



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

BJG
Docket No: 6123-02
15 August 2002

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

Subj: MA [REDACTED] USM [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 dtd 29 Mar 02 w/attachment
(2) HQMC MMER/PERB memo dtd 3 Jul 02
(3) HQMC MMOA-4 memo dtd 27 Jun 02
(4) 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 entire fitness report for 12 July 1997 to 31 July 1998, and modifying the report for 1 August 1998 to 14 May 1999 by removing the section K, "Reviewing Officer [RO] Comments." Copies of these reports are in enclosure (1) at Tabs A and B, respectively. As indicated in enclosure (2), the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) has directed that the report for 12 July 1997 to 31 July 1998 be modified by removing the following from the reporting senior (RS) comments: "Exercises acceptable judgment and leadership." Petitioner further requested removal of his failure of selection before the Fiscal Year (FY) 2003 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.

2. The Board, consisting of Messrs. Kastner, Pfeiffer and Schultz, reviewed Petitioner's allegations of error and injustice on 8 August 2002, 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. Petitioner received the contested fitness report for 12 July 1997 to 31 July 1998 (Tab A to enclosure (1)) while serving in his current grade of major. His observed marks were straight "OS" (outstanding), the highest possible mark, except in item 14g, "judgment," where he was marked "EX" (excellent), the second highest mark. In item 15, "general value to the service," category, he was marked "OS," but ranked below the one other major who was compared with him. Section C, the RS comments, was highly complimentary in all respects, except for the following, whose removal has been directed by the HQMC PERB:

Exercises acceptable judgment and leadership.

The RO concurred with the item 15 mark and peer ranking the RS assigned Petitioner, and he added highly complimentary comments, except for the following:

-- [Petitioner's] unit presents him with many unique challenges which he is making strides to meet.

Petitioner argued that both of the above quotes are adverse, and that he should have been given the opportunity to submit a rebuttal statement. He maintains these comments are more significant because neither the RS nor RO made recommendations regarding his promotion or advancement. In fact, block 19 of the report at issue, "qualified for promotion," is marked "yes."

d. Petitioner received the report for 1 August 1998 to 14 May 1999 (Tab B to enclosure (1)), in which he is contesting only section K, while serving as a major. In block K.3, "comparative assessment," the RO marked the third lowest of eight blocks. The RO added highly complimentary comments, except for the following:

- Bottom 1/3 of 21 Battery I-I [Inspector-Instructor] in Reg[imen]t.
- Promote with peers.

Petitioner argued that the first comment quoted above is adverse, and that it should have been referred to him so he could submit a rebuttal statement.

e. Enclosure (2) is the report of the HQMC PERB in Petitioner's case. The report reflects the PERB decision that Petitioner's request had limited merit. The report stated in pertinent part as follows:

...

3. In its proceedings, the PERB concluded that, with one minor exception, both reports are administratively correct and procedurally complete as written and filed. The following is offered as relevant:

a. The [PERB] agrees with the [P]etitioner, in part, concerning the phrase in Section C of [the report for 12 July 1997 to 31 July 1998] to which he objects. The sentence not only "damns with faint praise", but it is also totally inconsistent with the marks of "outstanding" of Items 13d (handling officers), 13e (handling enlisted personnel), and 14j (leadership). The [PERB] does not, however, find that complete removal of the report is warranted. Instead, they have directed elimination of that single sentence (i.e., "Exercises acceptable judgment and leadership.").

b. The [PERB] finds nothing "adverse", as that term in [sic] defined in [the applicable fitness report orders], in the [RO]s' comments in either of the challenged reports. While [P]etitioner (and others) may view the verbiage (or lack thereof) as "noncompetitive", the PERB is haste [sic] to point out that "adverse" and "noncompetitive" are not synonymous. Consequently, [P]etitioner was correctly not afforded an opportunity to append statements of rebuttal.

f. Enclosure (3) is the advisory opinion from the HQMC Officer Counseling and Evaluation Section, Personnel Management Division (MMOA-4) recommending approval of Petitioner's request to remove his failure of selection before the FY 2003 Lieutenant Colonel Selection Board. This advisory opinion includes the following:

3. In our opinion, the favorable PERB action marginally enhances the competitiveness of the record. However, [Petitioner]'s record contains others [sic] areas of competitive concern that may have led to his failure of selection.

a. **I&I Staff Comments.** [Petitioner]'s performance as an I&I can be characterized as mid-pack at best. His [RO] comments during [sic] two reports during the period comment, "Middle one third of 14 Major I&Is," and "Bottom one third of 21 Btry [Battery] I&Is." [Petitioner's RO] distribution in his final I&I report has no officers marked below him, two officer [sic] marked with him, and thirty-three officers marked above him.

b. **Value and Distribution.** [Petitioner]'s rankings are eight marked above and twenty-one marked below as a First Lieutenant. His rankings are twenty-two above and twenty-six below as a Captain. His rankings are three above and zero below as a Major. [Petitioner]'s distribution in command is twelve marked above and thirteen below. His total value and distribution is thirty-three marked above and forty-seven marked below.

4. In summary, the favorable PERB action marginally enhances the competitiveness of [Petitioner]'s record. The record does contain other areas of competitive concern that may have contributed to his failure of selection. However, because the removed comment may have also contributed to the failure of selection, we recommend approval of [Petitioner]'s request for removal of his failure of selection.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board finds an injustice warranting partial relief, specifically, complete removal of the fitness report for 12 July 1997 to 31 July 1998 and removal of Petitioner's failure of selection to lieutenant colonel.

Contrary to the PERB report at enclosure (2), the Board finds that the contested fitness report for 12 July 1997 to 31 July 1998 should be completely removed. They find that the PERB did not go far enough. In this connection, they conclude that both the "EX" mark in "judgment" and the two-of-two peer ranking were tainted by the comment PERB has already directed removing. They did not consider it appropriate to remove the mark and ranking, leaving the remainder of the report in the record, as they felt the report without these key elements would be fatally incomplete.

The Board substantially concurs with the PERB in finding that section K of the fitness report for 1 August 1998 to 14 May 1999 should stand.

Finally, the Board finds that Petitioner's failure of selection by the FY 2003 Lieutenant Colonel Selection Board should be removed. In this regard, they particularly note the favorable advisory opinion from HQMC MMOA-4 regarding the impact of the comment PERB has directed removing from the contested report for 12 July 1997 to 31 July 1998. They further find that removing the entire report, which would eliminate the "EX" mark in "judgment" and the two-of-two ranking, could have enhanced his competitiveness still more.

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
9 Aug 98	LtCol [REDACTED], USMC	12 Jul 97	31 Jul 98

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 Petitioner's naval record be corrected so that he will be considered by the earliest possible selection board convened to consider officers of his category for promotion to lieutenant colonel as an officer who has not failed of selection for promotion to that grade.

e. 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.

f. 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.

g. 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: SEP 6 2002

Joseph G. Lynch

JOSEPH G. LYNCH
Assistant General Counsel
(Manpower and Reserve Affairs)



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

4123-02

IN REPLY REFER TO:
1610
MMER/PERB
JUL 03 2002

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) Major [REDACTED] DD Form 149 of 29 Mar 02
(b) MCO P1610.7D w/Ch 1-5
(c) MCO P1610.7E w/Ch 1-2

Encl: (1) CMC Advisory Opinion 1600 MMOA-4 of 27 Jun 02

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 19 June 2002 to consider Major [REDACTED]'s petition contained in reference (a). Action as indicated was requested on the following fitness reports:

a. Report A - 970712 to 980731 (DC). Removal in its entirety. Reference (b) applies.

b. Report B - 980801 to 990514 (TR). Removal of Reviewing Officer's Certification and comments. Reference (c) applies.

2. The petitioner contends that the Reporting and Reviewing Officers' comments on Report A and the Reviewing Officer's assessment and comments on Report B could be construed as adverse. With specific regard to Report A, the petitioner believes the comments of both officers are exacerbated since neither provided any recommendations for promotion or advancement. It is the petitioner's position that he should have been given and opportunity to acknowledge and respond to both appraisals.

3. In its proceedings, the PERB concluded that, with one minor exception, both reports are administratively correct and procedurally complete as written and filed. The following is offered as relevant:

a. The Board agrees with the petitioner, in part, concerning the phrase in Section C of Report A to which he objects. The sentence not only "damns with faint praise", but it is also totally inconsistent with the marks of "outstanding"

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

of Items 13d (handling officers), 13e (handling enlisted personnel), and 14j (leadership). The Board does not, however, find that complete removal of the report is warranted. Instead, they have directed elimination of that single sentence (i.e., "Exercises acceptable judgment and leadership.").

b. The Board finds nothing "adverse", as that term is defined in references (b) and (c), in the Reviewing Officers' comments in either of the challenged reports. While the petitioner (and others) may view the verbiage (or lack thereof) as "noncompetitive", the PERB is haste to point out that "adverse" and "noncompetitive" are not synonymous. Consequently, the petitioner was correctly not afforded an opportunity to append statements of rebuttal.

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness reports should remain a part of [REDACTED]'s official military record. The limited corrective action identified in subparagraph 3a is considered sufficient.

5. The enclosure is furnished to assist in adjudicating Major [REDACTED] request for the removal of his failure of selection to the grade of Lieutenant Colonel.

6. The case is forwarded for final action.

[REDACTED SIGNATURE]

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

1600
MMA-4
27 Jun 02

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

Subj: BCNR PETITION FOR MAJOR [REDACTED]
USMC

Ref: (a) MMER Request for Advisory Opinion in the case of
Major [REDACTED] USMC
of 21 Jun 02.

1. Recommend approval of [REDACTED]'s request for removal of his failure of selection.
2. Per the reference, we reviewed [REDACTED]'s record and petition. [REDACTED] failed selection on the FY03 USMC Lieutenant Colonel Selection Board. He successfully petitioned the Performance Evaluation Review Board (PERB) to remove a Section C comment from the Direction of the Commandant fitness report for the period from 970712 to 980731. [REDACTED] requests removal of his failure of selection.
3. In our opinion, the favorable PERB action marginally enhances the competitiveness of the record. However, Major [REDACTED] record contains others areas of competitive concern that may have led to his failure of selection.

a. **I&I Staff Comments.** [REDACTED]'s performance as an I&I can be characterized as mid-pack at best. His Reviewing Officer comments during two reports during the period comment, "Middle one third of 14 Major I&Is," and "Bottom one third of 21 Btry I&Is." Major [REDACTED]'s Reviewing Officer distribution in his final I&I fitness report has no officers marked below him, two officer marked with him, and thirty-three officers marked above him.

b. **Value and Distribution.** Major [REDACTED] rankings are eight marked above and twenty-one marked below as a First Lieutenant. His rankings are twenty-two above and twenty-six below as a Captain. His rankings are three above and zero below as a Major. [REDACTED] distribution in command is twelve marked above and thirteen marked below. His total value and distribution is thirty-three marked above and forty-seven marked below.

012302

Subj: BCNR PETITION FOR MAJOR [REDACTED] USMC

4. In summary, the favorable PERB action marginally enhances the competitiveness of [REDACTED] record. The record does contain other areas of competitive concern that may have contributed to his failure of selection. However, because the removed comment may have also contributed to the failure of selection, we recommend approval [REDACTED]'s request for removal of his failure of selection.

5. POC is Maj [REDACTED]

[REDACTED]

Lieutenant Colonel, USMC
Head, Officer Counseling and
Evaluation Section
Personnel Management Division