



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

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Docket No: 5424-21

Ref: Signature Date



Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

A three-member panel of the Board, sitting in executive session, considered your application on 22 February 2022. The names and votes of the members of the panel will be furnished upon request. 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, relevant portions of your naval record, and applicable statutes, regulations, and policies, as well as the 15 July 2021 decision furnished by the Marine Corps Performance Evaluation Review Board (PERB), the 16 February 2021 advisory opinion (AO) provided to the PERB by the Manpower Management Division Records & Performance Branch (MMRP-13), and the 16 November 2021 AO furnished by the Military Personnel Law Branch (JPL). The AOs were provided to you on 15 July 2021 and 24 November 2021, respectively, and you were given 30 days in which to submit a response. Although you were afforded an opportunity to submit a rebuttal, you did not do so.

The Board carefully considered your request to remove your fitness report for the reporting period 1 June 2018 to 13 September 2018 and your 1 November 2018 Report of Substandard Performance. The Board considered your contentions that from July 2017 to May 2018 your performance as the Commanding Officer (CO), Recruiting Station, █ was well above average. You also contend that (1) after the Command Inspector General (CIG) complaint you were counseled by the CO, 9th Marine Corps District (MCD), however, the counseling was not in the form of a page 11 entry or other type of documentation that would be included in your official record and you were never "formally counseled" prior to your relief for cause; (2) the reference to formal counseling in your Report of Substandard Performance and fitness report was

administratively erroneous and created an injustice; (3) the CIG complainant's refusal to provide information concerning suspected fraudulent material created an issue as to his continued reliability, trust and confidence; (4) there is a presumption that when Article 31(b), Uniform Code of Military Justice (UCMJ) is exercised by an individual, it fully precludes any disciplinary or administrative action being taken against the individual. This is an overbroad application of the privilege against self-incrimination contained in the Military Rules of Evidence 301(f); (5) the investigation relied solely on evidence provided by the complainant, focused on events which occurred two years earlier, and improperly interpreted Article 31(b), UCMJ.

The Board noted that during 2018, while assigned as the CO, Recruiting Station, █, you were the subject of two CIG investigations. Both complaints alleged that you created a toxic command climate. The first CIG case found that, although there were issues with the command climate, they did not rise to the level of being toxic. The inquiry did, however, reveal a lack of unity and team mentality within the recruiting station. The second CIG complaint, was filed by a subordinate officer (Captain/Capt/O-3) alleging that you created a toxic command climate and abused your authority by threatening him when he invoked his Article 31(b) rights in the course of an unrelated command investigation. Specifically, you told the Captain that since he wanted to listen to a boot JAG and not give a statement, he was not living up to the special trust and confidence, and you would remember this come fitness report time. The Captain also alleged that you retaliated against him by giving him unfairly low marks on his fitness report. The Investigating Officer (IO) found that there was sufficient evidence to substantiate the allegation that you abused your authority by making threats against the Captain's career when he elected to invoke his Article 31(b) rights.

Concerning your contentions your reporting officials erroneously referenced a formal counseling in your contested fitness report, the Board substantially concurred with the PERB decision that your fitness report is valid and should be retained as filed. In this regard, the Board noted that your fitness report was mark adverse for 'Leading Subordinates' and your reporting senior (RS) did not recommended you for promotion. The Board also considered your RS' justification that you created a counterproductive work environment through threats and intimidation, used less than optimal performance counseling that was combative and demeaning, threatened a Marine Officer with a negative fitness report for lawfully invoking his Article 31(b) rights to remain silent during a preliminary inquiry in 2016, and were relieved for cause. The Board noted, too, that in correspondence dated 25 June 2018, the CO, 9th MCD indicated that you would be formally counseled and, on 16 July 2018, you submitted a written response to the counseling. The Board determined that the evidence is sufficient to conclude that you were counseled. The Board agreed with the 16 February 2021 AO that counseling can take many forms, counseling is not required to process an adverse fitness report nor to relieve a Marine for cause, and the Marine Corps Manual for Legal Administration definition of "formal" counseling does not have to be met for fitness report purposes. The Board also determined that your RS provided sufficient factual basis for the adverse assessment and stated why he relieved you for cause. Moreover, based upon the substantiated allegations that you created a toxic climate and abused your authority by making threats toward a subordinate officer, your CO acted within his discretionary authority by relieving you of command. In making these findings, the Board relied on the results of the CIG investigations that documented multiple performance issues during the period in question.

Concerning your request to remove your Report of Substandard Performance, the Board substantially concurred with the AO furnished by JPL that both your adverse fitness report and Report of Substandard Performance of Duty are valid. In this regard, the Board noted that both CIG investigations referred to the use of poor leadership techniques and, although the first CIG investigation did not substantiate a toxic command climate, it did include statements from 27 witnesses and detailed specific examples of your leadership failures. The Board determined that there was sufficient evidence to substantiate a pattern of leadership failures, as supported by multiple statements and not just the Captain's complaint. The Board also determined that your Report of Substandard Performance is valid and issued according to Marine Corps Legal Support and Administration Manual.

Concerning your contention that an individual is not protected from disciplinary or administrative action when exercising their Article 31(b) rights, the Board noted that 10 U.S.C. § Article 31(a) provides that no "person subject to this chapter may compel any person to incriminate himself. . ." The Board is not an investigative body, however, the determined that there was sufficient evidence to support the IO's finding that you abused your authority when you threatened to hold the Capt accountable for invoking his Article 31(b) rights and refusing to cooperate in the investigation. In summary and in consideration of the evidence provided, the Board found that the reference to formal counseling is not a material error or injustice, your substandard performance was substantiated during the CIG investigations, your adverse fitness report complies with the Marine Corps Performance Evaluation System Manual, and it does not indicate that you were the subject of derogatory material or disciplinary action. Accordingly, the Board concluded that there is no probable material error, substantive inaccuracy, or injustice warranting corrective action.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or 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,

█ 3/7/2022
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Executive Director
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