



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

BJG
Docket No: 3672-98
26 November 1999

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

Subj: LTCOL [REDACTED] USMCR, [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 2 Mar 98 w/attachments
(2) HQMC PERB memo dtd 30 Apr 98
(3) HQMC MMOA-4 memo dtd 8 Oct 98
(4) Subject's ltr dtd 21 Dec 98
(5) HQMC PERB memo dtd 13 Apr 99
(6) HQMC RAM-6 memo dtd 12 May 99
(7) HQMC MMPR memo dtd 26 May 99 w/encl
(8) Subject's ltr dtd 26 Aug 99
(9) Memo for record dtd 29 Oct 99
(10) 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 his naval record be corrected by removing therefrom the original fitness report for 7 March to 5 October 1989, a copy of which is at Tab A, and replacing it with a revised report for the same period, the last document with his application at enclosure (1). As indicated in paragraph 3.e below, the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) has directed removal of the original report, however, they did not file the revised report. As stated in paragraph 3.g below, Petitioner later amended his application by adding a request to remove his fitness report for 15 November 1985 to 28 February 1986, a copy of which is at Tab B. Finally, he requested removal of his failures of selection before the Fiscal Year (FY) 1998 and 1999 Reserve Lieutenant Colonel Selection Boards. He has been promoted pursuant to selection by the FY 2000 Reserve Lieutenant Colonel Selection Board.

2. The Board, consisting of Messrs. McCulloch, Pfeiffer, and Zsalman, reviewed Petitioner's allegations of error and injustice on 4 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. Although it appears that enclosure (1) was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. The contested original fitness report for 7 March to 5 October 1989 (Tab A) is a "TR" (transfer) report, documenting Petitioner's service as a captain in the reserve component. The reporting senior (RS) did not sign it until 6 December 1991, over two years after the end of the reporting period. He indicated his evaluation was based on only "frequent" observation. In Section B, items 13 and 14, the marks assigned were generally "EX" (excellent), the second highest. In item 15a, "general value to the service," Petitioner was marked "EX," third highest. The item 15b peer ranking showed four other captains ranked above him [three "EX" to "OS" (outstanding), second highest, and one "OS," highest] in "general value to the service" and none with or below him. The Section C comments, which were otherwise favorable, included the following:

...Although not overly aggressive, he will get the job done with frequent supervision. [Petitioner] needs to work on his initiative in getting missions accomplished and motivating himself to take on all tasks, once he is so engaged he is tactically proficient...

On 6 December 1991, the reviewing officer (RO) marked block 3 of the RO's certification, reflecting that he concurred with the marks assigned by the reporting senior (RS) in items 15a and b. He made no other comment.

c. Correspondence included with Petitioner's application at enclosure (1) shows that by letter dated 29 January 1992, HQMC returned the contested original report to Petitioner's command, because they had found the comments rendered it an "adverse" report requiring referral to Petitioner for an opportunity to submit a rebuttal statement; that the RO forwarded the report to Petitioner by endorsement of 12 April 1992; that Petitioner made a rebuttal statement dated 11 August 1992, in which he disagreed with the report and asked that it not be filed in his record; and that the RO made comments dated 27 May (sic) 1992, in which he disagreed with the RS's unfavorable comments, but agreed that Petitioner's overall performance was "excellent." The contested report was not sighted by a third officer, and the report was filed without Petitioner's rebuttal statement or the RO's comments.

d. The revised report for 7 March to 5 October 1989, the last document at enclosure (1), which Petitioner wants substituted for the contested original, reflects the RS signed it on 28 February 1998. This report raised 13 of the 17 "EX" marks in items 13 and 14, as well as the mark in item 15a, to "OS." The item 15b peer comparison was left blank. All the

unfavorable comments were deleted from Section C. The RO, who had concurred with the overall "EX" evaluation of the original report, did not sign the revised version.

e. Enclosure (2) is the first of two reports from the HQMC PERB in Petitioner's case. This report reflects the PERB decision that Petitioner's request for removal of the original fitness report for 7 March to 5 October 1989 (Tab A) has merit. Pursuant to the PERB decision, this report has been removed, but the removal was not effected until after both of Petitioner's failures of selection to lieutenant colonel. The FY 2000 Reserve Lieutenant Colonel Selection Board, before which Petitioner was successful, was the first to consider him for promotion to lieutenant colonel without the now removed report. The PERB decided not to file the revised report in place of the removed original, stating the following:

3...b. Based on the adverse comments in the report, this Headquarters initiated appropriate referral action. The necessary completed paperwork, however, apparently never reached this Headquarters and the report was improperly [emphasis in original] filed in [Petitioner's] official military record.

c. [Petitioner] is correct in his inference that the excessive time gap in completing the report, coupled with the limited observation of the [RS] and the improper handling of the adverse Section C comments, seriously question the credibility of the report. Utilizing that same logic, the revised report lacks both timeliness and credibility. Not only was it authored some eight years after the fact, but it also contains no distribution in Item 15b; nor is there an endorsement by the [RO] of record. Additionally, and contrary to [Petitioner's] claim, there is no statement from [the RS] as to how he now justifies the significantly revised report [Petitioner's application indicates a statement from the RS has been provided, but none actually appears].

f. Enclosure (3) is an advisory opinion from the HQMC Officer Counseling and Evaluation Section, Officer Assignment Branch, Personnel Management Division (MMOA-4) recommending denial of Petitioner's request to remove his failures of selection for promotion:

3...the petitioned report [the original report for 7 March to 5 October 1989 removed by the PERB] presented jeopardy to the record and the relief action enhanced the competitiveness of the record; but not significantly. However, [Petitioner] has other areas of considerable competitive concern in his record that may have contributed to his failure [sic] of selection.

a. **Overall Value & Distribution.** Throughout his career, [Petitioner] has sixteen officers ranked above him and seventeen below, placing him around mid pack.

b. **Section B Marks.** [Petitioner] received a substantial number of less competitive Section B marks in all categories throughout his career. He received

marks of Above Average ["AA", the third highest] in Regular Duties, Additional Duties, Handling Officers, Handling Enlisted, Training Personnel, Military Presence, Force, and Leadership on his Annual fitness report for the period of 85115 [sic] - 860228 [Tab B]. In his current grade, [Petitioner] received less competitive marks in Additional Duties, Administrative Duties, Handling Officers, Endurance, Personal Appearance, Initiative, Judgment, Force, and Economy of Management, indicating his performance is not up to that expected for his grade and experience.

c. **PME [Professional Military Education].** [Petitioner] has not completed the requisite PME for his grade as required by [the applicable Marine Corps order].

4. In summary, removal of the petitioned report eliminates some competitive concern from the record. However, [Petitioner's] Overall Value & Distribution, Section B marks, and lack of PME provide other areas of considerable competitive concern to the record and may have contributed to his failure [sic] of selection...

g. In enclosure (4), Petitioner's reply to the advisory opinion from MMOA-4, he amended his application by adding two new requests, to remove his fitness report for 15 November 1985 to 28 February 1986 (Tab B) and grant him a special selection board. He argued that when he was selected for major, the now removed original report for 7 March to 5 October 1989 was not in his record. He alleged that the Section B marks in the fitness reports he has received as a major "have been strong and far more competitive" than those he received as a captain. He stated that since his fitness reports as a lieutenant and captain were sufficiently strong to allow him to have been promoted to major, and since his major reports are "far more competitive," the probability of promotion to lieutenant colonel "would be high." Regarding his fitness report for 15 November 1985 to 28 February 1986, he stated that although it is an "annual" report, it covers only three months, during which the actual observation was only four to six calendar days. He said that the comments and "seemingly adverse" marks are inconsistent, and that this was his first experience with a reserve unit. He stated, incorrectly, that the RO had marked the block in his certification reflecting he had not had sufficient opportunity to observe Petitioner (he actually marked the second block, showing he had had only limited opportunity to observe); and he alleged that the RO should not have let this report go forward. He also argued that during the mid 1980's, "there was a move to reestablish truth in grading" which may account for his low marks. He stated that within two years of this report, he got a command billet and a "superior" fitness report. Concerning PME, he stated his belief that he had only to be enrolled in Command and Staff College, which he was for both the FY 1998 and 1999 promotion boards, to be educationally qualified for promotion to lieutenant colonel. He alleged he was aware of other officers promoted to lieutenant colonel by the last reserve selection boards without having completed any of the series of courses for Command and Staff College or any other PME beyond Amphibious Warfare School [the record does not reflect whether Petitioner had completed Command and Staff College when selected by the FY 2000 promotion board]. He said he was "astounded at how detrimental the marks of 'excellent' are considered." Finally, he concluded the removed report was so damaging as to be a "significant factor" in his failures of selection.

h. The contested fitness report for 15 November 1985 to 28 February 1986 (Tab B) is an annual reserve duty report, documenting Petitioner's service as a captain with the reserve component (it is actually marked "AN," which signifies annual active duty, but it should be marked "AR"). As indicated in the MMOA-4 advisory opinion at enclosure (3), this report reflected eight Section B marks of "AA." In item 15, he was marked "EX," with two other officers marked above him ("EX" to "OS"), and none with or below him. The Section C comments were as follows:

[Petitioner] is a new officer in a very different environment [sic] from which he has been trained. Consequently his effectiveness has been limited as he has been in an intensive learning cycle himself. I feel as his confidence increases with his new abilities his military presence and force will increase. He is very quick witted [sic] and intelligent which has made his new training some what [sic] easier. He still needs much work in his force and some in his physical prowess. He is, however, coming along quickly and should prove a valued asset to this command.

i. In their second report, at enclosure (5), the HQMC PERB has commented to the effect that Petitioner's request to remove his fitness report for 15 November 1985 to 28 February 1986 should be denied. This report of the PERB (which incorrectly cites Marine Corps Order (MCO) P1610.7D dated 3 March 1995, rather than MCO P1610.7C dated 4 November 1985, as the pertinent fitness report order) states the following:

3...a. The unique nature of the Reserve establishment offers members of the Selected Marine Corps Reserve (SMCR) a minimum of 48 drill periods (roughly 24 days) per fiscal year, including a two-week annual training period. As established by [MCO P1610.7D], monthly drills/meetings are considered to be "daily" observation of performance for the purpose of annual reserve (AR) report submission [same in MCO P1610.7C]. The challenged report meets the criteria for sufficient observation.

b. Contrary to [Petitioner's] argument, there are no "seemingly adverse" marks in Section B. Ratings of "above average" and "excellent" reflect more than acceptable levels of demonstrated performance. In this regard, the [PERB] emphasizes that "adversity" is in the recorded performance, not in perceived competitiveness.

c. Section C provides meaningful insight into [Petitioner's] capabilities. Although the [RS] stated that his effectiveness was limited, he did not fault [Petitioner]. Rather, [the RS] identified the different environment as the reason. The areas in which [Petitioner] needed to improve were appropriately commented on, but are not "adverse."

d. Insufficient opportunity to observe by the [RO] has absolutely no bearing whatsoever on the [RS's] ability to prepare an observed fitness report. Likewise, [the RO] had no authority to preclude the report from "going forward."

j. In correspondence attached as enclosure (6), the HQMC Reserve Affairs Division (RAM-6) has commented to the effect that Petitioner's request to remove his failures of selection has merit and warrants favorable action. This advisory opinion states in pertinent part as follows:

...2. Reserve Affairs Division generally concurs with the MMOA Advisory Opinion [enclosure (3)], concluding that the competitiveness issues remaining in [Petitioner's] record, even after considering the successful removal of the fitness report [for 7 March to 5 October 1989] ..., may still be sufficient to jeopardize his selection to lieutenant colonel. In all fairness to each Marine however, we must reinforce that it is impossible to determine the potential outcome of any promotion board...

4. In summary, it is the advisory opinion of the Reserve Affairs Division that removal of the TR ("transfer") fitness report for the period 7 March 1989 to 5 October 1989 may have removed sufficient jeopardy to have allowed for [Petitioner's] selection to lieutenant colonel. Therefore, we recommend that his implied request for removal of failure [sic] for selection be approved...

k. In correspondence attached as enclosure (7), the HQMC Promotion Branch (MMPR) has commented to the effect that Petitioner's request for a special selection board and removal of his failures of selection should be denied:

1...[Petitioner] requested a Special Selection Board (SSB) 28 Sep 99 [sic] due to material error of fact, in that the TR report 890307 [7 March 1989] to 891005 [5 October 1989] was removed following the FY98 [sic] USMCR [US Marine Corps Reserve] Lieutenant Colonel Promotion Selection Board [the memorandum enclosed with this advisory opinion shows Petitioner's SSB request actually sought relief from his FY 1999 failure, on the basis that the report was still in his record for that promotion board]. Per enclosure (1) the Secretary of the Navy disapproved his request [for an SSB] on 7 May 99.

2. [The applicable instruction] requires officers to exercise reasonable diligence to ensure the accuracy and completeness of their records prior to the convening of promotion selection boards. [Petitioner] waited eight years to remove the report from his record only after failing of selection and just prior to being put before a second board [he signed his application to this Board on 2 March 1998, and the FY 1999 Reserve Lieutenant Colonel Selection Board convened on 14 April 1998]. Since [Petitioner] failed to ensure his record was substantially complete and accurate prior to the convening of the FY98 and FY99 USMCR Lieutenant Colonel Promotion Selection Boards, he failed of selection through his own inaction...

1. By letter at enclosure (8), Petitioner withdrew his request for an SSB in light of his promotion to lieutenant colonel.

m. The memorandum for the record at enclosure (9) shows Petitioner informed a member of the Board's staff that he did not want to have his promotion backdated, as he wanted an additional two years to establish his performance record before being considered for promotion to colonel.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board finds an injustice warranting partial relief, specifically, removing Petitioner's failures of selection for promotion.

The Board substantially concurs with the two PERB reports at enclosures (2) and (5) in concluding that no further correction of Petitioner's fitness report record is warranted.

They concur with the RAM-6 opinion at enclosure (6) in concluding that his failures of selection should be removed. In this connection, they note that RAM-6 expressly acknowledges the matters of competitive concern cited in the unfavorable MMOA-4 opinion at enclosure (3). Concerning the unfavorable MMPR opinion at enclosure (7), the Board recognizes that Petitioner's application was untimely, but they consider it in the interest of justice to excuse this, given the evidence that the later removed fitness report denied him fair consideration for promotion. They also note the evidence that he tried to have the report nullified in 1992, and that the RS did not sign the revised report until 28 February 1998. In agreeing with the RAM-6 recommendation, they particularly note that Petitioner was selected by the first promotion board to consider him after the original fitness report for 7 March to 5 October 1989 had been removed, despite his status as having previously failed of selection.

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

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing his failures of selection before the FY 1998 and 1999 Reserve Lieutenant Colonel Selection Boards.

b. 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.

c. 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

d. 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
W. DEAN PFEIFFER

Reviewed and approved:

JAN 11 2000

C. L. Tompkins
Charles L. Tompkins
Deputy Assistant Secretary of the Navy
(Personnel Programs)