



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

BJG
Docket No: 3136-99
3 December 1999

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: MA [REDACTED] EL, USMCR [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552
(b) MCO P1610.7D

Encl: (1) DD Form 149 dtd 10 Mar 99 w/attachments
(2) HQMC MMER/PERB memo dtd 10 May 99
(3) HQMC RAM-6 memo dtd 15 Jul 99
(4) Memo for record dtd 6 Aug 99
(5) Subject's ltr dtd 12 Nov 99
(6) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, that the applicable naval record be corrected by removing therefrom the fitness report for 14 April to 31 July 1996. A copy of this report is at Tab A to enclosure (1). Petitioner further requested, by implication, removal of his failure of selection before the Fiscal Year (FY) 2000 Reserve Lieutenant Colonel Selection Board, so that he will be considered by the selection board next convened to consider officers of his category for promotion to the grade of lieutenant colonel as an officer who has not failed of selection to that grade (his application included a request that his case be completed before his consideration by the FY 2000 Reserve Lieutenant Colonel Selection Board, which convened on 13 April 1999).

2. The Board, consisting of Messrs. Lippolis, Neuschafer, and Zarnesky, reviewed Petitioner's allegations of error and injustice on 17 November 1999, and pursuant to its regulations, determined that the limited corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies which were available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. The contested fitness report for 14 April to 31 July 1996 (Tab A to enclosure (1)) is an "EN" (end of service) report of Petitioner's service as a major in the reserve component. In Section B, items 13 and 14, he was marked "OS" (outstanding), the highest possible, or "NO" (not observed) in all areas except items 13a ("regular duties"), 14d ("attention to duty"), 14i ("force"), 14j ("leadership"), 14l ("personal relations"), 14m ("economy of management"), and 14n ("growth potential"), in which he was marked "EX" (excellent), the second highest; and 14g ("judgment"), marked "AA" (above average), the third highest. In item 15 ("general value to the service"), he was marked by himself in the "EX" block, the third highest, with no other officers compared with him. In item 16 (desirability for service in war), he was marked "be glad [to have]," the second highest. Item 17b was marked "yes," which means Petitioner was the subject of an adverse report from outside the chain of command. Item 17c was marked "no," indicating he was not the subject of any civil conviction or military disciplinary action. The Section C comments were generally favorable, although they included the arguably negative statement that "he can quickly solve most complex communications problems, with little or no supervision," and the following indisputably derogatory material:

SNM [Subject named Marine] was cited for driving under the influence while assigned to Expeditionary Warfare Group, Pacific, attending school at Naval Amphibious Base Coronado on 950819 [19 August 1995]. SNM was convicted for this offense in February 1996.

Petitioner's reviewing officer marked the third block in his certification, which indicates that he concurred with the reporting senior's marking of Petitioner in item 15. Petitioner signed item 22, indicating he had seen the Section B marks and Section C comments. He did not, however, sign item 24, which would have indicated whether or not he wanted to submit a rebuttal. Instead, item 24 reflects the entry "See SAP [Standard Addendum Page]." The SAP, attached to the contested report, shows a memorandum for the record to the effect that the Headquarters Marine Corps (HQMC) Performance Evaluation Section attempted to obtain Petitioner's acknowledgement and rebuttal statement, if desired, but their efforts were to no avail, so this report was placed in his personnel file without further action.

d. Enclosure (2) is the report of the HQMC Performance Evaluation Review Board (PERB) in Petitioner's case. The report reflects the PERB decision that Petitioner's request for removal of his fitness report should be denied. This report reads in pertinent part as follows:

...

2...[P]etitioner argues that the information concerning his conviction for Driving Under the Influence (DUI) occurred during a prior reporting period and should not have been included in the challenged fitness report. He points out that his prior Reporting Senior [RS] (Lieutenant Colonel [LtCol] Ba...) was fully aware of the conviction when he authored

the previous report; however, it was his successor [REDACTED] who reported the conviction...

3...a. At the outset, the [PERB] emphasizes that...[P]etitioner was afforded an opportunity to officially respond to the challenged fitness report by appending a statement of rebuttal. However, by failing to respond to official correspondence from this Headquarters (so documented in the Memorandum for the Record appended to the report), he declined that right and waived any challenge to the report. We also point out that when... [P]etitioner signed Item 22 of the report, he acknowledged seeing the completed document which contained the comments addressing his DUI conviction.

b. In supporting his contention,...[P]etitioner states that the previous [RS] exercised his option, per the provisions of paragraph 3009 of [reference (b), addressing when a "DC" (directed by the Commandant of the Marine Corps) fitness report is required]...to not report the DUI conviction. Succinctly stated, ...[P]etitioner has misinterpreted the provisions in that directive; there is no option to not report a documented DUI. If, in fact, [LtCol] Ba... was fully aware of the conviction (as [P]etitioner indicates), then he knowingly abrogated his responsibility as a[n RS]. [LtCol] Bo... was left with the obligation of incorporating known factual information into...[P]etitioner's record.

c...[P]etitioner is naive in somehow believing, that since [LtCol] Ba... failed to report his DUI, it should completely disappear...[P]etitioner knew the DUI was recorded when he signed the challenged report and he knew its inclusion was proper per the spirit and intent of [reference (b)]. The only injustice here was [LtCol] Ba...['s] failure to report the DUI when he was required to do so...

e. Enclosure (3) is the advisory opinion from the HQMC Reserve Affairs Division (RAM-6) concerning Petitioner's failure of selection. The advisory opinion recommends approval of Petitioner's implied request to remove his failure of selection before the FY 2000 Reserve Lieutenant Colonel Selection Board on the basis that his "...record would be competitive among his peers if the subject fitness report were expunged."

f. The memorandum for the record at enclosure (4) shows a member of the Board's staff contacted now Colonel (Col) Ba..., Petitioner's RS for the period in which he was convicted of DUI. Col Ba... advised as follows:

...he did not know about the DUI, and if he had known, he would have given Pet [Petitioner] an adverse fitrep [fitness report]. He stated that Pet did everything he could to hide the fact that he had a DUI conviction.

g. By letter at enclosure (5), Petitioner replied to the memorandum for the record at enclosure (4). He stated that Col Ba... did know about his DUI at the time he signed his fitness report for 1 January 1995 to 13 April 1996 (Tab B to enclosure (1)), and that he "...consciously chose not to note the incident in the fitness report..." He said that on 19 August 1995, he was arrested in Coronado, California for DUI, while attending a two-week school. He stated that on 20 August 1995, the Coronado police notified the school's commanding officer (CO). He said that on 21 August 1995, the CO told him that he had already informed Petitioner's parent command and the unit Staff Judge Advocate. He stated that on 28 August 1995, a judge advocate informed him that his immediate superiors, as well as HQMC, had been told about the misconduct. He asserted that the next time he reported for drill, which he believed to be in September 1995, his RS, LtCol Ba..., asked him about his arrest for DUI and told him "'not to worry about it' or words to that effect." He alleged that he and LtCol Ba... were "close friends," and that he believed LtCol Ba... was doing him a "favor" by not reporting the DUI in the fitness report LtCol Ba... wrote. He stated that LtCol Ba... had only three officers working for him, so his statement that he did not know of the incident "strains credulity." He concluded the strongest evidence that LtCol Ba... knew of the misconduct is his statement that Petitioner "did everything he could to hide the fact that he had a DUI conviction." He posed the question that "If [LtCol Ba...] did not know about the DUI, how could he know [Petitioner] was doing everything [he] could to hide it?"

h. Paragraph 4006.7.b of reference (b), the applicable Marine Corps Order governing fitness reports, includes the following: "A...civilian conviction will be reported in the reporting period in which the finding is announced in court."

CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding the PERB report at enclosure (2), the Board finds an injustice warranting limited corrective action, specifically, removal of the contested fitness report.

The Board agrees with the PERB that it was right for Petitioner's RS for the period in question, on learning of the DUI conviction, to cause it to be reflected in his record. However, in light of paragraph 3.h above, they do not agree it was right for him to accomplish this by documenting the conviction in the fitness report for which he was responsible, which covered a period after the conviction had occurred. Since the comment on the DUI conviction is the only clearly negative information in the contested report, they find that its improper inclusion tainted the marks assigned, such that the entire report should be removed. While they find the DUI conviction ought to be in Petitioner's record, they will take no action to ensure this, since their function is purely remedial.

The Board finds Petitioner's failure of selection for promotion should stand, despite the favorable opinion from RAM-6. They particularly note that his DUI conviction should have been in his record in any event. They find that removing the contested fitness report, while documenting the DUI conviction, would not have appreciably enhanced his competitiveness.

In view of the above, the Board recommends the following limited corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the following fitness report and related material:

Date of Report	Reporting Senior	Period of Report From	To
13 Jul 96	[REDACTED] USMC	14 Apr 96	31 Jul 96

b. That there be inserted in his naval record a memorandum in place of the removed report, containing appropriate identifying data concerning the report; that such memorandum state that the report has been removed by order of the Secretary of the Navy in accordance with the provisions of federal law and may not be made available to selection boards and other reviewing authorities; and that such boards may not conjecture or draw any inference as to the nature of the report.

c. That the magnetic tape maintained by Headquarters Marine Corps be corrected accordingly.

d. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

e. That any material directed to be removed from Petitioner's naval record be returned to this Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

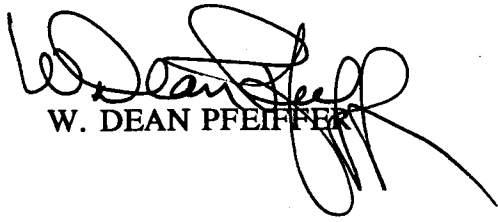
f. That the remainder of Petitioner's request be denied.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder

Jonathan S. Ruskin
JONATHAN S. RUSKIN
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.



W. DEAN PFEIFFER

Reviewed and approved:



CHARLES L. TOMPKINS
Deputy Assistant Secretary of the Navy
(Personnel Programs)