



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

BJG

Docket No: 2621-00

27 June 2000

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

Subj: LTCC [REDACTED] USMCR (RET), [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 dtd 3 Apr 00 w/attachments
(2) HQMC JAM3 memo dtd 6 Jun 00
(3) 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 promoting him to colonel, pay grade O-6, on 1 July 1999. Petitioner further requested that his retirement of 1 January 2000 be set aside.

2. The Board, consisting of Messrs. Frankfurt, Ivins, and Zarnesky, reviewed Petitioner's allegations of error and injustice on 15 June 2000, 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), the Headquarters Marine Corps office having cognizance over the subject matter of Petitioner's request has commented to the effect that Petitioner's promotion request has merit and warrants favorable action.

c. Petitioner requested retirement with the understanding that he had been promoted to colonel, but would be retired in the grade of lieutenant colonel because he lacked the required two years in grade. He says had he known his promotion had been delayed, he would not have requested retirement, but would have requested a chance to correct any deficiencies under the weight control regulations.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the contents of enclosure (2) and paragraph 3.c above, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's record be corrected to show he was promoted to colonel with a date of rank and effective date of 1 July 1999; and that his lineal precedence be adjusted accordingly.


b. That Petitioner's record be further corrected to show that he was not retired on 1 January 2000, but retained the status in the Marine Corps Reserve he held before that date.

c. 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.

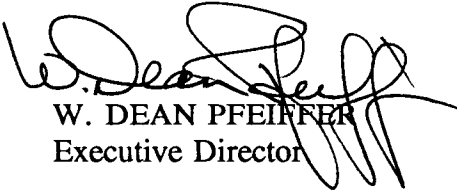
d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

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


FOR 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
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

2021-00

IN REPLY REFER TO:

1070

JAM3

06 JUN 2000

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

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF LIEUTENANT COLONEL [REDACTED]
[REDACTED] U.S. MARINE CORPS RESERVE (RET.)

1. We are asked to provide an opinion on Petitioner's request for promotion to the rank of colonel, and issuance of his promotion certificate of 1 July 1999.
2. We recommend that the relief be granted. In particular, that his official record be corrected to reflect his promotion date of 1 July 1999, and that he receive the promotion warrant. Our analysis follows.

3. Background

a. In May 1999, the Secretary of the Navy (SecNav) announced that Petitioner was selected for promotion by the FY00 USMCR Colonel Selection Board. In June 1999, the Commandant of the Marine Corps (CMC), acting on behalf of SecNav, authorized Petitioner's promotion to the grade of colonel effective on 1 July 1999. During June 1999, however, the Marine Corps Reserve Support Command (MCRSC) was informed that Petitioner failed to conform to Marine Corps weight standards. Nonetheless, the decision to delay Petitioner's promotion was not made until approximately the second week in July.¹ On 16 July 1999, the Commanding General, MCRSC, notified Petitioner in writing that his promotion was being delayed pending an investigation into his failure to meet weight standards. There is no indication the Petitioner was notified of the delay prior to the 1 July 1999 scheduled promotion date.

b. Petitioner retired from the IRR effective 1 January 2000. In March 2000, this Headquarters informally opined² that Petitioner was promoted to colonel effective 1 July 1999 when Petitioner's command failed to properly delay the promotion. Petitioner received a copy of this opinion.

¹ PHONCON H [REDACTED] (008) [REDACTED]
Meechum of 11 May 2000

² HQMC (JAR) E-Mail memo of 27 March 2000

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF LIEUTENANT COLONEL, ~~PAUL [REDACTED]~~
~~[REDACTED]~~ S. MARINE CORPS RESERVE (RET.)

4. Analysis

a. Promotion authority for commissioned officers is vested in the President by the Appointments Clause of Article II, Section 2, of the Constitution. Promotions (i.e., appointments) become effective when the "last act" legally required is performed. Marbury v. Madison, 5 U.S. 137, 155-158 (1803); ~~[REDACTED]~~ v. United States, 5 Cl. Ct. 146, 151 (1984). Publication of the MARADMIN constitutes this "last act", and the appointment becomes effective on the date published therein.

b. An appointment may be delayed, however. Title 10, U.S. Code, section 14311(c) provides that appointment of an officer to a higher grade may be delayed if the officer is given written notice of the grounds for the delay prior to the date of appointment, unless it is impracticable to do so.

c. In the present case, while MCRSC became aware of grounds for delay prior to the effective promotion date, the decision to delay the promotion was made after that date. Petitioner was statutorily eligible for promotion, was selected by a promotion board, and was appointed by the President with the advice and consent of the Senate. Acting for the President, CMC effected the "last act" required to promote Petitioner by publishing the MARADMIN, and directed his promotion on 1 July 1999.

5. Conclusion. Accordingly, for the reasons noted, we recommend that Petitioner's official record be corrected to reflect his promotion on 1 July 1999, and that he receive the appropriate promotion warrant. We note, however, that Petitioner's retirement grade will remain lieutenant colonel since he would not have served satisfactorily in the grade of colonel for two years proceeding his retirement.

~~[REDACTED]~~
~~[REDACTED]~~
Head, Military Law Branch
Judge Advocate Division