



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

*dw*

JSR  
Docket No: 9114-08  
4 December 2008

[REDACTED]

[REDACTED]

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

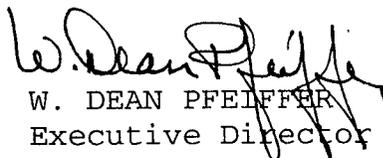
A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 4 December 2008. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. 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 advisory opinion from Headquarters Marine Corps (HQMC) dated 5 August 2008 and the report of the HQMC Performance Evaluation Review Board (PERB) dated 17 September 2008, copies of which are attached.

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 advisory opinion and the report of the PERB. Accordingly, your application 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

Enclosure



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3000 MARINE CORPS PENTAGON  
WASHINGTON, DC 20350-3000

IN REPLY REFER TO:

1070

JAM5

AUG 05 2008

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF  
NAVAL RECORDS

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

Ref: (a) MCO 1610.11C

1. You requested an advisory opinion on [REDACTED] (hereinafter "Applicant") application, requesting to remove his fitness report covering 9 November 2005 to 12 January 2006.

2. We recommend that Applicant's request for relief be denied. Our analysis follows.

3. Background

a. On 15 October 2005, Applicant was charged with misdemeanor battery in Escambia County Florida. Applicant was involved in a domestic dispute with his girlfriend. Applicant alleges that when he attempted to remove himself from the situation, his girlfriend called the police and alleged that Applicant had choked her. Applicant's case was handled as a plea bargain to a diversion program requiring him to complete counseling classes. On 16 January 2006, Applicant's case was forwarded to a Case Review Committee (CRC) and was classified as Level IV for physical abuse with high risk. On 31 May 2006, Applicant's case was closed as resolved.

b. On 7 May 2008, Applicant submitted a request to the Board of Corrections of Naval Records (BCNR) to have his fitness report removed on the grounds that he was not afforded the opportunity to present his case to the CRC or defend himself with legal counsel. Additionally, Applicant argues that the CRC finding of "Level IV" abuse is not meant to result in punitive consequences, but that in his case it resulted in a subsequent adverse fitness report.

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

4. Analysis

a. Applicant mischaracterizes the reason for the adverse fitness report as resulting from the CRC committee finding of abuse. Although the adverse report mentions the CRC finding, the report also states "[t]he basic facts surrounding the circumstances that generated this report are a matter of public record - both the arrest record and the agreement to enter pretrial diversion in lieu of a trial."

b. An adverse fitness report is a tool used by the command to annotate performance. Applicant's charges were criminal in nature and were properly documented by the adverse fitness report. Applicant's chain of command was in the best position to determine the facts surrounding the case and that determination should not be second-guessed now.

5. Conclusion. Accordingly, we recommend that Applicant's request for relief be denied. Furthermore, it appears this appeal should properly go before the Performance Evaluation Review Board as a matter under their cognizance per the reference.

6. This advisory opinion contains privileged attorney-client work product and is provided solely to BCNR. Please contact the Military Law Branch at (703) 614-4250, if you seek to release this memorandum.



G. L. SIMMONS  
Head, Military Law Branch  
Judge Advocate Division  
By direction of the  
Commandant of the Marine Corps



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

IN REPLY REFER TO:

1610  
MMER/PERB  
SEP 17 2008

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

Ref: (a) [REDACTED] DD Form 149 of 7 May 08  
(b) MCO P1610.7E w/ch 1-9

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 27 August 2008 to consider [REDACTED] petition contained in reference (a). Removal of the fitness report for the period 20051109 to 20060112 (DC) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner received this adverse report for substantiated Level IV spouse abuse. He now argues that this report is unjust for several reasons. In support of his appeal he submitted a personal statement, copies of court documents and a family advocacy case review.

3. In its proceedings, the Board concluded that the report is administratively correct and procedurally complete as written and filed. The following is offered as relevant:

a. The petitioner argues that although he was charged with Misdemeanor Battery by the state of Florida, the charges were subsequently dismissed. The legal documents provided with this appeal indicate that the petitioner participated in a pre-trial diversion program. Paragraph 4003.6d of reference (b) states, "It is immaterial whether as a result thereof, probation is imposed; a sentence is executed; execution of a sentence deferred, delayed, or suspended; or, by local law, custom, or procedure, charges are dismissed or expunged from civil courts' records after payment of fine, completion of a term in jail or penitentiary, or completion of a period of probation. These actions do not change the character of the initial misconduct."

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

b. The petitioner discusses actions taken by both him and "the victim" in the time period after the incident prompting the charges. The Board assumed this information was included as an attempt to mitigate the petitioner's alleged behavior. The Board found that this information has no bearing on the fitness report.

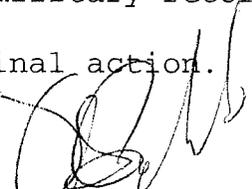
c. The petitioner submitted a rebuttal to the report in which he accepted full responsibility for his actions and deemed them a "one time incident". The rebuttal to the report was the petitioner's best opportunity to make any attempt to deny or mitigate his actions. Had he done so, the reporting officials would have had the ability to adjudicate the report.

d. The Board notes that the letter from the Manager, Counseling Services states that although the petitioner did self-refer to the Counseling Services, soon after, his case was transferred within the Family Services from his last duty station to his new one.

e. In conclusion, the Board found that [REDACTED] has not met his burden of proof that the report was unjust. The petitioner was found to be substantiated Level IV for physical abuse with high risk. The Board found that this was an appropriately submitted adverse report.

5. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report covering the period 20051109 to 20060112 (DC), should remain a part of [REDACTED] official military record.

6. The case is forwarded for final action.

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