



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

██████████
Docket No. 3120-22
Ref: Signature Date

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

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

Ref: (a) 10 U.S.C. § 1552
(b) Manual for Courts-Martial (2019)
(c) BCNR Docket No: 675-20

Encl: (1) DD Form 149 w/attachments
(2) Command Investigation Report, 21 Sep 18
(3) Divorce Decree, 27 Feb 18
(4) CO, ██████████ First Endorsement, 12 Oct 18
(5) Administrative Remarks (Page 11) 3005 counseling entry, 13 Mar 19
(6) Petitioner's rebuttal to Page 11, 18 Mar 19
(7) Report of Misconduct 5800 SJA, 21 Mar 19
(8) Petitioner's rebuttal 5800 ██████████, 12 Apr 19
(9) CMC ltr 1920 JPL, 5 Dec 19
(10) HQMC Memo 1070 JPL, 20 Aug 20

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 reconsideration of reference (c) to correct his naval record by removing a 21 March 2019 Report of Misconduct and associated material, to include his 13 March 2019 Administrative Remarks (Page 11) 3005 counseling entry.

2. The Board reviewed Petitioner's allegations of error and injustice on 21 July 2022, and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. 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 the facts of record pertaining to Petitioner's allegations of error and 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.

b. Petitioner was assigned to the U.S. Embassy in ██████████, ██████████, from July 2016 until July 2018. Petitioner was the subject of a Preliminary Inquiry (PI) and subsequent Command

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Investigation (CI) into allegations of unprofessional conduct and failure to disclose foreign contacts. Additionally, the investigation revealed that multiple senior officers had serious concerns regarding the romantic relationships of Petitioner which resulted in his Reporting Senior (RS) counseling him on the propriety of not having romantic relationships prior to his divorce being finalized. Enclosure (2).

c. On 3 January 2017, Petitioner and [REDACTED] separated with the intent to remain separate and apart, and had at all times thereafter lived continuously separate and apart. On 27 February 2018, Petitioner's divorce was fully finalized. Enclosure (3).

d. Between 11 December 2017 and 3 January 2018, [REDACTED] stayed at Petitioner's residence in [REDACTED] to celebrate Christmas, along with other members of her family and Petitioner's family. On or about 14 July 2018, Petitioner married [REDACTED]. Petitioner's child with [REDACTED] was born on 20 September 2018. Enclosures (2) and (7).

e. On 12 October 2018, Commanding Officer, Marine Corps Intelligence Activity concurred with the 21 September 2018 CI, and forwarded the CI to Commander, Marine Corps Installations [REDACTED]. It was noted that Petitioner's "judgement, maturity and emotional intelligence are questionable and inconsistent with the characteristics critical of a Marine Attaché." Additionally, Commanding Officer, Marine Corps Intelligence Activity recommended administrative action for Petitioner's substandard performance. Enclosure (4).

f. On 13 March 2019, Petitioner received a Page 11 3005 counseling entry, enclosure (5), stating "on or about 31 August 2018, you were the subject of a preliminary inquiry and subsequent command investigation regarding allegations of unprofessional conduct and failure to disclose foreign contacts. While the investigation did not substantiate a failure to disclose foreign contact, the investigation did reveal adultery." Petitioner submitted enclosure (6), a written rebuttal, asserting that there was no evidence of adultery, and no evidence of misconduct or substandard performance of duty.

g. On 21 March 2019, Petitioner received a Report of Misconduct (ROM), stating that the command investigation did not substantiate a failure to disclose a foreign contact, but did reveal adultery. Specifically, there was an overlap of approximately two months from when Petitioner was still married to [REDACTED] and when [REDACTED] became pregnant, and Petitioner was named the father on the certificate of live birth. Enclosure (7).

h. On 12 April 2019, Petitioner submitted a rebuttal to the ROM, stating that issuance of the Page 11 entry and the ROM is not warranted because the allegations of substandard performance and misconduct are unsubstantiated. Enclosure (8).

i. On 5 December 2019, Deputy Commandant for Manpower and Reserve Affairs, the designated Show Cause Authority for the Marine Corps, reviewed the adverse matters and determined it does not warrant processing for administrative separation. The case was closed and the adverse material concerning the matter included in Petitioner's official military personnel file (OMPF). Enclosure (9).

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j. Per the advisory opinion provided in reference (c) and enclosure (10), the contested adverse material should remain in Petitioner's OMPF. The AO opined that the command's conclusion that Petitioner's behavior constituted adultery under the UCMJ was supported by the evidence. The AO specifically noted that Petitioner's command was aware that Petitioner was legally separated at the time of the adultery, yet nevertheless elected to hold him accountable.

k. Petitioner submitted a reconsideration request of his petition at reference (c) with new evidence; specifically, his statement, without evidence, that his child born on 20 September 2018 was born preterm and that she is enrolled in the Exceptional Family Member Program. Petitioner contends this evidence is material because his command assumed that Petitioner's child, who was born in September 2018, was conceived in December 2017 and then concluded that there was a preponderance of the evidence to show that Petitioner's current spouse became pregnant prior to the dissolution of Petitioner's first marriage.

Petitioner also argues that the Report of Misconduct and counseling entry are erroneous because both state Petitioner committed adultery. Petitioner contends that there was not a preponderance of the evidence to prove adultery as in accordance with reference (b) the evidence must show that 1) the accused wrongfully engaged in extramarital sexual conduct, 2) that at the time, the accused knew that they were married, and 3) that the conduct of the accused was prejudicial to good order and discipline and/or that it was of such a nature to bring discredit upon the armed forces. Petitioner noted that the CI concluded that "the relationship with [REDACTED] did not have an impact on the good order or discipline of the unit" and that the relationship did not bring "discredit to the service" because the relationship with [REDACTED] was not known until Petitioner divorced his previous wife.

Enclosure (1).

CONCLUSION

Upon review and consideration of all the evidence of record, the Board determined that Petitioner's request warrants relief.

The Board determined that the counseling and the ROM contained a material error; both state that Petitioner committed adultery. The Board noted that Article 134 of the Uniform Code of Military Justice (UCMJ) requires proof of either prejudice to good order and discipline or evidence of discredit to the service. The Board found that there was insufficient evidence to support the third element and there was evidence in the command investigation to the contrary; specifically, that the relationship between Petitioner and [REDACTED] was not known until the end of Petitioner's tour in [REDACTED], which was after Petitioner's divorce. Additionally, an affirmative defense to the charge of adultery is whether there is evidence that the accused was legally separated. The Board took note that Petitioner was physically separated from his first wife for 17 months prior to the alleged adulterous act and therefore found that Petitioner's legal separation offers an affirmative defense to the adultery allegation.

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RECOMMENDATION

In view of the above, the Board recommends the following corrective action.

Petitioner's naval record be corrected by removing enclosures (5) and (6), the 13 March 2019 Administrative Remarks (Page 11) 3005 counseling entry and 18 March 2019 rebuttal.

Petitioner's naval record be corrected by removing enclosures (7) and (8), the 21 March 2019 Report of misconduct and 12 April 2019 rebuttal.

That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed, or completely expunged from Petitioner's record, and that no such entries or material be added to the record in the future. This includes, but is not limited to, all information systems or database entries that reference or discuss the expunged material.

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.

5. I am acting on behalf of the Executive Director subject to her recusal from the post-board approval of the Board's findings due to her participation on the Board and her express delegation. As such, the foregoing action of the Board is submitted for your review and action based on special delegation by the Executive Director.

9/15/2022

[REDACTED]

Deputy Director

From: Assistant General Counsel (Manpower and Reserve Affairs)

Reviewed and Approved Board Recommendation (Grant Relief)

Reviewed and Approved Advisory Opinion Recommendation (Deny Relief)

10/3/2022

[REDACTED]

Assistant General Counsel (M&RA)

Signed by: [REDACTED]