

## DEPARTMENT OF THE NAVY

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

> Docket No: 5399-22 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 application on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 15 September 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. The Board also considered the 16 July 2022 decision by the Marine Corps Performance Evaluation Review Board (PERB) (the PERB Decision) and the 15 March 2022 Advisory Opinion provided to PERB by the Manpower Management Division Records & Performance Branch (MMRP-30) (the AO). The PERB Decision and the AO were provided to you on 16 July 2022 and although you were given 30 days in which to submit a response, you chose not to do so.

The Board carefully considered your request to remove the fitness report covering the period 1 June 2013 to 31 December 2013, or in the alternative to change the reporting senior (RS) and reviewing officer's (RO) observation to non-observed. You further requested if relief associated with the fitness report is granted, to remove all failures of selection for promotion to lieutenant colonel. You argue that the report is erroneous as the report violated the Performance Evaluation System (PES) manual and the Military Whistleblower Protection Act. You contend that during the fitness report period, you were serving as a Marine Corps Congressional Fellow and witnessed multiple acts of questionable judgment and unethical behavior by your RS, the congressman you were assigned to, and his staff. You allege that you reported your concerns to your RO who dismissed your observations. You allege that because you refused to participate in

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these unethical activities the RS marginalized you and, in retaliation, submitted an inaccurate negative review of your performance for your fitness report.

However, the Board concurred with the AO that the fitness report is presumed administratively correct, procedurally complete, and valid. The Board noted that the RS gave you 2 "F" attribute markings and 11 "E" attribute markings; a highly favorable evaluation. The Board also noted that the petition fails to specify how the report violated the PES Manual or the Military Whistleblower Protection Act. The Board concurred with the AO that the petition does not include any evidence to show that the RS, or his staff, attempted to include you in any illegal activities and that there was no evidence to show RO malfeasance or irregularity.

Moreover, the Board noted that you did not provide any evidence that you submitted an Inspector General complaint in regards to your whistleblower contention. The Board thus determined there was insufficient evidence to conclude you were the victim of reprisal in violation of 10 USC 1034. 10 USC 1034 provides the right to request Secretary of Defense review of cases with substantiated reprisal allegations where the Secretary of the Navy's followon corrective or disciplinary actions are at issue. Additionally, in accordance with DoD policy you have the right to request review of the Secretary of the Navy's decision regardless of whether your reprisal allegation was substantiated or non-substantiated. Your written request must show by clear and convincing evidence that the Secretary of the Navy acted arbitrarily, capriciously, or contrary to law. This is not a de novo review and under 10 USC 1034(c) the Secretary of Defense cannot review issues that do not involve reprisal. You must file within 90 days of receipt of this letter to the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), Office of Legal Policy, 4000 Defense Pentagon, Washington, DC 20301-4000. Your written request must contain your full name, grade/rank, duty status, duty title, organization, duty location, mailing address, and telephone number; a copy of your BCNR application and final decisional documents; and, a statement of the specific reasons why you are not satisfied with this decision and the specific remedy or relief requested. Your request must be based on factual allegations or evidence previously presented to the BCNR, therefore, please also include previously presented documentation that supports your statements.

Consequently, the Board determined that the contested report did not contain material error, substantive inaccuracy, or injustice and shall remain in your official military personnel file as written. Based on this determination, the Board also concluded that removal of your failure to select for promotion to lieutenant colonel is not warranted. 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

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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.

