



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

BJG
Docket No: 5385-10
8 June 2011

[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. Your most recent previous case, docket number 2203-10, was denied on 8 April 2010. You request promotion to pay grade E-8 (master sergeant or first sergeant), with a date of rank and effective date reflecting selection by the Calendar Year 1999 promotion board. In accordance with the United States District Court for the District of Columbia remand order of 21 April 2010, your case was reconsidered.

An entirely new three-member panel of the Board for Correction of Naval Records, consisting of Mses. McCormick and Nappo and Mr. Boyd (the most recent previous panel consisted of Messrs. Dunn, Shy and Tew; and the panel for the immediately preceding case, docket number 10858-08, consisted of Ms. Countryman and Messrs. Butherus and Swarens), sitting in executive session, reconsidered your application on 18 May 2010. 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, and the Board's files on your prior cases (docket numbers 8653-01, 1685-06, 10858-08 and 2203-10).

By order of 31 March 2011, the United States District Court for the District of Columbia again remanded your case to this Board to address expressly three issues your counsel raised: (1) his allegation that the Enlisted Remedial Selection Board (ERSB) for the Calendar Year 1999 enlisted promotion board was flawed because the only tool it used as a basis for comparison with you was the Performance Index (PI), but your PI was above that of at least some of those Marines who were selected; (2) his allegation that the ERSB was further flawed because it had before it your Official Military Personnel File (OMPF), but not those of any selected Marines; and (3) his contention that the derogatory information in your OMPF was too old and stale to justify your failure of selection for promotion. By order of 27 May 2011, the court yet again remanded your case to this Board to explain the rationale for its findings concerning these issues.

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 attached advisory opinion dated 18 March 2010, which was provided by Headquarters Marine Corps in your most recent previous case.

Concerning issue (1), the Board found the ERSB could properly not select you for promotion on the basis of derogatory information reflected in your OMPF, regardless of how your PI compared with the PI's of your competitors. As indicated in paragraph 2 of the advisory opinion and in paragraph 3601 of Marine Corps Order (MCO) P1400.32D, the applicable directive, together with MCO 5420.16C, in effect when the ERSB met on 5 May 2008, the criterion to be used by the ERSB was "fully qualified." Paragraph 3601 further provided the following:

The ERSB will utilize a sampling of records of Marines in each competitive category who were recommended for promotion, and records of Marines in each competitive category who were not recommended for promotion. The sampling of records provides a relative base from which the ERSB can determine which Marines eligible for remedial consideration are fully qualified for promotion by comparing their records to both those selected by the regularly scheduled selection board and those not selected by the regularly scheduled selecton [sic] board.

As stated in paragraph 1 of the advisory opinion, since yours was the only OMPF available to the ERSB, "the focus of effort by board members to make a decision to promote [i.e., to determine whether you were "fully qualified" for promotion]...would have been based on [your] OMPF and leadership experience..." While the comparison of your PI with those of the other Marines whose records were considered would have been a factor in the ERSB's deliberations, their "focus" would have been on the information reflected in your OMPF. The Board found that the presence in your OMPF of derogatory information, as detailed in paragraph 1 of the advisory opinion, supported a determination by the ERSB that you were not "fully qualified" for promotion, regardless of how your PI compared with those of the other Marines whose records were considered.

Regarding issue (2), the Board found it unobjectionable for the ERSB to consider your OMPF while not considering the OMPF's of your competitors. The Board found nothing in either of the applicable directives, MCO P1400.32D and MCO 5420.16C, that prohibited this methodology or prescribed a different one. Neither specified what the "records" of the Marines to be considered must comprise. The Board did not find the methodology used for your ERSB to be ideal, but found it was permissible in accordance with the applicable directives. The Board did not find it unjust that yours was the only OMPF available to the ERSB, given that your OMPF did include derogatory information.

With respect to issue (3), the Board found it likewise unobjectionable for the ERSB to consider, as a basis for deciding not to select you for promotion, information reflected in your OMPF, regardless of its age. In this regard, as stated in paragraph 1 of the advisory opinion, "All [emphasis added] adverse material must be briefed to the board."

In view of the above, the Board again voted to deny relief. 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

Copy to:

