



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

[REDACTED]
Docket No. 3670-23
Ref: Signature Date

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

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

Ref: (a) 10 U.S.C. § 1552
(b) SECNAVINST 1650.1J, Department of the Navy Military Awards Policy, 29 May 2019
(c) SECNAVINST 1920.6D, Administrative Separation of Officers, 24 July 2019
(d) USD (P&R) Memo, subj: Limitation on the Authority of Military Department Correction Boards, 10 February 2015
(e) 10 U.S.C. § 629
(f) SECNAVINST 1420.3, Department of the Navy Commissioned Officer Program, 28 March 2019
(g) 10 U.S.C. § 8167
(h) DODI 1320.04, Military Officer Actions Requiring Presidential, Secretary of Defense, or Under Secretary of Defense for Personnel and Readiness Approval or Senate Confirmation, 3 June 2014 (Incorporating Change 1, 30 June 2020)
(i) SECNAV M-1650.1, Navy and Marine Corps Awards Manual, August 2019

Encl: (1) DD Form 149 w/enclosures
(2) Petitioner's Master Brief Sheet, created 24 May 2023
(3) NAVSO 1650/11, Navy and Marine Corps Commendation Medal, 24 March 2020
(4) CMC Action Memo, subj: Promotion Recommendation in the Case of [Petitioner], 8 March 2022
(5) [REDACTED] Memo 1650 S-1, subj: Request to Rescind Navy and Marine Corps Commendation Medal Awarded to [Petitioner], 3 September 2020
(6) [REDACTED] Memo 1920 SJA, subj: Notification of Board of Inquiry, 19 October 2020
(7) CMC Memo 1920 JPL, subj: Termination of Administrative Proceedings and Notification of Promotion Withhold in case of [Petitioner], 26 May 2021
(8) [REDACTED] Memo 1920 SJA, subj: Report of the Board of Inquiry in the case of [Petitioner], 2 February 2021
(9) [REDACTED] Marine Corps Defense Services Organization Memo 1910 DSO/rpb, subj: Letter of Deficiency in the Board of Inquiry for [Petitioner], 17 February 2021
(10) [REDACTED] Memo 1920 SJA, First Endorsement on Enclosure (8), subj: Report of the Board of Inquiry in the case of [Petitioner], 10 March 2021
(11) CMC Action Memo, subj: Promotion Recommendation in the Case of [Petitioner],

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- (12) MMMA E-mail Message (provided by Petitioner)
- (13) HQMC Memo 1400 MMRP-1, subj: Promotion Recommendation in the case of [Petitioner], 13 October 2021
- (14) Petitioner's e-mail to SMB Manpower MMRP-20, subj: OMPF Update – [Petitioner], sent Thursday, October 28, 2021 @ 4:32 PM
- (15) JPL e-mail to Petitioner's Detailed Defense Counsel, subj: RE: ICO [Petitioner], sent Monday, February 7, 2022 @ 2:58 PM
- (16) HQMC Memo 1400 MMRP-1, subj: Promotion Recommendation in the case of [Petitioner], 10 June 2022

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records, hereinafter referred to as the Board, requesting the following relief:

- a. Restoration of his name to the Fiscal Year 2022 (FY22) Active Duty U.S. Marine Corps (USMC) LtCol promotion list, and promotion to LtCol effective 1 September 2021;
- b. Removal of the substantiated findings of substandard performance of duty from his naval record;
- c. Removal and/or redaction of all derogatory documents and mention of misconduct or substandard performance of duty from his naval record; and
- d. Reinstatement of his end of tour Navy and Marine Corps Commendation Medal (NMCCM) (2nd award) issued in March 2020.

2. The Board reviewed Petitioner's allegations of error or injustice on 20 July 2023 and, pursuant to its governing regulations, determined that the partial relief discussed below is warranted. Documentary material considered by the Board included the enclosures, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies.

3. Having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, the Board finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulation within the Department of the Navy (DON).

b. On 16 June 2018, Petitioner was assigned as the commander of the [REDACTED]

[REDACTED] See enclosure (2).

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c. On 26 March 2020, Petitioner was awarded the NMCCM (2nd Award) by the [REDACTED] Commander upon the completion of his tour of duty as the [REDACTED] Commander.¹ See enclosure (3).

d. On 19 May 2020, the [REDACTED] Equal Opportunity (EO) Advisor received an anonymous complaint that Petitioner engaged in instances of bullying, harassment and retaliation between January 2019 and May 2020. The complainant further alleged that Petitioner created a toxic and hostile work environment by publicly demeaning and humiliating Marines within the workplace. Specifically, Petitioner was alleged to have made inappropriate sexist comments about female Marines within his company and mocked junior officers' intelligence and performance in front of others. See enclosure (4).

e. On 2 June 2020, the Commander, [REDACTED] initiated a command investigation (CI) to inquire into the facts and circumstances surrounding the allegations contained in the EO complaint. See enclosure (4).

f. On 23 July 2020, the CI substantiated allegations of bullying, harassment, and hostile work environment against Petitioner. See enclosure (4).

g. By memorandum dated 3 September 2020, the [REDACTED] Commander requested that the NMCCM he awarded to Petitioner on 26 March 2020 be rescinded based upon the findings of the above referenced CI. See enclosure (5).

h. On 16 September 2020, the [REDACTED] Commanding General (CG) concurred with the CI's findings and recommendations, and formally counseled Petitioner for violating the prohibited activities and conduct order, and for lack of professionalism. See enclosure (4).

i. On 19 October 2020, the [REDACTED] documented the findings of the above referenced CI in a Report of Misconduct (ROM), and recommended that Petitioner be required to show cause for retention in the Marine Corps. See enclosure (4).

j. By memorandum dated 19 October 2020, Petitioner was notified that a Board of Inquiry (BOI) would be convened to make a recommendation regarding his retention in the Marine Corps. See enclosure (6).

k. The results of the FY22 Active Duty USMC LtCol Promotion Selection Board (PSB) were published on 2 December 2020.² Petitioner was among the officers recommended for promotion by the FY22 Active Duty USMC LtCol PSB, but his promotion nomination was

¹ Petitioner provided evidence reflecting that this award was presented to him on 30 March 2020. This is relevant because the actual presentation of an award would elevate the rescission authority for the award from the official who approved it to the Secretary of the Navy (SECNAV) per reference (b).

² Per MARADMINS 316/20, the FY22 Active Duty USMC LtCol PSB was scheduled to convene on 4 August 2020. As such, none of the adverse information substantiated against Petitioner was in his record for review by the PSB at the time of his selection for promotion. The results of the FY22 Active Duty USMC LtCOL PSB were announced in ALNAV 102/20. Petitioner's name does not appear on this list because his nomination had been withheld pending resolution of the potentially adverse information and review of his qualification for promotion by the Secretary of the Navy (SECNAV).

withheld upon the discovery of the above referenced potentially adverse information during a screening of the records associated with the officers recommended for promotion, pending determination by the SECNAV regarding whether he remains mentally, physically, morally, and professionally qualified for promotion. See enclosure (7).

l. On 7 January 2021, the BOI convened to consider the evidence against Petitioner and to make a recommendation regarding Petitioner's retention in the Marine Corps. After hearing all of the testimony and reviewing all of the evidence, the BOI unanimously substantiated one of the alleged bases for separation for misconduct and two bases of separation for substandard performance of duty.³ Despite these substantiated findings, the BOI recommended that Petitioner be retained in the Marine Corps. See enclosures (4) and (8).

m. By memorandum dated 17 February 2021, Petitioner's detailed defense counsel submitted a letter of deficiency alleging errors in the BOI's proceedings. Specifically, he alleged the following errors:

(1) Defective Notification. Specifically, Petitioner's detailed defense counsel asserted that the only general basis for separation for which he was notified of his require to show cause in enclosure (5) was "Misconduct, Moral, or Professional Dereliction," while the specific bases stated in the notification were the two bases of substandard performance of duty which were substantiated. He was not put on notice of the specific violations of the UCMJ which he was required to defend against, one of which was substantiated. As such, he asserts that Petitioner was not notified of the specific bases of misconduct for which he would have to defend. Petitioner's detailed defense counsel further alleged that while the BOI substantiated the specific bases of substandard performance of duty, it did not substantiate the general basis. Finally, Petitioner's detailed defense counsel accused the Recorder of misleading the BOI during his opening statement by erroneously claiming that Petitioner had been notified of "two broad categories [supporting his proposed separation], each of which has two sub-categories."

(2) Failure of the BOI to make findings or recommendation required by applicable regulations. In support of this alleged error, Petitioner's detailed defense counsel reiterated errors cited in the findings worksheet related to the defective notification.⁴ He further accused the Recorder of engaging in ex parte communications with the BOI by providing documentation to the members upon their request for certain legal definitions necessary to make their determination without notifying and outside the presence of the defense. Finally, Petitioner's detailed defense counsel asserted that the senior member of the BOI informed the parties after the hearing that the BOI substantiated a basis for misconduct because Petitioner visited a subordinate enlisted Marine at her private residence. He asserts that such a finding was improper because it failed to appropriately apply the laws and regulations to the facts presented to the BOI.

³ The BOI substantiated an alleged violation of Article 133, Uniform Code of Military Justice (UCMJ) (Conduct Unbecoming of an Officer and Gentleman), as well as failure to demonstrate acceptable qualities of leadership required of an officer of his grade and to properly discharged duties expected of an officer of his grade and experience. The BOI did not substantiate an alleged violation of Article 92, UCMJ (Violation of a Lawful General Order).

⁴ A significant portion of the letter of deficiency in the record is redacted due to corrective action later taken pursuant to Petitioner's alleged errors. As such, this summary is incomplete with regard to the scope of this error alleged by Petitioner.

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The evidence reflected that Petitioner went to the Marine's private residence to work on a properly directed command and organizational activity, and did so only to accommodate the Marine since she was teleworking and was simultaneously caring for her child during the COVID-19 workplace restrictions. Under these circumstances, this could not serve as a proper basis to substantiate conduct unbecoming an officer and gentleman.

(3) Repeated attempts by the Recorder to introduce irrelevant and prejudicial materials into evidence. In this regard, Petitioner's detailed defense counsel asserted that the Recorder raised the results of a previous Aviation Mishap Board and Petitioner's resulting Military Occupational Specialty re-designation throughout the proceedings, despite the ruling of the BOI's Legal Advisor that it could only be admitted for the limited purpose of assessing the totality of Petitioner's career. He also accused the Recorder of repeatedly attempting to submit evidence regarding an earlier investigation which failed to substantiate a previous allegation of poor command climate against Petitioner at a prior duty station, without notifying Petitioner that the Government would attempt to separate him on that basis. Next, Petitioner's detailed defense counsel alleged that the Recorder insinuated gender and racial bias against Petitioner during his examination of a Government witness solely to inflame the passions of the BOI members and prejudice the Petitioner. Finally, Petitioner's detailed defense counsel asserted that the Recorder attempted to tacitly exert command influence over the BOI members by eliciting answers regarding the substantiation of the allegations contained in the CI, the endorsement of the CI by the commanding officer, and forwarding endorsement.

Based upon these allegations of error in the BOI proceedings, Petitioner's detailed defense counsel requested that all of the substantiated bases for Petitioner's separation be set aside, that all reference to the substantiated bases be removed from his naval record, and that the case against him be closed. Alternatively, Petitioner's counsel requested that the Show Cause Authority order the BOI members to correct the procedural defect and find no basis for separation to be substantiated. See enclosure (9).

n. By memorandum dated 10 March 2021, the [REDACTED] endorsed the BOI Report at enclosure (7) and forwarded it through the Commandant of the Marine Corps to the SECNAV. In this memorandum, the [REDACTED] addressed each of the allegations of error made in the above referenced letter of deficiency as follows:

(1) The [REDACTED] found no merit to the allegation that Petitioner was not properly notified of the substantiated substandard performance of duty bases for separation because they were specifically stated in the notification memorandum at enclosure (5). He further opined that the argument that the allegedly defective notice prejudiced Petitioner's right for a new BOI to be convened for the same conduct in accordance with reference (b) was not relevant because Petitioner did not allege fraud or collusion by the BOI as required by the cited reference.⁵ Next, he found no merit in Petitioner's contention that the Recorder misled and/or prejudiced the BOI members by stating that the two bases for separation alleged for misconduct and substandard performance of duty "merged," opining that the Recorder did not improperly instruct members

⁵ Paragraph 12c of Enclosure (7) to reference (b) provides that "[a]n officer will not again be processed for separation [for substandard performance of duty or misconduct] solely because of performance or conduct which was the subject of previous separation processing, unless the findings and recommendations of the board that considered the case are determined to have been obtained by fraud or collusion."

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regarding the BOI notification or incorrectly recite the law or regulations and explaining how Petitioner's detailed defense counsel took the Recorder's statement to the BOI members out of context.

(2) In response to the allegation that the BOI failed to make findings or recommendations required by applicable regulations, the [REDACTED] refuted the assertion that the members failed to complete the findings worksheet.⁶ He characterized the senior member's early failure to initial next to the entry substantiating a violation of Article 133, UCMJ, on the findings worksheet, which he corrected before serving the results of the BOI on Petitioner, as a harmless clerical error which could not have possibly misled the members. In response to the allegation of ex parte communications between the Recorder and BOI members, the [REDACTED] explained that the Recorder printed a copy of the Military Bench Book for the members' use when they were unable to make contact with the Legal Advisor late at night. The Recorder consulted with both of Petitioner's counsel before doing so, and neither objected.

(3) Finally, the [REDACTED] addressed and refuted each of Petitioner's accusations of improper efforts by the Recorder to introduce improper evidence during the BOI proceedings. Of note, the discussion of the Recorder's efforts to elicit evidence of the previous allegations of a poor command climate revealed that these efforts were made only in rebuttal to Petitioner's counsel's assertions during the BOI that the allegations of harassment included in the CI were the first that Petitioner had encountered in his career.

Having found no merit in any of the errors raised in the letter of deficiency, the [REDACTED] recommended that the adverse materials associated with the BOI be included in Petitioner's naval record and that the Deputy Commandant for Manpower and Reserve Affairs (DC (M&RA)) close the case. See enclosure (10).

o. By memorandum dated 26 May 2021, the DC (M&RA) directed that the show cause proceedings against Petitioner be closed and that the adverse material "as it relates to substantiated substandard performance" be included in Petitioner's naval record.⁷ With the show cause proceedings closed, Petitioner was notified of his opportunity to submit matters for consideration by the SECNAV to consider in his determination of Petitioner's qualification for promotion pursuant to his selection by the FY22 Active Duty USMC LtCol PSB. See enclosure (7).

p. By memorandum dated 23 July 2021, the Commandant of the Marine Corps (CMC) recommended to the SECNAV that Petitioner be removed from the FY22 Active Duty USMC LtCol promotion list.⁸ In making this recommendation, the CMC opined that Petitioner's

⁶ There is a paragraph redacted from this endorsement, presumably as a corrective action later taken to address Petitioner's allegations of error. Accordingly, this summary is incomplete with regard to the [REDACTED] response to this allegation of error.

⁷ Per enclosure (4), the DC (M&RA) determined that the substantiated violation of Article 133, UCMJ, was outside the scope of the notice provided to Petitioner at enclosure (5), and was therefore legally deficient. As a result, the BOI records in Petitioner's naval record were redacted to remove reference to the misconduct basis for separation substantiated by the BOI.

⁸ Enclosure (3) indicates that Petitioner's chain of command recommended removal, but the endorsements were not available in Petitioner's record nor submitted by Petitioner. The presumption of regularity applies.

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conduct “constitutes a significant departure from the judgment expected of a naval officer and does not comply with statutory exemplary conduct requirements.” He further noted that the FY22 Active Duty USMC LtCol PSB was not able to consider the adverse material in Petitioner’s naval record based upon the timing of Petitioner’s misconduct. Accordingly, the CMC agreed with the recommendation of Petitioner’s chain of command that Petitioner be removed from the promotion list. Within this memorandum, the CMC informed the SECNAV that the BOI had substantiated a violation of Article 133, UCMJ, for conduct unbecoming an officer and gentleman, and did not substantiate a violation of Article 92, UCMJ, for violation of a lawful general order, without mention of the DC (M&RA)’s determination that the substantiated bases of misconduct were outside of the scope of the show cause notification provided to Petitioner. See enclosure (11).

q. On 28 July 2021, Headquarters, USMC (MMMA), deleted the NMCCM referenced in paragraph 3c above from Petitioner’s record upon the request of the [REDACTED] Commander who awarded it (see paragraph 3g above). See enclosure (12).

r. On 7 October 2021, the SECNAV approved the recommendation of the CMC and directed Petitioner’s removal from the FY22 Active Duty USMC LtCol promotion list. See enclosure (11).

s. By memorandum dated 13 October 2021, Petitioner was notified of the SECNAV’s decision to remove his name from the promotion list, and informed that this action constituted his first failure of selection (FOS) for promotion to LtCol.⁹ See enclosure (13).

t. By e-mail dated 28 October 2021, Petitioner requested removal/redaction of the references to the substantiated misconduct basis for separation based upon the DC (M&RA)’s determination that only the adverse material related to the substandard performance of duty basis substantiated by the BOI be placed into his naval record. See enclosure (14).

u. By e-mail dated 7 February 2022, the Military Personnel Law Branch, Headquarters, USMC (JPL) informed Petitioner’s detailed defense counsel that it had determined that enclosure (11) was not entirely clear about the procedural history of the BOI.¹⁰ Specifically, it did not explain that the alleged violation of Article 133, UCMJ, substantiated by the BOI was beyond the scope of the notification provided to Petitioner. As such, JPL informed Petitioner’s defense counsel that it was going to resubmit the promotion review package to the SECNAV. See enclosure (15).

v. By memorandum dated 8 March 2022, the CMC again recommended that Petitioner be removed from the FY22 Active Duty USMC LtCol promotion list. Unlike enclosure (11), this recommendation specifically explained to the SECNAV that the DC (M&RA) had determined that the BOI’s substantiation of a violation of Article 133, UCMJ, was outside of the scope of the notification provided to Petitioner, and that he therefore directed that only the adverse material related to Petitioner’s substantiated substandard performance of duty be included in Petitioner’s

⁹ Petitioner had previously failed of selection for promotion to LtCol by the FY20 and FY21 Active Duty USMC LtCol PSBs. However, the Board directed the removal of those two previous FOS in Docket No. 6063-19 based upon the inclusion of erroneous fitness reports in his record.

¹⁰ The record contains no information explaining how JPL arrived at this conclusion.

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naval record. In making his recommendation, the CMC stated that, “[r]egardless of whether the [BOI’s] misconduct conclusion was legally flawed, SECNAV may consider the [BOI’s] finding of substandard performance of duty. SECNAV may also consider materials beyond those included in [Petitioner’s naval record], such as the CI of July 23, 2020, which substantiated [Petitioner’s] misconduct.” The CMC reiterated this opinion that Petitioner’s conduct “constitutes a significant departure from the judgment expected of a naval officer and does not comply with statutory exemplary conduct requirements.” See enclosure (4).

w. On 7 June 2022, the SECNAV again approved the recommendation of the CMC and reaffirmed his previous decision to remove Petitioner’s name from the FY22 Active Duty USMC LtCol promotion list. See enclosure (4).

x. By memorandum dated 10 June 2022, Petitioner was notified that the SECNAV reaffirmed his previous decision to remove Petitioner from the FY22 Active Duty USMC LtCol promotion list. See enclosure (16).

y. Petitioner asserts that “inaccurate, irrelevant, and unsubstantiated information was placed within his official records and routed to the [CMC] and [SECNAV] for decision to promote him to the rank of [LtCol] or remove his selection from the FY22 promotion selection list” due to the actions of the [REDACTED] Staff Judge Advocate following receipt of enclosure (7). Specifically, he asserts that the record was not adequately redacted to remove every piece of unsubstantiated evidence.¹¹ As a result of the routing of this inappropriate information, he asserts that his promotion review package was improperly briefed and that he therefore suffered an injustice.¹² With regard to the substantiated allegation of substandard performance of duty, Petitioner requests that the Board review his FITREPs and other favorable documents in the record to “make an objective decision whether he should be in fact, subject of substandard performance, specifically to make a fair and equitable conclusion if he has demonstrated acceptable qualities of leadership required of an officer in his grade.” He asserts that they reflect that he has consistently exceeded expectations even while filling positions billeted for officers senior to his present grade. With regard to his rescinded NMCCM, Petitioner cites to the provisions of reference (b) which provides that “SECNAV retains all authority to revoke a [Personal Military Decoration] ... once the award has been presented” to assert that the [REDACTED] Commander no longer had the authority to rescind the award that his predecessor had approved. Finally, Petitioner provided a detailed summary of his career and accomplishments, as well as numerous letters of recommendation, citations to favorable comments in his various FITREPs, and a personal statement to the Board, in support of his claim that he was qualified for promotion to

¹¹ In support of this contention, Petitioner highlights stray references to Article 133, UCMJ, and/or “moral or professional dereliction in his letter of deficiency and in the BOI notification memorandum which were not redacted. He also notes that the option for the BOI to substantiate the misconduct bases was not fully redacted from the BOI findings worksheet.

¹² Petitioner asserts that references to misconduct remained in his record following the determination of the DC (M&RA) that only matters related to the substantiated allegation of substandard performance of duty is to be entered into his naval record. As a result, he asserts that these materials “were inappropriately left for board member observation, consideration, and decision, which led members to believe misconduct did in fact occur.” It is not clear what “board” Petitioner was referring to. He makes reference to a promotion review board in his DD Form 149, but the record reflects that the decision to remove his name from the promotion list was made by the SECNAV himself upon the recommendation of the CMC. Petitioner also references the mention of misconduct in enclosure (11), and asserts that enclosure (4) was not sufficiently detailed to provide Petitioner a fair and unbiased reconsideration.

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LtCol. The personal statement purported to provide context to the EO complaint and the findings of the CI, suggesting that the anonymous complaint came from a disgruntled subordinate officer to whom Petitioner had issued an adverse FITREP and whose previous Inspector General complaint against Petitioner had been unsubstantiated.

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board finds the existence of an error warranting only the partial relief discussed below. However, the Board found no error or injustice in Petitioner's removal from the FY22 Active Duty USMC LtCol promotion list.

As a preliminary matter, the specific relief requested by Petitioner with regard to his promotion to LtCol is beyond the Board's authority to grant. Per reference (d), the Board does not have the authority to remedy perceived errors or injustices by correcting records to show that an officer has been appointed to a certain grade when the officer has not been appointed to that grade by the President or the Secretary of Defense. Accordingly, the Board could not direct that Petitioner's naval record be corrected to reflect that he was promoted to LtCol effective 1 September 2021, even if it found any error or injustice in the removal of his name from the promotion list. Further, per reference (e), "[i]f an officer whose name is on a list of officers approved for promotion ... to a grade for which appointment is required ... to be made by and with the advice and consent of the Senate is not appointed to that grade ... during the officer's promotion eligibility period, the officer's name shall be removed from the list unless as of the end of such period the Senate has given its advice and consent to the appointment." Petitioner's promotion eligibility period began on 2 December 2020, and ended on the first day of the eighteenth month following December 2020, which was 1 June 2022. Because the Senate has not given its advice and consent to Petitioner's appointment to LtCol and his promotion eligibility period has expired, his name would have been removed from the FY22 Active Duty USMC LtCol promotion list by operation of law even if the SECNAV had not acted to remove it himself. As such, the Board is not empowered to restore Petitioner's name to the FY22 Active Duty USMC LtCol promotion list to be forwarded to the Senate for confirmation, even if it believed such action to be warranted.

The Board found no error or injustice in the removal of Petitioner's name from the FY22 Active Duty USMC LtCol promotion list. Per reference (f), the CMC, or his designee, "will recommend to the SECNAV that an officer's name be withheld from the nomination scroll on the basis of adverse or reportable information attributed to that officer.¹³ Among the reasons that a promotion nomination may be withheld are that a show cause BOI has been convened to review the officer's records; substantiated adverse information about the officer that is material to the decision to appoint the officer is under review by the SECNAV or CMC, or their respective designees; there is cause to believe that the officer has not met the requirement for exemplary conduct set forth in reference (g); and there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for

¹³ See paragraph 4a of enclosure (8) to reference (f).

which he was selected for promotion.¹⁴ Finally, in the case of active duty list officers selected for promotion to grades O-4 and above, a nomination withhold may occur when adverse or reportable information becomes known to the DON before the Senate has given advice and consent to the officer's nomination.¹⁵ When Petitioner's name was withheld from the nomination scroll for the FY22 Active Duty USMC LtCol promotion list, the CI had substantiated allegations of bullying, harassment, and a hostile work environment against Petitioner, and show cause proceedings had already been initiated. The findings of the CI were not available to the FY22 Active Duty USMC LtCol PSB when it recommended Petitioner for promotion, and certainly constituted adverse information.¹⁶ Those findings also raised cause to believe that Petitioner had not met the requirement for exemplary conduct set forth in reference (g), and established cause to believe that Petitioner was mentally, physically, morally, or professionally unqualified to perform the duties of a LtCol. As such, it was appropriate to withhold Petitioner's name from the nomination scroll so that the SECNAV could review the adverse information pertaining to Petitioner to determine whether he was qualified for the promotion for which he had been selected.

Petitioner mischaracterized the action taken by the DC (M&RA) with regard to the BOI findings. The DC (M&RA) did not "unsubstantiate" the allegations of misconduct against Petitioner, as he claimed. The DC (M&RA) did not find that the BOI was wrong in finding that the allegation of misconduct was supported by the preponderance of the evidence. Rather, he determined that Petitioner was not properly notified of the misconduct bases for separation considered and substantiated by the BOI, and therefore took corrective action by directing the filing of only those portions of the BOI record pertaining to the substantiated findings of substandard performance of duty for which he was properly notified. This does not constitute an "unsubstantiation" of the allegations; rather, it was corrective action taken to ensure that Petitioner was not harmed by the defective BOI notice. The allegations of misconduct were, in fact, substantiated. Not only did the BOI find a violation of Article 133, UCMJ, to be supported by the preponderance of the evidence, but the CI also substantiated allegations of bullying, harassment, and hostile work environment. More importantly, the SECNAV was not limited to only those matters found in Petitioner's official record in determining whether he remained qualified for promotion. In fulfilling his obligation to ensure that only those officers qualified for appointment and who meet the exemplary conduct provisions of reference (g) are forwarded for nomination, it was entirely appropriate for the SECNAV to know that a BOI consisting of three senior officers unanimously found Petitioner's conduct to be unbecoming of an officer and gentleman in violation of Article 133, UCMJ, regardless of whether Petitioner was put on proper notice to defend against this allegation during the show cause proceedings. In fact, it would have been inappropriate not to inform the SECNAV of these facts. Likewise, it was also entirely appropriate for SECNAV to consider the results of the CI. As such, the Board would have found no error in the SECNAV's decision to remove Petitioner from the promotion list the first time. The fact that the action was repackaged to better inform the SECNAV of the procedural

¹⁴ See paragraph 2 of enclosure (8) to reference (f).

¹⁵ See paragraph 4b of enclosure (8) to reference (f).

¹⁶ Per reference (h), adverse information is "[a]ny substantiated adverse finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. To be credible, the information must be resolved and supported by a preponderance of the evidence. To be adverse, the information must be derogatory, unfavorable, or of a nature that reflects clearly unacceptable conduct, integrity, or judgment on the part of the individual. The CI findings were unquestionably adverse information.

background of Petitioner's case and to enable him to reconsider the previous decision with better knowledge of that background was prudent, but not necessary. It did, however, remove any doubt regarding the fairness of the SECNAV's action in this regard. Petitioner's argument that the decision to remove him from the promotion list was based upon "inaccurate, irrelevant, and unsubstantiated information" was without merit. The information presented to the SECNAV was entirely accurate and substantiated, and highly relevant to the question of whether Petitioner remained qualified for promotion to LtCol.

Petitioner's contention that the inadequate redaction of references to the allegation of misconduct from the BOI record tainted the recommendation of the promotion review board (PRB) are without merit because Petitioner's promotion qualification was not considered by a PRB. Per reference (f), adverse information need only be provided to a PRB for an officer recommended for promotion to a grade below O-7 when adverse information which was not reviewed by the PSB that recommended the officer for promotion is reported to the Secretary of Defense. In other words, a PRB would have been required only if the SECNAV determined that Petitioner continued to warrant promotion to LtCol despite the adverse information substantiated against him. There is no evidence or reason to believe that a PRB ever even considered the adverse information substantiated against Petitioner, so there is no evidence or reason to believe that a PRB was ever tainted by the allegedly inadequate redaction of references to misconduct from the BOI records.¹⁷

The Board finds that the misconduct substantiated against Petitioner alone was sufficient to justify the SECNAV's decision to remove Petitioner from the promotion list. Although Petitioner did not provide a copy of the CI for review, the Board relies upon the presumption of regularity to uphold the propriety of the actions taken by naval authorities in the absence of evidence to the contrary. In this regard, the Board had no reason to question or doubt the validity of the CI findings of bullying, harassment, and/or hostile work environment. The Board found no reason to question the judgment, competence, or bias of the investigating officer who rendered the findings; the judge advocate who would have performed a legal review which found those findings to be supported by the evidence; or the several levels of command, to include the II MEF CG, which reviewed the findings and evidence and recommended that Petitioner be required to show cause for retention in the Marine Corps. The validity of the CI findings was further validated by the BOI results, notwithstanding the defective notice provided to Petitioner. Having found no error in the results of the CI, the Board also found no error in the substantiated finding of substandard performance of duty against Petitioner which were presumably based upon those findings. In this regard, Petitioner asked the Board to review his FITREPs and the letters of recommendation included with his request, and "to make an objective decision whether he should be in fact, subject of substandard performance." The Board reviewed Petitioner's FITREPs and letters of recommendation, and believed that Petitioner's conduct constituted substandard performance of duty. This is not to undermine Petitioner's otherwise meritorious record and performance. The Board does not deny that Petitioner has performed his duty at or above standards for the majority of his career. However, bullying, harassment, and maintaining a toxic work environment while in command is a very substantial departure from the standard of performance expected of an officer of Petitioner's grade and experience. Finally, the Board did

¹⁷ The Board did not believe the redactions to be inadequate regardless. The redaction deficiencies highlighted by Petitioner were so insignificant as to be harmless.

not believe that Petitioner's otherwise meritorious service justified his promotion to LtCol despite this substantial departure from the standard of conduct expected of Marine Corps officers of his grade and experience. Petitioner's otherwise meritorious service undoubtedly was the reason that the BOI recommended that he be retained in the Marine Corps despite substantiating misconduct and substandard performance of duty against him. It does not, however, entitle him to promotion to LtCol. The FY22 Active Duty USMC LtCol PSB would undoubtedly not have selected Petitioner for promotion if it had known of the results of the CI or of the BOI. Promotion to LtCol is highly competitive, and this adverse information almost certainly would have been a discriminator which the PSB would have found to render Petitioner not best qualified for promotion. Accordingly, the Board found nothing unjust about Petitioner's removal from the promotion list.

Although the Board found no error or injustice in Petitioner's removal from the FY22 Active Duty USMC LtCol promotion list, it did find an error in the rescission of Petitioner's end of tour NMCCM. Per reference (b), the SECNAV is the sole authority to revoke a personal military decoration after it has been issued.¹⁸ Reference (i) further clarifies that this authority has not been delegated, and establishes the procedure for presenting award rescission requests to the SECNAV in cases such as this where the awardee's honorable service is questioned or when additional facts are discovered that call into question the appropriateness of the original award.¹⁹ The record reflects that the subject NMCCM was presented to Petitioner prior to its revocation, and that it was revoked upon the request made by the award's approval authority based upon the results of the CI.²⁰ There is no evidence that this rescission was ever made or approved by the SECNAV. Accordingly, Petitioner's NMCCM has not been revoked by a proper authority, and the removal of it from his naval record was therefore premature.

RECOMMENDATION:

In view of the above, the Board recommends the following corrective action be taken on Petitioner's naval record:

That Petitioner's naval record be corrected by reinstating the previously issued NMCCM.

That any material or entries inconsistent with or relating to the Board's recommendation in this regard be corrected, removed, or completely expunged from Petitioner's record. This includes, but is not limited to, all information systems or database entries that reference or discuss the expunged material.

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 titled matter.

¹⁸ See paragraph 5k(2).

¹⁹ See paragraph 1.2.f.

²⁰ The Board notes that the officer who approved the award was not the same officer who requested its rescission. They were, however, in the same command position with approval authority for the award. This distinction is irrelevant, however, as neither had the authority to rescind the award once presented to the awardee.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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

8/28/2023



SECRETARY OF THE NAVY DECISION:

— Board Recommendation Approved (Partial Relief – I concur with the conclusion of the Board and therefore direct the relief recommended by the Board above. This decision does not preclude future submission of a proper request to revoke the NMCCM issued to Petitioner pursuant to reference (i).)

— Petitioner's Request Approved (Full Relief – I concur with the Board's conclusion with regard to the rescission of Petitioner's NMCCM, but I do not concur with its conclusion with regard to the removal of Petitioner's name from the FY22 Active Duty USMC LtCol promotion list. Specifically, I find that my previous decision was not properly informed with regard to the adverse information pending against him. Unfortunately, it is not within my authority to restore Petitioner to the FY22 Active Duty USMC LtCol promotion list, as he has been removed from it by operation of law. However, I direct that all references to Petitioner's misconduct and substandard performance of duty be completely removed from his record. I further direct the removal of all references to my previous decisions to remove Petitioner's name from the FY22 Active Duty USMC LtCol promotion list, including but not limited to the removal of his FOS for promotion caused by that action. This relief is in addition to the relief recommended by the Board above with regard to Petitioner's NMCCM.)



Board Recommendation Approved (in part) (Deny Relief – I concur with the conclusion of the Board, but not in the relief requested. While I concur that the record reflects that the rescission of Petitioner's NMCCM was not approved by proper authority, I find that the decision to rescind the NMCCM was appropriate given the findings of the BOI and the CI. Accordingly, I hereby ratify the previous decision to revoke the NMCCM which was taken without my authority. The Board's recommendation is therefore disapproved. No corrective action is to be taken on Petitioner's naval record.)

