



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

█
Docket No: 1633-22

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.

Although your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 2 August 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 11 May 2022 advisory opinion (AO) provided by the Headquarters Marine Corps, Military Personnel Law Branch (JPL) and your response to the AO.

The Board carefully considered your request to remove the 23 June 2017 Administrative Remarks (page 11) and rebuttal statement; 25 July 2017 Report of Misconduct (ROM); 4 December 2017 Board of Inquiry (BOI) proceedings; and all associated adverse material. If approved, you request the reinstatement of your promotion to Major (Maj/O-4) effective 1 October 2019. The Board considered your contentions that the derogatory material should be removed based on the continued negative impact on your ability to progress in the Marine Corps and it goes against the BOI's intention of allowing you to continue to serve. You also contend that over the objection of your Defense Counsel, the BOI considered additional exhibits presented by the Government on the day before the BOI convened. The Board also considered your assertions that the results of the BOI and adverse material was based on hearsay, the claims by your spouse were inconsistent, and she refused to testify to the source or veracity of the information provided, which denied you the opportunity for cross examination. You also assert

that the investigation concluded that both spouses lied, the information came from your spouse, she admitted to providing false information, and lied about the allegations. You claim that since the BOI, you have been passed for promotion to major and your request to transition to the Marine Corps Reserve (MCR) was denied. You also claim that you have continued to progress in your career, have received favorable evaluations, and you have been recommended for promotion and retention on fitness reports. For consideration by the Board, you noted that the Board previously granted relief for a Petitioner that believed a document in his record was unfairly prejudicial after he was acquitted at a court-martial and the presence of the derogatory material would continue to severely prejudice him in the future with advancement.

The Board noted that a Preliminary Inquiry (PI) was directed into circumstances surrounding the suspected adultery between you and █. The Investigating Officer (IO) recommended continued observation and no disciplinary action. A Command Investigation (CI) was directed to corroborate allegation made during the PI. At the conclusion of the CI, the IO found that you violated Article 134, Uniform Code of Military Justice (UCMJ) by conducting a consensual, sexual relationship with █, the relationship occurred between May 2015 and June 2016, and you both violated the Military Protective Order (MPO) by exchanging emails on 27 March 2017. The IO recommended that you and █ be held accountable by the Commanding General, █ Marine Aircraft Wing (CG, █ MAW) for adultery and for violating the MPO.

The Board noted that pursuant to the Marine Corps Individual Record Administration Manual (IRAM) the CG, █ MAW issued you a page 11 entry, counseling you for violating Articles 90 and 134, UCMJ. The Board also noted that you acknowledged the entry and elected to submit a statement. The Board determined your contested page 11 entry was written and issued according to the IRAM. Specifically, the entry provided notification concerning your misconduct and afforded you the opportunity to submit a statement. Moreover, the CG signed the entry and determined that your misconduct was a matter forming an essential and permanent part of your military record, as it was his right to do.

Concerning your contention that the BOI's Legal Advisor and the Senior Member admitted evidence that the Government received the day before the BOI convened over your Defense Counsel's objections. The Board substantially concurred with the AO that the BOI's inclusion of the evidence was not an error or injustice. In this regard, the Board noted that the BOI's Senior Member considered the Defense Counsel objections and clarified that the BOI members would give appropriate weight to the documents. The Board determined this was within the Senior Member's discretion and, therefore, the Board was not persuaded by your arguments in rebuttal. The Board determined that a BOI is not a court-martial, is not bound by the Military Rules of Evidence, and can consider matters that would not be admissible at court-martial. Thus, the BOI was not precluded from considering the text messages and giving them proper weight in light of the objections. The Board also noted that the BOI majority found that you committed misconduct, specifically, adultery in violation of Article 134, UCMJ; conduct unbecoming an officer in violation of Article 133, UCMJ; and willful disobedience of a superior commissioned officer under Article 90, UCMJ. In consideration of the available evidence, the Board further determined that the BOI findings were based on the totality of the evidence and not solely on the evidence received on the day before the BOI convened.



Concerning your promotion to major, the Board noted that the Secretary of the Navy (SECNAV) withheld your name from the promotion list pending a review of adverse material that was not available to the promotion board. You were notified of the promotion withhold, you were afforded an opportunity to comment, and you declined to submit matters in support of your promotion. The Board also noted that the Action Memo furnished by the Deputy Commandant, Manpower and Reserve Affairs (DC M&RA) indicated that you declined to submit matters in support of your promotion and according to your CO, you expressed your desire not to pursue field grade status. On 12 May 2020, the Acting SECNAV approved the removal of your name from the promotion list. Based on the foregoing, the Board determined that you received due process and you were afforded an opportunity to address the adverse material. The Board also determined that your subsequent failures of selection do not constitute an error or injustice.

Concerning your request for transition to the MCR, the Board noted that the DC M&RA notified you that your potential to serve in the MCR was reviewed and your appointment was not favorably endorsed. The Board determined that the SECNAV has delegated initial Reserve application review to DC M&RA. The DC M&RA is mandated to screen all members seeking to enter the Reserves for moral and professional qualifications. The Board also determined that your retention in the Marine Corps does not mandate favorable consideration for a reserve commission. Thus, the DC M&RA acted within his discretionary authority when determining that your appointment was not favorably endorsed.

Concerning the entry of the adverse material and its impact on your career, the Board noted that the Marine Corps Legal Support Administration Manual provides that at the conclusion of a BOI with substantiated misconduct, a Report of BOI must be completed and served. Further, both the ROM and Report of BOI must contain the officer's acknowledgement that adverse material concerning the misconduct will be included in the officer's OMPF and provide the officer an opportunity to respond. The Board also noted that the BOI substantiated your misconduct, you acknowledged that you reviewed the ROM and Report of BOI and you understood that the adverse material would be forwarded to DC M&RA for a decision on whether to include the material in your OMPF. The Board noted, too, that DC M&RA reviewed both reports and then directed inclusion of the adverse material in your record. The Board determined that the DC M&RA has the sole authority and it was within his discretion to include adverse material in your record.

The Board acknowledged your contention that the presence of the adverse material in your record is unduly prejudicial and your reference to a Petitioner that was granted relief after being acquitted at court-martial. The Board determined that you are not similarly situated as the Petitioner in the case you referenced. You were not the subject of a court-martial and your misconduct was not unsubstantiated. Therefore, the presence of adverse material in your record is warranted and supported by regulations. Moreover, the Board is not an investigative body and relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. The Board found your evidence insufficient to overcome this presumption. As a result, the Board concluded that there is no probable material error, substantive inaccuracy, with the findings of the BOI or the inclusion of the adverse materials in your record. Based on this finding, the Board determined your reinstatement to Major was not supported by the

[REDACTED]

evidence. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

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,

8/12/2022

[REDACTED]

Executive Director

[REDACTED]