



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

BJG
Docket No: 7967-02
11 October 2002

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

Subj: GYSC [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 dtd 31 May 02 w/attachment
(2) HQMC MMR/PERB memo dtd 9 Sep 02
(3) Memo for record dtd 9 Oct 02
(4) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, that the applicable naval record be corrected by removing his fitness report for 1 October 2000 to 31 July 2001, a copy of which is at Tab A to enclosure (1). As shown in enclosure (2), the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) has directed modification of this report by removing the following reporting senior (RS) comment: "Received 6105 [service record book page 11 ("Administrative Remarks (1070)") counseling entry] for POV [privately owned vehicle] accident during this period." Petitioner also requested removal of his failures of selection by the Calendar Year (CY) 2001 and 2002 Master Sergeant (pay grade E-8) Selection Boards, and remedial consideration for promotion.

2. The Board, consisting of Messrs. Pfeiffer, Rothlein and Zsalman, reviewed Petitioner's allegations of error and injustice on 10 October 2002. Pursuant to the Board's regulations, the majority, Messrs. Rothlein and Zsalman, determined that the limited corrective action indicated below should be taken on the available evidence of record. The minority, Mr. Pfeiffer, recommended that Petitioner's request be denied. 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 which were available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. On 20 January 2001, while Petitioner was assigned to Marine Corps Air Station (MCAS) Iwakuni, Japan, another Marine, driving Petitioner's automobile with Petitioner's permission, had an accident involving injuries.

d. On 4 April 2001, Petitioner received the page 11 counseling entry mentioned in the contested fitness report. While he provided a copy of this entry, at Tab B to enclosure (1), he did not request its removal. The entry, showing a "CO" (commanding officer) signature by a person other than the RS, stated in pertinent part the following:

...Counseled this date concerning the following deficiency: at 0515 on 20 January 2001, did demonstrate a lack of dependability, self discipline [sic] and judgement by allowing another Marine to operate a motor vehicle while intoxicated, which resulted in an accident with injuries. Specific recommendations for corrective action are to use sound judgment, and uphold the highest standards of conduct, integrity and leadership expected of all Marines. Assistance in correcting these deficiencies is available through my chain of command to include my SNCOIC [staff noncommissioned officer in charge], OIC, XO [executive officer] and CO. I am advised that failure to take corrective action may result in administrative separation or limitation of further service. I am advised that within five working days after acknowledgment of this entry a written rebuttal may be submitted and that such a rebuttal will be filed on the document side of the service record. I choose (to) make such a statement.

Petitioner's undated rebuttal statement, at Tab C to enclosure (1), included the following:

...I do not [emphasis in original] agree with this entry and I choose to make a statement for the following reasons:

1. The Gunnery [sic] Sergeant [sic] [who was driving Petitioner's automobile when the accident occurred] was assigned as the Designated [sic] Driver [sic] prior to us going to the club.
2. We were separated most of the evening but when I did see him, did not appear to be drinking.
3. Before leaving the club, I checked with the Gunnery [sic] Sergeant [sic], to see if he was too tired to drive back. He replied he was fine. During that time I did not smell or see any indication of alcoholic usage. I did not think about him being intoxicated because as stated prior; he was the Designated [sic] Driver [sic].
4. If I had known that he was physically impaired in any way, I would never have allowed him to operate the vehicle...

e. The page 11 entry was issued after 8 March 2001, the date of the report of investigation of the accident, but before 6 July 2001, the date of the second endorsement (Tab D to enclosure (1)) on this report. The following statement, in paragraph 5 of this endorsement, calls into question the assertion, in the page 11 entry, that Petitioner's having

allowed an allegedly intoxicated Marine to drive his automobile "resulted in" the accident: "...there is no 'clear and convincing evidence' to establish that [the driver's] intoxication alone was the proximate cause of the accident."

f. The contested fitness report for 1 October 2000 to 31 July 2001 (Tab A to enclosure (1)), submitted on 31 July 2001, documented Petitioner's service in his current grade of gunnery sergeant, pay grade E-7, aboard MCAS Iwakuni. The report was submitted on the occasion of his transfer; it was his last of three reports at that station from the same RS. He received seven marks of "E," the third highest possible on a range of seven marks, in sections D.1 ("performance"), D.2 ("proficiency"), E.2 ("effectiveness under stress"), E.3 ("initiative"), F.1 ("leading subordinates"), F.2 ("developing subordinates") and F.5 ("communication skills"); two of "D," the fourth highest, in E.1 ("courage") and G.1 ("professional military education"); and four of "C," the fifth highest, in F.3 ("setting the example"), F.4 ("ensuring well-being of subordinates"), G.2 ("decision making ability") and G.3 ("judgment"). The RS comments were positive in all respects, except for the comment quoted in paragraph 1 above, whose removal has been directed by the HQMC PERB. In "comparative assessment," the reviewing officer (RO) marked Petitioner in the fourth highest block of eight possible, along with four other gunnery sergeants; no others were ranked above him, and three were below him. The RO comments were positive in all respects. Petitioner was not given the opportunity to submit a rebuttal statement to this fitness report.

g. Petitioner provided a supporting letter dated 30 April 2002 (Tab E to enclosure (1)) from the RS who submitted the contested transfer fitness report, as well as both of Petitioner's two preceding reports at MCAS Iwakuni. The RS letter included the following:

...
[Petitioner's] marking [sic] were always very high and fully qualifying for Promotion [sic] until his last reporting period here aboard MCAS Iwakuni, during which time he received a Page [sic] 11 concerning an automobile accident. I had no input on the particular Page [sic] 11 entry. Several markings were significantly lower based on this page 11. I understood that the Page [sic] 11 resulted from a full investigation concerning the accident involving [Petitioner] and his POV. The Page [sic] 11 Entry [sic] served to hang a Dark [sic] Cloud [sic] over my number 1 Gunnery [sic] Sergeant [sic]. His performance during the period of this TR [transfer] Report [sic] never wavered, his pack was fully loaded and he was a Marine with a mission aboard MCAS Iwakuni right up until he got on the plane for transfer out to the Food Team.

h. In his application at enclosure (1), Petitioner contended that the RS comment PERB has since directed removing is incorrect. He noted that the page 11 entry is the only other matter in his record about the accident, and that the RS letter affirms he "received a Page [sic] 11." He also stressed the statements, in the RS letter, that the RS "had no input on the particular Page [sic] 11 entry" and that "Several markings were significantly lower based on this page 11."

i. Enclosure (2) is the report of the HQMC PERB in Petitioner's case. It shows that on 5 September 2002, they directed removal of the RS comment quoted in paragraph 1 above. The PERB report further offers the following explanation for their decision to deny further relief:

3. In its proceedings, the PERB concluded that, with one minor exception, the [contested fitness] report is both administratively correct and procedurally complete as written and filed...

b. Notwithstanding [sic] the voluminous documentation furnished..., to include the [RS]'s letter, the [PERB] is not persuaded or convinced that the lower markings in Sections E, F, and G of the fitness report at issue were based solely on the 6105 entry and/or POV accident. In this regard, the [PERB] emphasizes that although five marks were lower than on the prior performance evaluation [for 1 October 1999 to 30 September 2000] by the same [RS] [E.1 mark dropped from "E" to "D," F.3 from "D" to "C," F.4 from "D" to "C," G.2 from "D" to "C" and G.3 from "E" to "C"], two were elevated (F2 [sic], Effectiveness Under Stress and F3 [sic], Initiative) [E.2 and E.3 raised from "D" to "E"].

j. The memorandum for the record at enclosure (3) documents that a member of the Board's staff contacted the HQMC PERB to determine their basis for the partial relief they had approved, removing only the RS comment about the POV accident. The memorandum reflects he was informed the PERB had found this comment adverse, such that the report in which it appeared should have been referred to Petitioner for an opportunity to respond.

k. In his application at enclosure (1), Petitioner asserts, without corroborating evidence, that his command communicated with the CY 2001 Master Sergeant Selection Board, which convened on 23 January 2001, about the incident of 20 January 2001 for which he later received both the page 11 counseling entry of 4 April 2001 and the RS comment the PERB directed removing from the contested fitness report submitted on 31 July 2001. This fitness report, without the correction directed by the PERB on 5 September 2002, was in his record for the CY 2002 Master Sergeant Selection Board, which convened on 28 January 2002.

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, the majority of the Board finds an injustice warranting limited relief, specifically, complete removal of the contested fitness report.

In concluding that the entire fitness report at issue should be removed, the majority notes that the PERB directed removing the only adverse material in the report, because Petitioner had not been given an opportunity to rebut it. The majority finds that the PERB did not go far enough, as the RS admitted that on the basis of the page 11 entry cited in the comment the

PERB directed removing, "Several markings were significantly lower." They find removal, rather than further revision, of the contested report is appropriate, as the RS did not specify which marks had been affected, nor did he clarify what marks Petitioner would have received without the page 11 entry. They do not feel Petitioner's having had a chance to rebut the page 11 entry cured the failure to afford him the proper processing of the adverse fitness report, processing which would have included review of his rebuttal by both the RO and a third sighting officer superior to the RO.

Since the uncorrected fitness report in question was in Petitioner's record before the CY 2002 Master Sergeant Selection Board, the majority finds he should have relief concerning his failure of selection by that promotion board. He may submit to the HQMC Promotion Branch (MMPR-2) his request for remedial consideration for promotion from this promotion board, to be based on either complete removal of the contested fitness report, if the majority's recommendation is approved, or the PERB action to remove the adverse comment.

The majority finds no relief is warranted concerning Petitioner's failure of selection by the CY 2001 Master Sergeant Selection Board. They note that this promotion board could not have considered either the page 11 entry or the contested fitness report. Further, they are unable to accept Petitioner's unsupported allegation that his command communicated information to the promotion board regarding the incident of 20 January 2001.

In view of the foregoing, the majority recommends the following limited corrective action.

MAJORITY RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the following fitness report and related material:

Date of Report	Reporting Senior	Period of Report	
		From	To
31 Jul 01	[REDACTED] Jr., USMC	1 Oct 00	31 Jul 01

b. That there be inserted in his naval record a memorandum in place of the removed report, containing appropriate identifying data concerning the report; that such 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 the magnetic tape maintained by HQMC be corrected accordingly.

d. That any material or entries inconsistent with or relating to the majority'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 this 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.

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

MINORITY CONCLUSION:

The minority of the Board agrees with the majority report as it concerns Petitioner's failures of selection for promotion and his request for remedial promotion consideration. Contrary to the majority, the minority finds the contested fitness report, as amended, should stand. While the minority agrees with the majority that the comment the PERB directed removing did adversely influence how the RS marked Petitioner, the minority finds that Petitioner's having had a chance to rebut the page 11 entry provided him adequate due process. In view of the above, the minority's recommendation is as follows:

MINORITY RECOMMENDATION:

- a. That Petitioner's application 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.

W. Dean Pfeiffer
W. DEAN PFEIFFER

MAJORITY REPORT

NOV 22 2002

Reviewed and approved:

Joseph Lynch
Joseph Lynch

MINORITY REPORT

Reviewed and approved: _____



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:
1610
MMER/PERB
SEP 09 2002

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
GUNNERY SERGEANT [REDACTED], [REDACTED] USMC

Ref: (a) [REDACTED] DD Form 149 of 31 May 02
(b) MCO P1610.7E w/Ch 1-2

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 5 September 2002 to consider Gunnery Sergeant [REDACTED] petition contained in reference (a). Removal of the fitness report for the period 001001 to 010731 (TR) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner contends it was inappropriate for the Reporting Senior to mention (Section I) his receipt of a 6105 Page 11 entry regarding a POV accident. In addition, he believes that markings on the report were lowered as a result of said entry and accident. To support his appeal, the petitioner furnishes his own statement, a copy of the Line of Duty/ Misconduct Investigation, the page 11 entry, a copy of the challenged fitness report, a letter of recommendation from the Reporting Senior, copies of Master Brief Sheets, and copies of MARADMINs 137/01 and 156/02.

3. In its proceedings, the PERB concluded that, with one minor exception, the report is both administratively correct and procedurally complete as written and filed. The following is offered as relevant:

a. The Board agrees with the petitioner that no mention should have been made concerning the Page 11 entry and/or POV accident. To this end, the Board concludes that eliminating the report in its entirety is not warranted and has, instead, directed removal of the objectionable verbiage (i.e., "Received 6105 for POV accident during this period.").

b. Notwithstanding the voluminous documentation furnished with reference (a), to include the Reporting Senior's letter,

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

the Board is not persuaded or convinced that the lower markings in Sections E, F, and G of the fitness report at issue were based solely on the 6105 entry and/or POV accident. In this regard, the Board emphasizes that although five marks were lower than on the prior performance evaluation by the same Reporting Senior, two were elevated (F2, Effectiveness Under Stress and F3, Initiative).

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report, as modified, should remain a part of Gunnery Sergeant [REDACTED] official military record. The limited corrective action identified in subparagraph 3a is considered sufficient.

5. The case is forwarded for final action.

[REDACTED]

Chairperson, Performance
Evaluation Review Board
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps

9 October 2002

MEMORANDUM FOR RECORD

Re: [REDACTED] USMC, [REDACTED]

[REDACTED] MER says PERB directed removal of comment from [REDACTED] contested fitness rept because it was adverse, and rept had not been referred to him.

[REDACTED]
[REDACTED]
[REDACTED]
Head, Performance Section