



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

█
Docket No. 3077-23
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.

A three-member panel of the Board, sitting in executive session, considered your application on 18 May 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.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

The Board carefully considered your request to remove the 12 May 2022 non-judicial punishment (NJP), fitness report for the reporting period 1 May 2022 to 12 May 2022, and all references to your misconduct. The Board considered your contention that your statement did not constitute harassment as defined in the Marine Corps Prohibited Activities and Conduct (PAC) Prevention and Response Policy. You also contend that the finding of guilt at NJP was legally flawed, because the alleged conduct does not meet the legal standard of harassment in the PAC Prevention and Response Policy. You claim that you used the word "puta" when joking with a junior Marine. After you made the comment, the Marine objected, you immediately apologized and meant no offense. You assert that, "Behavior that is rude, ignorant, abrasive, or unkind, but does not adversely affect the work environment, is not harassment." The off-color comment, while unacceptable, does not constitute harassment under the PAC Prevention and Response Policy and requires the conduct in question to be knowing, reckless or intentional. You also assert that there

is nothing in the preliminary inquiry (PI) or the command investigation (CI) showing that the alleged off-color comment was knowing, reckless or intentional. You further contend that the willful failure of the Commanding General, █ to honor the terms of the Offer for Plea Agreement resulted in a violation of your constitutional rights, your right to refuse NJP and demand trial by court martial. You waived your right to demand court-martial and accepted NJP solely on the word and signed agreement made by the CG. The CG violated the terms of the agreement and therefore, the NJP must be set aside.

The Board noted the CI into alleged prohibited actives and conduct violation. During the investigation, witnesses at your command reported that you were observed making comments that were perceived as unprofessional or immature. Specifically, you were heard making negative comments about Marines personal lives, making statements about the use of pornography in the barracks, making negative public statements about a Lance Corporal (LCpl) and her physical abilities, and using vulgar language at the Marines in the S-1 shop for minor infractions. The Board also noted that according to the CI, on 24 November 2021, three Marines witnessed you state, "No, puta." to █. The word "puta" is a Spanish word that translates to "bitch" or "whore." The Investigating Officer (IO) opined that your negligence of directives degraded your Marines' trust and confidence in your abilities as a commissioned officer. Your conduct also adversely impacted the work environment, your actions are consistent with harassment by a supervisor, and goes beyond what one could reasonably believe to be within the "general civility code."

The Board noted that you accepted an Offer for Plea Agreement, in which you agreed to accept NJP, if the convening authority (CA) will agree to recommend that you should not be processed for administrative separation for your misconduct. The Board also noted your acknowledgment that the recommendation by the CA is not binding on a higher authority. On 12 May 2022, you attended the NJP hearing but refused to plead guilty or not guilty; therefore, the CG entered a plea of not guilty on your behalf. The Board noted, too, that during NJP hearing you stated that you are humbled and embarrassed for the mistake that you made, that it was very foolish of you and based on a lack of judgment, and you accepted responsibility for your actions. The CG then found you guilty of violating Article 92, UCMJ.

The Board, however, substantially concurred with the CG, █ that your repeated claim that your use of the derogatory slur "puta" was neither knowing, reckless, or intentional is not credible given the overwhelming evidence to the contrary. In this regard, the Board noted the Report of NJP documenting that you wrongfully called a subordinate Marine "puta," a derogatory Spanish expletive, in the workplace, creating an offensive environment. The Board also noted that the CG recommended that you not be required to show cause for retention in the Marine Corps at a Board of Inquiry or be separated via notification procedures for substandard performance of duty or misconduct, or moral or professional dereliction.

According to the PAC Prevention and Response Policy, harassment is defined as any conduct, "whereby a Service member knowingly, recklessly, or intentionally and with a nexus to military service engages in behavior that is unwelcome or offensive to a reasonable person that creates an intimidating, hostile, or offensive environment. Harassment may include, but is not limited to, unwanted physical contact; offensive jokes; *epithets or name calling* [emphasis added]; ridicule or

mockery; insults or putdowns; displays of offensive objects or imagery; offensive non-verbal gestures; stereotyping; intimidating acts; veiled threats of violence; threatening or provoking remarks; racial or *other slurs*[emphasis added]; derogatory remarks about a person's accent or disability; displays of racially offensive symbols; and interference with work." Harassment can occur in a variety of circumstances, the harasser can be the victim's supervisor, a supervisor in another area, and harassment can be oral, visual, written, physical, or electronic.

The Board determined that the CI contains sufficient evidence of a pattern of harassing behavior. The Board found that your use of the slur "puta," a Hispanic word, to a Latina female Marine, meets the definition of harassment pursuant to the PAC Prevention and Response Policy. In this regard, you recklessly and intentially used an offensive epithet, that was insulting, offensive, racially targeted, and as a Marine officer, your conduct most certainly created a hostile work environment for a subordinate Marine, in this case a LCpl, a Marine significantly junior to you in grade. The Board also determined that the CG's comments in the Report of NJP is not a material error or injustice. As required by the Offer for Plea Agreement, the CG did not recommend your administrative separation. There are no regulations or laws that restrict the CG from commenting on his impressions and opinions of your misconduct. In consideration of the totality of the evidence, the Board determined that your NJP was conducted properly and according to the Manual for Courts-Martial (2019 ed.) and your adverse material was properly filed in your record. Moreover, the Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. The Board also found your evidence insufficient to overcome this presumption. The Board thus concluded that there is no probable material error, substantive inaccuracy, or injustice warranting setting aside of the NJP or removing any related derogatory material from your record. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

Concerning your request to remove your fitness report for the reporting period 1 May 2022 to 12 May 2022, the Board determined that you have not exhausted your administrative remedies. The Performance Evaluation Review Board (PERB) is the initial action agency for fitness report appeals, therefore, you must submit your request to the PERB according to the Marine Corps Performance Evaluation Appeals Manual.

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,

6/6/2023

