



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

[REDACTED]
Docket No. 3026-16
MAY 05 2017

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

Subj: REVIEW OF NAVAL RECORD ICO

[REDACTED] USMC

Ref: (a) Title 10 U.S.C. 1552
(b) MCO 1610.7 (PES)

Encl: (1) DD Form 149 w/attachments
(2) Appt Ltr dtd 8 Jul 2011
(3) Fitrep #1704405
(4) CG [REDACTED] ltr 1920 SJA dtd 15 May 2014
(5) CG [REDACTED] ltr 1920 SJA dtd 15 May 2014
(6) Fitrep #1894955
(7) NAVMC 11296 dtd 28 Aug 2014
(8) [REDACTED] ltr 1920 SJA 23 Oct 2014
(9) [REDACTED] ltr 1000 DRH dtd 30 Oct 2014
(10) CO [REDACTED] ltr 1300 CO dtd 20 Jan 2015
(11) Fitrep #2021073
(12) CMC ltr 1920 JPL dtd 9 Feb 2015
(13) HOMC memo 1610 PERB dtd 30 Mar 16
(14) [REDACTED] MBS dtd 4 Jan 2016
(15) Rebuttal to A/O dtd 15 Mar 17

1. Pursuant to the provisions of reference (a) Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected to remove a fitness report and a FY18 Major Promotion selection board failure of selection (FOS).

2. The Board, consisting of [REDACTED], reviewed Petitioner's allegations of error and injustice on 15 March 2017 and, pursuant to its regulations, determined that the 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 available under existing law and regulations within the Department of the Navy.

b. On 8 July 2011, the Petitioner was appointed as the ground supply officer of the [REDACTED] Marine Corps Base Hawaii. This is his primary Military Occupational Specialty (MOS). This appointment was to remain in effect during the duration of his assignment and be self-canceling upon his separation from the unit or by relief of a competent authority. The Petitioner was removed from this billet before transferring from the command and he did not receive notification by a competent authority. During the summer of 2011, the Petitioner volunteered to cover the billet of the units' logistics officer while that officer performed temporary additional duty (TAD). See enclosures (2), (3), (6), and (11).

c. In January 2013, the Petitioner volunteered to support [REDACTED]. In August 2013, the Petitioner returned to [REDACTED] to a new Commanding Officer as a result of a change of command that occurred while he was TAD. In September 2013, two investigations were initiated and the Petitioner stated he was removed from his billet and designated a special projects officer; a billet that does not exist on the units Table of Organization and Equipment (T/O&E). See enclosures (4), (6), and (11).

d. On 15 May 2014, the Petitioner received a report of misconduct which required him to show cause for retention in the Marine Corps at a Board of Inquiry (BOI). See enclosures (4) and (5).

e. On 30 July 2014, the Petitioner received an adverse fitness report ending 23 June 2014 as a result of a report of misconduct. The Petitioner stated that the allegations in the report of misconduct were based upon false assumptions and false allegations while emphatically asserting his innocence. See enclosures (5) and (6).

f. On or about 25 August 2014, the Petitioner stated the Battalion Executive Officer (XO) spoke with the Petitioner's monitor who recommended the Petitioner attend the Intermediate MAGTF Logistics Operations Course [REDACTED]. The course was a TECOM funded course. The XO told the Petitioner to pursue this opportunity as it would be good for his career. The Petitioner completed all administrative requirements to register for the course. After completing this, the Commanding Officer (CO) disapproved his TAD request to attend the [REDACTED] course. See enclosure (7).

g. On 28 August 2014, the Petitioner submitted a Marine Corps Request Mast application to the [REDACTED] Commanding Officer. The Petitioner spoke with the [REDACTED] the same day who stated he agreed with the unit CO not to send the Petitioner to the [REDACTED]. On 2 October 2014, the Petitioner received the request mast to complete the part III: applicant's acknowledgment of request mast. The Petitioner stated "I do not agree with the disposition and do not believe it accurately reflects the request mast phone con." See enclosure (7).

h. On 23 October 2014, the BOI convened to determine if the Petitioner should be separated from the Marine Corps. The alleged acts were the exact same as stated in the report of misconduct. The BOI found the allegation(s) to be unsubstantiated and that a preponderance of the evidence did not prove the allegations for separation. See enclosure (8).

i. On 30 October 2014, the Petitioner submitted a request to the Deputy Commandant, Manpower and Reserve Affairs (DC, M&RA) to not include the report of BOI and associated material into his Official Military Personnel File (OMPF). He also stated that he asserted all allegations were untrue. See enclosure (10).

j. On 21 January 2015, the Petitioner requested to be reassigned via the Fleet Assistance Program (FAP) to fill the billet of the [REDACTED] Marine Corps Base Hawaii. See enclosure (10).

k. On or about 21 January 2015, the Petitioner stated that he discussed the submission his Marine Reported on Worksheet (MROW) with his Reporting Senior (RS), the [REDACTED] Battalion XO. The Petitioner expressed his concerns with the observation dates for the report, specifically the time prior to his Board of Inquiry (BOI). The Petitioner states that based upon their discussion, the XO was going to afford him time to contact the Defense Counsel who represented him during the BOI for guidance regarding the matter prior to submission of his MROW. While in the process of determining if this report was appropriate or if this report should be broken into two separate reports, the XO created and submitted the Fitness Report contained in enclosure (11) without any input from the Petitioner. See enclosure (11).

l. On 9 February 2015, as designated as the Show Cause Authority for the Marine Corps, the DC, M&RA closed the Petitioner's case and stated that any adverse material concerning this matter will not be included into his OMPF. See enclosure (12).

m. On 17 March 2016, the Performance Evaluation Review Board (PERB) boarded the petitioners request to remove the two fitness reports contained in enclosures (6) and (11). The PERB voted to remove enclosure (6) because "the Board found that the purpose of the "Report of Misconduct" was not made clear by the RS's Section I comments. Nevertheless, there is no such document filed in the petitioner's OMPF to support the RS's claim of such a report and it appears not [to] have been based on incontrovertible facts. The essence of the BOI conducted on 23 October 2014 addressed the same alleged adversity reported in the contested report as a result of the "Report of Misconduct", and found no substantiation of the allegations of misconduct. Subsequently, on 9 February 2015, the DC, M&RA directed that no adverse material should be filed in the Petitioner's OMPF regarding this matter and therefore renders the report invalid." The PERB removed the fitness report from the Petitioner's OMPF.

In regards to the fitness report contained in enclosure (11), the PERB voted to keep this report as part of his OMPF. See enclosure (13).

n. Contained in enclosure (14) is the Petitioner's Master Brief Sheet.

o. The PERB provided an advisory opinion concluding that the evidence offered by the Petitioner is insufficient to remove the contested fitness report from his OMPF. The advisory opinion stated the following:

The PERB's reasoning for disapproving his request to remove the fitness report contained in enclosure (11) was "The report is by a different RS and the alleged adversity that was the cause of the BOI occurred well before he became the Petitioner's new RS. The Petitioner fails to substantiate in any manner that the RS was biased toward him because of the ongoing BOI which ended three months before the reporting period ended or that there was a "cause and effect" relationship. He fails to substantiate that the RS lacked objectivity in assessing his overall performance and that the report is anything other than a true and accurate portrayal of his exhibited efforts and results for the reporting period. Similarly, he fails to provide the burden of proof that the RO was biased and lacking objectivity in providing evaluative comments and a comparative assessment." See enclosure (13).

p. The Petitioner provided a response refuting the comments contained in enclosure (13). He stated:

The day following the BOI [24 October 2014], in a meeting with both the CO and XO, I expressed to them both how extremely elated I was to have this behind me and asked to be reintegrated into this unit and assume a leadership role. I requested the opportunity to lead Marines and make impactful decisions, but these requests fell upon deaf ears. It was clear I was still "guilty" regardless of what the BOI determined.

I discovered the [REDACTED] course and after gaining approval from the XO and the Operations Officer (OpsO), I completed all administrative requirements. Days later, the XO called me in after hours and informed me that the CO was not comfortable with sending me to this course. When I asked the XO for the CO's reasoning, he explained to me that the CO did not want to spend unit funds on my TAD. I explained to the XO the TAD would be at no cost to the unit [TECOM funded]. The XO then explained to me the CO still believes I am guilty and that he does not want to send me to a course that would advance my career. He also stated "that I was not going to be able to attend the course due to the CO's bias toward me and his unwillingness to allow me to attend the course." I requested to speak to the CO. When I spoke with the CO, he was very dismissive and clear that the BOI results meant nothing to him. He expressed that he "wished he would have just given me an adverse fitness report instead of launching a Command Investigation." At this point is when I requested mast to [REDACTED]

On 28 Aug 2014, I had a conversation with the [REDACTED] about my request mast. He stated the following comments to me:

[REDACTED] I have already been brought up to speed regarding your request/situation by your Commanding Officer [REDACTED] "You need to listen to your Commanding Officer, drop this request and learn your job."

- You need to better yourself before attending any career progressing courses such as Intermediate MAGTF Logistics Officers Course (IMLOC).

- [REDACTED] is advising that you should not attend the course. [REDACTED] stated, "he trusts [REDACTED] and that he does not support me attending IMLOC."

- I know who you are and I have known since I took command earlier this year. (referring to the command investigation and BIO, he clearly has a pre-established bias against me, even though he has never seen me, met me, or observed me.) He then commented that he is aware of the allegations from the investigations and that he read my adverse Fitness Report, where in his opinion, "I failed to take responsibility for my actions."

- [REDACTED] advised me to get competitive and to learn my job before seeking to attend these type of courses.

- He told me to stop thinking I could avoid the command [REDACTED] by trying to "run off to school."

- He told me to "knock it off," and that "clearly I am not a stellar performer."

- He then proceeded to tell me that, "this (Requesting Mast) is the problem with the young generation."

- He then told me to, "start digging and to earn the trust of my CO," a man who clearly has bias against me.

- [REDACTED] asked me if I understood and if he had resolved my issue. I responded, "No Sir, you have not resolved my issue." He advised me to take it up with [REDACTED] and commented, "you know the CG who signed your Letter of Misconduct."

This concluded my phone conversation with [REDACTED]. I then proceeded to draft a Request Mast to the [REDACTED] which was supported, but highly discouraged by my RS, RO, and other leadership in the chain of command. I decided not to follow through with this Request Mast. Following this experience I actively pursued TAD orders to another command aboard Marine Corps Base Hawaii where I would be afforded opportunities to move forward. From 28 August to 20 January I actively pursued leadership opportunities at [REDACTED] until receiving Fleet Assistance Program (FAP) Orders to [REDACTED] where I served as the Operations Officer, and was selected to serve as the [REDACTED] Commander for over 400 Marines and Sailors.

The RS for the fitness report contained in enclosure (11) was also my RS while I waited for my BOI, which was conducted 20 August 2014, the RS observed me during a period for which by order of the Battalion Commanding Officer I was not to be integrated into the Battalion S-4 or given tasking of any significance. The Battalion CO made it clear to me and my RS verbally that he believed I was guilty of allegations pertaining to the BOI and that he did not want me to have an adverse impact on the Battalion. Following my BOI nothing changed. Therefore, opportunities for tasking and responsibly commensurate with my rank were not assigned.

The RS for the fitness report contained in enclosure (11) did not adhere to the policies and procedures set forth in the PES. The RS did not provide me any initial counseling, follow on counseling, or Fitness Report counseling. The RS did not build my report off an MROW. Furthermore, the RS verbally conveyed to me "don't worry this won't be an adverse report" and "I am sure you intend to have this report pulled anyway, so I would worry about its impact." Based on those two statements alone I believe it is evident this report could not fairly and

accurately evaluate my performance, and therefore it is administratively incorrect, as it does not meet the spirit and intent of a Fitness Report. It is my hope the board agrees this report lacks, fairness, focus, and an ethical basis.

CONCLUSION

Upon review and consideration of all the evidence of record, the Board carefully weighed all potentially mitigating factors, such as Petitioner's assertion he received an injustice from the fitness report received due to the same RS and RO during an investigation and his BOI, his request must on the RS and RO, the RO refused to integrate him into the Battalion, counsel him, or task him, and not allowing the Petitioner to submit an MROW when the RS created, populated, and submitted the report. The Board agreed with the PERB; enclosure (13) that the fitness report contained in enclosure (6) should have been removed from the Petitioner's OMPF; however, the Board disagreed with the PERB that the fitness report contained in enclosure (11) should stay in his OMPF. The Board believes that this fitness report should be removed because it is the markings of the CO as the RO for both reports are identical; per enclosure (14). Specifically, all of the fitness reports that the Petitioner received in the grade of Captain, the Reviewing Officer Markings have been at the five (5) levels or higher; except the two fitness reports contained in enclosures (6) and (11). The Board also looked at the markings of Relative Value at Procurement (RV at Proc) and Cumulative Relative Value (Cum RV) for this RO and for both reports they are the same; even though one report is an adverse report. The Board believes, in accordance with reference (b), that the Petitioner should have been afforded the opportunity to provide his MROW and that the report should have ended when the BOI was completed, not months later when the Petitioner executed FAP orders. The Board further believes that this report should fall under enclosure (12) to have everything removed from his OMPF pertaining to the incident. Lastly, the Board believes that the CO marked the Petitioner the same as the adverse report; minus checking the adverse box, knowing that any promotion board would never select the Petitioner for promotion. Due to these reasons, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. The Petitioner's naval record be corrected by removing therefrom the following Fitness Report & Counseling Record from his OMPF:

<u>End Date of report</u>	<u>Reporting senior</u>	<u>Period of report</u>
27 Jan 2015	[REDACTED]	24 Jun 2014 to 27 Jan 2015

b. That there be inserted in Petitioner's 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 influences as to the nature of the report.

c. Remove the Petitioner's FY18 Major Promotion Selection Board (PSB) Failure of Selection. Note: the Petitioner should now independently request a Special Selection Board (SSB) directly through Headquarters Marine Corps, to exhaust all available administrative remedies to him.

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.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that 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.

[REDACTED]
Recorder

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

[REDACTED]
Executive Director

Reviewed and Approved / ~~Disapproved~~

[REDACTED]
Signature

Acting ABC (M&RA)

Date

MAY 23 2017