



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

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Docket No. 8079-23
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

A three-member panel of the Board, sitting in executive session, considered your application on 18 April 2024. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, relevant portions of your naval record and applicable statutes, regulations, and policies, as well as the 29 February 2024 Advisory Opinion (AO) provided by Headquarters Marine Corp (JPL), which was emailed to you on 1 March 2024 to allow you an opportunity to provide a rebuttal response. Although you were provided an opportunity to respond to the AO, you chose not to do so.

The Board carefully considered your request to remove the Administrative Remarks (Page 11) counseling entry of 1 August 2022 and all associated paperwork from your Official Military Personnel File (OMPF). Additionally, you requested the Board adjust your date of rank (DOR) for Chief Warrant Officer TWO (CWO2) from 1 August 2023 to your originally scheduled promotion date of 1 August 2022.

The Board, having reviewed all the facts of record pertaining to your allegations of error and injustice, found as follows:

Before applying to this Board, you exhausted all administrative remedies available under existing law and regulation within the Department of the Navy.

You served as the Officer in Charge (OIC) of █
█ which supported █.

On 29 April 2022, a gunnery sergeant (GySgt) from ██████ filed a Prohibited Activities and Conduct (PAC) complaint alleging you used homophobic slurs and demeaning actions to create an intimidating, hostile, and offensive work environment within ██████ in violation of MCO 5354.1F (Prohibited Activities and Conduct (PAC) Policy).

Commanding Officer (CO), ██████, ██████ ██████ convened a command investigation (CI) to examine the allegations. In the his opinion, the Investigating Officer (IO) determined you did not knowingly and intentionally harass ██████ based on his sexuality but, regardless of whether anyone knew ██████ was homosexual, “it was reckless to carry on conversations in the workplace about a person’s sexuality, and regardless of whether they were directed toward any one person or just made in general, a reasonable person could find this behavior offensive as well as creat[ing] a hostile a work place.” The IO further opined that you, as the OIC, “had an obligation to maintain a professional environment. Whether any one person was offended does not change the fact that those comments and discussions should never have happened to begin with.” Lastly, the IO stated that although the evidence indicates you discriminated against ██████ because you “believed he was performing poorly as the ██████ and as a staff noncommissioned officer,” you compromised your “ability to remain fair and impartial when [you] carried on inappropriate conversations in the workplace which now calls into question [your] objectivity and the justification to counsel ██████ because of his performance.” The IO concluded that you should never have tolerated – let alone participated in – such comments in the workplace and your “failure of leadership unnecessarily added to the friction within [the] team” which undermined your “ability to resolve the legitimate complaints [you] had regarding [██████] performance or professionalism.” The IO recommended the CO take appropriate administrative or disciplinary action regarding your “failure to set and enforce acceptable standards of professionalism within the ██████ section.”

On 1 August 2022, Commanding General (CG), ██████, issued you a Page 11 entry counseling you regarding your misconduct and substandard performance of duty as detailed in the CI. The Page 11 stated that while serving as OIC, ██████, you “repeatedly made offensive comments in the work place that created an intimidating, hostile, and offensive work environment within ██████ and which constituted harassment in violation of MCO 5354.1F (PAC Order).” By your signature, you acknowledged receipt and expressed your intention to submit a rebuttal statement.

In your rebuttal response of 3 August 2022, you denied making offensive comments in the work place that created an intimidating, hostile, and offensive work environment within ██████. You emphasized that in 16 years of service, you have not received “an ounce of negative paperwork until now.” Further, you denied the allegations of harassment and disagreed with the IO’s findings and opinions. As part of your rebuttal, you included additional statements from witnesses to rebut the findings and opinions made in the CI.

By memorandum of 10 August 2022, the Commandant of the Marine Corps (CMC) notified you that your promotion had been delayed due to a report of potentially adverse or reportable information. Further, the notification provided you with an opportunity to submit matters in response within ten days or upon completion of all pending administrative, civil, or punitive action. On 12 August 2022, you acknowledged receipt but indicated your intent to submit matters within ten days of the conclusion of all administrative, investigative, or judicial proceedings.

By memorandum of 12 August 2022, as required by MCO 5800.16 (LSAM) Volume 15, CG, ██████ submitted a Report of Misconduct (ROM) informing the CMC of the circumstances giving rise to the ROM and the subsequent issuance of the Page 11 entry administratively counseling you. The CG did not recommend your separation and noted that despite your misconduct, you had potential for further service.

Also on 12 August 2022, you appealed the PAC complaint, denying all allegations of PAC violations, to include making harassing comments/jokes which made ██████ feel harassed. In your appeal, you alleged ██████ made the allegations after receiving two negative counselings related to his substandard performance and unprofessional behavior while deployed in ██████. Additionally, you requested the PAC CI be disapproved due to its “retaliatory, insincere, and disingenuous nature.” Further, you noted the IO found ██████ to be misleading in his complaint and account of events but still substantiated his uncorroborated version of events despite the numerous witnesses who stated the alleged conduct did not occur or could not recall the conduct. You also noted the IO failed to interview key witnesses and made findings of fact that either lacked context or did not have any factual support. In addition to numerous statements provided by fact witnesses, you also included numerous statements highlighting your character as a Marine, an officer, a husband, and a father. In your appeal, you provided detailed discussion of the IO’s deficiencies, inaccurate findings, and unsupported opinions, as well as the unfounded and uncorroborated allegations in ██████ statement.¹

By memorandum of 10 January 2023, the CMC, after reviewing the ROM, determined the information, while adverse, did not warrant processing for administrative separation. He directed the case be closed but that the adverse material concerning the matter be included in your OMPF. CMC noted your promotion delay and stated that within ten days, you could submit matters to be considered while assessing whether you were mentally, physically, morally, and professionally qualified for promotion.

On 13 February 2023, you responded to the CMC’s termination of administrative proceedings and notification of promotion delay and requested to be promoted to CWO2 as originally scheduled on 1 August 2022. In your response, you referenced your 12 August 2022 appeal of the PAC CI and your 3 August 2022 rebuttal to the Page 11 counseling entry. In addition to a letter of recommendation, your statement noted your recent demonstrations of leadership and professional competence, your maintained

¹ Through email correspondence with you, the Examiner confirmed that your appeal had been denied “immediately after [you] submitted it.”

physical fitness at peak performance, and your contention you were physically, mentally, morally, and professionally ready for promotion to CWO2.

On 19 April 2023, the CMC determined, in accordance with SECNAVINST 1412.11, you were qualified for promotion to CWO2 with an adjusted DOR of 1 August 2023.

The Board carefully considered your statement and supporting attachments. Specifically, the Board considered the following summarized contentions:

(1) Your originally scheduled promotion date of 1 August 2022 was delayed due to legal status then administratively changed as a form of additional punishment when you had already received my formal adverse paperwork for the alleged violations.

(2) Multiple inaccuracies in the CI led the IO to make recommendations that were based on inaccuracy described by the accuser. Further, the CI ignored key facts and misrepresented testimonies to fit a guilty narrative against you. Several false accusations made by the IO, using information taken out of context, have been refuted with factual non-bias supporting documentation. The IO also ignored several key factors that allowed him to substantiate the findings against you demonstrating his bias intent to find you guilty.

(3) You did not commit the acts described by the accuser and the IO. Notably, all the witnesses said you did not do it.

(4) This investigation began because the accuser retaliated against you after you provided him with substandard performance and misconduct counseling. The accuser, states he was fearful of further administrative actions because you had previously provided him with adverse counseling so he felt justified making the allegation in a PAC complaint. This is a form of retaliation that would not have succeeded if the basis of why the complaint was submitted was acknowledged by the IO.

(5) The accuser was deemed untrustworthy and not credible by the IO but had no information to discredit your testimony.

(6) The Page 11 covered a reporting period when you were not at my present unit and a reporting period when you were not the accuser's Reporting Senior or in his chain of command. Further, the Page 11 is inconsistent with the findings in the investigation pertaining to the time when the misconduct occurred. Specifically, the Page 11 covers a time period of July 2021 to April 2022 but the accuser reported misconduct only occurred in March 2022.

(7) The Page 11 was given for substandard performance and misconduct but the CI was for a PAC complaint and only included findings of misconduct and nothing to do with substandard performance. The CI was solely focused on misconduct therefore you were wrongfully charged for substandard performance as nothing in the investigation is related to my proficiency.

(8) Having this Page 11 in your OMPF will certainly have adverse impacts on your future promotions, assignments, and career endeavors thus serving as punishment for your violation of the PAC order. Further, because of the promotion delay you are essentially facing another punishment for the same violation without any justification other than their own opinions.

(9) You were charged/punished twice for the same violation. NJP would not have been such a [severe] punishment. In total, this second punishment cost you over \$5000 in base pay, set you a year behind my peers, and set you back two years for retirement at the next rank in your high three.

Upon review and consideration of all the evidence of record, the Board determined there is insufficient evidence of an error or injustice warranting your requested relief. The Board noted you provided no new evidence, other than your statement, which had not already been considered by the ultimate decision maker in the promotion delay process. Further, your arguments and supporting documentation were insufficient to obtain a more favorable result when you appealed the PAC complaint in August 2022 and when you responded to the termination of the administrative proceedings and notification of promotion delay on 13 February 2023. Nothing has changed to reach a different result in the present review of your request to be promoted on the original date of 1 August 2022. The Board also presumes, based upon the presumption of regularity that it is obligated to apply in accordance with its governing regulation, that your contentions in your appeal, which essentially mirror those presented in your present application, were subjected to legal review and scrutiny at various levels prior to being presented for the CMC's decision.

After a thorough review of your current submission and in consideration of your new statement which included some additional contentions, the Board, however, substantially concurred with the AO provided by JPL. Specifically, the Board relies on a presumption of regularity to support the official actions of public officials, and in absence of substantial evidence to the contrary, presumes those officials have properly discharged their duties. The Board considered your contentions, as noted above, regarding the CI that formed the basis of the counseling and the ROM. The Board, substantially agreeing with the AO, noted the CO made the determination to formally counsel you based on his review of the evidence gathered by the IO, which included interviews with over ten witnesses as well as email and cell phone message data. The Board determined there was insufficient evidence of IO bias or attempts by him to ignore key facts or misrepresent testimonies "to fit a guilty narrative against [you]." CO, [REDACTED] and CG, [REDACTED], determined there was sufficient evidence that you, as the OIC with the responsibility for creating and fostering a healthy command environment, failed to fulfill those duties. The Board also considered your contention [REDACTED] retaliated against you by submitting a PAC complaint. However, the Board noted those same allegations were considered by the IO and chain of command but determined to be without merit or not supported by the evidence. Looking specifically at the Page 11 entry, the Board further noted the counseling entry included all required elements and you availed yourself of the opportunity to submit a rebuttal which has been properly included in your OMPF. Lastly, the Board noted your contentions regarding the dates covered by the Page 11 but determined there was insufficient evidence of an error or injustice in the dates chosen by the CG.

As required by Marine Corps Order, CG, [REDACTED] issued a ROM and allowed you the opportunity to submit matters for consideration. The Board disagreed with the AO's comments that you submitted a rebuttal to the ROM, noting your 12 August 2022 acknowledgement of receipt of the ROM indicated that you did not desire to submit a statement but understood that the letter would be included in your OMPF if DC (M&RA) elected to include the adverse material in your OMPF. However, the Board noted your extensive August 2022 appeal of the complaint of the PAC Dash was referenced in your 13 February 2023 response to the CMC regarding the termination of administrative proceedings and notification of promotion delay. The Board determined all of the evidence provided in the appeal of the PAC complaint, ROM, and promotion delay process was available to the CMC when he determined you were qualified for promotion to the grade of CWO2 with an adjusted DOR of 1 August 2023.

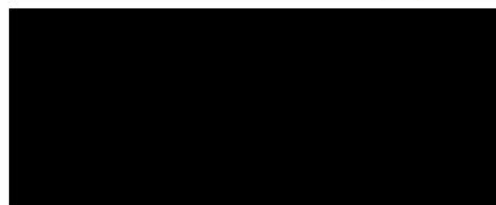
Lastly, the Board considered your contention that your delayed promotion was a "form of additional punishment when [you] had already received [your] formal adverse paperwork for the alleged violations" and that you were charged twice for the same violation. The Board noted that each action taken -- the CI, the counseling, the ROM, and promotion delay -- was required by governing instructions. The Board concluded the decision to delay your promotion was not additional punishment but an appropriate and authorized outcome flowing from the chain of command's determination the preponderance of the evidence substantiated misconduct and substandard performance of duty².

Based on the available evidence, the Board concluded there was insufficient evidence demonstrating a material error or injustice to overcome the presumption of regularity attached to the official actions taken by your chain of command. The Board concluded your misconduct was properly documented and filed in your OMPF and you were properly promoted on 1 August 2023. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

5/13/2024

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² Substandard performance of duty, in the context of the CI and follow-on counseling, ROM, and promotion delay, is not simply defined as "proficiency" at one's duties. SECNAVINST 1920.6D defines substandard performance of duty as an "inability of an officer to maintain adequate levels of performance or conduct" as evidenced by nine different listed reasons.