done, and should avoid direct quotation when possible. However, the reporting senior is not required to change his or her opinion or description of performance simply because it happens to coincide with that contained in the medical report. While it is inevitable that some of the same words will be used, it is a matter of opinion as to how much is too much.

8. Although not specifically mentioned in the member's BCNR petition, the member is also asking for the removal of the Fitness Report for the period of 14 October 1999 to 7 January 2000, which is a Detachment of Individual/Regular Report. For

7954-44

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN CASE OF
LT [REDACTED], MC, [REDACTED]

the reasons discussed in the preceding paragraphs and in references (b) and (c), I recommend relief not be granted.

9. It appears that the member's requests for relief in regards to his Incentive Special Pay (ISP), and for copies of signed, written statements, are not within proper BCNR requests. The ISP is governed by reference (e), which provides for an appeal process. His request for documents is governed by the Privacy Act and the Freedom of Information Act (FOIA). Both of these have appeal procedures.

10. In conclusion, the evidence in this case does not warrant the requested relief. Documentation of a member's performance is the role of a commanding officer and accordingly commanding officer's are given substantial discretion. In this case, the commanding officer's opinion is based on substantiated facts and is in no way arbitrary.

[REDACTED]