



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

█
Docket No. 9298-23
Ref: Signature Date

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

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

Ref: (a) 10 U.S.C. § 1552
(b) MCO 1610.7A, subj: Performance Evaluation System (Short Title: PES), 1 May 2018
(c) 10 U.S.C. § 628

Encl: (1) DD Form 149
(2) NAVMC 10835A, USMC Fitness Report, FITREP #3067197
(3) NAVMC 10835A, USMC Fitness Report, FITREP #3253899
(4) SECDEF Memo, subj: Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members, 24 August 2021
(5) ALNAV 062/21, subj: 2021-2022 Department of Navy Mandatory COVID-19 Vaccination Policy, dtg 302126Z AUG 21
(6) MARADMIN 462/21, subj: Mandatory COVID-19 Vaccination of Marine Corps Active and Reserve Components, dtg 011400Z SEP 21
(7) MARADMIN 612/21, subj: Supplemental Guidance (2) to Mandatory COVID-19 Vaccination of Marine Corps Active and Reserve Components, dtg 222100Z OCT 21
(8) NAVMC 10835A, USMC Fitness Report, FITREP #3369310 (unfiled)
(9) NAVMC 10835A, USMC Fitness Report, FITREP #3369310 (filed)
(10) MARADMIN 464/22, subj: Interim Guidance Regarding Marines Requesting Religious Accommodation from COVID-19 Vaccination Requirements, dtg 132100Z SEP 22
(11) SECDEF Memo, subj: Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces, 10 January 2023
(12) MARADMIN 025/23, subj: Rescission of COVID-19 Vaccination Requirement, dtg 181130Z JAN 23
(13) ALNAV 009/23, subj: Rescission of COVID-19 Vaccination Requirement for Members of the Armed Forces, dtg 201839Z JAN 23
(14) MARADMIN 109/23, subj: Update to Mandatory COVID-19 Vaccination Requirement of Marine Corps Active and Reserve Components, dtg 272000Z FEB 23
(15) MARADMIN 293/23, subj: Convening of the FY20 U.S. Marine Corps Colonel, Lieutenant Colonel, Major, and Captain Promotion Selection Boards, dtg 061815Z JUN 23
(16) ALNAV 092/23, subj: FY25 U.S. Marine Corps Lieutenant Colonel Selections,

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dtg 201542Z NOV 23

- (17) HQMC Memo 1610 MMRP-30, subj: Performance Evaluation Review Board (PERB) Advisory Opinion ICO [Petitioner], 16 August 2023
- (18) HQMC Memo 1610 MMPB-21D/PERB, subj Performance Evaluation Review Board (PERB) Decision in the case of [Petitioner], Docket No. [REDACTED], 17 October 2023
- (19) Petitioner's Memo 1611 DEC, subj: Rebuttal to Performance Evaluation Review Board Advisory Opinion Docket [REDACTED] for Board for Correction of Naval Records Docket #NR20230009298, 16 December 2023

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 by removing his fitness report (FITREP) for the reporting period 1 June 2021 to 19 January 2022 and his failure of selection (FOS) by the Fiscal Year (FY) 2025 U.S. Marine Corps (USMC) Lieutenant Colonel (LtCol) Promotion Selection Board (PSB).

2. The Board reviewed Petitioner's allegations of error or injustice on 15 February 2024 and, pursuant to its governing policies and procedures, determined the corrective action indicated below should be taken on Petitioner's naval record in the interests of justice. 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 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 regulations within the Department of the Navy (DON).

b. On or about 1 September 2019, Petitioner assumed command of the [REDACTED]. His first two observed FITREP in this position covering the reporting periods encompassing 2 November 2019 to 31 May 2021 were generally favorable and competitive.¹ See enclosures (2) and (3).

c. By memorandum dated 24 August 2021, the Secretary of Defense (SECDEF) mandated that all members of the Armed Forces under Department of Defense authority be fully vaccinated against the COVID-19 virus with a vaccine receiving full licensure from the Food and Drug

¹ Petitioner's attribute markings were generally average, but the FITREPs in question were competitive. For the rating period 2 November 2019 to 12 June 2020, he received a "D" marking for every attribute except "Professional Military Education," for which he received an "E" marking, but his Reviewing Officer (RO) assessed him as "One of the Few Exceptionally Qualified Marines" with a "3" block in his comparative assessment. See enclosure (2). For the rating period 13 June 2020 to 31 May 2021, he received four "E" markings, eight "D" markings, and two "C" markings, and was again assessed as "One of the Few Exceptionally Qualified Marines" with a "3" in the RO's comparative assessment.

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Administration (FDA).² Accordingly, he directed the Service Secretaries to immediately begin full vaccination of all Service members of their respective services. See enclosure (4).

d. On 30 August 2021, the Secretary of the Navy (SECNAV) implemented the SECDEF's directive referenced in paragraph 3c above in ALNAV 062/21, ordering all DON active duty Service Members who were not already vaccinated or exempted to be fully vaccinated within 90 days. In issuing this directive, SECNAV made the following statement:

The order to obtain full vaccination is a lawful order, and failure to comply is punishable as a violation of a lawful order under Article 92, Uniform Code of Military Justice [(UCMJ)], and may result in punitive or adverse administrative action or both. The Chief of Naval Operations and Commandant of the Marine Corps have authority to exercise the full range of administrative and disciplinary actions to hold non-exempt Service Members appropriately accountable. This may include, but is not limited to, removal of qualification for advancement, promotions, reenlistment, or continuation, consistent with existing regulations, or otherwise considering vaccination status in personnel actions as appropriate.

See enclosure (5).

e. On 1 September 2021, the Marine Corps published MARADMIN 462/21 to implement the COVID-19 vaccination mandates referenced in paragraphs 3c and 3d above. Specifically, MARADMIN 462/21 directed all uniformed members of the Marine Corps to be fully vaccinated against COVID-19, unless medically or administratively exempt. All non-exempt Active Component Marines were to achieve full vaccination no later than 28 November 2021.³ MARADMIN 462/21 further specified that this mandate "constitutes a lawful general order and any violations of these provisions is punishable as a violation of Article 92 of [the UCMJ]." See enclosure (6).

f. On 23 October 2021, the Marine Corps published MARADMIN 612/21 to supplement the guidance of MARADMIN 462/21 referenced in paragraph 3e above. This message provided guidance that "a Marine is considered to have 'refused the vaccine' when they do not have an approved administrative or medical exemption, religious accommodation, or pending appeal... and they (1) received and willfully disobeyed a lawful order from a superior commissioned officer to be vaccinated against COVID-19; or, (2) they are not or will not be fully vaccinated on the date(s) required by [MARADMINS 462/21]." MARADMIN 612/21 further provided that "Marines who have refused the vaccine may not serve in a command assignment," and that "[c]ommanders will relieve for cause unvaccinated Marines without an approved administrative or medical exemption, religious accommodation, or pending appeal currently serving in command assignments." See enclosure (7).

² A Service member was considered to be fully vaccinated two weeks after completing the second dose of a two-dose COVID-19 vaccine, or two weeks after receiving a single dose of a one-dose vaccine.

³ This date was 90 days from issuance of ALNAV 062/21 (see paragraph 3d above).

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g. On 19 January 2022, Petitioner was relieved from his command after refusing lawful orders to become fully vaccinated against COVID-19.⁴ See enclosure (8).

h. On 4 March 2022, Petitioner's Reporting Senior (RS) issued Petitioner an adverse FITREP for the reporting period 1 June 2021 to 19 January 2022 to document his relief for cause. He assigned Petitioner "A" ratings for the attributes of "Leading Subordinates", "Setting the Example", "Decision Making Ability", and "Judgment"; and provided directed comments supporting these ratings referencing the Subject's refusal to comply with the COVID-19 vaccination mandate.⁵ He assigned "B" ratings to all other evaluated attributes. The RS also recommended that Petitioner not be promoted.⁶ See enclosure (9).

i. On 15 March 2022, Petitioner's RO concurred with the RS's evaluation, and assessed Petitioner's as "Unsatisfactory" his comparative assessment.⁷ His comments were as follows:

[Petitioner's] refusal of lawful orders to become fully vaccinated against COVID-19 is unacceptable and prevents [REDACTED] from maintaining a mission ready force in the [REDACTED]. As a Company Commander, he is unable to effectively lead his Marines and Sailors when they have complied with those lawful orders. Of note, [Petitioner] has and continues to perform his duties as a Marine Officer, and maintains the physical standards expected of every Marine. I do not recommend [Petitioner] be retained.

See enclosure (8).

j. Petitioner acknowledged the adverse nature of this FITREP on 17 March 2022 and provided the following statement in response:

I appreciate the opportunity extended to me to serve the Marines entrusted to my care as a Company Commander for nearly three years. It was one of the highest honors and privileges of my career. I remain concerned that the abrupt end to this period of service as a Company Commander was due to my deeply held religious beliefs and due to me upholding the requirements of my conscience. I took the oath of office when I accepted my commission and I have worked consistently to uphold this same oath throughout my time of service; our country depends on all officers doing the same. I do not believe that it is just, good, or right to punish a Marine for maintaining their strongly held religious beliefs while keeping their honor clean. This appears discriminatory and does not appear consistent with our organization's ethos nor our Constitution.

⁴ Enclosure (8) reveals that Petitioner had requested, but was denied, a religious accommodation to the COVID-19 vaccination mandate. He appealed that denial to the Commandant of the Marine Corps, but that appeal was also denied. He continued to refuse the order to become fully vaccinated after his appeal was denied.

⁵ Per reference (b), an "A" rating for any attribute renders the FITREP adverse and requires directed comments justifying the rating.

⁶ The RS forwarded the his markings and comments to the Petitioner for comment by e-mail dated 24 February 2024, but Petitioner elected not to acknowledge this adverse FITREP. In this e-mail, the RS noted that "[w]e had many conversations about the COVID-19 vaccination mandate. Ultimately, your decision NOT to comply with the mandate made continued service as a Company Commander impossible."

⁷ The RO who provided this comparative assessment was not the same RO who provided the favorable comparative assessment referenced in footnote 1.

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See enclosure (8).

k. The FITREP described in paragraphs 3h – 3j above was never filed in Petitioner’s naval record. Instead, Petitioner’s RS issued a new FITREP for the reporting period 1 June 2021 to 19 January 2022 on 29 March 2022 in which he elevated the adverse attribute markings to “B” and changed his promotion recommendation, therefore removing the “adverse” nature of the FITREP in accordance with reference (b). With the removal of the adverse markings, so too were removed the directed comments referencing Petitioner’s refusal of the COVID-19 mandate and his relief for cause. The removal of the “adverse” nature of the FITREP had the effect of removing Petitioner’s right to submit a statement in response to the FITREP. As such, Petitioner’s statement referenced in paragraph 3j above did not appear on this FITREP. See enclosure (9).

l. On 4 April 2022, Petitioner’s RO concurred with the new evaluation provided by the RS, and described Petitioner as “One of the Many Highly Qualified Professionals Who Form the Majority of this Grade” with a “5” block in his comparative assessment.⁸ He replaced the comments referenced in paragraph 3i above with the following faint praise:

[Petitioner] is a capable Marine Officer who performed his duties as the [REDACTED] [REDACTED] with a fair and composed demeanor. As the Company Commander, his focus on training and process improvement positively affected the Marines and Sailors he engaged and supported during high tempo operations throughout the IndoPacific. [Petitioner] is a consummate professional and a confident aviator who will continue to develop as a field grade officer.

See enclosure (9).

m. On 18 August 2022, the [REDACTED] issued a preliminary injunction prohibiting the Marine Corps from taking certain actions against Marines whose requests for religious accommodation for the COVID-19 vaccination mandate were disapproved and unsuccessfully appealed. In response to this injunction, on 13 September 2022 the Marine Corps published MARADMIN 464/22, amending the aforementioned guidance of MARADMINs 462/21 and 612/21 to prevent the enforcement of the COVID-19 vaccination mandate upon Marines who met this criteria. Specifically, MARADMIN 464/22 provided that the Marine Corps would not enforce any order to accept the COVID-19 vaccination, administratively separate, or retaliate against Marines who met this criteria for asserting statutory rights under the Religious Freedom Restoration Act. It also directed that the COVID-19 vaccination status of any class member shall not be considered or referenced in FITREPs or other performance evaluation documents processed on or after 18 August 2022. See enclosure (10).

⁸ The RO rated Petitioner last in his comparative assessment amongst the 25 Marines in Petitioner’s grade who he had previously reviewed.

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n. On 23 December 2022, the James M. Inhofe National Defense Authorization Act (NDAA) for FY 2023 was enacted. Section 525 of the FY 2023 NDAA directed the SECDEF to rescind the vaccination mandate referenced in paragraph 3c above. See enclosure (11).

o. By memorandum dated 10 January 2023, the SECDEF rescinded the vaccine mandate referenced in paragraph 3c above in accordance with the FY 2023 NDAA. He also directed the military departments to update the records of individuals currently serving in the Armed Forces who sought an accommodation to the vaccination mandate on religious, administrative, or medical grounds “to remove any adverse actions solely associated with denials of such requests, including letters of reprimand.” See enclosure (11).

p. On 18 January 2023, the Marine Corps published MARADMIN 025/23, rescinding MARADMINs 462/21, 612/12, and other MARADMINs related to the former vaccination mandate, and directing the immediate suspension of any new adverse administrative actions associated with refusal of the COVID-19 vaccine. See enclosure (12).

q. On 20 January 2023, the SECNAV published ALNAV 009/23, cancelling ALNAV 062/21. See enclosure (13).

r. On 28 February 2023, the Marine Corps published MARADMIN 109/23 to provide further guidance regarding the rescission of the former vaccination mandate. Amongst the guidance provided was that the Deputy Commandant for Manpower and Reserve Affairs (DC (M&RA)) would “direct an audit to search for adverse information in the [official military personnel files (OMPF)] of all *currently serving members who requested religious accommodations to the COVID-19 vaccine mandate (emphasis added)*,” and that such adverse matters would be removed as necessary in accordance with the SECDEF’s guidance referenced in paragraph 3o above. See enclosure (14).

s. On 25 June 2023, the FY 2025 USMC LtCol PSB convened. Based upon this date of rank, Petitioner was in the zone for consideration by this PSB. See enclosure (15). Petitioner was not amongst the officers selected for promotion. See enclosure (16). This constituted his first FOS.

t. On 1 July 2023, the Petitioner submitted a DD Form 149 to the Marine Corps Performance Evaluation Review Board (PERB) requesting the removal from his record of the FITREP for the reporting period 1 June 2021 to 19 January 2022 referenced in paragraphs 3k and 3l above based upon legal errors and injustices. Specifically, he asserted legal errors in that the low attribute marks (i.e., “B” ratings for every attributed) represented a notable decline from his previous ratings without any documented justification, counseling, or shift in expectations, in violation of reference (b). His argument was essentially that he was assessed against an unknown and unestablished standard. As such, the FITREP in question fails to accurately reflect his demonstrated performance. See enclosure (1).

u. By memorandum dated 16 August 2023, the Headquarters, Marine Corps (HQMC) Performance Evaluation Section (MMRP-30) provided an advisory opinion (AO) to the PERB, recommending that the Petitioner’s request for relief be denied. Specifically, MMRP-30 noted

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that reference (b) neither requires the RS to justify any attribute markings of “B” nor to mimic attribute markings from one reporting period to the next. It also does not restrain the RS from reducing attribute markings from one reporting period to the next.⁹ MMRP-30 ultimately opined that Petitioner’s claim of error is based only upon his own subjective opinion regarding his performance and not upon any objective evidence. While the FITREP in question does reflect a notable decline in his attribute markings relative to his preceding FITREP, the Petitioner provided no evidence to suggest that this decline was not justified by any diminishment in his performance during the rated period. See enclosure (17).

v. On 20 September 2023, the PERB determined by a majority vote that Petitioner had not demonstrated probable material error, substantive inaccuracy, or injustice warranting removal of the subject FITREP in accordance with reference (b). According, the PERB directed that the contested FITREP be retained as filed.¹⁰ See enclosure (18).

w. By memorandum dated 16 December 2023, Petitioner submitted a rebuttal to the MMRP-30 AO referenced in paragraph 3u above. In this response, Petitioner addressed each of the notes included in the MMRP-30 AO in turn. Specifically, Petitioner noted that the MMRP-30 AO did not address the Petitioner’s complaint regarding the lack of counseling,¹¹ or the fact that the FITREP in question was different that that originally signed by the RS.¹² Petitioner also noted that some of the original attribute markings on the Marine Reported On Worksheet were higher than those which ended upon the Petitioner’s final FITREP, suggesting that the RS reevaluated Petitioner’s performance in the interim under a different standard. Petitioner also contends that the MMRP-30 applied a standard of proof to establish the absence of counseling that would be impossible for him to satisfy. The Petitioner also claimed an injustice in that the FITREP in question contains “fingerprints of adversity” without the justification for such adversity as required by reference (b). See enclosure (19).

CONCLUSION:

Upon careful review and consideration of all the evidence of record, the Board found sufficient evidence of an injustice warranting corrective action, but not for the reasons asserted by Petitioner.

The Board found no substantive errors in the FITREP in question. It was not adverse within the definition provided by reference (b), and reference (b) did not require justification for the decline in his attribute markings relative to his preceding FITREP. The criteria for characterizing a FITREP as “adverse” are objectively established in reference (b), and so-called “fingerprints of adversity” do not satisfy these criteria. Contrary to Petitioner’s claim, there is evidence in the record that he was counseled regarding the reason for the decline in his performance markings.

⁹ MMRP-30 acknowledged that the Petitioner’s contention that the decline in his attribute markings was not justified in the record had some merit, but that the absence of such justification does not invalidate the FITREP because reference (b) requirements justification only for attribute markings of “A”, “F”, and “G”.

¹⁰ Per the procedures established in reference (b), the Petitioner’s application was forwarded to the Board for a final determination after being denied by the PERB.

¹¹ The Board notes that the MMRP-30 AO did in fact address this issue.

¹² The Board notes that Petitioner did not raise this issue in his original complaint.

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Petitioner was well aware that the decline in his attribute markings was due to his refusal of the former COVID-19 vaccination refusal mandate. The Board was perplexed by Petitioner's effort to seek relief based upon his claim of ignorance to the reason for his declining marks rather than upon the reason for the decline itself.

Although the Board found no error in the FITREP in question, it did find an injustice in its content warranting equitable relief. It was obvious that the decline in Petitioner's performance and resulting mediocre markings and comments contained within the FITREP in question was due to his refusal to comply with the former COVID-19 vaccination mandate. That refusal was the basis for the original adverse FITREP prepared by the RS, and the final, technically non-adverse FITREP filed in Petitioner's record carried over all of the mediocre markings and comments from the original adverse FITREP except those which made it adverse. The original adverse markings and comments were substituted with the minimum markings and comments necessary to avoid the scrutiny which would follow an adverse FITREP, and thus denied Petitioner the opportunity to provide comments and the benefit of a Third Officer Sighter review. As a result, Petitioner received an extremely mediocre FITREP calculated to diminish his future competitiveness for promotion for no reason other than his refusal to comply with the former COVID-19 vaccination mandate.

MARADMIN 109/23 directed the automatic removal of all adverse material resulting from the refusal of the former COVID-19 vaccination mandate from the naval records of Marines who requested but were denied a religious accommodation to the mandate. Adverse material was described to include "adverse fitness report remarks related to vaccine refusal." Petitioner did, in fact, request such an accommodation, and the FITREP in question was, in fact, adverse material resulting from his refusal of the vaccination mandate. While the FITREP was not technically "adverse" within the meaning of reference (b), it was certainly adverse within the common usage of the term and MARADMIN 109/23 did not specify that the latter definition applied. Additionally, while the final FITREP did not include any overt reference to the Petitioner's COVID-19 vaccination refusal, its mediocre assessment of the Petitioner's performance was clearly the result of that refusal. As such, the Board found that the FITREP in question should be removed from the Subject's record in accordance with the guidance of MARADMIN 109/23.

MARADMIN 109/23 was published on 28 February 2023, and the FY 2023 USMC LtCol PSB convened on 25 June 2023. As such, the FITREP in question should have been removed from the Petitioner's record in accordance with MARADMIN 109/23 before his record was considered by the FY 2023 USMC LtCol PSB. Accordingly, the Board found a material unfairness in Petitioner's FOS by the FY 2023 USMC LtCol PSB warranting the removal of this FOS from his naval record and the convening of a Special Selection Board (SSB) in accordance with reference (c) to reconsider his promotion to LtCol absent the offending FITREP.

RECOMMENDATION:

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

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That the FITREP for the reporting period 1 June 2021 to 19 January 2022 be removed from Petitioner's naval record and replaced with an appropriate continuity memorandum.

That any and all references to Petitioner's FOS by the FY 2025 USMC LtCol PSB be removed from Petitioner's naval record.

Upon correction of Petitioner's naval record as directed herein, that a SSB be convened to reconsider Petitioner's record as corrected pursuant to the criteria of the FY 2025 USMC LtCol PSB.

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

5/10/2024

[REDACTED]

ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

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

Board Recommendation Disapproved (Deny Relief – I do not concur with the Board's conclusion. Specifically, I find the absence of any reference to Petitioner's refusal of the COVID-19 vaccination removed the FITREP in question from the guidance of MARADMIN 109/23. As the FITREP in question was not adverse, I find no error or injustice in the Petitioner's record warranting corrective action.)

[REDACTED]