



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. 9297-23
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 November 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 13 October 2023 decision furnished by the Marine Corps Performance Evaluation Review Board (PERB), and the 16 August 2023 advisory opinion (AO) provided to the PERB by the Manpower Management Division Records and Performance Branch (MMRP-30) and your response to the AO.

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 fitness report for the reporting period 1 June 2020 to 30 June 2021. The Board considered your contentions that the fitness report is in violation of the Marine Corps Performance Evaluation System (PES) Manual. Specifically:

(1) The Senior Marine Representative (SMR) added a comment that implied adverse material without affording you the opportunity to address the comment.

(2) The Reviewing Officer (RO) downgraded your comparative assessment mark, the downgraded comparative assessment is not justified by the Reporting Senior's (RS's) assessment that did not change from the previous fitness report indicating that there was no decrease in your performance. You claim that you were screened and selected for a second Attaché assignment during the reporting period, and your collection managers confirmed that your performance during the period increased.

(3) According to the PES Manual RO guidance, “a MRO you are assessing in back-to-back reporting periods, and whose performance remains constant, should receive at least the same mark as you assigned to the prior report.”

(4) The fitness report is reprisal against you in violation of the Military Whistleblower Protection Act (10 U.S.C. section 1034). During May 2021, you filed an Inspector General (IG) complaint against your RS and the chain of command regarding the handling of national security information. You were also a witness in an ongoing IG investigation into the Chief, ██████████ ██████████ ██████████.

(5) You were directed to return to ██████████ for a meeting, you were not told the reason for your return, and during the meeting on 11 May 2021 you were issued a Memorandum of Counseling. During the meeting, you claim that you were not accused of misconduct, however, you were counseled for a host of absurd reasons, including your reporting of the improper handling of national security information to your supervisor, which was falsely characterized as being disrespectful.

The Board, however, substantially concurred with the AO and PERB’s decision that your fitness report, as modified is valid, in accordance with the applicable PES Manual. In this regard, the Board noted that the PERB approved a correction to your record by removing the contested SMR comment because it was deemed unnecessary and could be construed negatively. The Board also noted that the SMR is responsible to provide non-Marine RSs and ROs guidance and education on the policies of the PES Manual, and the PES Manual provides that the SMR must review all fitness reports for administrative correctness. In addition, the SMR is permitted to comment on a Marine, as appropriate, according to PES Manual guidance. The Board determined that the SMR was in fact authorized to reviewed your fitness report. With the exception of the fore mentioned PERB correction, the Board also determined that the SMR’s review of your fitness report was proper and valid.

The Board also noted that during the reporting period you were both verbally and formally counseled regarding your conduct, and the counseling’s were based on reports received by your RO and chain of command. The Board determined that it was within the discretionary authority of your chain of command when determining that your actions warranted the counseling memorandum. Based on the content of the counseling memorandum and the noted May 2021 incident involving your RO, the Board opined that it is reasonable that your RO considered both your performance and conduct in his evaluation. Moreover, the Board determined that your RO had the discretion to determine that your overall performance and conduct did not remain constant when compared to all Marines (both past and present) of the grade whose professional abilities are known to the RO. The Board noted, too, that the PES Manual does not require the RO to assign the same comparative assessment mark on back-to-back fitness reports, it does not require the comparative assessment mark to be justified by the underlying RS assessment/values, and the RO is not required to justify the basis for increasing or lowering a comparative assessment mark.

The Board noted that you filed a complaint with the ██████████. The Board also noted that the ██████████ determined there was insufficient evidence to conclude that responsible management officials engaged in the prohibited personnel practice of reprisal against you, and your downgraded fitness report was determined to be reasonable actions taken by your former supervisors to address concerns reported to them. The Board determined that your allegations

regarding the Chief, █ and your involvement as a witness in the investigation are unrelated to your fitness report. The Chief, █ Division Defense Attaché Service was not your reporting official and there is no evidence that she unduly influenced your RS or RO.

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 found your evidence insufficient to overcome this presumption. The Board concluded that there is no probable material error, substantive inaccuracy, or injustice warranting further corrective action. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

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, █. Your written request must contain your full name, grade, duty status, duty title, organization, duty location, mailing address, and telephone number; a copy of your Board for Correction of Naval Records 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 Board, therefore, please also include previously presented documentation that supports your statements.

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,

11/30/2023

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