



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

█
Docket No. 3484-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF █
█ USMC

Ref: (a) 10 U.S.C. § 1552
(b) SECNAVINST 1420.3, Department of the Navy Commissioned Officer Promotion Program, 28 March 2019
(c) SECNAVINST 1402.1, Special Selection Boards, Supplemental All-Fully-Qualified-Officers Lists, and Special Boards, 29 April 2019

Encl: (1) DD Form 149 w/enclosures
(2) CMC Action Memo, subj: Promotion Recommendation in the Case of [Petitioner], 9 April 2021
(3) CMC Memo 1420 JPLP, subj: Notification of Promotion Withhold and Possible Removal from the Fiscal Year 2021 USMC Lieutenant Colonel Promotion List, 3 June 2020
(4) HQMC Memo 1610 MMRP-30, subj: Performance Evaluation Review Board (PERB) Advisory Opinion ICO [Petitioner], 19 April 2021
(5) CMC Memo 1400 MMRP-1, subj: Promotion Recommendation in the case of [Petitioner], 17 May 2021
(6) HQMC Memo 1610 MMRP-13/PERB, subj: Correction of Naval Record, 23 July 2021
(7) HQMC Memo 1070 JPL, subj: Application for Correction in the case of [Petitioner], 18 September 2022

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 promotion to lieutenant colonel (LtCol) effective 1 September 2020;¹ payment of back pay and allowances; and removal from his record of all references to his failure of selection (FOS) for promotion.

2. The Board reviewed Petitioner's allegations of error or injustice on 8 November 2022 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on Petitioner's naval record. Documentary material considered by the Board included the enclosures, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies.

¹ This requested relief has become moot, as Petitioner was promoted above-the-zone to LtCol subsequent to his application to the Board.

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3. The Board, having reviewed all of the evidence 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.

b. On 6 December 2018, the [REDACTED] experienced a Class A mishap which resulted in the loss of six lives and two aircraft. Petitioner was the [REDACTED] operations officer at the time. See enclosure (2).

c. On 22 April 2019, the Commanding General (CG), [REDACTED] relieved Petitioner of his duties for loss of trust and confidence and initiated an adverse fitness report (FITREP). See enclosure (2).

d. On 6 August 2019, the Fiscal Year 2021 (FY21) United States Marine Corps (USMC) LtCol Promotion Selection Board (PSB) convened and selected Petitioner for promotion to LtCol. There was no reference to Petitioner's recent relief for cause in his record at the time. See enclosure (2).

e. On 15 August 2019, the adverse FITREP for the reporting period 16 April 2019 to 22 April 2019 referenced in paragraph 3c above was completed and filed in Petitioner's naval record. See enclosure (2).

f. On 16 December 2019, the President nominated Petitioner for promotion to LtCol pursuant to his selection by the FY21 USMC LtCol PSB. See enclosure (2).

g. On 3 March 2020, the Consolidated Disposition Authority (CDA) appointed to review the [REDACTED] mishap concluded his final report, noting Petitioner's substandard performance and that it had already been documented in his adverse FITREP. The CDA recommended that no further action be taken against Petitioner and that his promotion not be withheld or delayed. See enclosure (2).

h. On 15 April 2020, the Commandant of the Marine Corps (CMC) requested that the Secretary of the Navy (SECNAV) hold Petitioner's nomination for promotion in abeyance pending a determination of his mental, physical, moral, and professional qualifications for promotion. See enclosure (2).

i. By memorandum dated 3 June 2020, Petitioner was notified that his nomination for promotion was being withheld prior to Senate confirmation pending a determination of his mental, physical, moral, and professional qualifications for promotion.² See enclosure (3).

j. On 6 April 2021, Petitioner requested that the USMC Performance Evaluation Review Board (PERB) remove the above referenced adverse FITREP from his naval record based upon

² According to enclosure (1), Petitioner's projected date of rank was 1 September 2020.

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the “incomplete, flawed, biased and unfocused investigation” which resulted in his relief. See enclosure (4).

k. By memorandum dated 9 April 2021, the CMC recommended to the SECNAV, contrary to the recommendations of Petitioner’s chain of command, that Petitioner’s nomination for promotion be withdrawn and his name removed from the FY21 USMC LtCol promotion list. In making this recommendation, the CMC commented that the FY21 USMC LtCol PSB was not aware of the adverse material in Petitioner’s naval record when it selected him for promotion and that Petitioner’s performance fell below that expected of a naval officer and did not comply with the statutory exemplary conduct requirement. Finally, the CMC suggested that Petitioner’s removal from the promotion list was appropriate under the circumstances “[t]o maintain parity with other cases in which adverse material was unavailable [to] the PSB, and [to] ensure the justness and fairness of the officer promotion process,” and that such action would “allow a future selection board the opportunity to determine whether [Petitioner] is among the best and fully qualified for promotion.” See enclosure (2).

l. By memorandum dated 19 April 2021, the Headquarters, Marine Corps (HQMC) Performance Evaluation Section (PES) provided a favorable advisory opinion (AO) to the PERB with regard to Petitioner’s request to remove the adverse FITREP. This AO revealed that the [REDACTED] conducted a subsequent investigation of the facts and circumstances of the [REDACTED] mishap at the direction of the CDA which “invalidated many of the conclusions reached in the original mishap investigations, including those impacting [Petitioner].” The HQMC PES AO concluded that Petitioner met his burden of proof and showed probable material error, substantive inaccuracy, or injustice warranting removal of the adverse FITREP. The material relied upon by the HQMC PEB in making this recommendation included the same material that the CMC considered in making his recommendation to the SECNAV to remove Petitioner from the promotion list, as discussed in paragraph 3k above. See enclosure (4).

m. On 29 April 2021, the SECNAV approved the CMC’s recommendation and removed Petitioner from the FY21 USMC LtCol promotion list. See enclosure (2).

n. By memorandum dated 17 May 2021, Petitioner was notified that the SECNAV removed his name from the FY21 USMC LtCol promotion list and that this action constituted a FOS by the FY21 USMC LtCol PSB. See enclosure (5).

o. By memorandum dated 23 July 2021, the PERB notified Petitioner that the adverse FITREP for the period 16 April 2019 to 22 April 2019 would be removed from his naval record. See enclosure (6).

p. Petitioner, through counsel, contends that he was erroneously removed from the FY21 USMC LtCol promotion list based upon an adverse FITREP that has since been removed from

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his records by the PERB. He also contends that none of the bases cited in reference (b) under which the SECNAV may withhold a promotion were met.³ See enclosure (1).

q. After filing his application for relief to the Board, Petitioner was selected for promotion by the Fiscal Year 2023 (FY23) USMC LtCol PSB, and ultimately promoted to LtCol with an effective date of rank of 1 August 2022.

r. By memorandum dated 18 September 2022, the Head, HQMC Military Personnel Law Branch (JPL), provided an AO for the Board's consideration recommending that Petitioner's request be granted. This AO found, contrary to Petitioner's contention, that there was no error in the decision to withhold Petitioner's promotion pursuant to the FY21 USMC LtCol promotion list. It did, however, suggest that Petitioner met his burden to prove an injustice in what was ultimately a delay in his promotion. Specifically, the JPL AO noted that the CMC explained in enclosure (2) that the reason SECNAV should remove Petitioner from the promotion list was "to maintain parity with other cases in which adverse material was not available [to] the PSB." While this reason for removal was valid at the time, the subsequent removal of Petitioner's adverse FITREP made enclosure (2) inaccurate. If the CMC had known at the time that Petitioner's adverse FITREP was erroneous, he may have instead recommended that Petitioner be promoted. Accordingly, the JPL AO recommended that Petitioner's FOS by the FY21 USMC LtCol PSB be removed from his record, and that a FY21 USMC LtCol Special Selection Board (SSB) be convened to reconsider Petitioner for promotion pursuant to that PSB.⁴ See enclosure (7).

MAJORITY CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Majority of the Board found an injustice warranting relief.

The Majority found no error in Petitioner's removal from the FY21 USMC LtCol promotion list. At the time that this decision was made, there was adverse material in Petitioner's record which was not considered by the FY21 USMC LtCol PSB. This material, and its basis, supported the CMC's recommendation that Petitioner be removed from the promotion list based upon substandard performance and/or failure to meet the exemplary conduct requirements of 10

³ Petitioner's counsel notes that the CMC cited substandard performance of duty and failure to meet the standards of exemplary conduct in accordance with 10 U.S.C. § 5947 as the bases for his recommendation that Petitioner be removed from the promotion list, and argued that the PERB found no evidence of substandard performance of duty when it removed the adverse FITREP and that there was no evidence that Petitioner failed to meet the requirements of 10 U.S.C. § 5947.

⁴ The AO explained that an SSB is necessary because Petitioner's name was removed from the FY21 USMC LtCol promotion list and his statutory promotion eligibility period has expired. This recommendation was invalid, however, as Petitioner is not eligible for an SSB. Per reference (c), SSBs may be convened only for officers not considered by a PSB due to an administrative error or in the case of an officer considered but not selected by a PSB in an unfair manner. Petitioner meets neither of these criteria, and the Board's delegated authority to direct an SSB is circumscribed to prohibit such relief if contrary to reference (c). Regardless, it is not necessary to convene an SSB to provide Petitioner full and fair relief in this case, as the Board has the authority to change Petitioner's date of rank to his current grade without resort to an SSB. As Petitioner has already been properly promoted to LtCol pursuant to his selection by the FY23 USMC LtCol PSB, there is no impediment to the Board correcting his record to give him the same date of rank he would have had but for his removal from the promotion list.

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U.S.C. § 5947. Further, the procedures of reference (b) were followed to properly remove Petitioner from the promotion list, and such action was within the SECNAV's authority.

While finding no error in Petitioner's removal from the promotion list, the Majority did find that the ultimate delay of his promotion by almost two years as a result of that removal now constitutes an injustice given the circumstances. Shortly after the decision was made to remove Petitioner from the promotion list based upon the adverse FITREP, the PERB voted to remove the subject FITREP from his record. If this decision had been rendered less than three months earlier, there would have been nothing remaining in Petitioner's record to justify his removal from the promotion list and it is doubtful that the CMC would have recommended Petitioner's removal from the promotion list. Further, the basis upon which the PERB decided to remove the adverse FITREP from Petitioner's record raises doubts regarding the underlying basis for his removal from the list.

Per reference (b), an officer whose name is removed from a promotion list continues to be eligible for consideration for promotion. If that officer is recommended for promotion by the next selection board convened for his grade and competitive category and he is promoted, the SECNAV may, upon such promotion, grant him the same date of rank, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the active-duty list as he would have had if his name had not been so removed. Accordingly, given the injustice which resulted from Petitioner's removal from the promotion list, the Majority determined that Petitioner's effective date of rank to LtCol and position on the active-duty list should be changed to reflect that which it would have been if he had never been removed from the FY21 USMC LtCol promotion list.

For the same reasons that it found that Petitioner's date of rank to LtCol should be changed, the Majority also determined that Petitioner's FOS for promotion to LtCol pursuant to the FY21 USMC LtCol PSB should be removed from his record. Again, if the PERB had removed the adverse FITREP from Petitioner's record only a few months earlier, or if the CMC knew of the PERB's determination before providing his recommendation to the SECNAV, Petitioner likely never would have been removed from the promotion list and therefore would not have a FOS for promotion in his record. The Majority finds no remaining justification to taint Petitioner's naval record with a FOS that subsequent events have proven to be unwarranted.

MAJORITY RECOMMENDATION:

In view of the above, the Majority of the Board recommends that the following corrective action be taken on Petitioner's naval record:

That Petitioner's date of rank and effective date to the grade of LtCol be change to that which it would have been but for his removal from the FY21 USMC LtCol promotion list. Petitioner contends that this date would have been 1 September 2020, but the Board has no way to confirm this assertion. Accordingly, HQMC should confirm this date and make the changes to Petitioner's record reflect the appropriate date. Additionally, Petitioner's lineal standing should be adjusted accordingly.

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That all documents containing reference to Petitioner's removal from the FY21 USMC LtCol promotion list, and resulting FOS for promotion, be removed from Petitioner's naval record. This includes, but is not necessarily limited to, enclosures (2), (3), and (5).

That any material or entries in Petitioner's naval record inconsistent with or relating to the Board's recommendation be corrected, removed, or completely expunged from Petitioner's record. This includes, but is not necessarily limited to, all information systems or database entries that reference or discuss the expunged material.

That the Defense Finance and Accounting Service (DFAS) conduct an audit of Petitioner's finance records to determine any pay, allowances, or benefits that Petitioner may be entitled to as a result of the changes to his naval record resulting from this record of proceedings.

MINORITY CONCLUSION:

Upon review and consideration of all of the evidence of record, the Minority of the Board also found an injustice warranting relief.

The Minority concurred with the Majority conclusions in all regards except with regard to the removal of Petitioner's FOS for promotion to LtCol. The Minority simply found no injustice warranting this relief. As discussed in the Majority conclusion, there was no error in the removal of Petitioner's name from the promotion list. It was warranted based upon the circumstances in effect at the time, and removal from the promotion list constitutes a FOS per reference (b). While the subsequent circumstances warranted an equitable change to his date of rank to negate the effect of that removal, the fact of his removal from the promotion list remains a matter of record. Further, given Petitioner's subsequent selection for promotion and the other relief granted herein, the Minority found no reason to remove references to this action. Petitioner's selection for promotion despite the presence in his record of his FOS proves that such references are not likely to have an adverse effect upon Petitioner's career.

MINORITY RECOMMENDATION:

In view of the above, the Minority of the Board adopts the recommendations of the Majority, except for the recommendation that all references to Petitioner's removal from the FY21 USMC LtCol promotion list and resulting FOS for promotion be removed from 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.

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

12/8/2022

[REDACTED]

Executive Director

SECRETARY OF THE NAVY DECISION:

- [REDACTED] MAJORITY Recommendation Approved (Grant Relief – I concur with the conclusions of the Majority and direct the relief recommended by the Majority above.)
- MINORITY Recommendation Approved (Grant Relief – I concur with the conclusions of the Minority and direct the relief recommended by the Minority above.)
- Board Recommendation Disapproved (Deny Relief – I do not concur with the Board’s recommendation for relief and direct that no change be made to Petitioner’s naval record. As the Board correctly noted, there was no error in my predecessor’s decision to remove Petitioner from the FY21 USMC LtCol promotion list. Given that Petitioner has already been promoted above the zone pursuant to his selection by the FY23 USMC LtCol PSB, I find no injustice in the fact that his promotion to LtCol was delayed as a result of his role in the VMFA (AW)-242 mishap.)

[REDACTED]

Secretary of the Navy

Date: APR 12 2023