



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

██████████  
Docket No. 8078-22  
Ref: Signature Date

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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.

A three-member panel of the Board, sitting in executive session, considered your application on 28 March 2023. 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 21 October 2022 decision by the Marine Corps Performance Evaluation Review Board (PERB), and the 23 August 2022 Advisory Opinion (AO) provided to the PERB by the Manpower Management Division Records and Performance Branch (MMRP-30), as well as your 13 February 2023 response to the AO.

The Board carefully considered your request to remove your Fitness Report (Fitrep) for the reporting period 1 June 2020 to 3 May 2021 and correct your Master Brief Sheet (MBS) to reflect the same. The Board considered your contention that the Fitrep is a thinly veiled attempt at retaliation and revenge from your reporting senior (RS) and reviewing officer (RO), who were the subject of investigations after you made protected communications against them. You further contend the Fitrep fails to justify the exceedingly low markings and fails to provide ample justification to overcome the clear bias and conflict present between you and your reporting officials. You believe the only reasonable explanation for the poor marks is the RS's and RO's desire to visit consequences on you filing a Congressional Interest, a DoD Inspector General (IG) complaint, and ultimately a Prohibited Activities Complaint order violation allegation against them, which should have resulted in you receiving a Fitrep from parties without the presence of actual and apparent bias against you. You assert that during your time as a drill field, you saw many things that disturbed you, but you held your tongue. After some period, you decided you could no longer stand idly by and do nothing, so you obtained counsel, got advice, and then decided to file complaints with the DoD IG and your Congressperson, some of which formed the basis of a command investigation (CI). You believe that

because your RS and RO were the subject of some of your complaints to elected officials and the DoD IG, there is sufficient justification to remove the contested Fitrep. In rebuttal to the AO, you assert that you furnished “. . . additional evidence that provides further context to the evidence to demonstrate [you met] the burden of proof that [your] RS and RO were clearly biased against [you] and retaliated . . .” and that the evidence “should be re-evaluated and determined to meet the burden of proof by a preponderance of the evidence that [your] RS and RO were biased against [you] and therefore the contested report was unjust.” The Board fully considered all of your contentions in support of your request to have the contested Fitrep removed from your official military personnel file (OMPF).

The Board, however, substantially concurred with the AO in its entirety, and the PERB decision that the Fitrep is administratively correct, procedurally complete, and valid, in accordance with the Performance Evaluation System (PES) Manual. In this regard, the Board determined that your reporting officials adhered to PES Manual guidance and the Fitrep based was issued based on your RS’s evaluation of your performance and conduct, and your RO’s comparative assessment. Of particular note, the Board noted the following:

With regard to your contention that the reporting officials failed to justify the “exceedingly low markings” the Board concurred with the AO that the reporting chain was not required to justify any of the marks on the contested Fitrep because the only RS markings requiring justification are “A” “F” or “G” and the only RO marking requiring justification is “unsatisfactory.” You did not receive any of these markings. The Board was not swayed by the fact that “inflammatory language” was removed from a draft version because it was not the intent of the reporting chain to process an adverse Fitrep. Moreover, Fitrep iterations are allowed before a final version of a Fitrep is inserted into a member’s OMPF. Moreover, the PES Manual does not restrain a RO from reducing a comparative assessment on a subsequent report. Next, the Board noted that each Fitrep issued is for a finite period of time, and the performance and conduct as a series commander is not comparable to the performance of a trial counsel. Your MBS reflects that, while serving in your primary military occupational specialty, you received Fitreps that placed you in the middle and lower third of your RSs’ profile, and in some cases, you were ranked at the bottom of your ROs’ profile. Lastly, the Board concurred with the AO that Marines assigned to the Special Duty Assignment of Recruit Training are drawn from almost all military occupational specialties, and the fact that you are a Staff Judge Advocate did not necessarily infer any inability to follow the regimented duty requirements of a Series Commander, nor give you a proverbial pass.

The Board noted that your formal complaints were investigated and unsubstantiated. In fact, the CI essentially exonerated the reporting chain from any formal finding of malfeasance or culpability, and there was no evidence that you were harassed or bullied. Additionally, the IO did not make a recommendation regarding the validity of the reporting chain, and/or reference any potential conflict. Furthermore, the PES Manual grants Battalion-level Commanders wide discretion in determining what constitutes an unresolved conflict. In this case, the Board concurred with the AO that your unsubstantiated formal complaint essentially “resolved” the conflict, albeit not in your favor. Despite your chain of command—up to the Commanding General—being cognizant of your various complaints, your established reporting chain was not modified. Furthermore, your petition does not demonstrate that you necessarily deserved markings different than what were received, nor does it prove that your reporting chain was compromised. The Board determined that it was not in error or unjust to maintain your established reporting chain.

With regards to your contention that the command used the Fitrep as an attempt at retaliation and revenge against you, the Board determined that you failed to provide sufficient evidence that your demonstrated performance was not accurately portrayed in the contested Fitrep nor that it was compromised. Additionally, you failed to provide any supporting evidence, beyond your own subjective statement, that your reporting officials acted maliciously against you based on your formal complaints against them, or that they acted illegally or improperly evaluated you during the reporting period.

You also indicate in your application that you are the victim of reprisal. The Board also 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 follow-on 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 Board for Correction of Naval Records (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.

In view of the above, the Board concluded that your request is lacking in sufficient evidence of probable material error, substantive inaccuracy, or injustice, warranting removal of the Fitrep from your OMPF.

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,

4/24/2023

