



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

HD:hd
Docket No: 08656-01
27 January 2003

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

Subj: LCDR [REDACTED] USN [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 dtd 7 Dec 01 w/attachments
(2) PERS-834C memo dtd 7 May 02
(3) PERS-311 memo dtd 23 Aug 02
(4) Subject's counsel's undtd ltr recvd 13 Nov 02
(5) 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 the applicable naval record be corrected by removing the fitness report for 1 November 2000 to 3 August 2001 (copy at Tab A) and all documentation concerning his civil arrest for public intoxication on 6 April 2001 (copy at Tab B).

2. The Board, consisting of Messrs. Chapman and Morgan and Ms. Nofziger, reviewed Petitioner's allegations of error and injustice on 24 January 2003, 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), PERS-834C, the Navy Personnel Command (NPC) office having cognizance over personnel performance and security matters, has commented to the effect that they had no objection to removing the contested documentation relating to Petitioner's arrest. They noted that the civil court concerned had issued an expungement order stating the arresting agency had lacked probable cause for the arrest.

c. In correspondence attached as enclosure (3), PERS-311, the NPC office having cognizance over fitness report matters, commented to the effect that in light of enclosure (2), they had no objection to removing the contested fitness report. This opinion superseded an earlier version, which had recommended against removing the contested report.

d. Petitioner's counsel's letter at enclosure (4) notes that PERS-834C has no objection to removing the arrest documentation, in view of the expungement. Counsel further asserts that the arrest did not merit reporting, and that the expungement only provides additional justification for removing it from Petitioner's record. Finally, counsel takes issue with the original version of the PERS-311 opinion. This opinion was revised after enclosure (4) had been submitted.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the contents of enclosures (2) and (3), the Board finds the existence of an injustice warranting 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 of Report From	To
01Aug03	LCDR D. [REDACTED] USN	00Nov01	01Aug03

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.

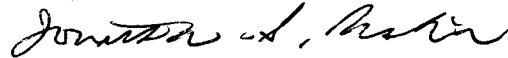
c. That Petitioner's naval record be corrected further by removing the "Report of Final Civil Action in Case of [Petitioner]" dated 11 July 2001, concerning his arrest for public intoxication on 6 April 2001, and all related documents.

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.

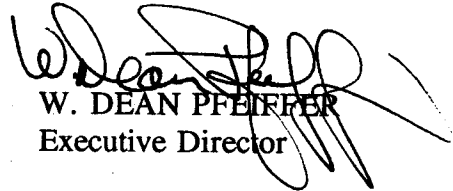
e. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

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
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.


W. DEAN PFEIFFER
Executive Director



DEPARTMENT OF THE NAVY

NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

4656-01

1611
PERS 834C/284
7 May 02

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

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

Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IN CASE OF
LCDR ██████████ USN, ██████████

Ref: (a) MILPERSMAN 1611-010

Encl: (1) BCNR File

1. Enclosure (1) is returned. PERS-83 has reviewed the contents of enclosure (1) and determined the arguments presented by petitioner are with merit, and adverse information contained in enclosure (1) should be removed.

2. LCDR ██████████ command reported that he was arrested 6 Apr 01 for public intoxication. LCDR ██████████ entered a plea of *nolo contendere* on 20 Apr 01. The Municipal Court of Nueces County fined LCDR ██████████ \$350 which was suspended for 90 days.

3. Reference (a) requires the filing of civil convictions in an officer's permanent record if the misconduct is punishable under the UCMJ by confinement of one year or more or a punitive discharge. The original offense LCDR ██████████ was convicted of was considered a violation of UCMJ Article 133, conduct unbecoming an officer and a gentleman, which is punishable by confinement greater than a year and a punitive discharge. His drunk and disorderly conduct was considered to be a violation of UCMJ Article 134, which is punishable by confinement of six months. LCDR ██████████'s counsel argued that public intoxication should not have been an offense to which filing under reference (a) was made. Counsel was partially correct; however, the Article 133 violation was apparently not taken into account.

4. Subsequently, LCDR ██████████ received an Order of Expunction on 23 Aug 01 from the Nueces County District Court. This order appears to be valid on its face and states the ground for expunction was that the arresting agency lacked probable cause to arrest LCDR ██████████ for the charged offense.

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Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IN CASE OF
LCE [REDACTED] USN [REDACTED]

5. As the civilian conviction which formed the basis for the adverse matter filed in [REDACTED]'s record is no longer valid, PERS-83 poses no objection to its removal.

[REDACTED]
Commander, U.S. Naval Reserve
Director, Personnel Performance
And Security Division

4656-01



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

1610
PERS-311
23 August 2002

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

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

Subj: LCDR [REDACTED] USN [REDACTED]

Ref: (a) BUPERSINST 1610.10 EVAL Manual
(b) PERS-
(c) 834C memo 1611 PERS-834C/284 of 7 May 2002

Encl: (1) BCNR File

1. Enclosure (1) is returned. The member requests the removal of his fitness report for the period 1 November 2000 to 3 August 2001.

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 member argument that the report is adverse and was not referred to him for a statement by separate correspondence is without merit. The member signed the report on 3 August 2001 and indicated his desire to submit a statement.

c. The report in question is a Detachment of Individual/Regular report. The member alleges the report contains material error, is incomplete, unjust, and does not comply with procedural requirements.

d. A fitness report is unique to the period being evaluated. The reporting senior's is charged with commenting on the performance or characteristics of all members under his command and determines what material will be included in a fitness report. The grades and comments on fitness report reflects the reporting senior's perception of the member's performance and may be influenced by incidents that occurred during the period of the report. Reference (a), Annex N, paragraph N-13 states; "Comments may be included on misconduct whenever the facts are

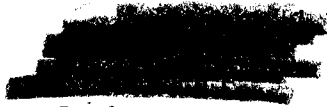
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clearly established to the reporting senior's satisfaction." It should also be noted that the member did not receive a mark of "1.0" in Military Bearing/Character. The member's official record revealed the member received a mark of "2.0" in block-35.

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

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

3. However, based on the information provided in reference (b), we have no objection of the removal of the fitness report.



Performance
Evaluation Branch