



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

██████████
Docket No: 4230-20
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF ██████████
██████████

Ref: (a) 10 U.S.C. § 1552
(b) 10 U.S.C. § 14311
(c) DODI 1320.14, DoD Commissioned Officer Promotion Program Procedures
(d) DODI 1320.04, Military Officer Actions Requiring Presidential, Secretary of Defense, or Under Secretary of Defense for Personnel and Readiness Approval or Senate Confirmation, 3 January 2014
(e) SECNAVINST 1401.4A, Consideration of Adverse Information by General and Flag Officer Promotion Selection Boards
(f) SECNAVINST 1420.1B
(g) SECNAVINST 1401.3, Selection Board Membership, 28 December 2005
(h) MCO PI400.31C W/CH 1

Encl: (1) DD Form 149 with attachments
(2) IGMC Memo 5041 IGA, subj: Subject Notification, 13 January 2016
(3) SECDEF Memo, subj: Fiscal Year 2017 United States Marine Corps Reserve Major General Promotion Selection Board, 16 February 2016
(4) IGMC Memo 5041 IGA, subj: Inspector General of the Marines Corps (IGMC) Case ██████████ 28 April 2016
(5) Petitioner's Memo, subj: Comment on Preliminary Report of Investigation, 6 May 2016
(6) IGMC Memo 5041 IGA, subj: Investigation of Allegations Against [Petitioner] (IGMC SOI Case ██████████), 27 May 2016
(7) HQMC Memo 5800 ACMC, subj: Nonpunitive Letter of Caution, 16 July 2016
(8) HQMC Memo 1412 JPLP, subj: Notification of Convening of Promotion Review Board, 11 August 2016
(9) Petitioner's Memo 1402.2, subj: Materials for Performance Review Board Consideration, 6 September 2020
(10) HQMC Memo, subj: Promotion Review Board Findings, 13 September 2016
(11) HQMC Memo, subj: Promotion Review Board Findings (First Endorsement), 13 September 2016
(12) HQMC Memo 1412 JPLP, subj: Promotion Review Board Findings (Second Endorsement), 16 September 2016
(13) Petitioner's Memo 1402.2, subj: Additional Materials for Performance Review Board Consideration, 22 November 2016
(14) SECNAV Action Memo, subj: Fiscal Year 2017 U.S. Marine Corps Reserve Major

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

- General Promotion Selection Board Report and Nomination, 5 January 2016
(15) CJCS Memo, subj: Removal of Permanent Promotion to Major General –
[Petitioner], 28 December 2016
(16) SECDEF Memo, subj: Removal of Officer's Name from a Promotion List, 30
January 2017

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board) requesting that he be promoted to Major General on the Retired List of the United States Marine Corps Reserve (USMCR).
2. The Board reviewed Petitioner's allegations of error or injustice on 29 July 2021 and, pursuant to its regulations, determined that no corrective action was warranted. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval records, and applicable statutes, regulations, and policies.
3. The Board, having reviewed all of the facts of record pertaining to Petitioner's allegations of error or injustice, found as follows:
 - a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulation within the Department of the Navy (DON).
 - b. On 16 September 2015, the Fiscal Year (FY) 2017 USMCR Major General Promotion Selection Board (PSB) was convened. Petitioner was the only officer selected by the PSB for promotion to major general.
 - c. By memorandum dated 13 January 2016, the Inspector General of the Marine Corps (IGMC) notified Petitioner that it was initiating an investigation into allegations that Petitioner abused his position and authority by using inappropriate language (cursing) directed toward, or in the presence of, subordinates; improperly used official government time by having a subordinate officer complete training for him in violation of the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R § 2635.705(b)); introduced an unauthorized electronic device into a Class II Secure Area and connected the unauthorized electronic device to his government computer; improperly signed training certificates for training that he did not complete; and threw his helmet at a subordinate officer. See enclosure (2).
 - d. By memorandum dated 16 February 2016, the Secretary of Defense (SECDEF) approved the report of the FY 2017 USMCR Major General PSB, but delayed recommending that the President nominate Petitioner for appointment to the grade of major general in the USMCR pending resolution of the IGMC investigation of the allegations against Petitioner. See enclosure (3).
 - e. By memorandum dated 28 April 2016, the IGMC notified Petitioner of the preliminary results of its investigation, which substantiated the allegations that Petitioner introduced an

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

unauthorized electronic device into a Class II Secure Area and connected the unauthorized electronic device to his government computer;¹ improperly used official government time by having a subordinate officer complete training for him in violation of 5 C.F.R. § 2635.705(b));² and improperly signed training certificates for training he did not complete.³ The investigation did not substantiate the allegations that Petitioner abused his position and authority by using inappropriate language (cursing) directed toward, or in the presence of, subordinates, or that he threw his helmet at a subordinate officer. See enclosure (4).

f. By memorandum dated 6 May 2016, Petitioner acknowledged receipt of the preliminary Report of Investigation (ROI), and informed the IGMC that he had nothing further to add or comment upon. See enclosure (5).

g. On 25 May 2015, the Department of Defense Inspector General approved the IGMC ROI. See enclosure (6).

h. By memorandum dated 16 July 2016, Petitioner was issued a nonpunitive letter of caution (NLPOC) by the Assistant Commandant of the Marine Corps (CMC) regarding the allegations substantiated in the IGMC ROI. See enclosure (7).

i. By memorandum dated 11 August 2016, Petitioner was notified that the CMC had directed the convening of a Promotion Review Board (PRB), and provided the opportunity to submit matters for consideration. Petitioner contends that this was his first notification that he had been selected by the FY 2017 USMCR Major General PSB and that his nomination had been withheld. See enclosure (8).

j. By memorandum dated 6 September 2016, Petitioner provided matters for consideration by the PRB. He provided context for the circumstances under which he plugged his cell phone into his government computer;⁴ explained that he had never instructed his subordinate officer to complete the training required of him as a result of being removed from the NIPR network because of the cell phone incident; and that he relied upon this subordinate to ensure that he satisfied the requirements necessary to get back on to the NIPR system. He asserted that he did not study the documents (training certificates) presented to him for signature, but rather signed what was placed in front of him so that he could satisfy the requirements necessary to reestablish

¹ This allegation had been previously investigated and substantiated by the command in accordance with Army Regulation 15-6. Petitioner charged his personal cell phone by connecting it via a USB cable to his government computer, which was located in a Class II Secure Area.

² As a remedial action for his violation of security protocols with this cell phone, Petitioner was required to complete certain security training modules. This substantiated allegation found that he allowed a subordinate officer to complete these training modules for him.

³ This substantiated allegation found that Petitioner signed the training certificates reflecting that he had completed the training which had been conducted by his subordinate officer.

⁴ Petitioner explained that he had just returned to [REDACTED] from leave, when he learned that his mother, for whom he had made arrangements to move into assisted living care prior to his departure, was refusing to move. He asserts that his phone was dead and that he reactively plugged it into his computer so that he could retrieve the phone number for the movers that he had coordinated.

his NIPR connection. Petitioner accepted responsibility for his actions, and acknowledged that he should have asked the right questions. See enclosure (9).

k. On 13 September 2016, the PRB unanimously determined that Petitioner was “not fully qualified for promotion to the grade of major general to meet the needs of the Marine Corps.” The PRB found that Petitioner “violated existing rules and regulations and he further failed to comply with the prescribed remediation plan (for his violation of computer security protocols).” The PRB acknowledged that Petitioner’s “overall outstanding performance reflects dedication to duty, Corps, and country,” but found that “his lapse in judgment and compliance illuminated to the board deficiencies not indicative of a major general.” See enclosure (10).

l. By memorandum dated 13 September 2016, the Deputy Commandant for Manpower and Reserve Affairs endorsed the PRB’s recommendation that Petitioner was not fully qualified for promotion to the grade of major general. See enclosure (11).

m. By memorandum dated 16 September 2016, the Staff Judge Advocate to the CMC found the PRB findings to be legally sufficient and in compliance with reference (c). See enclosure (12).

n. By memorandum dated 22 November 2016, Petitioner prepared a memorandum for the Office of the Secretary of Defense (OSD), explaining that he did not provide any additional information or context to the unsubstantiated allegations in the IGMC ROI because the IGMC did not find those allegations to be credible.⁵ See enclosure (13).

o. By memorandum dated 5 December 2016, the Secretary of the Navy (SECNAV) recommended that the SECDEF sign and forward to the President a memorandum recommending that Petitioner’s name be removed from the FY 2017 USMCR Major General promotion selection list. See enclosure (14).

p. By memorandum dated 23 December 2016, the Chairman of the Joint Chiefs of Staff concurred with the SECNAV’s recommendation that Petitioner be removed from the FY 2017 USMCR Major General promotion selection list. See enclosure (15)

q. By memorandum dated 30 January 2016, the SECDEF recommended that the President remove Petitioner’s name from the FY 2017 USMCR Major General promotion selection list. See enclosure (16).

r. On 1 June 2017, the President removed Petitioner’s name from the promotion list. See enclosure (16).

s. Petitioner raises the following contentions of error or injustice regarding his removal from the FY 2017 USMCR Major General promotion selection list:

⁵ Petitioner explained that his legal counsel had explained to him that the results of his PRB were reviewed by the SECNAV and would now be reviewed by OSD. He also stated that he was advised that OSD would be reviewing the unsubstantiated complaints of the IGMC investigation.

(1) It was unjust to withhold Petitioner's promotion to major general because his due process rights were violated when his name was withheld from the promotion list and he was not provided timely notice. Petitioner contends that he was not notified of his selection for promotion to major general until the PRB notification in August 2016. He cites to paragraph (c) of reference (b), which provides that "[t]he appointment of an officer to a higher grade may not be delayed [for an investigation] unless the officer is given written notice of the grounds for the delay," and that the officer "shall be given the opportunity to make a written statement to the Secretary of the military department concerned in response to the action taken." He also cited to paragraph 15i(2) of reference (f), which provides that "upon official dissemination of the names of the selected officers by ALNAV message, CNO or CMC, as appropriate, shall notify the officer whose name was withheld from the scroll, in writing of their status." Finally, he cited to paragraph 5003(1) for reference (h), which states that "if the Secretary of the Navy withholds an officer's name from nomination, the officer shall be notified in writing of such action and be afforded the opportunity to submit a signed statement to that effect." Petitioner contends that he was deprived of timely notice as the ALNAV was never produced and the Marine Corps failed to inform him that he had been selected for promotion. He asserts that he would have prepared a different and more thorough defense against the allegations in the IGMC investigation if he had known of his selected status, which would likely have changed the outcome of the subsequent PRB.

(2) The PRB that recommended Petitioner's removal from the promotion selection list was improperly constituted. He cites to paragraph 6f of reference (g), which provides that no officer may be a member of two successive promotion selection boards convened to consider officers of the same competitive category and grade. Petitioner noted that two of the three members of the PRB that recommended his removal from the FY 2017 USMCR Major General promotion selection list were members of the FY 2016 USMCR Major General PSB, which did not select him for promotion. He contends that the inclusion of two members on the PRB who had been members of the previously convened PSB was contrary to the intent of the statutory promotion system. Petitioner also contends that the members of the PRB had a conflict of interest since the limited number of general officers in the USMCR provided a personal career-enhancing incentive for them to create a gap in filling the limited number of billets.

(3) The PRB relied upon a flawed and incomplete IGMC investigation. Petitioner asserts that the IGMC investigation relied upon an Army investigation which substantiated the allegation regarding Petitioner's cell phone being plugged into his government computer, the summary of which erroneously contended that Petitioner was interviewed during the investigation. He also asserts that there are clear and critical inconsistencies in witness interviews relied upon by the IGMC in making its findings. Petitioner also objected to the fact that an unredacted version of the IGMC ROI was sent to OSD, which he found troublesome since the SECNAV was the approval authority for the PRB findings and the PRB was only supposed to have access to the redacted version.

(4) It was unjust to withhold Petitioner's promotion due to his exemplary record of service and the relatively minor rule violation underlying the IGMC investigation. He provided a summary of his career, rising from an enlisted Marine to a brigadier general who was selected

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

for promotion to major general. He also notes that family stress contributed to the circumstances of his unfortunate decision to plug his personal cell phone into his government computer. Finally, Petitioner notes that his superiors continue to support his promotion to major general despite the findings of the IGMC investigation, as evidenced by the letters submitted to the PRB.

See enclosure (1).

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board found insufficient evidence any error or injustice warranting relief.

As a preliminary matter, the Board notes that the specific relief requested by the Petitioner is beyond the Board's authority to grant. As Petitioner was never confirmed by the Senate for appointment to major general in the USMCR, the Board is powerless to direct that he be promoted to such a grade. The Board could recommend that Petitioner's name be forwarded for nomination to the Senate for such an appointment, but, as discussed below, found insufficient evidence of any error or injustice to warrant such relief.

The Board found Petitioner's contention that his due process rights were violated when his name was withheld from the promotion list and he was not provided timely notice to be without merit. Petitioner's name was never withheld from the FY 2017 USMCR Major General promotion selection list. The SECDEF approved the FY 2017 USMCR Major General PSB report on 16 February 2016, thereby converting the report to a promotion selection list. The SECDEF merely delayed forwarding his recommendation for Petitioner's nomination to the President pending resolution of the IGMC investigation. It was entirely appropriate for the SECDEF to delay recommending that Petitioner be nominated for promotion, as he is required to certify exemplary conduct of any officer forwarded for nomination, and he could not legitimately do so absent the results of the pending investigation. As Petitioner's name was the only name on the FY 2017 USMCR Major General promotion selection list, the production of the nomination scroll was also delayed. Accordingly, Petitioner's nomination was never withheld; his name remained on the promotion selection list until such time as it was properly removed by the President, rendering moot his arguments in his first contention of error or injustice.⁶

Further, in accordance with Enclosure 3, paragraph 2d, of reference (d), public announcements of flag officer nominations are not made until the nomination is approved by the President and confirmation is of the nomination's delivery to the Senate is received. Petitioner's nomination was never forwarded to the President for approval, much less delivered to the Senate for confirmation. Accordingly, the DON was not authorized to publically announce Petitioner's selection.

⁶ SECNAVINST 1420.3 defines "Withhold" as "[t]he act of removing an officer's name from an appointment or nomination scroll when adverse or reportable information concerning the officer must be reviewed by the SECNAV to determine if the officer remained qualified for promotion, in accordance with [10 U.S.C. § 1431 I]. The officer's name remains on the board report and promotion list until the officer is either promoted or removed from the promotion list by proper authority or by operation of law."

The Board found that the proper procedures were followed to remove Petitioner from the promotion selection list. Paragraph 8a of reference (e) requires that “[a]dverse information that was not reviewed by a PSB, including adverse information that arose subsequent to convening a board or adverse information from investigations or inquiries that were not completed in time to provide the affected officer adequate notice and opportunity to comment prior to the convening of the PSB, must be presented to a PRB. The officer must be notified of the convening of a PRB and must be provided an opportunity to review the adverse material and submit comments on the adverse information.” Almost immediately after the substantiated allegations against Petitioner were disposed of with a NPLOC, the CMC directed that a PRB be convened to consider the adverse information in accordance with reference (e). Petitioner was properly notified of the convening of the PRB, and provide an opportunity to review the adverse material and submit comments. Reference (e) provides that an officer must be provided 30 calendar days from receipt of the notice of a PRB in which to provide comments, and Petitioner was provided 30 days to submit such matters. The record reflects that he availed himself of this opportunity. The record also reflects that the PRB considered, and commented favorably upon, Petitioner’s overall record of service, before recommending that he be removed from the FY 2017 USMCR Major General promotion selection list. After the PRB rendered its recommendation, it was forwarded through proper channels before ultimately being acted upon by the President in accordance with 10 U.S.C. § 14310.

The Board did not find credible Petitioner’s contention that he would have responded differently to the IGMC ROI findings if he knew at the time that he had been selected for promotion to major general. In this regard, the Board notes that Petitioner did not dispute or contest the allegations that were substantiated by the IGMC. In fact, he provided detailed context regarding these incidents to explain his conduct. Additionally, the Board questioned the logic behind Petitioner’s contention that he would have responded differently to the IGMC findings if he knew that he had been selected for promotion. As Petitioner argues in his application, his service record proves that he is worthy of his selection for promotion to major general. The Board found the contention that an officer of Petitioner’s caliber, knowing that he may be competitive for promotion to major general (either at the time or upon successful completion of the prestigious command that he held), would require knowledge of his promotion selection as motivation to fully defend himself from substantiated IGMC allegations which he would have known to be detrimental to his promotion opportunity.

The Board found Petitioner’s contention that the PRB was improperly constituted to be without merit. PSBs are statutory boards, while PRBs are regulatory boards. Further, PSBs and PRBs have entirely different purposes and procedures, as the former selects the best qualified officers for promotion from among the entire eligible population, while the latter considers newly discovered adverse information and provides recommendations regarding whether individual officers selected for promotion remain best qualified in light of such adverse information. Accordingly, the Board disagreed with Petitioner’s contention that the statutory prohibition against members serving on consecutive PSBs for the same competitive category logically extends to membership on a PRB. Per reference (e), the only limitation on PRB membership is that the members must be senior in grade to the officer under consideration. The Board was also not persuaded by Petitioner’s contention that the membership of the PRB presented a perception

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
[REDACTED]

of a conflict of interest. The Petitioner provided no evidence to support this contention, and to accept this premise would be to deny these officers of the trust and confidence inherent in their appointed grade, which the Board was not inclined to do.

The Board was not persuaded by Petitioner's contention that the IGMC investigation findings were flawed and incomplete. In this regard, the Board noted that the IGMC provided the preliminary ROI to the Petitioner for comment before it was approved, and that Petitioner elected in enclosure (5) not to comment further. Additionally, the Board is not an investigative body. In the absence of evidence to the contrary, the Board applies the presumption of regularity to establish that government officials properly performed their duties. The Board was not provided any evidence or reason to question the completeness and or accuracy of the IGMC ROI. The ROI appeared to the Board to be thorough, and its findings were supported by the evidence cited in the ROI. The Board also noted that the inconsistencies described by Petitioner were acknowledged and described in detail in the ROI. The Board was not concerned with the minor inaccuracy cited by Petitioner regarding the Army investigation, as Petitioner has admitted to the conduct and provided the context for the incident. The Board also had no concerns regarding Petitioner's contention that OSD had access to an unredacted version of the IGMC, as neither the SECNAV nor the SECDEF are limited to the matters considered by the PRB in making their determinations.

Finally, the Board considered Petitioner's contention that the denial of his promotion was unjust given the entirety of Petitioner's exemplary service record compared to the relatively minor nature of the allegations substantiated by the IGMC investigation. In this regard, the Board agrees that Petitioner's service record is extremely meritorious and impressive; he would not have been selected for promotion to major general if it was not. However, the Board disagreed with Petitioner's characterization of the substantiated allegations as "minor rule violations." While the Board might agree with such a characterization with regard to the cell phone incident, especially given the context of the family stress he was dealing with at the time, it did not agree with this characterization as it pertained to Petitioner's signing of the training certificates. Petitioner's signing of these certificates, documenting training that he knew that he did not conduct, raises legitimate questions regarding his judgment, if not his integrity. Considered in the light most favorable to Petitioner, this act demonstrates, at the very least, a disregard for the designated remedial action for his cell phone oversight, and an inexcusable lack attention to detail. Regardless of the quality of Petitioner's service record, such lapses in judgment do call into question Petitioner's qualifications to serve as a major general. Accordingly, the Board found no injustice in the denial of Petitioner's promotion to major general based upon these substantiated allegations.

RECOMMENDATION:

In view of the above, the Board recommends that no corrective action be taken on Petitioner's naval record.

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.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
[REDACTED]

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

9/1/2021

[REDACTED]

Executive Director

SECRETARY OF THE NAVY DECISION:

FEB 10 2022

Board Recommendation Approved (Deny Relief)

Petitioner's Request Approved (Prepare Necessary Documentation to Recommend to the Secretary of Defense that Petitioner be Nominated for Appointment on the Retired List as a Major General in the U.S. Marine Corps Reserve)

[REDACTED]