



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

BJG

Docket No: 8526-98

13 May 1999

CAPT [REDACTED] USMC
[REDACTED]
[REDACTED]
[REDACTED]

Dear Captain [REDACTED]

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

It is noted that the Commandant of the Marine Corps (CMC) has directed removal of your contested adverse fitness report for 1 November 1995 to 19 June 1996.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 12 May 1999. 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 report of the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) in your case, dated 9 December 1998, the advisory opinion from the HQMC Military Law Branch, Judge Advocate Division (JAM4), dated 15 January 1999, and the advisory opinion from the HQMC Officer Counseling and Evaluation Section, Officer Assignment Branch, Personnel Management Division (MMAA-4), dated 15 March 1999, copies of which are attached. They also considered the record of your nonjudicial punishment (NJP) proceedings, and your rebuttal letter dated 24 January 1999.

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 report of the PERB and the advisory opinions, except they noted that at your NJP hearing you did not, as JAM4 states, admit guilt of the charge of conduct unbecoming an officer and a gentleman; rather, you admitted only the facts on which the charge was based. They found that you should not have required counseling to know it was inadvisable to tell the joke in question, whether on the first or second occasion.

Specifically regarding the remaining contested adverse fitness report for 1 August 1997 to 23 February 1998, the Board noted that your reviewing officer, with the concurrence of your third sighting officer, stated that "there is merit" in your argument about the harmful effect your having been "on loan" had on your peer ranking. However, they found that your NJP would have harmed your ranking in any event.

Concerning your contested NJP, the Board found that disciplinary, rather than administrative action was not too severe a response for the offense concerned. Whether or not the officer conducting the preliminary inquiry knew why you were charged with conduct unbecoming an officer and a gentleman, the record of your NJP proceedings shows that you were aware of the basis for the charge when you were presenting your defense. They found no prohibition against the preliminary inquiry officer's holding the same pay grade as yours. They were unable to find that he was predisposed as to the outcome of the inquiry. They found no prohibition against your NJP officer's consulting with legal advisors in your absence during adjournments and deliberations. They found no prohibition against your being questioned at your hearing by staff lawyers of your NJP officer. Finally, the endorsement on your appeal reflects that your NJP officer did know the results of the investigation of your case under Article 32, Uniform Code of Military Justice.

In view of the above, your application for relief beyond that effected by CMC 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
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:
1610
MMER/PERB
DEC 9 1998

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

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
CAPTAIN [REDACTED] USMC

Ref: (a) Captain [REDACTED]'s DD forms 149(2) of 15 and
16 September 1998
(b) MCO P1610.7D w/Ch 1
(c) MCO P1610.7D w/Ch 1-4

1. Per MCO 1610.11B, the Performance Evaluation Review Board, with three members present, met on 3 December 1998 to consider Captain [REDACTED]'s petitions contained in reference (a). Removal of the following fitness reports was requested:

- a. Report A - 951101 to 960619 (CD) -- Reference (b) applies
- b. Report B - 970801 to 980223 (TR) -- Reference (c) applies

2. The petitioner challenges the appropriateness of Report A based on it's content of factually inaccurate and prejudicial information. This, he believes, is abundantly clear by his finding of "not guilty" during nonjudicial punishment (NJP) proceedings. He also takes exception with the administrative processing of the report and his inability to view the completed document until over a year after he initially signed the evaluation. Concerning Report B, the petitioner argues the injustice associated with the report in that he never worked for the Reporting Senior (Lieutenant Colonel [REDACTED]). He also contends the report unfairly reflects "double jeopardy" and serves to render him noncompetitive for advancement.

3. In its proceedings, the PERB concluded that:

a. The removal of Report A is warranted and has been directed.

b. Report B is both administratively correct and procedurally complete as written and filed. The following is offered as relevant information concerning that appraisal.

(1) The uncontroverted matter of fact is that the petitioner was the subject of NJP during the reporting period and that event was correctly recorded. To this end, the Board

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discerns absolutely no error or injustice. Should the NJP be set aside or otherwise eliminated from the petitioner's record, then consideration should be given to removing the report.

(2) The Reporting Senior clearly stated that the petitioner had not worked for him during the period covered by the report and that comments were based on input from "senior officers and peers." Given the nature of what was occurring, the situation was most understandable. The Board is haste to point out that when the petitioner signed Item 22 of the report, he certified to the accuracy of all data contained in Section A. This includes, but is certainly not limited to, identification of both the Reporting Senior and Reviewing Officer.

(3) The PERB must emphasize its position that it simply cannot and does not operate under the premise that an administratively correct and factually accurate fitness report should be removed to enhance promotional competitiveness. To do so would breach the integrity and viability of the entire Performance Evaluation System.

4. The Board's opinion, based on deliberation and secret ballot vote, is that Report B should remain a part of Captain [REDACTED] official military record.

5. The case is forwarded for final action.

[REDACTED]

Colonel, U.S. Marine Corps
Deputy Director
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:
1070
JAM4

15 JAN 1998

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

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF CAPTAIN [REDACTED]
[REDACTED] MARINE CORPS

Ref: (a) Manual for Courts-Martial, United States (1995
Edition), Part V
(b) COMMARFORRES ltr 5812 SJA of 6 Jan 98

1. We are asked to provide an opinion regarding Petitioner's request that his nonjudicial punishment (NJP) of 1 August 1997, be set aside and all references to the NJP be removed from his official military records.

2. We recommend that relief be denied. Our analysis follows.

3. Petitioner argues that the punishment he received in this case was unjust and disproportionate to the offense committed. Petitioner's arguments are without merit.

4. Under reference (a), the NJP authority may impose punishment when he believes the preponderance of the evidence establishes the accused committed the offense charged. Absent clear evidence of an abuse of discretion, the NJP authority's findings should remain undisturbed. Petitioner no longer disputes the events that led to his NJP for a violation of Article 133, Uniform Code of Military Justice, Conduct unbecoming and officer and gentleman, and has admitted his guilt several times both during the NJP hearing and in previous unsuccessful appeals. Petitioner now offers substantially the same arguments that have already been considered and rejected, including an appeal denied by the Assistant Commandant of the Marine Corps. (See reference (b)). Furthermore, the punishment Petitioner received, a punitive letter of censure, was well within legal limits.

5. Accordingly, I find that Petitioner has failed to demonstrate that the NJP authority abused his discretion in any way, and I recommend that relief be denied.

B. D. BARKEY
Major, U.S. Marine Corps
Assistant Head
Military Law Branch
Judge Advocate Division



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8526-98

IN REPLY REFER TO:
1600
MMOA-4
15 Mar 99

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

Subj: BCNR PETITION FOR CAPTAIN [REDACTED] [REDACTED]
[REDACTED] USMC

Ref: (a) MMER Request for Advisory Opinion in the case of
Captain [REDACTED] USMC
of 3 Mar 99

1. Recommend disapproval of Captain [REDACTED] request for removal of his failure of selection.

2. Per the reference, we reviewed Captain [REDACTED]'s record and petition. Captain [REDACTED] failed selection on the FY99 USMC Major Selection Board. He successfully petitioned the Performance Evaluation Review Branch (PERB) to remove the Change of Duty fitness report for the period 951101 to 960619. The PERB denied his request for removal of the Transfer (TR) fitness report for the period 970801 to 980223 and all documentation associated with his Non Judicial Punishment (NJP). Captain [REDACTED] petition contains an implied request for removal of his failure of selection.

3. In our opinion, the PERB action removes some jeopardy from Captain [REDACTED]'s record, but fails to make it competitive with his peers. The (TR) fitness report for the period 970801 to 980223 and the associated documents relating to the NJP appear to constitute the most obvious jeopardy to the competitiveness of his record. However, even with the TR report removed, Captain [REDACTED]'s record still contains the following competitive concerns that most likely resulted in his failure of selection:

a. **Value and Distribution.** Captain [REDACTED]'s overall Value and Distribution contains twenty-one officers ranked above him and six below, indicating his performance is in middle-to-bottom of his peer group. Specifically, he has sixteen officers ranked above him and two below him in his current rank.

b. **Section B marks.** Captain [REDACTED]'s record contains less competitive Section B marks in Administrative Duties, Handling Officers, Handling Enlisted Personnel, Cooperation, Judgement, Personal Relations, and Economy of Management.

Subj: BCNR PETITION FOR CAPTAIN [REDACTED]
[REDACTED] USMC

c. **Promotion photograph.** The Material Update Log for the FY99 USMC Major Selection Board contains no entry that Captain [REDACTED] promotion photograph was received by the Board.

4. In summary, the PERB action removes some jeopardy from Captain [REDACTED]'s record, but fails to make it competitive with his peers. Furthermore, even with the TR report and the associated documents relating to the NJP removed, we believe the remaining competitive concerns likely would have resulted in his failure of selection. Therefore, we recommend disapproval of Captain [REDACTED] implied request for removal of his failure of selection.

[REDACTED]

Major, U. S. Marine Corps
Head, Officer Counseling and
Evaluation Section
Officer Assignment Branch
Personnel Management Division