



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

BJG
Docket No: 4072-00
6 September 2000

MAJ [REDACTED] SMC
[REDACTED]
[REDACTED]

De [REDACTED]:

This is in reference to your application dated 23 February 2000, seeking reconsideration of your previous application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552. Your previous case, docket number 834-92, in which you requested that the fitness report for 1 June to 7 September 1988 be modified or removed, was denied on 6 February 1992. You again request that this fitness report be removed, and you add a new request for consideration by a special selection board for promotion to lieutenant colonel.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 24 August 2000. 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 current application, together with all material submitted in support thereof, the Board's file on your prior case, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the report of the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) in your case, dated 7 June 2000, and the advisory opinion from the HQMC Officer Assignment Branch, Personnel Management Division (MMOA-4), dated 21 June 2000, copies of which are attached. They also considered your rebuttal letter dated 5 July 2000.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board substantially concurred with the comments contained in the report of the PERB in finding that the contested fitness report should stand. In their previous decisional document dated 11 February 1992, they stated that they were "...not persuaded that the final marks on the contested fitness report did not represent your reporting senior's intent when they were assigned..." You provided nothing new to show the marks in "attention to duty" and

"judgment" were changed because of command influence. They noted that the PERB does not allege the reporting senior ordered a "sight and touch" formation; in paragraph 3.c they say you deny that he ordered this.

The Board noted paragraph 7 of the Commandant of the Marine Corps (CMC) second endorsement dated 4 January 1989 on the Judge Advocate General Manual investigation of the lance corporal's death, at Tab 5 to your application, directed that a copy of the investigation be provided to "all Marine Corps commanding generals [emphasis added] for appropriate incorporation of its findings and conclusions in all their operations and training." They were unable to find, as you alleged, that the CMC guidance "mandated all officers and staff non-commissioned officers [SNCO's] read the investigation..." For this reason, they could not accept your allegation that all subsequent boards that considered you for any purpose were tainted.

The Board agreed with the assessment you attributed to a counselor on 1 April 1997, to the effect that the contested fitness report "'is insurmountable and regardless of any billet or further assignment, promotion would be very unlikely.'" They found this report would have made your selection to lieutenant colonel definitely unlikely, regardless of your billet assignment or selection for schools. Therefore, even if you are correct that knowledge of the investigation impaired your billet assignment and selection for schools, and even if you were, as you allege, the victim of collusion to deny you a chance to return to a command billet, they found that your failures by the Fiscal Year 1998, 1999, 2000 and 2001 Lieutenant Colonel Selection Boards should stand, and that you should not be recommended for a special selection board. They were unable to find, despite the comments of your career counselors, that your promotion boards did not follow the guidance they were given.

Finally, the Board was unable to find that you suffered discriminatory treatment. They observed that adverse actions were taken against all those with important roles in the lance corporal's death. Concerning your allegation that your reporting senior was afforded a chance to return to command while you were not, their position as stated above is that the contested fitness report, rather than your billet assignment, precluded your selection for promotion. As also indicated above, they were unable to find that CMC mandated all officers and SNCO's read the investigation, so they could not accept your argument that such a mandate reflected discrimination against you.

Since the Board found insufficient basis to remove your failures of selection to lieutenant colonel, they had no grounds to set aside action to effect your involuntary retirement on 1 November 2000.

In view of the above, the Board voted again to deny relief. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously 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,

W. DEAN PFEIFFER
Executive Director

Enclosures



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
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4072-00

IN REPLY REFER TO:
1610
MMER/PERB
7 JUN 2000

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF MAJOR
[REDACTED] USMC

Ref: (a) [REDACTED] DD Form 149 of 23 Feb 00
(b) MCO P1610.7C w/Ch 1-3

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 25 May 2000 to consider Major [REDACTED] petition contained in reference (a). Removal of the fitness report for the period 880601 to 880907 (CH) was requested. Reference (b) is the performance evaluation directive governing submission of the report. NOTE: During 1991, (then) Captain [REDACTED] submitted a petition challenging certain Section B grades on this same report. Since this current request asks for complete removal of the report, PERB is treating it as a new application vice a request for reconsideration.

2. The petitioner bases his request for removal of the report "... to ensure fair, equitable, and unprejudiced consideration for selection." It is his belief that the Marine Corps failed to afford him "... due process, fair and equitable consideration for billet assignment, selection to Lieutenant Colonel during the FY98-01 selection boards, and selection for school during the FY92 and 95 Intermediate Selection Boards." In his appeal, the petitioner alleges that senior officers, career counselors, and at least one monitor, intentionally and unintentionally deprived him of fair consideration for command, promotion, and school selection. To support his appeal, the petitioner provides his own detailed statement and 24 items of documentary material.

3. In its proceedings, the PERB concluded that the report is both administratively correct and procedurally complete as written and filed. The following is offered as relevant:

a. The Board observes that when the petitioner originally challenged the fitness report some nine years ago, he only indicated he wanted some grades changed in Section B, not that the entire report was either inappropriate or invalid. They also observed that the 1991 petition had been generated because the request for correction was first made to this Headquarters by the Reporting Senior (Lieutenant Colonel [REDACTED]). At this juncture,

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the petitioner is now claiming Lieutenant Colonel [REDACTED] should never have written the challenged report since he had been relieved for the same incident that caused the petitioner's relief. Succinctly stated, Lieutenant Colonel [REDACTED] was the valid Reporting Senior and he remained fully in command for another five months immediately afterward.

b. The petitioner's contention that the Reviewing Officer (Colonel [REDACTED] was unduly prejudiced by the incident of Lance Corporal [REDACTED] death, because it was going to allegedly prevent Colonel [REDACTED] from being promoted to general, is considered without merit or substantiation. Such a claim appears rather cynical and incredible since the supposed source of the petitioner's information was via multiples of hearsay (reference second paragraph on page four of the petitioner's statement appended to reference (a)).

c. A leader's inherent and sacred leadership responsibility is for the accountability of those Marines under his or her charge. The petitioner continues to argue that upon completion of the CAX he was never ordered by Lieutenant Colonel [REDACTED] (his Battalion Commander and Reporting Senior) to conduct a "sight and touch" formation upon return from the field to Camp Wilson. What he clearly acknowledged in his rebuttal to the challenged fitness report, however, was that he received an order to "ensure the strict accountability and that all of my Marines were out of the field." The fact is that he did neither.

d. Opinion 15 to [REDACTED]'s JAG investigation (enclosure (5) to reference (a)) makes it clear that "strict accountability" was a failure on the part of the petitioner. Furthermore, the Reviewing and Third Sighting Officers (Colonel [REDACTED] and [REDACTED], respectively) address the petitioner's failure in this case in no uncertain terms. The Board's position is that the petitioner's responsibility as the Company Commander in properly accounting for Lance Corporal [REDACTED] under the circumstances surrounding the period covered by the fitness report at issue, and his failure to properly execute that responsibility, is not an issue to which he has a valid argument or challenge.

e. That the report of record is a second iteration is immaterial. The fact is the petitioner acknowledged the report, submitted his rebuttal, and the report was properly adjudicated. Given the extreme sensitivity of the issues, the timeline from

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[REDACTED] USMC

when Lieutenant Colonel [REDACTED] completed the evaluation to when it was sighted by Major General [REDACTED] considered neither inordinate nor invalidating. The petitioner was given every consideration to ensure he had ample opportunity/time to rebut the Reporting Senior's evaluation and the Reviewing Officer's review.

f. The petitioner's implication that the ensuing courts-martial, the overall publicity of the incident, and the Commandant's release of the JAG Investigation prejudiced the report is unsubstantiated speculation. There is no proof that anything about the fitness report was untrue, unwarranted, or unduly influenced. Likewise, the memorandum at enclosure (7) to reference (a) which distributed the JAG Investigation to Commanding Generals is presumably quite legal since it was signed by the Staff Judge Advocate to the Commandant. For the petitioner to argue the Commandant had no valid part in this extremely sensitive issue, and especially in initiating measures to prevent a similar occurrence, is disingenuous at best.

g. The part the report played in the petitioner's career progression/opportunities is definitely problematic. It certainly did not deter his selection and promotion to the grade of Major. It very well may have contributed to his non-selection for schools, to certain billet assignments, and for selection to the grade of Lieutenant Colonel. Regardless, the issue is the validity of the report, not it's impact on competitiveness.

h. Lance Corporal [REDACTED] death was tragic, sad, and needless. The principles of military leadership mean that consequences are suffered by those in authority as a result of improper actions or no action at all. Leaders must be held accountable, and those closer to the action and who can more immediately influence that action, suffer the more severe consequences when adverse situations occur. The two immediate noncommissioned officers involved were court-martialed; the officer immediately involved was court-martialed and dismissed; Lance Corporal [REDACTED] platoon commander was relieved; eventually the Battalion Commanding Officer and Executive Officer were relieved. While these actions terminated all of their careers, Lance Corporal [REDACTED] was lost forever.

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report should remain a part of [REDACTED] official military record.

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[REDACTED] USMC

5. The case is forwarded for final action.

[REDACTED]

Colonel, U.S. Marine Corps
Deputy Director
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps



DEPARTMENT OF THE NAVY
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4072-00

IN REPLY REFER TO:

1600
MMOA-4
21 Jun 00

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BCNR PETITION FOR MAJOR [REDACTED]
[REDACTED] USMC

Ref: (a) MMER Request for Advisory Opinion in the case of
Major [REDACTED] MC
of 21 Jun 00

1. Recommend disapproval of [REDACTED]'s request for removal
of his failures of selection.

2. Per the reference, we reviewed [REDACTED] record and
petition. He failed selection on the FY98, FY99, FY00 and FY01
USMC Lieutenant Colonel Selection Boards. Subsequently, he
unsuccessfully petitioned the Performance Evaluation Review Board
(PERB) for removal of the Change of Reporting Senior fitness
report of 880601 to 880907. [REDACTED] requests removal of
his failures of selection.

3. In our opinion, removing the petitioned report would have
significantly increased the competitiveness of the record.
However, the unfavorable PERB action does not reflect a material
change in the record as it appeared before the FY98, FY99, FY00
and FY01 Boards and his record received a substantially complete
and fair evaluation by each board. Therefore, we recommend
disapproval of [REDACTED]'s request for removal of his
failures of selection.

4. Point of contact [REDACTED] [REDACTED]

[REDACTED]

Colonel, U.S. Marine Corps
Head, Officer Assignments Branch
Personnel Management Division