



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. 7663-22  
4135-20  
Ref: Signature Date

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Dear █:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code, and the Order of the United States District Court for the District of Columbia (DDC), dated 14 September 2022, remanding your case to the Board for Correction of Naval Records, hereinafter referred to as the Board, to reconsider the Board's previous decision in Docket No. 4135-20.<sup>1</sup> After careful review and reconsideration of all of the evidence of record, the Board continues to find insufficient evidence of any probable material error or injustice warranting relief. Accordingly, your application has been denied.

A three-member panel, sitting in executive session, reconsidered your application in accordance with the Order of the DDC on 17 November 2022. The names and votes of the panel members will be furnished upon request. Your allegations of error or injustice were reviewed in accordance with administrative regulations and procedures applicable to the Board's proceedings. Documentary material considered by the Board included your complaint to the DDC filed on 18 May 2022, along with the Order of the DDC remanding your case to the Board;<sup>2</sup> the Consent Motion for Voluntary Remand filed by the Government on behalf of the Secretary of the Navy on 13 September 2022; the decision letter and case file for Docket No. 4135-20, which included your previous application with the four affidavits referenced in your complaint; the decision letters and historical case files for each of your previous requests for relief from this Board; relevant portions of your naval record; and applicable statutes, regulations, and policies.

The Board determined your personal appearance, with or without counsel, would not materially add to its understanding of the issues involved. Accordingly, the Board determined that your

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<sup>1</sup> Your case was based upon a complaint, filed with the DDC on 18 May 2022, in which you alleged two causes of action. Specifically, you alleged that the Board's decision in Docket No. 4135-20 was arbitrary and capricious because it was based on a significantly higher standard of review than is statutorily required and because your submission of four previously unobtainable affidavits constituted new and material evidence. In its Order remanding your case to the Board, the DDC directed that the Board "address, as [it] deems appropriate, the issues raised in [your] complaint; address any other issues that [you submit] in writing to the [Board] within 30 days of [the] remand order, and consider any evidence or arguments in such submissions, and explain whether [you are] entitled to any relief based on any errors or injustices found.

<sup>2</sup> By e-mail dated 14 October 2022, your Counsel notified the Government's representative that no further matters would be submitted for the Board's consideration.

personal appearance was not necessary and considered your case based upon the evidence of record.

The factual background of your case documented in the decision letter for Docket No. 4135-20, dated 16 July 2021, is adopted and incorporated herein

On reconsideration, the Board found no merit to either of the causes of action detailed in your Complaint to the DDC. Both of these causes of action alleged that the Board's decision in Docket No. 4135-20 failed to apply the statutory reconsideration standard established in Section 1552(a)(3)(D) of Title 10, U.S. Code. This allegation is false, as evidenced by the existence of the decision document for Docket No. 4135-20. No such decision document would exist if the Board did not reconsider its previous denials of Petitioner's requests for relief based upon his submission of materials not previously presented or considered by the Board. Rather, Petitioner would have received a letter from the Board indicating that his application was being administratively closed if the Board had actually denied his request for reconsideration as he claims. The commentary of the advisory opinion in this regard is irrelevant, as the Board obviously granted reconsideration in Docket No. 4135-20 and clearly addressed the affidavits that had not been previously presented to or considered by it in its decision to deny the relief requested. In this regard, the Board noted in Docket No. 4135-20 that this material was reasonably available to you at the time that you had submitted each of your previous applications. This reflected commentary on the weight of this evidence and the relative weakness of your argument that your relief for cause was the result of a toxic command climate, and was not indicative that your request for reconsideration was "denied" as you claim. As your request for reconsideration in Docket No. 4135-20 was clearly granted, albeit unsuccessfully, there was no merit in either of the causes of action alleged in your Complaint.

Although not specifically directed to do so by the DDC Order, the Board reconsidered its finding in Docket No. 4135-20 regarding your claim that your relief for cause was the product of a toxic command climate. Based upon this reconsideration, the Board continues to find insufficient evidence of any error or injustice warranting relief.

This Board is not an investigative body. In the absence of evidence to the contrary, the Board relies upon the presumption of regularity to establish that Marine authorities properly performed their duties and that you were properly relieved from your position as Adjutant of [REDACTED], [REDACTED], based upon your demonstrated performance. Unfortunately, the evidence that you provided to establish that your relief for cause was the result of a toxic command climate was grossly inadequate to overcome this presumption.

First, as noted in the decision letter for Docket No. 4135-20, you did not raise a toxic command climate as the reason for your relief for cause as the Battalion Adjutant in any of your previous applications for relief to this Board, the Performance Evaluation Review Board, or the Court of Federal Claims. Rather, your previous applications for relief focused on procedural flaws in the adverse fitness report (FITREP) resulting from this relief for cause, rather than on any substantive challenge to its contents. Your failure to previously make such a claim naturally raises significant doubts regarding the credibility of the claim being raised now. "Toxic leadership" is not a new concept in the Marine Corps, and your contention that these statements supporting your claim were not previously available to you lacks credibility since three out of the four statements were provided by Navy personnel who would not be subject to the continuing

risk of reprisal by a Marine Corps officer. Your failure to raise this issue previously suggests that it was not the actual reason for your relief for cause, but rather a theory developed long after the fact when your other efforts to expunge the offending FITREP from your record failed.

Another factor which raised questions regarding the credibility of your current claim was your lack of candor regarding your experience and the circumstances under which you entered the position of Battalion Adjutant. In both your application to the Board and your Complaint to the DDC, you characterized yourself as a “novice” junior officer who arrived at the unit during a “chaotic time” just as the prior Administrative Chief was fired, leaving you “without the oft needed assistance and resources of a seasoned Staff Non-Commissioned Officer.” At least one of the affidavits that you provided dutifully reiterated this description of the circumstances of your entry into the command. You emphasized your inexperience in this regard and the circumstances of your entry into the position to bolster your claim that the command lacked empathy for your inability to meet their expectations. However, your records reflect that, while you were a relatively junior officer, you were not inexperienced in or unaware of the duties and expectations of the position that you assumed. Prior to accepting your commission, you served at as a 0193 MOS (Personnel/ Administrative Chief), and prior to that as a 0131 MOS (Unit Diary Clerk). Additionally, you had completed the six-week Adjutant MOS School before reporting as the Battalion Adjutant. These experiences should have prepared you better than most to serve as a Battalion Adjutant, but you understated your experience in order to bolster your claim. Your lack of candor in this regard did not weigh in favor of your novel and largely unsupported theory that you were the victim of a toxic command climate.

Next, you offered statements written years after the fact from only four out of the hundreds of Marines and Sailors who were assigned to the battalion at the time. While these hand-picked individuals shared your opinion regarding the quality of your battalion leadership, theirs does not approach a consensus opinion. Notably, three out of the four statements you provided came from Navy personnel rather than from Marines. This is notable because such personnel would have been a significant minority within a task force commanded by a Marine officer, and they would have been relatively unqualified to comment upon the expectations and quality of Marine Corps leadership. If the command climate in the battalion was a toxic as you and these statements suggest, the Board would expect many formal complaints against the commander which would have resulted in either a command investigation or Inspector General review of his command in the many years since your relief for cause. At the very least, such toxic leadership would have been reflected in command climate surveys. The absence of any such documented findings suggests that the opinion of the command climate expressed by you and your colleagues was not widely shared; this Board refuses to accept that every Marine under the command lacked the courage to call out toxic leadership if it actually existed. Additionally, the Board simply did not find these statements to be very credible. They reflect the opinions of a very small and unrepresentative group of hand-picked individuals, voicing opinions on matters that they were not necessarily qualified to render. The Board found these statements to be obviously manufactured evidence to support your latest theory for relief.

Finally, even if the command climate in the battalion was as toxic as you claim it to have been, you have not demonstrated that this command climate was the reason for your relief. None of the four individuals from whom you received statements were remotely qualified to judge your performance as the Battalion Adjutant, or positioned to routinely observe your interactions with battalion leadership. In fact, three out of the four affidavits specifically acknowledged that their

observation of your performance was limited. Further, three out of the four individuals were Navy personnel attached to the task force, meaning that their observation of your performance of duties as the Battalion Adjutant would be limited and their opinions regarding the expectation of Marine officers within the command was questionable at best. It was fairly obvious that these individuals were specifically chosen because they were likely to or did provide the answers you desired to the questions that you posed; they certainly were not chosen based upon their placement in the command and/or credibility to comment upon your performance. Even so, one of these statements observed that you were not an aggressive officer within a command where such a trait was expected (as it often is within the Marine Corps). If that was the expectation of Marine officers within the command, then it was your duty to be an aggressive officer. You would have only yourself to blame for failing to comply with this expectation. Further, the FITREP in question was detailed in describing your performance shortcomings as the Battalion Adjutant. You acknowledged having been the recipient of numerous performance counselings, so you cannot claim ignorance of the standard expected of you. You also acknowledged that certain of your assigned tasks were taken away from you due to the perception that you were unable to perform them. Your command had a vested interest in your success, as your failures inevitably would reflect poorly upon them. An "ambitious" officer intent to use the command to advance his career, as you describe the battalion commander, would have a vested interest in your success since your performance in such a key position would directly reflect upon him, either positively or negatively. Accordingly, the Board did not believe your claim that the battalion leadership went out of its way to see you fail. That claim simply defies logic. Finally, you offered no evidence to refute the assessment of your performance as reflected in the FITREP. You have simply failed to demonstrate that any of the bases for your relief for cause, which were documented in your FITREP, were inaccurate or unjust.

Having found insufficient evidence of any error or injustice in your relief for cause from the position of Battalion Adjutant, the Board continued to find no error or injustice in the FITREP (as corrected) currently in your naval record. The Board also finds no basis to convene a Special Selection Board to reconsider you for promotion to captain, or to reinstate you on active duty.

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,

12/19/2022

