



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

██████████
Docket No. 5153-21
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF ██████████, USMC,
XXX-XX-██████████

Ref: (a) 10 U.S.C. § 1552
(b) MCO P1070.12K w/CH1, Marine Corps Individual Records Administration Manual (IRAM), 14 July 2000
(c) MCO 5354.1E w/CH1, Marine Corps Prohibited Activities and Conduct (PAC) Prevention and Response Policy, 29 March 2018
(d) SECNAVINST 1920.6D, Administrative Separation of Officers, 24 July 2019
(e) SECNAVINST 1420.3, Department of the Navy Commissioned Officer Promotion Program, 28 March 2019
(f) MCO 5800.16, Legal Support and Administration Manual (LSAM), Volume 15 (Officer Misconduct and Substandard Performance of Duty), 8 August 2018

Encl: (1) DD Form 149 w/enclosures
(2) NAVMC 10835B, USMC Fitness Report (FITREP ID #2811130) (20180601-20190110)
(3) ██████████ – Crisis Response – ██████████
██████████ CO Memo 5830 CO, subj: Command Investigation into the Circumstances Surrounding Allegations of Bullying, Harassment, Maltreatment, Hostile Working Environment and Fraternization Committed by [Petitioner], 10 January 2019
(4) ██████████ Memo 5354 CG, subj: Prohibited Activities [sic] and Conduct Substantiation Appeal in the case of [Petitioner], 26 February 2019
(5) NAVMC 118(11), 26 February 2019
(6) ██████████ Request Details
(7) Petitioner's Counsel Legal Memorandum, undated
(8) HQMC Memo 1420 JPLP, subj: Notification of Promotion Delay and Possible Removal from the Fiscal Year 2019 USMC Major Promotion List, 4 April 2019
(9) ██████████ Letter, subj: Your Freedom of Information Act Case ██████████
██████████ 22 April 2019
(10) ██████████ Memo 1920 SJA, subj: Report of Misconduct in the case of [Petitioner], 18 July 2019
(11) Petitioner's Memo 1920 SJA, subj: Acknowledgement of Receipt of Report of Misconduct and Inclusion of Adverse Material in Official Military Personnel File, undated
(12) Petitioner's Memo, subj: Report of Misconduct Rebuttal, 30 August 2019

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- (13) [REDACTED] Memo 1920 SJA, subj: Board of Inquiry in the case of [Petitioner], 30 September 2019
- (14) [REDACTED] Memo 1920 SJA, subj: Notification of Board of Inquiry, 22 October 2019
- (15) Petitioner's Memo, subj: Acknowledgment of Notice, 2 December 2019
- (16) [REDACTED] Memo 1920 SJA, subj: Report of the Board of Inquiry in the case of [Petitioner], 19 May 2020
- (17) Findings of the Board of Inquiry ICO [Petitioner]
- (18) [REDACTED] Memo 1920 SJA (First Endorsement of Enclosure (16)), subj: Report of the Board of Inquiry in the case of [Petitioner], 21 May 2020
- (19) [REDACTED] Memo 1920 SJA (Second Endorsement of Enclosure (16)), subj: Report of the Board of Inquiry in the case of [Petitioner], 15 July 2020
- (20) [REDACTED] Memo 1920 JPL, subj: Termination of Administrative Proceedings and Notification of Promotion Delay in case of [Petitioner], 9 December 2020
- (21) [REDACTED] Memo 1920 SJA (Second Endorsement of Petitioner's Letter), subj: Matters in Response to Termination of Administrative Proceedings and Notification of Promotion Delay in case of [Petitioner], 19 March 2021
- (22) [REDACTED] Memo, subj: Promotion Recommendation in the Case of [Petitioner], 21 April 2021
- (23) NAVMC 11296, Marine Corps Request Mast, 24 May 2021
- (24) [REDACTED] Memo 1700.23 CIG, subj: Request Mast ICO [Petitioner], 27 May 2021
- (25) [REDACTED] Memo 1400 MMPR-1, subj: Promotion Recommendation in the case of [Petitioner], 4 June 2021
- (26) HQMC 1070 JPL, subj: Application for Correction in the case of [Petitioner], Undated
- (27) Petitioner's Counsel Letter, subj: Responses and Submissions to the Advisory Opinion, Docket No. NR20210005153, [Petitioner], 23 November 2021
- (28) Petitioner's Counsel Letter, subj: Docket No. NR20210005153, [Petitioner], Supplemental Submission

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, hereinafter referred to as the Board, requesting that his naval record be corrected by removing a fitness report (FITREP) for the reporting period 1 June 2018 to 10 January 2019; removing a 26 February 2019 Administrative Remarks ("Page 11") counseling entry; restoring his name to the Fiscal Year 2020 (FY20) USMC Major Promotion List; and processing his name for promotion to Major.

2. The Board reviewed Petitioner's allegations of error or injustice on 17 February 2022 and, pursuant to its regulations, determined that no corrective action should be taken on the Petitioner's naval record. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval records, and applicable statutes, regulations, and policies.

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3. The Board, having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, finds as follows:

a. Except for that part of his request pertaining to the removal of the FITREP for the reporting period 1 June 2018 to 10 January 2019, Petitioner has exhausted all administrative remedies available under existing law and regulation within the Department of the Navy. Petitioner must first request removal of the subject FITREP through the Headquarters, Marine Corps (HQMC) Performance Evaluation Review Board (PERB) before this Board will consider such a request.

b. On 6 November 2018, Petitioner's battalion commander verbally counseled him for publically berating a senior noncommissioned officer and an officer. That verbal counseling was followed up in writing on 13 November 2018. See enclosure (2).

c. On 28 December 2018, numerous individuals under Petitioner's command approached the [REDACTED] equal opportunity representative to report allegations of violations of reference (c) by Petitioner.¹ A preliminary inquiry subsequently corroborated these claims. See enclosure (2).

d. On 10 January 2019, Petitioner's battalion commander relieved Petitioner for cause after determining that he had not responded to counseling and continued mistreating subordinates. See enclosure (2).

e. By memorandum dated 10 January 2019, a command investigation (CI) was appointed to inquire into allegations of bullying, harassment, maltreatment, hostile working environment, and fraternization against Petitioner. See enclosure (3).

f. On or about 12 February 2019, the CI investigating officer (IO) substantiated allegations that Petitioner bullied and harassed a platoon commander in the rank of first lieutenant; harassed a platoon commander in the rank of second lieutenant; harassed a platoon sergeant in the rank of gunnery sergeant; and bullied and harassed a heavy equipment operator in the rank of sergeant. The CI also identified that Petitioner's incidents of harassment and bullying were not limited to the aforementioned individuals, but also occurred on numerous occasions against groups of Marines and other unspecified individuals. The CI also found that Petitioner fraternized with a corporal in his unit by maintaining an unduly family relationship that violated the customs of the service regarding the relationship between officer and enlisted Marines. See enclosures (4) and (5).

g. Petitioner subsequently appealed the findings of the CI, but his appeal was denied by the Commanding General, [REDACTED] by memorandum dated 26 February 2019. See enclosure (4).

[REDACTED] was Petitioner's higher-level command.

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h. On 18 February 2019, Petitioner's battalion commander, in his capacity as Petitioner's Reporting Senior (RS), issued Petitioner an adverse FITREP for the reporting period 1 June 2018 to 10 January 2019. Petitioner signed this FITREP on 25 February 2019 and attached a statement.² See enclosure (2).

i. On 26 February 2019, the [REDACTED] commander, in his capacity as the Reviewing Officer (RO), concurred with the battalion commander's rating on Petitioner's FITREP after considering Petitioner's statement (see footnote 2), describing Petitioner's performance as "Unsatisfactory" and at the bottom of his comparative assessment. Petitioner acknowledged this report on 6 March 2019, and again attached a statement to the FITREP.³ See enclosure (2).

j. On 26 February 2019, Petitioner was counseled regarding the findings of the CI. This "Page 11" counseling statement stated that the CI determined that Petitioner created a hostile and offensive work environment as a company commander by harassing and bullying both enlisted and officer Marines under his charge over the course of several months. It also described this behavior as being not limited to one or two isolated incidents, but rather a pattern that he adopted and accepted as his leadership style, and stated that Petitioner had been counseled and provided the opportunity to correct his behavior, but failed to do so. Finally, the counseling statement stated that the CI substantiated an allegation that Petitioner fraternized with a corporal in his unit by maintaining an unduly familiar relationship that violated the customs of the service regarding relationships between officers and enlisted Marines. Petitioner indicated his intent to make a statement in response to the counseling statement. See enclosure (5).

k. On 15 March 2019, Petitioner submitted a request under the Freedom of Information Act (FOIA) for a copy of the CI. This request was denied with the explanation that the CI was not complete. See enclosure (6).

l. On 2 April 2019, the third officer sighter signed Petitioner's adverse FITREP. See enclosure (2).

m. By undated memorandum, Petitioner's counsel responded to the "Page 11" counseling statement discussed in paragraph 3j above. In this response, Petitioner's counsel stated that this was the first time he had seen administrative measures taken against a service member while the investigation was still purportedly underway. He described this as "an end-run around [Petitioner's] Article 31, UCMJ, rights." He also noted that, although the counseling statement

² In response to the RS ratings and comments, Petitioner stated that he respectfully disagreed with the adverse findings, that he did not mistreat his subordinates or erode good order and discipline, and that he did not create a hostile work environment in his company or treat his subordinates with less than dignity and respect. He also commented that he was unable to defend himself in more detail without a copy of the CI, and requested that such a copy be provided.

³ In response to the RO ratings and comments, Petitioner again stated that he respectfully disagreed with the adverse findings of the FITREP, and that he did not mistreat his subordinates, erode good order and discipline, create a hostile work environment or treat his subordinates with less than dignity and respect. He further asserted that since the CI had not been completed, it cannot be referred to in an adverse FITREP, so the FITREP was deficient as a matter of regulation. Finally, he again comment that he is unable to defend himself in more detail with a copy of the investigation, and requested that he and his counsel be provided such a copy.

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indicated that the investigation was complete, the denial of his FOIA request suggested otherwise, and that it is impossible to provide an informed rebuttal absent a copy of the investigation. See enclosure (7).

n. By memorandum dated 3 April 2019, Petitioner was notified that his promotion to the grade of major, which had been scheduled for 1 April 2019, was delayed pursuant to reference (e) pending completion of any administrative or disciplinary proceedings regarding the allegations that Petitioner bullied, verbally berated, and mistreated subordinate Marines on multiple occasions and fraternized with a corporal, and for a determination of whether Petitioner was mentally, physically, morally, and professional qualified for promotion. See enclosure (8).

o. A second FOIA request for the CI was received on 22 April 2019, which was denied with the explanation that there is an ongoing investigation of the subject matter. See enclosure (9).

p. On 27 June 2019, Petitioner received a separation physical and was found medically qualified for separation. Petitioner screened positive for post-traumatic stress disorder (PTSD), but it was reported that there is no indication that his condition had an impact on his behavior. See enclosure (10).

q. By memorandum dated 18 July 2019, Petitioner's command prepared a Report of Misconduct (ROM) regarding Petitioner's misconduct in accordance with reference (f). Specifically, this ROM reported that Petitioner harassed and bullied the Marines described in the CI; that he fraternized with a corporal; that he was willfully derelict in the performance of his duties by taking no action to ensure the wellbeing of an injured Marine;⁴ and engaged in conduct unbecoming an officer and a gentleman when he established a company order requiring full personal protective equipment (PPE) to be worn while standing or visiting posts while he failed to wear his PPE on those occasions. This ROM recommended that Petitioner be required to show cause for retention in the Marine Corps at a Board of Inquiry (BOI) pursuant to reference (d), describing Petitioner's conduct as an inexcusably gross departure from what is expected of a Marine Corps officer. See enclosure (10).

r. On 16 August 2019, Petitioner acknowledged receipt of the ROM discussed in paragraph 3q above, and indicated his desire to make a statement. See enclosure (11).

s. By memorandum dated 30 August 2019, Petitioner submitted a rebuttal to the ROM discussed in paragraph 3q above. In this rebuttal, he again denied bullying or harassing the named subordinate Marines. He also denied fraternizing with the corporal and that he refused medical treatment to a Marine. Finally, he stated that he had been denied due process "until now." With regard to the allegations of harassment and bullying, Petitioner provided several examples of the named subordinates disobeying orders or failing to enforce proper standards. With regard to the allegation of fraternization, Petitioner asserted that his personal interactions with the corporal in question involved compliance with the "buddy system" during a period of heightened security and his demonstration of hands-on leadership to improve the Marine's

⁴ Petitioner allegedly stated, "I don't care, that Marine is fat," or words to that effect, upon receipt of a report that one of his Marines had been injured and was experiencing concussion like symptoms.

physical fitness. In this regard, Petitioner denied providing the enlisted Marine with any special treatment. Finally, with regard to the allegation that Petitioner denied medical treatment to a subordinate Marine, Petitioner asserted that the only evidence of this allegation within the CI was a "clearly biased statement" from a Marine who was receiving nonjudicial punishment for disobeying an order. In support of this contention, Petitioner provided a statement from a medic confirming that the Petitioner had not been notified of the injury for two days after it occurred. In addition to rebutting each of the individual allegations cited in the ROM, Petitioner further asserted that the battalion command climate was toxic and dysfunctional, which he explained resulted in the need for him to involve himself with every aspect of his unit's mission. See enclosure (12).

t. By memorandum dated 30 September 2019, the show cause authority directed that a BOI be convened under the provisions of references (d) and (f) to make a recommendation as to whether Petitioner should be retained in the Marine Corps and, if appropriate, to make a recommendation regarding his characterization of service. The specific reasons for separation to be considered by the BOI were substandard performance of duty, in that Petitioner failed to demonstrate acceptable qualities of leadership required of an officer in his grade, and misconduct, moral, or professional dereliction, as evidenced by the commission of a military or civilian offense that could be punished by confinement of six months or more and any other misconduct which would require specific intent for conviction.⁵ In making this decision, the show cause authority stated that he had reviewed the allegations in the CI and determined that there was sufficient information to warrant the BOI referral. See enclosure (13).

u. By memorandum dated 22 October 2019, Petitioner was notified that a BOI would be convened to make a recommendation regarding his retention in the Marine Corps. The specific reasons for separation to be considered by the BOI cited in this memorandum were substandard performance of duty, as evidenced by Petitioner's alleged failure to demonstrate acceptable qualities of leadership required of an officer of his grade, and misconduct, moral, or professional dereliction, as evidenced by the misconduct listed in footnote 5. See enclosure (14).

v. On 22 December 2019, Petitioner acknowledged receipt of the memorandum referred to in paragraph 3u above. See enclosure (15).

w. After conducting a hearing during which Petitioner had the opportunity to defend himself and present evidence in his defense, the BOI substantiated the allegations of substandard performance of duty due to Petitioner's failure to demonstrate acceptable qualities of leadership required of an officer in his grade, and misconduct, moral, or professional dereliction, as evidenced by the commission of military or civilian offenses that could be punished by confinement of six months or more if prosecuted under the UCMJ and any other misconduct which would require specific intent for conviction.⁶ Despite substantiating these bases for

⁵ The specific offenses cited were violations of Article 92, Uniform Code of Military Justice (UCMJ), for violation of orders, namely reference (c); Article 93, UCMJ, for maltreatment of subordinates; Article 115, UCMJ, for communicating a threat; Article 133, UCMJ, for conduct unbecoming an officer and a gentleman; and Article 134, UCMJ, for fraternization.

⁶ The BOI specifically substantiated allegations that Petitioner disobeyed an order in violation of Article 92, UCMJ, and engaged in conduct unbecoming an officer and a gentleman in violation of Article 133, UCMJ. It did not

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separation, the BOI recommended that Petitioner be retained in the Marine Corps. During the BOI hearing, Petitioner reportedly acknowledged that he made mistakes and that his company had an issue with his leadership style, but that it was not his intent to humiliate or demean anyone. Rather, it was his intent only to meet mission requirements. See enclosures (16) and (17).

x. By memorandum dated 21 May 2020, the Commanding General, [REDACTED], forwarded the BOI report and recommended that Petitioner's case be closed. This endorsement reported that Petitioner did not submit any additional matters for consideration. See enclosure (18).

y. By memorandum dated 15 July 2020, the Commanding General, [REDACTED], concurred with the recommendation that Petitioner's case be closed. He further recommended that all adverse material be included in Petitioner's permanent record. See enclosure (19).

z. By memorandum dated 9 December 2020, the show cause authority approved the BOI recommendation that Petitioner be retained in the Marine Corps, and directed that the adverse materials concerning the BOI matters would be included in his permanent record. In the memorandum notifying Petitioner of this action, Petitioner was informed that he could submit matters for the Secretary of the Navy (SECNAV) to consider when assessing whether he should be promoted pursuant to his selection by the FY20 USMC Major Promotion Selection Board (PSB). See enclosure (20).

aa. Petitioner subsequently submitted matters for consideration by the SECNAV to determine whether he should be promoted pursuant to this selection by the FY20 USMC Major PSB by letter dated 24 February 2021. Although the record is incomplete in this regard, these matters included several letters of recommendation from high ranking officers and civilians. Included among these recommendations were letters of support from Petitioner's former command and his then-current operational command. By memorandum dated 19 March 2021, the Commander, [REDACTED], recommended that Petitioner be removed from the FY20 USMC Major Promotion List. In making this finding, he stated that he had reviewed and considered all relevant matters in the case, to include the BOI report, the ROM, and matters submitted from Petitioner, and while he noted that the matters suggested that Petitioner's performance had improved they did not overcome the BOI's substantiation of misconduct and substandard performance. See enclosure (21).

bb. By memorandum dated 21 April 2021, the [REDACTED] recommended to the SECNAV that Petitioner's name be removed from the FY20 USMC Major Promotion List. See enclosure (22).

cc. On 24 May 2021, Petitioner requested mast with the Commander, [REDACTED]. Specifically, Petitioner alleged that the CI which

substantiate the allegations that Petitioner engaged in maltreatment in violation of Article 93, UCMJ; communicated a threat in violation of Article 115, UCMJ; or fraternized in violation of Article 134, UCMJ.

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served as the basis for the allegations against him were one sided and did not support the allegations. In fact, he claimed that the allegations in the investigation were substantiated only because he invoked his right to remain silent. He further claimed that the BOI found that all of the allegations were “unsupported and/or outright lies,” but that he was found to have violated an order only because he admitted to using coarse language. Petitioner further complained about his treatment by the command, alleging that his superior did not have an open mind regarding his promotion. See enclosure (23).

dd. By signature dated 27 May 2021, the SECNAV removed Petitioner’s name from the FY20 USMC Major Promotion List. See enclosure (22).

ee. By memorandum dated 27 May 2021, Petitioner’s request for mast was denied because it pertained to an administrative proceeding which had already been decided. See enclosure (24).

ff. By memorandum dated 4 June 2021, Petitioner was notified of the SECNAV decision to remove his name from the FY20 USMC Major promotion list and informed him that this action constituted his first failure of selection (FOS) for promotion to major. See enclosure (25).

gg. Petitioner contends that relief is warranted because he was denied due process by being denied a copy of the CI prior to the issuance of his “Page 11” counseling statement and FITREP. Specifically, Petitioner contends that MILPERSMAN 1070-10 and the case of *Brezler v. Mills*, 220 F. Supp. 3d 303 (2016), required the unit to provide Petitioner a copy of the complete CI prior to issuing the counseling statement. By failing to do so, Petitioner contends that he was forced to provide responses to the counseling statement and adverse FITREP without the benefit of actually reviewing the investigation. Petitioner further contends that the CI upon which Petitioner’s adverse actions was based was fundamentally flawed and not supported by credible facts. Specifically, he cited to his rebuttal to the ROM at enclosure (12) to support his contention that his actions did not constitute misconduct but instead focused on protecting his Marines and mission accomplishment. Petitioner asserts that it is fundamentally unjust and unfair to punish him for false allegations made by individuals who “weaponized” the USMC complaint system to protect their own careers. Finally, Petitioner asserted error in his promotion endorsement process. Specifically, Petitioner asserted that reference (e) required a recommendation from his chain of command regarding whether Petitioner’s name should be removed from the promotion list, but in Petitioner’s case it was the Marine Forces Command which made such a recommendation. Petitioner asserted that this was inappropriate because Forces Command does not observe his performance or complete his performance evaluation. He also noted that the Forces Command recommendation did not credit his favorable promotion recommendations from his previous chain of command. See enclosure (1).

hh. By memorandum dated 28 October 2021, the Military Personnel Law Branch of Headquarters, U.S. Marine Corps (JPL), provided an advisory opinion (AO) for the Board’s consideration, recommending that Petitioner’s application be denied. In making this recommendation, the AO noted that commanders have wide discretion regarding the subject matter of a formal counseling, so long as the commander has the necessary understanding of the facts and circumstances surrounding the subject matter of the counseling in accordance with reference (b). It also suggested that Petitioner’s reliance on the case of *Brezler v. Mills* was

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misplaced, because Petitioner was provided with the entire CI with enclosures and the opportunity to comment on it prior to his BOI and to any adverse material being placed in his permanent record. Specifically, the AO noted that Petitioner acknowledged receipt of the entire ROM on 16 August 2019 and provided a detailed rebuttal to the ROM on 30 August 2019 in which he stated that he was provided the investigation on 8 August 2019. As such, Petitioner was in receipt of the entire CI, with enclosures, six months prior to his BOI and long before his removal from the promotion list. The AO also noted that administrative counselings do not create the discovery obligations discussed in *Brezler v. Mills*, and that MILPERSMAN 1070-10 does not apply to Marines. The AO stated that Petitioner's counseling statement was issued in accordance with reference (b), and that Petitioner availed himself of his appellate rights in this regard without success. With regard to Petitioner's contention that the CI was fundamentally flawed and not supported by the evidence, the AO suggested that Petitioner has not provided substantial evidence demonstrating that the counseling statement was materially in error or unjust. Finally, with regard to Petitioner's contention that his promotion endorsement process was not in compliance with reference (e) because his operational chain of command was excluded from the process and because the endorsing chain of command "did not credit him with the favorable promotion recommendations from... his previous command," the AO noted that all of the promotion recommendations submitted by Petitioner with his matters, to include those from his operational chain of command and his previous command, were reviewed by each endorsing commander and considered by SECNAV. It further noted that Petitioner submitted his matters for consideration to the very command that he now claims improper. Accordingly, the AO opined that Petitioner's promotion removal action was in compliance with references (e) and (f). See enclosure (26).

ii. By letter dated 23 November 2021, Petitioner, through counsel, provided a rebuttal to the JPL AO discussed in paragraph 3hh above. This rebuttal addressed each of the AO's points as follows:⁷

(1) Petitioner's counsel insisted that the failure to provide the CI to Petitioner in order to respond to the "Page 11" counseling statement was arbitrary and capricious, and that the counseling statement was issued based on "an ongoing and incomplete investigation." He further asserted that the BOI unsubstantiated the allegations cited on the counseling statement, so they were not supported by any credible evidence.

(2) Petitioner's counsel repeated his assertion that his promotion was denied based upon an incomplete and inaccurate investigation. Specifically, he reiterated his previous assertion that his current and previous chains of command recommendations were not considered. He further asserted that the AO failed to address Petitioner's arguments in this regard and was therefore unreliable.

See enclosure (27).

⁷ In addition to the points addressed below, Petitioner raised arguments regarding the impropriety of his adverse FITREP. As Petitioner has not exhausted his administrative remedies in this regard, the Board did not consider these arguments.

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jj. By letter dated 5 February 2022, Petitioner, through counsel, supplemented his case file by notifying the Board that he had since FOS for promotion to major. This constituted Petitioner's second FOS. He further asserted that he had been improperly notified regarding this FOS because he had not been notified by the first flag officer in the chain of command, which he asserted was corroboration of his claim that [REDACTED] was not his chain of command. See enclosure (28).

CONCLUSION:

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

The Board found Petitioner's contention, that the CI upon which the adverse actions taken against him was based was fundamentally flawed and not supported by credible facts, to be entirely without merit. The Board is not an investigative body. In the absence of evidence to the contrary, it relies upon the presumption of regularity to establish that naval authorities properly performed their functions. In this case, there is no reason to believe that the IO failed to conduct a thorough investigation or to weigh the credibility and value of any conflicting evidence in reaching his conclusions. There is also no reason to believe that the CI did not receive a competent legal review to ensure that the findings and recommendations were supported by the evidence, or that the multitude of naval authorities who reviewed and took action based upon the CI failed to consider the evidence supporting the conclusions or Petitioner's comments in response to the findings. Petitioner's objection to the sufficiency of the CI seems to be supported by little more than his disagreement with the findings, which is not nearly sufficient to overcome the presumption of regularity. In this regard, the Board was not convinced by the single witness statement provided by Petitioner which offered a subjective assessment of Petitioner's conduct contrary to the CI findings.

Although the presumption of regularity alone would support the sufficiency of the CI in this case, the evidence in the record further validated the CI results. Specifically, contrary to Petitioner's contention, the BOI largely substantiated the CI findings. According to enclosure (5), the CI found that Petitioner created a hostile and offensive work environment by harassing and bullying subordinate Marines under his command over a the course of several months, and that he fraternized with an enlisted Marine. It further noted that the former substantiated misconduct occurred despite the fact that Petitioner was counseled by his battalion commander and provided the opportunity to correct his behavior. Consistent with these findings, the BOI unanimously determined that Petitioner violated Articles 92 and 133, UCMJ, by bullying, harassing, and creating a hostile work environment multiple Marines under his command during the period in question. This finding does not support Petitioner's assertion in enclosure (23) that the BOI found only that he used coarse language. Further, although the BOI ultimately unsubstantiated the allegation that Petitioner fraternized with a subordinate enlisted Marine, this finding was not unanimous. The fact that one member of the BOI voted to substantiate this allegation suggests that there was sufficient evidence in the CI to support the finding of fraternization, which is a subjective standard. Finally, Petitioner himself admitted during the BOI that he made mistakes in regard to the allegations made against him. The Board found more

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than sufficient evidence to support the substance of the CI upon which the adverse actions against Petitioner were based.

The Board also found no merit in Petitioner's contention that he was denied due process in the issuance of the "Page 11" counseling statement. First, as noted in the AO, commanders have wide discretion regarding the subject matter of a formal counseling, so long as the officer has the necessary understanding of the facts and circumstances surrounding the subject matter of the counseling. In Petitioner's case, the issuing commander based his formal counseling on a substantiated CI which, as discussed above, was clearly supported by the evidence. Petitioner's contention that this entry was based upon an incomplete investigation is erroneous, as the evidence reflects that the CI was completed on 12 February 2019 and his appeal of the CI was acted upon by memorandum dated 26 February 2019, which is the same day that the counseling statement was issued. More significantly, Petitioner clearly was afforded the right to rebut the substance of a counseling statement, as evidenced by enclosure (7). Petitioner's contention that he was denied due process in this regard because he was not provided a complete copy of the investigation is meritless. The evidence reflects that he was provided a complete copy of the CI before the decision was made to file the counseling statement in his official record. Petitioner verified this fact in enclosure (12). Prior to action being taken to file the counseling statement in Petitioner's official record through the ROM at enclosure (10), the "Page 11" had no possibility of adversely affecting Petitioner's career. It was entered into his official record only after Petitioner was provided a complete copy of the CI upon which it was based and afforded the opportunity to rebut the findings, as he did on multiple occasions, including after verifying receipt of the CI in enclosure (12). Unfortunately, Petitioner's rebuttal to the CI findings was not sufficient to override the weight of the evidence in the CI. Regardless, the Board believed that Petitioner unquestionably was afforded all process due to him in the filing of the "Page 11" counseling statement.

The Board found Petitioner's reliance upon the case of *Brezler v. Mills* and MILPERSMAN 1070-10 to be misplaced and unpersuasive. First, as was noted in the AO, MILPERSMAN 1070-10 does not apply in Petitioner's case because he is Marine and his official record is not maintained by Navy Personnel Command. More significantly, *Brezler v. Mills* dealt with the government's discovery obligations in advance of adverse proceedings. The issuance of a counseling statement is not an adverse proceeding. Such a standard would require commanders to provide due process prior to issuing any corrective guidance, which clearly and understandably is not the standard. As discussed above, the evidence reflects that Petitioner received the entirety of the CI and availed himself of the opportunity to comment upon it prior to both the filing of the counseling statement and the initiation of his BOI, the latter being the only adverse proceeding Petitioner has faced. Accordingly, the Board did not find Petitioner's reliance upon these authorities to be persuasive.

Finally, the Board found no error or injustice in either the delay of Petitioner's promotion or his ultimate removal from the promotion selection list. Per Enclosure (8) of reference (e), the delay of an officer's promotion may be based upon "substantiated adverse information about the officer that is material to the decision to appoint the officer that is under review by the ... SECNAV ... or CMC," or if there is cause to believe that "the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he... was

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selected for promotion." Petitioner's promotion to major was properly withheld based upon a substantiated investigation which was clearly material to the decision of whether he should be promoted and which provided a cause to believe that he was morally or professionally unqualified to perform the duties of a Marine Corps major. The decision to remove Petitioner from the promotion list was made by the SECNAV only after the BOI substantiated both misconduct and substandard performance of duties. The conduct substantiated by the BOI was clearly more than sufficient to raise significant doubts regarding Petitioner's qualifications and ability to serve in the grade of major. Accordingly, there was no error or injustice in Petitioner's removal from the promotion list.

Petitioner's contention that the promotion withhold and the removal of his name from the promotion list were procedurally defected is without merit. Petitioner's promotion was withheld by the [REDACTED] in accordance with reference (e) upon the discovery of the adverse information in the CI, and the decision to remove him from the promotion list was made the SECNAV himself. Although the Board does not know the precise command structures applicable to Petitioner's position, it appears from the record that Petitioner served in a position for which Commander, [REDACTED] would retain administrative command authority. Even if this assumption is incorrect, however, the SECNAV may receive recommendations from anyone he chooses in determining whether an officer with substantiated misconduct is qualified for promotion, and his decision to remove Petitioner from the promotion list was supported by the BOI findings. In this case, the SECNAV received and considered recommendations from, among others, the [REDACTED], Petitioner's operational commander, and Petitioner's former command. Petitioner's repeated contention that the recommendation of his current operational command and former command is simply not supported by the evidence. Those recommendations were clearly presented for consideration.

The Board found no relevance in Petitioner's contention that he was not properly notified by a flag officer of his most recent FOS for promotion.

As discussed above, the Board did not consider Petitioner's contentions regarding his adverse FITREP because he has not exhausted his administrative remedies in this regard. By refusing to consider these contentions, the Board preserved Petitioner's maximum opportunity to seek relief in this regard.

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 titled matter.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USMC,
XXX-XX-[REDACTED]

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

4/11/2022

[REDACTED]

SECRETARY OF THE NAVY DECISION:

AUG 04 2022

Board Recommendation Approved (Deny Relief) [REDACTED]

Petitioner's Request Approved (Full Relief – Remove the adverse FITREP for the reporting period 1 June 2018 to 10 January 2019, along with all associated documents, from Petitioner's naval record; Remove the 26 February 2019 "Page 11" counseling statement, along with all associated documents, from Petitioner's naval record; Remove all documents associated with Petitioner's BOI from Petitioner's naval record; Remove all documents referencing the withhold of Petitioner's promotion and ultimate removal from the FY20 USMC Major Promotion List; Restore Petitioner to the FY20 USMC Major Promotion List and process his name for promotion to major with the date of rank he would have had but for his removal from the promotion list)

Petitioner's Request Partially Approved (Partial Relief – Remove the 26 February 2019 "Page 11" counseling statement, along with all associated documents, from Petitioner's naval record; Remove all documents associated with Petitioner's BOI from Petitioner's naval record; Remove all documents referencing the withhold of Petitioner's promotion and ultimate removal from the FY20 USMC Major Promotion List; Restore Petitioner to the FY20 USMC Major Promotion List and process his name for promotion to major with the date of rank he would have had but for his removal from the promotion list)

[REDACTED]

[REDACTED]