



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
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ARLINGTON, VA 22204-2490

██████████
Docket No. 7187-23
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF ██████████
██████████ XXX XX ██████████ USMCR

Ref: (a) 10 U.S.C. § 1552
(b) MCO P1400.32D (w/ Changes 1-2), subj: Marine Corps Promotion Manual, Volume 2, Enlisted Promotions (Short Title: MARCORPROMAN, VOL 2, ENLPROM, 14 June 2002

- Encl:
- (1) DD Form 149 w/enclosures
 - (2) MARADMIN 088/21, subj: FY21 Approved Selected Marine Corps Reserve (SMCR) Staff Noncommissioned Officer Selections, dtg 231239Z FEB 21
 - (3) ██████████ COVID-19 Quick Reference Sheet, as of 13 May 2021
 - (4) ██████████ Memo 1400 CoS, subj: Recommend Delay of Promotion due to Pending Preliminary Investigation in the case of [Petitioner], 20 July 2021
 - (5) MARADMIN 376/21, subj: August 2021 Staff Noncommissioned Officer (SNCO) Promotions for Active Reserve (AR), Selected Marine Corps Reserve (SMCR), and Individual Ready Reserve (IRR) and September 2021 Planned SNCO Promotions for AR, SMCR, and IRR, dtg 191831Z JUL 21
 - (6) Petitioner's Memo 1400 TSC, subj: Recommend Delay of Promotion due to Pending Preliminary Investigation in the case of [Petitioner], undated
 - (7) ██████████ CO Memo 1400 G-1, First Endorsement on Enclosure (4), subj: Recommend Delay of Promotion due to Pending Preliminary Investigation in the case of [Petitioner], 26 July 2021
 - (8) NAVMC 118(11), Administrative Remarks (1070, 4 August 2021
 - (9) ██████████ CO Memo 1400 CMFS, subj: Recommend Revocation of Promotion ICO [Petitioner], 4 August 2021
 - (10) Petitioner's Defense Counsel's Memo, subj: Recommended revocation of promotion ICO [Petitioner], 12 August 2021
 - (11) HQMC Memo 1450/2 MMPR-2, subj: Delay of Promotion in the case of [Petitioner], 16 August 2021
 - (12) Petitioner's Memo 1400 TSC, subj: Rebuttal to 6105 Administrative Action Dated 4 August, 2021, 17 August 2021
 - (13) ██████████ CO Memo 1400 CMFS, subj: Withdrawal of Request for Delay of Promotion Revocation in the case of [Petitioner], 1 September 2021
 - (14) HQMC Memo 1450/2 MMPR-2, subj: Delivery of Certificate of Appointment in the case of [Petitioner], 10 September 2021
 - (15) Petitioner's Master Brief Sheet, 14 September 2023

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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 that his naval record be corrected to reflect his date of rank (DOR) and effective date of promotion to Master Gunnery Sergeant (MGySgt) as 1 August 2021, rather than 1 September 2021.¹²

2. The Board reviewed Petitioner's allegations of error or injustice on 14 December 2023 and, pursuant to its governing regulations, determined that the corrective action indicated below should be taken on Petitioner's naval record. 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 found 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.

b. On 23 February 2021, Petitioner's selection for promotion to MGySgt in the Selected Marine Corps Reserve (SMCR) was announced in MARADMIN 088/21. See enclosure (2).

c. As of 14 May 2021, it was [REDACTED] policy that individuals who were not fully vaccinated against the COVID-19 virus must wear a face mask indoors on base, unless eating or drinking, or alone in their office.³ Masks were, however, required in cubicles and open spaces in accordance with Department of Defense guidance in place at the time. See enclosure (3).

d. As of late June 2021, Petitioner was presumably not fully vaccinated against the COVID-19 virus. After three successive incidents on 28, 29, and 30 June 2021 in which Petitioner's compliance with [REDACTED] indoor masking policy was questioned by a senior civilian employee, a preliminary inquiry (PI) was initiated against Petitioner.⁴ See enclosure (4).

¹ Petitioner also requested the back pay and allowances inherent in such a correction.

² Petitioner originally requested this relief in Docket No. 5873-23 in July 2023, but that application was administratively closed by letter dated 17 July 2023 because Petitioner had not exhausted his administrative remedies. Specifically, his case was reportedly under investigation at the time of his first application to the Board by the Department of Defense Inspector General (DODIG). By letter dated 21 August 2023, the Inspector General of the Marine Corps (IGMC) informed Petitioner that the DODIG had completed an oversight review of his complaint and concurred with the determination of the IGMC that his complaint did not meet the requirements of a Military Whistleblower Protection Act investigation in accordance with 10 U.S.C. § 1034. The IGMC letter identified some "administrative, non-reprisal issues that required follow-up, and included a petition to this Board as a potential action that he could take to address his DOR.

³ Petitioner was assigned to [REDACTED], so he was subject to [REDACTED] policies.

⁴ All documents pertaining to this PI, and Petitioner's resultant promotion delay, have been removed from his naval record. Accordingly, the Board had no information regarding the specific acts resulting in the PI, or the PI's actual finding, other than that provided by Petitioner himself.

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e. On 19 July 2021, the Petitioner's promotion to MGySgt effective 1 August 2021 was authorized in MARADMIN 376/21. See enclosure (5).

f. By memorandum dated 20 July 2021, the [REDACTED] Chief of Staff recommended to the Commandant of the Marine Corps (MMRP-2) that Petitioner's promotion to MGySgt be delayed to allow for completion of the PI referenced in paragraph 3d above and any follow-on actions. See enclosure (4).

g. Petitioner subsequently provided a response to the recommendation referenced in paragraph 3f above that his promotion to MGySgt be delayed. In this response, he claimed to "take full responsibility for [his] actions," but desired to "shed some light on the subject." He stated his belief that he had built up a natural immunity to COVID-19, which influenced his decision not to be vaccinated, and expressed his belief that he was being "singled out and directly targeted for exercising [his] right." Regarding the specific allegations against him, he claimed to have simply forgotten to put on his mask when attending a meeting, but immediately complied when reminded to do so and then endured deliberate targeting and harassment by the Deputy G-3 over the following two days. See enclosure (6).

h. By memorandum dated 26 July 2021, the [REDACTED] commander endorsed the promotion delay recommendation referenced in paragraph 3f above, also recommending that Petitioner's promotion to MGySgt be delayed pending completion of the PI and any follow-on actions that may result. See enclosure (7).

i. On 4 August 2021, Petitioner was administratively counseled in writing by the [REDACTED] commander for dereliction in the performance of his duties in violation of Article 92, Uniform Code of Military Justice (UCMJ). Specifically, the counseling asserted that Petitioner was derelict on the performance of his duty by failing to wear an appropriate face mask while indoors at [REDACTED] on 28, 29, and 30 June 2021. Petitioner acknowledged this administrative counseling on 10 August 2021, and indicated his intent to provide a statement in response. See enclosure (8).

j. By memorandum dated 4 August 2021, the [REDACTED] commander informed MMRP-2 that the PI was complete and that he had substantiated an allegation of dereliction of duty in violation of Article 92, UCMJ, against Petitioner for failing to wear a face mask. Based upon this substantiated misconduct, the [REDACTED] commander recommended that Petitioner's promotion to MGySgt be revoked. In making this recommendation, the [REDACTED] commander stated that Petitioner's conduct "fell below what is expected of a senior staff noncommissioned officer." He noted Petitioner claimed to "believe in enforcing good order and discipline and [to] have always led by example" in his response to the notification of promotion delay (see paragraph 3g above), but clearly admitted placing his "commonsense approach to [his] actions regarding covid mitigation" in his decision to not wear a mask. See enclosure (9).

k. By memorandum dated 12 August 2021, Petitioner's appointed defense counsel provided a statement in response to the [REDACTED] commander's recommendation that his promotion to MGySgt be revoked. She provided Petitioner's detailed version of the events of

28-30 June 2021,⁵ which she claimed were not included in the PI despite Petitioner having spoken with the investigating officer.⁶⁷ Based upon this version of events, Petitioner's defense counsel suggested that the issue at hand was "more of a personality conflict between a senior enlisted Marine and a high ranking civilian employee." She also suggested that Petitioner's case was being "lumped together" with that of another Marine who was being investigated for testing positive for COVID-19 and failing to properly wear his mask. See enclosure (10).

l. By memorandum dated 16 August 2021, Petitioner's promotion to MGySgt was officially delayed pending completion of all investigations and legal proceedings. Petitioner's command was instructed to submit a request for promotion authority upon completion of these actions if he remained eligible for promotion. See enclosure (11).

m. By memorandum dated 17 August 2021, Petitioner provided a statement in rebuttal to the administrative counseling statement referenced paragraph 3i above. He asserted that the administrative counseling statement at enclosure (8) misrepresented the events that transpired on 28-30 June 2021. Specifically, he claimed that he was following the COVID-19 mitigation policy published by the commander by maintaining appropriate social distancing of six feet, and only removed his mask temporarily when eating or drinking indoors; and that the counseling statement mischaracterized the conversations between him and the Deputy G-3 as "repeated counseling." Petitioner also asserted that the PI which resulted in the administrative counseling was flawed in its completeness and lack of due process. Specifically, he claimed that his conversation with the investigating officer was never documented, and that the only information that went forward was that he declined to make a sworn statement.⁸ See enclosure (12).

⁵ Petitioner's version of each of the three events were described as follows:

- With regard to the incident on 28 June 2021, Petitioner claimed that he removed his face mask at his desk to consume a snack. He then departed his workplace to attend a meeting, and neglected to replace the mask. When he arrived at the meeting without his face mask in place, he was asked about his vaccination status by the command's Deputy G-3. Petitioner asserts that he then replaced the mask after making a joke which was reportedly not appreciated by the Deputy G-3.
- With regard to the incident on 29 June 2021, Petitioner claimed that he again removed his face mask while at his desk to consume a snack. When a fellow non-commissioned officer who worked nearby asked him a question, Petitioner reportedly stood up and walked around the corner to hear him better, again neglecting to replace his mask. The same Deputy G-3 who had questioned him during the meeting the day before witnessed Petitioner without his face masked on, and said, "MSgt, put your mask on, I'm not going to tell you again." Petitioner reportedly replied that he was "just using common sense," as he was snacking at his desk and was more than six feet away from the other non-commissioned officer. The Deputy G-3 then began to berate Petitioner in front of others, reportedly quoting the mask policy inaccurately.
- With regard to the incident on 30 June 2021, Petitioner reported that he was sitting at a round table waiting for a morning meeting with his face mask on. When he pulled his mask down to take a sip of coffee, he was immediately corrected again by the same Deputy G-3 referenced above. The Deputy G-3 reportedly corrected himself immediately when he realized that Petitioner was drinking coffee, but Petitioner responded angrily to being called out in error. He reportedly stated "Sir, the Combatant Commander said there will be no mask police," to which the Deputy G-3 responded, "Watch it," or words to that effect.

⁶ Petitioner apparently declined to make a sworn statement.

⁷ Petitioner's version of the events was supported by statements of two witnesses who reportedly were not interviewed during the PI.

⁸ Petitioner claimed that he only declined to make a sworn statement because he had never been informed of the allegations against him, and therefore could not formulate a proper rebuttal.

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n. By memorandum dated 1 September 2021, the [REDACTED] commander withdrew his previous recommendation that Petitioner's promotion to MGySgt be revoked based upon the new information provided in Petitioner's response to the administrative counseling statement (see paragraph 3m above). Despite withdrawing his promotion revocation recommendation, he specifically stated that the formal administrative counseling regarding Petitioner's violation of the command's mask mandate, and Petitioner rebuttal matters to that administrative counseling statement, should remain a part of Petitioner's official military personnel file (OMPF). See enclosure (13).

o. By memorandum dated 10 September 2021, MMPR-2 directed the [REDACTED] commander to prepare Petitioner's certificate of appointment to MGySgt with a date of rank and effective date of 1 September 2021. See enclosure (14).

p. Petitioner was subsequently promoted to MGySgt with a DOR of 1 September 2021. See enclosure (15).

q. Petitioner contends his promotion was delayed for a month due to "a fraudulent investigation where [he] was targeted by a civilian member of the command who attempted to block [his] promotion." He further contends that "the negligent actions of [his] command at the time" caused him to lose his seniority, 30 days time-in-grade (TIG), and 30 days of pay at the rate of E-9." Finally, Petitioner notes that there are no derogatory records in his OMPF to justify the actions taken against him. See enclosure (1).

r. Reference (b) states that "[p]romotions will not be backdated ... when a period of promotion restriction or delay has ended and the commander subsequently recommends delivery of the promotion. The date of rank will be effective the first day of the month following the end of the restriction period. The only instance when a Marine is issued the original date of rank and effective date is in the case of a delay where the Marine is subsequently exonerated of all wrongdoing."⁹

MAJORITY CONCLUSION:

Upon review and consideration of all of the evidence of record, the Majority of the Board found an injustice warranting the relief requested.

The Majority found insufficient evidence to support Petitioner's contention that his promotion was delayed due to "a fraudulent investigation where [he] was targeted by a civilian member of the command who attempted to block [his] promotion." In the absence of evidence to the contrary, the Board applies the presumption of regularity to establish that naval authorities properly performed their functions. In this regard, Petitioner failed to provide any evidence to establish the PI was "fraudulent" or without basis. Although the details of this investigation in the record are scarce due to the unavailability of the investigative documents, there is sufficient evidence in the record to establish probable cause to believe that Petitioner violated [REDACTED] policies regarding the indoor masking requirements for individuals not fully

⁹ See paragraph 1204.2.

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vaccinated during the COVID-19 pandemic. As such, it was appropriate and responsible to gather the PI to gather the facts related to Petitioner's alleged violation of this policy. It was equally appropriate to delay execution of Petitioner's promotion pending completion of the PI and any follow-on actions to ensure that he remained fully qualified for that promotion. Accordingly, Petitioner contention that his promotion was delayed due to "the negligent actions of [his] command" is also without merit. Petitioner cannot reasonably complain that his version of events was not included in the PI report when he refused to testify under oath. While that was certainly his right, it was his own decision in this regard which deprived the decision makers of his version of events until after the PI was complete and initial actions were taken upon it. Ultimately, the system worked as it was supposed to, as Petitioner was promoted after only a one month delay to assess his continued qualifications for the promotion in light of the allegations against him.

While the Majority found insufficient evidence of any error in the original delay of his promotion, it did find an injustice in the fact that Petitioner was deprived of a month of pay in his current grade and of his relative seniority in that grade due to allegations of misconduct for which he was ultimately exonerated. In this regard, the Majority noted that Petitioner's OMPF no longer includes any of the documents pertaining to his promotion delay or to the administrative counseling statement documenting his alleged violation of Article 92, UCMJ. As such, the Majority concluded that Petitioner has been "exonerated of all wrongdoing," under which circumstances the backdating of a promotion is authorized in accordance with reference (c).¹⁰ Accordingly, the Majority determined that Petitioner's DOR and effective date to MGySgt should be adjusted to reflect that which it would have been but for the allegations of misconduct which precipitated the delay and of which he was exonerated.

MAJORITY RECOMMENDATION:

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

That Petitioner's naval record be corrected to reflect that his DOR and effective date of promotion to the grade of MGySgt was 1 August 2021.

That any material or entries inconsistent with or relating to the Board's recommendation 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.

Upon completion of the corrections directed herein, that a copy of this record of proceedings be forwarded to the Defense Finance and Accounting Service (DFAS) to determine what, if any, pay, allowances, and/or benefits Petitioner may be entitled to as a result of this corrective action.

¹⁰ See paragraph 3r above.

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MINORITY CONCLUSION:

Upon careful review and consideration of all the evidence, the Minority of the Board found insufficient evidence of any error or injustice warranting relief.

The Minority concurred with the Majority conclusion that there was no error in the delay of Petitioner's promotion to MGySgt.

The Minority did not, however, concur with the Majority conclusion that the absence of any documentation pertaining to Petitioner's promotion delay or disposition of the alleged violation of Article 92, UCMJ, reflects his "exoneration of all wrongdoing." The Minority found no logical relevance to the absence these materials from Petitioner's naval record with regard to the validity of the misconduct, and the Majority's conclusion in this regard to be illogical. The Minority speculated that the subject documentation was removed from Petitioner's record as the result of a misapplication of the guidance of MARADMIN 109/23, which directed the removal of all adverse information pertaining to refusal of the former COVID-19 vaccination mandate from the records of certain currently serving Marines, to the documents in Petitioner's naval record related to his violation of a local command mask mandate. Regardless of the reason for the absence of these documents, however, the Minority did not believe that their absence reflected Petitioner's "exoneration of all wrongdoing." Rather, the Minority believed that the recommendation of the [REDACTED] commander that the administrative counseling statement and Petitioner's response thereto should remain in Petitioner's OMPF despite his decision to withdraw his promotion revocation recommendation in enclosure (13) to be conclusive evidence that Petitioner was not "exonerated of all wrongdoing," but rather that the wrongdoing in question remained substantiated. Additionally, even Petitioner's version of the events did not "exonerate" him of most of the alleged misconduct, but rather simply provided context and mitigated the misconduct. As such, the Minority found no evidence or reason to believe that Petitioner's was exonerated of the allegations of misconduct against him, and the backdating of his promotion to therefore be prohibited by reference (b). Accordingly, the Minority found no injustice in the fact that Petitioner's promotion to MGySgt was delayed for only one month while misconduct which was ultimately substantiated was investigated and his continued qualification for that promotion was being properly assessed.

MINORITY RECOMMENDATION:

In view of the above, the Minority of the Board recommends that no corrective action be taken on Petitioner's naval record.

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.

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

1/21/2024



ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

MAJORITY Recommendation Approved (Grant Relief – I concur with the Majority conclusion and therefore direct the relief recommended by the Majority above.)

MINORITY Recommendation Approved (Deny Relief – I concur with the Minority conclusion and therefore direct that no corrective action be taken on Petitioner’s naval record.)

