



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

JSR
Docket No: 3937-08
14 August 2008

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

Subj: [REDACTED]
REVIEW OF NAVAL RECORD (RECONSIDERATION)

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

Encl: (1) DD Form 149 dtd 17 Apr 07 w/attachments
(2) BCNR ltr JSR Docket No. 09135-07
dtd 1 Nov 07 w/enclosure
(3) Subject's ltr dtd 3 Apr 08 w/enclosures
(4) HQMC MMER/PERB memo dtd 23 Jul 08
(5) Subject's ltr dtd 7 Aug 08 w/enclosures
(6) 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 his naval record be corrected by removing the fitness report for 1 July 2005 to 24 March 2006, a copy of which is at Tab A. Enclosure (2), the report of the Board in Petitioner's original case, shows the Board denied this request on 1 November 2007. By enclosure (3), Petitioner submitted new evidence and argument warranting reconsideration.

2. The Board, consisting of Ms. Humphrey and Messrs. W. Hicks and Swarens, reviewed Petitioner's allegations of error and injustice on 14 August 2008, 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 which were available under existing law and regulations within the Department of the Navy.

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

c. The contested fitness report is a transfer report evaluating Petitioner's performance of duty as procurement chief in his current grade of master sergeant (pay grade E-8). The portion of the report submitted by the reporting senior (RS), a civilian, was entirely favorable, including a recommendation for promotion. However, the following non-concurring reviewing officer (RO) comments in section K.4 made the report adverse (as reflected in section A, item 5.a ("Adverse")):

SNM [subject named Marine] is a versatile and knowledgeable in his MOS [military occupational specialty], however during this reporting period, his inability to keep his superiors informed pertaining to his impending retirement or transfer contributed to a confusing workplace. This SNCO [staff noncommissioned officer] worked "deals" outside of the command and kept changing his mind as to retirement/transfer, which kept his billet (a high demand MOS) dbl [double] filled for 7 months. This required the SgtMaj [Sergeant Major] of the Marine Corps to get involved as SNM had not kept the enlisted leadership of the command informed either. I do not recommend him for promotion at this time.

Section K.3 (RO's "Comparative Assessment") assigned Petitioner the fifth best of eight possible marks.

d. The report at issue reflects the following reply dated 22 July 2006 from Petitioner to the RO's comments:

It was never my intentions [sic] to hide, deceive or be aloft [sic] with Col [Colonel] G--- [the RO] and the command concerning my retirement decision. After I decided to retire in November 05, the proper paperwork was submitted and I started terminal leave in January 06. While on terminal leave, the 3044 [contract specialist] MOS Occupational Field Sponsor contacted me and stated that the contracting MOS was very short of experienced Marines and my leadership was needed. I then requested that my retirement package be rescinded and orders issued for duty at Camp Lejeune, NC. I took no measure to work a "deal" with anyone concerning this whole issue. The decisions I made were complex but for the good of the Marine Corps, my family and my career on a whole. To receive an adverse fitness report with negative promotion recommendation does

not accurately reflect the burden of my decision nor the other decisions I made during the entire reporting period. Lastly, having my replacement on board for three months allowed me to have a proper turn over concerning the Procurement Chief's responsibilities and enabled me to focus on the Director [Director of Contracting]'s responsibilities.

e. The report also reflects the following comments dated 25 July 2006 from Colonel S---, the third sighting officer who gave as his title "Cheif [sic] of Staff":

I have reviewed this report in its entirety. [Petitioner] is technically proficient and probably one of the best contractors in the Marine Corps. That being said he was a constant source of frustration to his OIC [officer in charge], COS [chief of staff] and SgtMaj over his decision to retire or PCS [permanent change of station]. One week it was this and one week it was that. He was directed to begin terminal leave and he would still show up for work. He worked his own bolt with his monitor and his OIC had to pry information out of him as to his status. I will concede that his circumstances were unique with the contractor community short experienced SNCOs but I concur with Col G---'s overall assessment. As I stated above, exceptionally proficient in his MOS, but my assessment is that [Petitioner] lacks the leadership skills tools to succeed [sic] as a MGYSGT [master gunnery sergeant (pay grade E-9)]. I do not recommend promotion at this time.

f. With his original application at enclosure (1), Petitioner provided a statement dated 20 December 2006 from the RS supporting his request. She expressed the opinion that the contested report was "...unfair and not warranted." She said the RO had told her he disagreed with the evaluation she had given Petitioner, but she had defended her reasoning and refused to change the report "...because it was correct." She said she "...felt intimidated based on his position and rank as my supervisor." Petitioner also contended that the officer who acted as the third sighting officer was not authorized to do so.

g. With his reconsideration request at enclosure (3), Petitioner provided a statement dated 27 March 2008 (document 1 of 14) from Master Gunnery Sergeant C---, the 3044 MOS Occupational Field Sponsor/Procurement Chief of the Marine Corps. He concluded that the RO's section K.4 comments were "...unsupported and outside of the Marine's professional

character that I knew personally and by third party." He said "...there is no reasonable expectation that those higher in [Petitioner's] chain of command were not aware of [his] actions of either planning to retire or remain on active duty...a minimum of three to five other senior level Marines at [Petitioner's] command should have been well aware of his actions and plans." He also said that to his knowledge, the Sergeant Major of the Marine Corps "...had no involvement in this matter." Petitioner also provided new evidence to prove that on the date Colonel S--- signed the report at issue as the third sighting officer, he was no longer the chief of staff, as he had left that position in June 2006. In addition, Petitioner provided documents showing that he had been approved for further service in the Marine Corps.

h. Enclosure (5), the report of the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) on Petitioner's reconsideration request, concluded that relief should still be denied, stating "...regardless of the intent of his action, the final result was that it had a detrimental effect on the workplace..." and Petitioner did not submit anything to prove otherwise. PERB further concluded that the statements he has provided "...do not support [his] contention that the command was kept informed as things changed." Finally, the PERB stated that Colonel S--- was the correct third sighting officer, as he was the chief of staff on the ending date of the reporting period.

i. In enclosure (6), Petitioner's reply to the PERB report, he maintained his position that the fitness report at issue is unwarranted and that Colonel S--- was not authorized to act as the third sighting officer. He also argued that Colonel S--- displayed bias against him by his "falsification" of his title. He asked that the contested report, which represents a "stigma" against which he must constantly defend himself, be removed in its entirety, or that the adverse comments of Colonels G--- and S--- be removed.

CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding enclosure (5), the Board now finds an injustice warranting partial relief, specifically, removal of the mark from section A, item A.a; complete removal of section K (RO's marks and comments), together with Petitioner's statement in reply to the RO; and removal of the third officer sighting.

In concluding that their portions of the contested report should be removed, the Board feels that Colonels G--- and S--- wrongfully insinuate that Petitioner had no right to consult with his occupational field sponsor. Further, the Board finds persuasive the statement from that sponsor, who is also the Procurement Chief of the Marine Corps. The Board finds that removing the RO and third sighting portions of the report dictates deleting the mark from section A, item 5.a and removing Petitioner's reply to the RO.

Finally, the Board finds that the portion of the report submitted by the RS should stand, as it is entirely commendatory, and Petitioner has provided nothing to show it is in any way erroneous or unjust.

In view of the above, the Board recommends the following limited corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected by modifying as follows the fitness report for 1 July 2005 to 24 March 2006, dated 1 June 2006 and signed by [REDACTED]

- (1) Remove the mark from section A, item 5.a.
- (2) Completely remove section K.
- (3) Completely remove both Addendum Pages (on which appear Petitioner's statement of 22 July 2006 in reply to the RO and the third sighting officer comments of 25 July 2006).

b. That the magnetic tape maintained by HQMC be corrected accordingly.

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 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.

e. That the remainder of Petitioner's request 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
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.


W. DEAN PFEIFFER

Reviewed and approved:


8-26-08

Robert T. Cali
Assistant General Counsel
(Manpower and Reserve Affairs)